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CASES ARGUED AND DETERMINED

IN THE

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

PERMANENT EDITION.

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JUDGES

OF THE

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

FIRST CIRCUIT.

Hon. OLIVER WENDELL HOLMES, Circuit Justice.....Washington, D. C.
Hon. LE BARON B. COLT, Circuit Judge.....Bristol, R. I.
Hon. WILLIAM L. PUTNAM, Circuit Judge.....Portland, Me.
Hon. CLARENCE HALE, District Judge, Maine .....Portland, Me.
Hon. EDGAR ALDRICH, District Judge, New Hampshire.....Littleton, N. H.
Hon. FRANCIS C. LOWELL, District Judge, Massachusetts.....Boston, Mass.
Hon. ARTHUR L. BROWN, District Judge, Rhode Island.....Providence, R. I.

SECOND CIRCUIT.

Hon. RUFUS W. PECKHAM, Circuit Justice.....Washington, D. C.
Hon. WILLIAM J. WALLACE, Circuit Judge.....Albany, N. Y.
Hon. E. HENRY LACOMBE, Circuit Judge.....New York, N. Y.
Hon. WILLIAM K. TOWNSEND, Circuit Judge .....New Haven, Conn.
Hon. ALFRED C. COXE, Circuit Judge .....Utica, N. Y.
Hon. GEORGE C. HOLT, District Judge, S. D. New York .....New York, N. Y.
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Hon. GEORGE B. ADAMS, District Judge, S. D. New York .....New York, N. Y.
Hon. EDWARD B. THOMAS, District Judge, E. D. New York....29 Liberty St., New York.
Hon. HOYT H. WHEELER, District Judge, Vermont.....Brattleboro, Vt.
Hon. JOHN R. HAZEL, District Judge, W. D. New York. .....Buffalo, N. Y.

THIRD CIRCUIT.

Hon. HENRY B. BROWN, Circuit Justice .....Washington, D. C.
Hon. MARCUS W. ACHESON, Circuit Judge.....Pittsburgh, Pa.
Hon. GEORGE M. DALLAS, Circuit Judge.....Philadelphia, Pa.
Hon. GEORGE GRAY, Circuit Judge .....Wilmington, Del.
Hon. EDWARD G. BRADFORD, District Judge, Delaware.....Wilmington, Del.
Hon. ANDREW KIRKPATRICK, District Judge, New Jersey [1].....Newark, N. J.
Hon. WILLIAM M. LANNING, District Judge, New Jersey [2].....Trenton, N. J.

[1] Died May 3, 1904.
[2] Appointed May 3, 1904, to succeed Kirkpatrick, District Judge.

Hon. JOHN B. McPHERSON, District Judge, E. D. Pennsylvania.....Philadelphia, Pa.
Hon. J. B. HOLLAND, District Judge, E. D. Pennsylvania [3].....Philadelphia, Pa.
Hon. ROBERT WODROW ARCHBALD, District Judge, M. D. Pennsylvania..Scranton, Pa.
Hon. JOSEPH BUFFINGTON, District Judge, W. D. Pennsylvania.....Pittsburgh, Pa.

FOURTH CIRCUIT.

Hon. MELVILLE W. FULLER, Circuit Justice.....Washington, D. C.
Hon. NATHAN GOFF, Circuit Judge.....Clarksburg, W. Va.
Hon. CHARLES H. SIMONTON, Circuit Judge [4].....Charleston, S. C.
Hon. JETER C. PRITCHARD, Circuit Judge [5].....——, S. C.
Hon. THOMAS J. MORRIS, District Judge, Maryland.....Baltimore, Md.
Hon. THOMAS R. PURNELL, District Judge, E. D. North Carolina.....Raleigh, N. C.
Hon. JAMES E. BOYD, District Judge, W. D. North Carolina.....Greensboro, N. C.
Hon. WILLIAM H. BRAWLEY, District Judge, E. and W. D. South Car..Charleston, S. C.
Hon. EDMUND WADDILL, Jr., District Judge, E. D. Virginia.....Richmond, Va.
Hon. HENRY CLAY McDOWELL, District Judge, W. D. Virginia.....Lynchburg, Va.
Hon. JOHN J. JACKSON, District Judge, N. D. West Virginia.....Parkersburg, W. Va.
Hon. BENJAMIN F. KELLER, District Judge, S. D. West Virginia.....Branwell, W. Va.

FIFTH CIRCUIT.

Hon. EDWARD D. WHITE, Circuit Justice.....Washington, D. C.
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Hon. A. P. McCORMICK, Circuit Judge.....Dallas, Tex.
Hon. DAVID D. SHELBY, Circuit Judge .....Huntsville, Ala.
Hon. THOMAS GOODE JONES, District Judge, M. and N. D. Alabama...Montgomery, Ala.
Hon. HARRY T. TOULMIN, District Judge, S. D. Alabama.....Mobile, Ala.
Hon. CHARLES SWAYNE, District Judge, N. D. Florida.....Pensacola, Fla.
Hon. JAMES W. LOCKE, District Judge, S. D. Florida.....Jacksonville, Fla.
Hon. WILLIAM T. NEWMAN, District Judge, N. D. Georgia.....Atlanta, Ga.
Hon. EMORY SPEER, District Judge, S. D. Georgia.....Macon, Ga.
Hon. CHARLES PARLANGE, District Judge, E. D. Louisiana.....New Orleans, La.
Hon. ALECK BOARMAN, District Judge, W. D. Louisiana.....Shreveport, La.
Hon. HENRY C. NILES, District Judge, N. and S. D. Mississippi.....Kosciusko, Miss.
Hon. DAVID E. BRYANT, District Judge, E. D. Texas.....Sherman, Tex.
Hon. EDWARD R. MEEK, District Judge, N. D. Texas. .....Ft. Worth, Tex.
Hon. THOMAS S. MAXEY, District Judge, W. D. Texas.....Austin, Tex.
Hon. WALLER T. BURNS, District Judge, S. D. Texas.....Houston, Tex.

SIXTH CIRCUIT.

Hon. JOHN M. HARLAN, Circuit Justice.....Washington, D. C.
Hon. HENRY F. SEVERENS, Circuit Judge. .....Kalamazoo, Mich.
Hon. HORACE H. LURTON, Circuit Judge.....Nashville, Tenn.
Hon. JOHN K. RICHARDS, Circuit Judge .....Ironton, Ohio.
Hon. ANDREW M. J. COCHRAN, District Judge, E. D. Kentucky.....Covington, Ky.
Hon. WALTER EVANS, District Judge, W. D. Kentucky.....Louisville, Ky.
Hon. HENRY H. SWAN, District Judge, E. D. Michigan.....Detroit, Mich.
Hon. GEORGE P. WANTY, District Judge, W. D. Michigan. .....Grand Rapids, Mich.
Hon. AUGUSTUS J. RICKS, District Judge, N. D. Ohio.....Cleveland, Ohio.
Hon. FRANCIS J. WING, District Judge, N. D. Ohio .....Cleveland, Ohio.
Hon. ALBERT C. THOMPSON, District Judge, S. D. Ohio .....Cincinnati, Ohio.
Hon. CHARLES D. CLARK, District Judge, E. and M. D. Tennessee....Chattanooga, Tenn.
Hon. ELI S. HAMMOND, District Judge, W. D. Tennessee.....Memphis, Tenn.

[3] Appointed in accordance with an act of Congress providing for an additional District Judge for this District.
[4] Died April 25, 1904.
[5] Appointed to succeed Simonton, Circuit Judge.

SEVENTH CIRCUIT.

Hon. WILLIAM R. DAY, Circuit Justice.....Washington, D. C.
Hon. JAMES G. JENKINS, Circuit Judge.....Milwaukee, Wis.
Hon. PETER S. GROSSCUP, Circuit Judge .....Chicago, Ill.
Hon. FRANCIS E. BAKER, Circuit Judge .....Indianapolis, Ind.
Hon. CHRISTIAN C. KOHLSAAT, District Judge, N. D. Illinois.....Chicago, Ill.
Hon. ALBERT B. ANDERSON, District Judge, Indiana.....Indianapolis, Ind.
Hon. J. OTIS HUMPHREY, District Judge, S. D. Illinois.....Springfield, Ill.
Hon. WILLIAM H. SEAMAN, District Judge, E. D. Wisconsin.....Sheboygan, Wis.
Hon. ROMANZO BUNN, District Judge, W. D. Wisconsin.....Madison, Wis.

EIGHTH CIRCUIT.

Hon. DAVID J. BREWER, Circuit Justice.....Washington, D. C.
Hon. WALTER H. SANBORN, Circuit Judge.. .....St. Paul, Minn.
Hon. AMOS M. THAYER, Circuit Judge.....St. Louis, Mo.
Hon. WILLIS VAN DEVANTER, Circuit Judge .....Cheyenne, Wyo.
Hon. WILLIAM C. HOOK, Circuit Judge .....Leavenworth, Kan.
Hon. JACOB TRIEBER, District Judge, E. D. Arkansas.....Little Rock, Ark.
Hon. JOHN H. ROGERS, District Judge, W. D. Arkansas.....Ft. Smith, Ark.
Hon. MOSES HALLETT, District Judge, Colorado.....Denver, Colo.
Hon. SMITH McPHERSON, District Judge, S. D. Iowa. .....Red Oak, Iowa.
Hon. HENRY THOMAS REED, District Judge, N. D. Iowa.....Cresco, Iowa.
Hon. JOHN C. POLLOCK, District Judge, Kansas..... Topeka, Kan.
Hon. WM. LOCHREN, District Judge, Minnesota.....Minneapolis, Minn.
Hon. PAGE MORRIS, District Judge, Minnesota.....Duluth, Minn.
Hon. ELMER B. ADAMS, District Judge, E. D. Missouri.....St. Louis, Mo.
Hon. JOHN F. PHILIPS, District Judge, W. D. Missouri..... Kansas City, Mo.
Hon. W. H. MUNGER, District Judge, Nebraska..... ..Omaha, Neb.
Hon. CHARLES F. AMIDON, District Judge, North Dakota.....Fargo, N. D.
Hon. JOHN E. CARLAND, District Judge, South Dakota.....Sioux Falls, S. D.
Hon. JOHN A. MARSHALL, District Judge, Utah.....Salt Lake City, Utah.
Hon. JOHN A. RINER, District Judge, Wyoming.....Cheyenne, Wyo.

NINTH CIRCUIT.

Hon. JOSEPH McKENNA, Circuit Justice.....Washington, D. C.
Hon. WM. W. MORROW, Circuit Judge.....San Francisco, Cal.
Hon. WILLIAM B. GILBERT, Circuit Judge.....Portland, Or.
Hon. ERSKINE M. ROSS, Circuit Judge.....Los Angeles, Cal.
Hon. JOHN J. DE HAVEN, District Judge, N. D. California.....San Francisco, Cal.
Hon. OLIN WELLBORN, District Judge, S. D. California.....Los Angeles, Cal.
Hon. WILLIAM H. HUNT, District Judge, Montana [6].....——, Mont.
Hon. CORNELIUS H. HANFORD, District Judge, Washington.....Seattle, Wash.
Hon. THOMAS P. HAWLEY, District Judge, Nevada.....Carson City, Nev.
Hon. CHARLES B. BELLINGER, District Judge, Oregon.....Portland, Or.
Hon. JAMES H. BEATTY, District Judge, Idaho.....Boise City, Idaho.

[6] Appointed April 19, 1904, to succeed Knowles, District Judge.

CASES REPORTED.

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CASES

ARGUED AND DETERMINED

IN THE

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

PEYTON et al. v. DESMOND.

(Circuit Court of Appeals, Eighth Circuit. February 15, 1904.)

No. 1,878.

1. VENUE—ACTION TO RECOVER FOR TRESPASS TO REAL ESTATE—LOCAL OR TRANSITORY, ACCORDING TO LAW OF STATE WHERE BROUGHT.

Whether an action to recover pecuniary damages for trespass to real estate is real and local, or is personal and transitory, is essentially a matter of state policy or local law, and must be determined by the view taken of the nature of the action in the state in which it is brought.

2. SAME—MINNESOTA.

In Minnesota an action to recover pecuniary damages for trespass to real estate in another state is viewed, not as relating to the real estate, but only as affording a personal remedy, and transitory.

3. SAME—PLEADING—ACTION TO RECOVER FOR CUTTING AND REMOVAL OF TIMBER—WHEN TRANSITORY.

Where the facts stated and the relief demanded show that the gravamen of the action is the conversion of lumber manufactured out of trees wrongfully cut and removed from plaintiff's land by defendant, and that the purpose of the action is to recover the value of the lumber, and not damages for any depreciation in the value of the land, the action is transitory, although the trespass to the land is stated as illustrating the character of the conversion, and as bearing upon plaintiff's right to recover the value of the manufactured lumber.

4. SAME.

The giving of an instruction in such an action, at the request of the defendant, that the measure of damages recoverable was the value of the logs as they stood in the trees, could not change the nature of the action, whether or not it stated the correct measure of damages; nor can it be invoked by defendant to defeat the jurisdiction of the court.

5. PUBLIC LANDS—PROCEEDINGS TO ACQUIRE TITLE—JURISDICTION OF LAND DEPARTMENT.

The jurisdiction of the Land Department over public lands continues so long as the legal title remains in the United States, and the decisions and rulings of that department in proceedings to acquire title to such lands, prior to the act which passes the legal title from the government, are interlocutory, and are as much open to review or reversal by the

Land Department, while the legal title remains in the United States, as are the interlocutory decrees of a court open to review upon the final hearing.

6. SAME—FINAL ACT OF LAND DEPARTMENT—TERMINATION OF JURISDICTION.
The issuance of a patent, or such other act as passes the legal title from the government, is the final act, and the expression and entry of the final judgment, of the officers of the Land Department, and marks the termination of the jurisdiction of these officers.

7. SAME—NOTICE OF PROCEEDINGS IN LAND DEPARTMENT.
The power of the Land Department to review its prior rulings, and to cancel existing entries, while the legal title remains in the United States, is not unlimited or arbitrary, and can be exercised only after notice to parties in interest and due opportunity for a full hearing.

8. SAME—CONVEYANCE BY ENTRYMAN PRIOR TO PATENT—RIGHTS ACQUIRED.
One who purchases from an entryman, on the faith of a final receipt or patent certificate, before the issuance of a patent, takes only the equity of his vendor, subject to the authority of the Land Department to cancel the entry, while the legal title remains in the United States, if it is found that the entry is based upon an error of law or a clear misapprehension of the facts, which, if not corrected, will lead to the transfer of the government's title to one not entitled to it.

9. SAME—DECISION OF LAND DEPARTMENT AS TO MATTERS OF FACT CONCLUSIVE IN COLLATERAL PROCEEDING.
The Land Department being a special tribunal to which Congress has confided the administration of the public land laws, the final judgment of that department as to matters of fact properly determinable by it is conclusive, when brought to notice in a collateral proceeding.

10. SAME—EFFECT OF STATE STATUTE.
A state statute, purporting to regulate the effect of final receipts issued by the Land Department of the United States, cannot restrict the authority of the officers of that department in the disposition of the public lands, or withhold from the grantees of the United States any of the incidents of the transfer of the government title.

11. SAME—APPLICATION OF DOCTRINE OF RELATION.
The doctrine of relation is applicable to public land transactions, and, where necessary to give effect to the intent of the statute or to cut off intervening claimants, the patent is deemed to relate back to the initiatory act.

12. SAME—HOMESTEAD PATENTEE—RIGHT TO RECOVER FOR TIMBER CUT AFTER INITIATION OF CLAIM AND BEFORE ISSUANCE OF PATENT.
A patent issued under the homestead laws relates back to the initiation of the claim, and gives the patentee the right to recover the value of timber wrongfully cut and removed from the land after the initiation of his claim, as established by the patent proceedings, and prior to the issuance of the patent.

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

This action was brought in the Circuit Court of the United States for the District of Minnesota, Fifth Division, December 29, 1898, by George E. Desmond, a citizen of Wisconsin, against Hamilton M. Peyton and Levi A. Barber, citizens of Minnesota, and residents of the Fifth Division of the Minnesota District. The complaint alleged that the plaintiff made homestead settlement in 1890 upon a stated quarter section of public land in Wisconsin, containing merchantable pine timber aggregating 3,600,000 feet, board measure; that continuously thereafter he resided upon and occupied the land, and obtained a United States patent therefor May 16, 1898, by full and regular compliance with the homestead law; that in the winter of 1893 and 1894,

¶ 11. See Public Lands, vol. 41, Cent. Dig. § 315.

while he was in possession of the land under his homestead claim, the defendants "wrongfully and unlawfully and forcibly entered upon" the land, and cut therefrom all the pine timber; that they thereafter carried off and removed all of this timber, and sawed the same into lumber, and thereafter, and before the issuance of the patent to plaintiff, sold and disposed of the lumber; that the acts of the defendants were done and performed with full knowledge of the rights of the plaintiff to the timber, and against his protest; that the value of the timber prior to the cutting of the trees was $4 per thousand feet, board measure, and after being sawed into lumber was $12 per thousand feet, board measure. Judgment was prayed for $43,200, the value of the lumber, with interest. The case was soon brought to issue, but a trial was not had until October, 1902, when a verdict was returned for plaintiff in the sum of $9,425, with interest, for which judgment was given against defendants. No objection was made to the jurisdiction until immediately preceding the trial, when defendants moved that the action be dismissed for the reason, as then asserted by them, that it was one for trespass to realty in Wisconsin, and was therefore local, and not within the jurisdiction of the court below. The action upon this motion was as follows:

"Mr. O'Brien [for plaintiff]: * * * This action is brought to recover the value of the timber cut and carried away from the land. It is not, under the statutes of Minnesota, nor under the practice of this state, an action of trespass. It is an action in trover, pure and simple; and the measure of damages here is the value of the timber when cut from the land, and not the injury to the land. The resulting injury to the land in this case is not alleged as a matter of damage, nor would the court permit testimony to be introduced to show it. It is really an action of trover, because the damages sought to be recovered is the value of the property when severed from the land. * * *

"Mr. Hayden [for defendants]: I will concede that they could have made a transitory action out of this matter, by using the same facts, if they had seen fit to bring their action in trover instead of in trespass.

"The Court: I think I understand your position fully. It is not a matter of words, but it is a matter of the substantive facts, constituting the plaintiff's right to recover. He seeks to recover in this case—the complaint leaves no doubt that he so seeks to recover—the value of the timber at the latest stage when it can be traced into your hands, to wit, the value of the lumber. He does not seek to recover damages for the depleted value of the land, which is the essential feature of a suit in trespass. The motion is denied."

Other rulings at the trial were to the effect that the title obtained by plaintiff, by his compliance with the homestead law, and by the issuance to him of the patent for the land, related back so as to enable him to maintain this action.

The evidence showed that plaintiff and one Benjamin F. Judd settled upon the land prior to the passage of the land grant forfeiture act of September 29, 1890, c. 1040, § 2, 26 Stat. 496 [U. S. Comp. St. 1901, p. 1599], under which the land was restored to the public domain; that each claimed to have settled with a view to obtaining title under the homestead laws of the United States; that each claimed to be the prior settler, and each presented in due time at the local land office an application to make homestead entry, but the application of Judd, being presented first, was allowed by the local land officers, and that of the plaintiff rejected; that a contest, based upon plaintiff's claim of prior settlement, was then commenced in the local land office by plaintiff against Judd's entry, the proceedings in which resulted in a decision by the Secretary of the Interior against the plaintiff, January 7, 1893; that Judd on July 17, 1893, commuted his homestead entry, and obtained a patent certificate, but no patent was ever issued to him; that plaintiff on October 9, 1893, or possibly when Judd submitted final proof upon his entry, instituted in the local land office further contest proceedings against Judd's entry, which resulted in a decision by the Secretary of the Interior May 23, 1896 (Desmond v. Judd, 22 Land Dec. Dep. Int. 619), declaring that Judd had not in good faith maintained his residence on the land as required by the homestead law, and directing the cancellation of his entry; that, following this decision, plaintiff made final homestead entry of the land, under the statute requiring five years' residence, and under that entry obtained a United States patent May 16, 1898;

that in the meantime, on October 11, 1893, the lands were conveyed by Judd to defendants; that defendants had knowledge of, and participated in, the contest proceedings in the Land Department which resulted in the cancellation of Judd's entry; and that the cutting and conversion of the timber by defendants occurred in the winter of 1893 and 1894, while the contest proceedings last named were pending.

Arthur H. Crassweller (Frank Crassweller, on the brief), for plaintiffs in error.

C. D. O'Brien (Thos. D. O'Brien and P. H. Seymour, on the brief), for defendant in error.

Before SANBORN, THAYER, and VAN DEVANTER, Circuit Judges.

VAN DEVANTER, Circuit Judge, after stating the case as above, delivered the opinion of the court.

By the common law of England, an action for the recovery of damages for injury to land is local, and can be brought only where the land is situated. This is the law in most of the states of the Union. 1 Chitty, Pl. 281; Shipman, Com. L. Pl. (2d Ed.) 201, 383; Cooley on Torts, 471; Livingston v. Jefferson, 15 Fed. Cas. 660, No. 8,411; McKenna v. Fisk, 1 How. 241, 11 L. Ed. 117; Ellenwood v. Marietta Chair Co., 158 U. S. 105, 15 Sup. Ct. 771, 39 L. Ed. 913. The operation of this common-law rule has been much restricted by legislation in England (British South Africa Co. v. Companhia de Mocambique [1893] App. Cas. 602) and in some of the states (15 Fed. Cas. 665, note; Genin v. Grier, 10 Ohio, 209, 214). There are other states in which the rule never prevailed. Holmes v. Barclay, 4 La. Ann. 63. The matter is essentially one of state policy or local law. As was said by Mr. Justice Gray in Huntington v. Attrill, 146 U. S. 657, 669, 13 Sup. Ct. 224, 36 L. Ed. 1123:

"Whether actions to recover pecuniary damages for trespasses to real estate * * * are purely local, or may be brought abroad, depends upon the question whether they are viewed as relating to the real estate, or only as affording a personal remedy. * * * And whether an action for trespass to land in one state can be brought in another state depends on the view which the latter state takes of the nature of the action."

In Minnesota an action for pecuniary damages for trespass to real estate in another state is viewed, not as relating to the real estate, but only as affording a personal remedy. It is there deemed to be transitory in nature, and not local. In Little v. Chicago, etc., Railway Co., 65 Minn. 48, 67 N. W. 846, 33 L. R. A. 423, 60 Am. St. Rep. 421, the Supreme Court of that state, in sustaining the jurisdiction of the courts of the state over an action brought to recover damages for injuries to real estate situated in Wisconsin, said:

"The reparation is purely personal, and for damages. Such an action is purely personal, and in no sense real."

By the existing judiciary act (Act Aug. 13, 1888, c. 866, § 1, 25 Stat. 433 [U. S. Comp. St. 1901, p. 508]) it is declared:

"That the Circuit Courts of the United States shall have original cognizance, concurrent with the courts of the several states, of all suits of a civil nature, at common law or in equity, where the matter in dispute exceeds, exclusive of interest and costs, the sum or value of two thousand dollars and

* * * in which there shall be a controversy between citizens of different states, * * * 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. * * *"

This action presents a controversy between citizens of different states, and was brought in the district and division of the residence of the defendants. It is of a civil nature, is a common-law action, and the matter in dispute exceeds, exclusive of interest and costs, the sum or value of $2,000. Being also an action which is cognizable in the courts of the state, as before shown, it is equally within the concurrent cognizance of the Circuit Court of the United States, within that state. It was said by Mr. Justice Field in Gaines v. Fuentes, 92 U. S. 10, 18, 20, 23 L. Ed. 524, in referring to the jurisdiction of the federal courts of suits at common law or in equity in which there is a controversy between citizens of different states:

"The Constitution imposes no limitation upon the class of cases involving controversies between citizens of different states to which the judicial power of the United States may be extended, and Congress may therefore lawfully provide for bringing, at the option of either of the parties, all such controversies within the jurisdiction of the federal judiciary. * * * There are no separate equity courts in Louisiana, and suits for special relief of the nature here sought are not there designated suits in equity. But they are none the less essentially such suits; and if, by the law obtaining in the state, customary or statutory, they can be maintained in a state court, whatever designation that court may bear, we think they may be maintained by original process in a federal court, where the parties are, on the one side, citizens of Louisiana, and, on the other, citizens of other states."

Even if the action be regarded as one for the recovery of damages for injury to land, we think it was cognizable in the circuit court.

But we believe this is an action for the recovery of damages for the conversion of personal property—one more in the nature of trespass de bonis asportatis or trover than of trespass quare clausum fregit—and that it is transitory, and not local, under the common-law distinction. By the laws of Minnesota (sections 5131, 5228–5231, Gen. St. 1894), the forms of actions existing at common law are abolished, and the first pleading or complaint by the plaintiff is required to contain a plain and concise statement of the facts constituting his cause of action, and a demand for the relief to which he supposes himself entitled. The facts stated and the relief demanded, rather than the form of statement, determine the nature of the action. The facts here stated and the relief demanded show that the gravamen of the action is the conversion of the lumber manufactured out of the trees, and that the purpose of the action is to recover the value of the lumber. There is no direct statement of a depreciation in the value of the land by reason of the trespass, and there is no attempt to dwell upon the injury to the land by stating that the remaining trees or undergrowth were injured, that roads were constructed through the land, or that the soil was disturbed in hauling away the pine timber, or was incumbered with the limbs and tops of the trees removed. This, and the fullness and particularity with which the complaint states the manufacture of the severed trees into lumber and their conversion, shows that the conversion is deemed the principal thing, and that the trespass is stated only as illustrating

the character of the conversion, and as bearing upon plaintiff's right to recover the value of the manufactured lumber, which, as alleged, is identical with the amount for which judgment is demanded. The fact that the defendants did not question the nature of the action until at the trial, almost four years after the action was commenced, and that then the plaintiff promptly and decisively declared it to be one to recover the value of the timber when severed from the land, and not damages for any resulting injury to the land, requires that any doubt or uncertainty as to the nature of the action arising from the fullness of statement in the complaint be resolved in favor of the jurisdiction; the case being one where, upon the facts stated, the plaintiff, in commencing his action, could have made the trespass to the land the gravamen thereof, or, waiving that, could have relied upon the conversion. When the timber was severed from the land it became personal property, but the title to it was not changed. It remained the property of the owner of the land, as before the severance, and he could have followed and reclaimed his property into whatever jurisdiction it might have been taken, or he could have maintained an action in the nature of trespass de bonis asportatis for damages for its unlawful asportation, or he could have maintained an action in the nature of trover for damages for its conversion. United States v. Cook, 19 Wall. 501, 22 L. Ed. 210; Schulenberg v. Harriman, 21 Wall. 44, 64, 22 L. Ed. 551; United States v. Steenerson, 1 C. C. A. 552, 50 Fed. 504; McGonigle v. Atchison, 33 Kan. 726, 7 Pac. 550; Nelson v. Burt, 15 Mass. 204; Riley v. Boston Water Power Co., 11 Cush. 11; Farrant v. Thompson, 5 B. & Ald. 826; Richardson v. York, 14 Me. 216; Moody v. Whitney, 34 Me. 563; Whidden v. Seelye, 40 Me. 247, 255, 63 Am. Dec. 661; Bulkley v. Dolbeare, 7 Conn. 232; Wadleigh v. Janvrin, 41 N. H. 503, 520, 77 Am. Dec. 780; Greeley v. Stillson, 27 Mich. 153; Tyson v. McGuineas, 25 Wis. 656, 659; Mooers v. Wait, 3 Wend. 104, 20 Am. Dec. 667; Wright v. Guier, 9 Watts, 172, 36 Am. Dec. 108; Harlan v. Harlan, 15 Pa. 507, 53 Am. Dec. 612; Forsyth v. Wells, 41 Pa. 291, 80 Am. Dec. 617. The rule for determining the character of the action is well stated in 2 Waterman on Trespass, § 1102:

"Although, as standing trees are part of the inheritance, and the severing them from it is deemed an injury to the freehold, for which trespass quare clausum fregit is the appropriate remedy, yet the party may waive that ground of recovery, and claim the value of timber only thus severed and carried away. In the one case the entering and breaking of the close is the gist of the action; in the other, the taking and carrying away of the property. In the latter case the action is transitory, and not local."

This case is unlike Ellenwood v. Marietta Chair Co., 158 U. S. 105, 15 Sup. Ct. 771, 39 L. Ed. 913, relied upon by the plaintiffs in error, because there the allegations of the petition made a continuing trespass upon the land, covering a period of more than 10 years, the principal thing, and the conversion of the timber only incidental. The case of Stone v. United States, 167 U. S. 178, 182, 17 Sup. Ct. 778, 42 L. Ed. 127, is more in point. There the petition stated the ownership of the lands by the plaintiff, and that the defendant "unlawfully, wrongfully, and willfully cut from the said lands 77,441 trees." It then stated with much particularity that the defendant thereafter manufactured the trees into lumber and railroad ties and converted these to his own use,

and, after stating the value of the trees when standing upon the land, and the value of the manufactured products at the time of the conversion, demanded judgment for the latter. After distinguishing the case of Ellenwood v. Marietta Chair Co., Mr. Justice Harlan, speaking for the court, said:

"In the present case the petition, it is true, avers that the United States was the owner of the lands from which the trees were cut, but the gravamen of the action was the conversion of the lumber and the railroad ties manufactured out of such trees, and a judgment was asked, not for the trespass, but for the value of the personal property so converted by the defendant. The description in the petition of the lands and the averment of ownership in the United States were intended to show the right of the government to claim the value of the personal property manufactured from the trees illegally taken from its lands. Although the government's [defendant's] denial of the [government's] ownership of the land made it necessary for it to prove its ownership, the action, in its essential features, related to personal property, was of a transitory nature, and could be brought in any jurisdiction in which the defendant could be found and served with process."

That case is so nearly identical with the present one that the decision of the Supreme Court therein controls the determination of the question now under consideration, and requires that this action be held to be transitory and within the jurisdiction of the Circuit Court.

It is said that "the court charged the jury that the measure of damages was not the value of the logs taken, but their value as it appeared in the tree," and because of this we are asked to declare this action local. This instruction was given at the request of the defendants. If it properly states the rule for measuring the damages to be awarded in an action for the conversion of personal property under the circumstances shown at the trial (Wooden Ware Co. v. United States, 105 U. S. 432, 27 L. Ed. 230; Forsyth v. Wells, 41 Pa. 291, 80 Am. Dec. 617; Gentry v. United States, 41 C. C. A. 185, 101 Fed. 51; United States v. Homestake Mining Co., 54 C. C. A. 303, 117 Fed. 481), it is in harmony with the court's jurisdiction of the case; and, if it states the rule more favorable to the defendants than they were entitled to ask, its only effect has been to diminish the damages which otherwise would have been awarded to the plaintiff—a matter which cannot be invoked by the defendants to defeat the jurisdiction or otherwise. It was correctly ruled at the beginning of the trial, and again at its close, that the action was one for the conversion of personal property and not for trespass to land.

Does plaintiff's title under the patent issued May 16, 1898, upon his homestead entry, relate back to a time anterior to the cutting of the timber by the defendants in the winter of 1893 and 1894, and entitle him to maintain this action? The solution of this question depends upon the effect to be given in this action to the proceedings in the Land Department of the United States upon the adverse claims of the plaintiff and Judd. The land covered by the patent issued to the plaintiff, while formerly within a land grant made in aid of the construction of a railroad, was restored to the public domain under the act of September 29, 1890, c. 1040, § 2, 26 Stat. 496 [U. S. Comp. St. 1901, p. 1599], with a direction that actual settlers in good faith at the date of the act should have a preference right of entry, and should "be regarded as such actual settlers from the date of actual settlement or occupation." Proceedings

to acquire the title to this land, instituted and conducted in the Land Department, with due notice to the parties in interest, and with opportunity for full hearing, resulted in the issuance of a patent conveying the government's title to the plaintiff. During the pendency of these proceedings, while the legal title was yet in the United States, and with notice of plaintiff's claim, the defendants purchased the land from Judd, cut and removed therefrom the timber, and sold the lumber into which it was sawed by them. In doing this, the defendants relied upon a ruling of the land officers which declared Judd's claim to be the superior one, and under which he had submitted proof of compliance with the homestead law, and had obtained a certificate declaring that he was entitled to a patent. But this ruling and the issuance of this certificate were not in themselves final acts, and, no patent being issued thereon, they never became final. The rulings and acts of the officers of the Land Department of the United States, made and done in the course of proceedings to obtain the title to public land before the issuance of a patent, are interlocutory; and, "until the matter is closed by final action, the proceedings of an officer of a department are as much open to review or reversal by himself or his successor as are the interlocutory decrees of a court open to review upon the final hearing." New Orleans v. Paine, 147 U. S. 261, 266, 13 Sup. Ct. 303, 37 L. Ed. 162. The issuance of a patent, or such other act as passes the legal title from the government, is the final act, and is the expression and entry of the final judgment of the officers of the Land Department; and this is the act that marks the termination of the jurisdiction of these officers and the beginning of the jurisdiction of the courts. Moore v. Robbins, 96 U. S. 530, 533, 24 L. Ed. 848; United States v. Schurz, 102 U. S. 378, 396, 401, 402, 26 L. Ed. 167; Smelting Co. v. Kemp, 104 U. S. 636, 640, 26 L. Ed. 875; Michigan Land & Lumber Co. v. Rust, 168 U. S. 589, 592, 18 Sup. Ct. 208, 42 L. Ed. 591; Brown v. Hitchcock, 173 U. S. 473, 19 Sup. Ct. 485, 43 L. Ed. 772; Bockfinger v. Foster, 190 U. S. 116, 23 Sup. Ct. 836, 47 L. Ed. 975. "The true rule, drawn from an examination of all of the authorities, is that the jurisdiction of the Land Department ceases where the jurisdiction of the courts commences, viz., when the legal title passes, and that there is no hiatus between the termination of the one and the beginning of the other. Under this rule the land will always be within a jurisdiction which can administer the law, and protect both public and private rights" involved in proceedings for the acquisition of its title. Parcher v. Gillen, 26 Land Dec. 34, 42. So long as the legal title remains in the United States, the land laws are in process of administration. Michigan Land & Lumber Co. v. Rust, supra; Beley v. Naphtaly, 169 U. S. 353, 364, 18 Sup. Ct. 354, 42 L. Ed. 775; Brown v. Hitchcock, supra. And the extent, character, and validity of rights claimed under those laws, and of entries made thereunder, are subject to inquiry, examination, and determination in the Land Department. See authorities supra, and Orchard v. Alexander, 157 U. S. 372, 15 Sup. Ct. 635, 39 L. Ed. 737; Hawley v. Diller, 178 U. S. 476, 488, 490, 20 Sup. Ct. 986, 44 L. Ed. 1157; Cosmos Co. v. Gray Eagle Oil Co., 190 U. S. 301, 309, 23 Sup. Ct. 692, 47 L. Ed. 1064. That this is necessarily so is shown in the following statement of Mr. Secretary Lamar (5 Land Dec. Dep. Int. 494), which received the approval

of the Supreme Court in Knight v. United States Land Association, 142 U. S. 161, 178, 12 Sup. Ct. 258, 35 L. Ed. 974:

"For example, if, when a patent is about to issue, the secretary should discover a fatal defect in the proceedings, or that, by reason of some newly ascertained fact, the patent, if issued, would have to be annulled, and that it would be his duty to ask the Attorney General to institute proceedings for its annulment, it would hardly be seriously contended that the secretary might not interfere and prevent the execution of the patent. He could not be obliged to sit quietly and allow a proceeding to be consummated, which it would be immediately his duty to ask the Attorney General to take measures to annul."

But the power of the Land Department to review its prior rulings and to cancel existing entries is not unlimited or arbitrary (Cornelius v. Kessel, 128 U. S. 456, 9 Sup. Ct. 122, 32 L. Ed. 482), and can be exercised only after notice to parties in interest and due opportunity for a full hearing (Brown v. Hitchcock, 173 U. S. 478, 19 Sup. Ct. 485, 43 L. Ed. 772; Guaranty Savings Bank v. Bladow, 176 U. S. 448, 453, 20 Sup. Ct. 425, 44 L. Ed. 540; Hawley v. Diller, 178 U. S. 489, 20 Sup. Ct. 986, 44 L. Ed. 1157; Thayer v. Spratt, 189 U. S. 346, 351, 23 Sup. Ct. 576, 47 L. Ed. 845). One who purchases of an entryman before the issuance of a patent obtains no greater right or estate than is possessed by the entryman, and acquires at the most a right or equitable estate, which is subject to examination in the Land Department while the title remains in the government. In the absence of a statute providing otherwise, he is chargeable with knowledge of the state of the title which he buys, holds it subject to any equities which could be asserted against it in the hands of the vendor, and takes the risk of losing it if it is subsequently shown that the entry is based upon an error of law or a clear misapprehension of the facts, which, if not corrected, will lead to the transfer of the government's title to one not entitled to it. Hawley v. Diller, 178 U. S. 485–488, 20 Sup. Ct. 986, 44 L. Ed. 1157; Guaranty Savings Bank v. Bladow, 176 U. S. 454, 20 Sup. Ct. 425, 44 L. Ed. 540; Thayer v. Spratt, 189 U. S. 352, 23 Sup. Ct. 576, 47 L. Ed. 845. The Land Department being a special tribunal to which Congress has confided the administration and execution of the laws for the disposition of the public lands, the final judgment of the officers of that department as to matters of fact properly determinable by them is conclusive, when brought to notice in a collateral proceeding, such as this is, and is unassailable, except by a direct proceeding for its correction or annulment. Johnson v. Towsley, 13 Wall. 72, 20 L. Ed. 485; Shepley v. Cowan, 91 U. S. 330, 340, 23 L. Ed. 424; Quinby v. Conlan, 104 U. S. 420, 26 L. Ed. 800; Steel v. Smelting Co., 106 U. S. 447, 1 Sup. Ct. 389, 27 L. Ed. 226; Moss v. Dowman, 176 U. S. 413, 20 Sup. Ct. 429, 44 L. Ed. 526; Calhoun, etc., Co. v. Ajax, etc., Co., 182 U. S. 499, 510, 21 Sup. Ct. 885, 45 L. Ed. 1200; De Cambra v. Rogers, 189 U. S. 119, 23 Sup. Ct. 519, 47 L. Ed. 734; Gertgens v. O'Connor, 191 U. S. 237, 24 Sup. Ct. 95, 48 L. Ed. 164; James v. Germania Iron Co., 46 C. C. A. 476, 107 Fed. 597; Uinta Tunnel, etc., Co. v. Creede, etc., Co., 57 C. C. A. 200, 119 Fed. 164. As was said by Mr. Justice Field in Smelting Co. v. Kemp, 104 U. S. 636, 640, 26 L. Ed. 875:

"The execution and record of the patent are the final acts of the officers of the government for the transfer of its title, and, as they can be lawfully performed only after certain steps have been taken, that instrument, duly

signed, countersigned, and sealed, not merely operates to pass the title, but is in the nature of an official declaration by that branch of the government to which the alienation of the public lands, under the law, is intrusted, that all the requirements preliminary to its issue have been complied with. The presumptions thus attending it are not open to rebuttal in an action at law."

By the application of these established rules to the facts of this case, it is seen that the proceedings in the Land Department, which terminated with the issuance of the patent to the plaintiff, were within the jurisdiction of that department, and by them it is conclusively determined, so far as this action is concerned, that the plaintiff, by full compliance with the requirements of the homestead law, entitled himself to the patent; that he lawfully settled upon the land, and lawfully maintained his residence thereon for a continuous period of at least five years before the patent was issued, these being conditions precedent to obtaining a patent under the statutes (section 2291, Rev. St., Act May 14, 1880, c. 89, § 3, 21 Stat. 140, 141, U. S. Comp. St. 1901, pp. 1390, 1393) under which this patent was issued; that Judd never entitled himself to a patent; and that his entry was properly canceled, because wrongfully obtained. The defendants obtained no right to the land or to the timber by their purchase from Judd. His entry and his conveyance to the defendants have no bearing whatever upon this action, save as they indicate whether the defendants appropriated the timber under such an honest belief in a legal right so to do as affects or limits the damages which otherwise would be recoverable from them.

After the plaintiff, in the course of asserting a claim adverse to Judd, had secured the cancellation of the latter's entry and the rejection of the defendant's claim thereunder, it was entirely competent for the land officers to give full effect to plaintiff's residence upon the land during the existence of that entry, if such residence was actual, and was begun and maintained in good faith, with a view to obtaining title under the homestead law. Counsel for the defendants call attention to a statute of Wisconsin (section 4165, Rev. St. 1898) purporting to give certain probative force to a final receipt or patent certificate issued under the land laws of the United States, and argue from this that the plaintiff was a mere trespasser during the existence of Judd's entry, and that his residence upon the land during that time could not be made the basis of any right, legal or equitable. There are two sufficient answers to this contention. One is that, before the plaintiff's residence during that period was made the basis of issuing a patent to him, the receipt or certificate issued to Judd had been canceled by competent authority because it was wrongfully obtained, and by that cancellation had been deprived of all probative force. Guaranty Savings Bank v. Bladow; Thayer v. Spratt, supra. The other is that a state cannot by its legislation restrict or affect the authority of the officers of the Land Department in the disposition of the public lands of the United States, or withhold from the grantees of the United States any of the incidents of the transfer of the government's title. Bagnell v. Broderick, 13 Pet. 436, 450, 10 L. Ed. 235; Wilcox v. McConnel, 13 Pet. 498, 516, 10 L. Ed. 264; Irvine v. Marshall, 20 How. 558, 564, 15 L. Ed. 994; Gibson v. Chouteau, 13 Wall. 92, 99, 20 L. Ed. 534; Langdon v. Sherwood, 124 U. S. 74, 84, 8 Sup. Ct. 429, 31 L. Ed. 344; Paige v. Peters, 70 Wis. 182, 35 N. W. 329, 5 Am. St. Rep. 156.

From what has been said, it is clear that the defendants are liable to the plaintiff or to the United States for the conversion of the timber, and that their only lawful concern is that they be made to respond only to the rightful claimant. Their liability is as certain as if the cutting had been a willful trespass, and the measure of the damages for the conversion is the same, whether the right of recovery is in the plaintiff or in the United States. We therefore return to the question whether the plaintiff's title under the patent relates back to a time anterior to the cutting of the timber, and entitles him to recover for its conversion. It will be observed that the question is not whether the doctrine of relation can be invoked to create a liability where otherwise there is none, or to defeat or impair an intervening right or equity of an innocent third person, or can be invoked by one whose default and laches will make its application operate unjustly upon another (Evans v. Durango Land & Coal Co., 25 C. C. A. 531, 537, 80 Fed. 433, 438), or by a stranger to the title (Gibson v. Chouteau, 13 Wall. 92, 101, 20 L. Ed. 534), or can be invoked to avoid a liability otherwise existing (United States v. Ball [C. C.] 31 Fed. 667; United States v. Freyberg [C. C.] 32 Fed. 195; United States v. Norris [C. C.] 41 Fed. 424; Teller v. United States, 54 C. C. A. 349, 117 Fed. 577), or to make lawful an act which was criminal when done (Teller v. United States, 51 C. C. A. 230, 113 Fed. 273; Teller v. United States, 54 C. C. A. 349, 352, 117 Fed. 577, 580). Nor is the question whether a homestead claimant may, in advance of perfecting his claim into a full legal or equitable title, maintain an action against another for the value of timber severed from the land, which the homestead claimant could not have lawfully severed for purposes of sale. Shiver v. United States, 159 U. S. 491, 16 Sup. Ct. 54, 40 L. Ed. 231. These several matters, whether determined or undetermined by existing decisions, are apart from the matter now under consideration, save as the principles controlling it may be applicable to them. While the doctrine of relation is of equitable origin, it has a well-recognized application to proceedings at law. By it "is meant that principle by which an act done at one time is considered, by a fiction of law, to have been done at some antecedent period. It is usually applied where several proceedings are essential to complete a particular transaction, such as a conveyance or deed. The last proceeding which consummates the conveyance is held, for certain purposes, to take effect by relation as of the day when the first proceeding was had." Gibson v. Chouteau, 13 Wall. 92, 100, 20 L. Ed. 534. Its purpose is to promote justice and to give effect to the lawful intention of the parties. Its most frequent application is to conveyances of real property or interests therein in pursuance of an antecedent contract, when, to give effect to the intention of the parties, or to protect purchasers from the vendee pending the fulfillment of the contract, the title is considered as having vested in the grantee not merely from the date of the actual conveyance, but from the time when the contract was made. The doctrine is also applied to public land transactions, when, to give effect to the intent of the statute or to cut off intervening claimants, the patent is deemed to relate back to the initiatory act. Ross v. Barland, 1 Pet. 655, 664, 7 L. Ed. 302; Landes v. Brant, 10 How. 348, 372, 13 L. Ed. 449; Lessee of French v. Spencer, 21 How. 228, 240, 16

L. Ed. 97; Beard v. Federy, 3 Wall. 478, 491, 18 L. Ed. 88; Grisar v. McDowell, 6 Wall. 363, 380, 18 L. Ed. 863; Stark v. Starr, 6 Wall. 402, 418, 18 L. Ed. 925; Lynch v. Bernal, 9 Wall. 315, 325, 19 L. Ed. 714; Shepley v. Cowan, 91 U. S. 330, 337, 340, 23 L. Ed. 424; Weeks v. Bridgman, 159 U. S. 541, 546, 16 Sup. Ct. 72, 40 L. Ed. 253; United States v. Loughrey, 172 U. S. 206, 218, 219, 225–231, 19 Sup. Ct. 153, 43 L. Ed. 420. Thus it was said in Shepley v. Cowan:

"The party who takes the initiatory step in such cases, if followed up to patent, is deemed to have acquired the better right, as against others, to the premises. The patent which is afterwards issued relates back to the date of the initiatory act, and cuts off all intervening claimants. Thus the patent upon a state selection takes effect as of the time when the selection is made and reported to the land office, and the patent upon a pre-emption settlement takes effect from the time of the settlement, as disclosed in the declaratory statement or proofs of the settler to the register of the local land office."

Other applications of the doctrine will be found in Cothrin v. Faber, 68 Cal. 39, 4 Pac. 940, 8 Pac. 599; Jackson v. Bull, 1 Johns. Cas. 81; Id., 2 Caines, Cas. 301; Jackson v. Ramsay, 3 Cow. 75, 15 Am. Dec. 242; Heath v. Ross, 12 Johns. 146; St. Onge v. Day, 11 Colo. 368, 18 Pac. 278; Musser v. McRae, 44 Minn. 343, 46 N. W. 673. It conclusively appears, as before shown, that the timber was severed from the land after the initiation and during the maintenance of the plaintiff's homestead claim; in other words, while he had a conditional or inchoate right to the land, which was capable of perfection through compliance with the homestead law, and which in due course ripened into a full legal and equitable title before the commencement of this action. This conditional or inchoate right included an exclusive right to the possession so long as the plaintiff should comply in good faith with the requirements of the law controlling homestead claims, and included a further right to earn and receive the title. This right to the possession and to earn and receive the title extended to everything which was part of the land—timber as well as soil. The severance of the timber from the soil was a violation or infraction of the plaintiff's right to the possession, and of his right to earn and receive the title. It was an injury to both. It may be that the conditional or inchoate right of a homestead claimant is subject to a power in Congress to terminate it in whole or in part—as to the land or only as to the timber—at any time before it is perfected into a vested equitable estate by full compliance with the requirements of the law, but it is not terminable or subject to impairment by third persons. Unquestionably, in the absence of the exercise of such a power by Congress—and its exercise here is not claimed—the plaintiff was entitled, upon perfecting his homestead claim, to receive a conveyance of the land in the condition in which it was when his claim was initiated. The defendants made that impossible. When the patent was issued, the timber was gone. In its stead there existed a right of action for its conversion. Does not the promotion of justice—the due protection of the plaintiff's rights—require that his patent be held to relate to the date of his initiatory act, and thereby to invest him with that which now takes the place of the timber? We think it does. The terms of the statute are such that the presence of valuable timber on public land does not exclude it from homestead settlement or entry. It is therefore probable and reasonable

that the plaintiff, in selecting this tract from among others, was influenced by the value given to it by its timber. It was the intention of the government, by the homestead law, and was the intention of the plaintiff, in accepting the provisions of that law, that, upon his compliance with its requirements, he should be entitled to the land, with whatever advantages were incident to its natural condition and character, whether due to the fertility of its soil, or to its growth of timber. But for the act of the defendants, that intention would have been effectuated, and the timber would have passed to the plaintiff by the patent, as did the soil from which the timber was severed. It does not comport with the spirit of the homestead law to say that, after the initiation and partial perfection of a homestead claim, some third person may rob the land of a substantial part of that which gives it value, and that, on full compliance with the law by the homestead claimant, the government may convey to him that which is left of the land, and may recover from the wrongdoer, and retain to its own use, the value of that which has been unlawfully taken from the land through no fault or wrongful act of the homestead claimant. The law does not contemplate anything so unreasonable. The principles underlying and supporting the doctrine of relation are such that it may be as readily invoked to remedy or correct a loss such as is here disclosed, occurring while the claim was being perfected, as to prevent the loss of the entire right or title through an intervening claim. The plaintiff's title under the patent relates back to a time prior to the severance and conversion of the timber by the defendants, which was after the initiation of his claim, and entitles him to maintain this action.

The judgment is affirmed.

INTERNATIONAL NAV. CO. v. SEA INS. CO., Limited.

(Circuit Court of Appeals, Second Circuit. March 8, 1904.)

No. 113.

1. MARINE INSURANCE—SALVAGE EXPENSES—LAW GOVERNING APPORTIONMENT.
An English valued policy on a ship contained the provision: "General average salvage, and special charges as per foreign custom, payable according to foreign statements, * * * or per rules of port of discharge, * * * at the option of assured." *Held*, that under such provision the law of New York, the port of discharge, governed as to the amount payable by the insurer on account of salvage arising from stranding, there adjusted, and the insured was entitled to recover on the policy, in accordance with the law of the port, a sum which bears the same ratio to the entire salvage he was compelled to pay as the amount of the policy bears to the policy value of the ship, although the award was made on a higher valuation, and not, as by the law of England, only such part of said sum as bears the same ratio to the whole as the policy valuation bears to the valuation on which the adjustment was made.

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

This cause comes here on appeal from a decree of the District Court, Eastern District of New York, in favor of the libelant, owner of the steamer St. Paul, claiming loss under a policy of marine insurance. The opinion of the District Court is found in 124 Fed. 93.

Wilhelmus Mynderse, for appellant.
Henry G. Ward, for appellee.

Before LACOMBE, TOWNSEND, and COXE, Circuit Judges.

PER CURIAM. The St. Paul, on a voyage from Southampton, stranded on the New Jersey coast, and salvage services were rendered to vessel and cargo, as the result of which the vessel reached New York, having sustained physical damage involving serious repairs. The salvors took legal proceedings against vessel and cargo, and an award was made separately against each. The St. Paul (D. C.) 82 Fed. 104, affirmed by this court 86 Fed. 340, 30 C. C. A. 70. The award against the vessel (exclusive of the share to be borne by the freight) was $129,914.57. A statement was made up by Johnson & Higgins, average adjusters, in which the salvage award against the steamer was claimed as a particular average, being added to the cost of repairs to the ship caused by stranding; the total amount being $248,377.28. This statement was presented to the underwriters on the St. Paul, both in this country and in England. Some of the American underwriters refused payment of the claim under the said statement. Suit was brought in the District Court, Southern District of New York, and libelant recovered. International Navigation Co. v. Atlantic Mutual Ins. Co. (D. C.) 100 Fed. 304. That decision was affirmed by this court. 108 Fed. 987, 48 C. C. A. 181.

The respondent here is a British corporation, and issued the policy of insurance in London. The vessel was valued in all her policies at £275,000, and she was insured for the whole of that amount; the respondent underwriting £4,500. The salvage award was made on the basis of actual value in her salved condition, $2,000,000 (£410,256); and her value in sound condition was $2,100,000 (£441,025). The libelant claimed to recover $^{45}/_{2750}$ of the $248,377.28. The insurers contend that their liability for the salvage award is restricted to $^{45}/_{2750}$ of $^{275000}/_{441025}$ thereof. The conceded amount was paid, and this suit was brought to recover the difference. The question in dispute is whether, under a valued policy, where salvage has been awarded on a higher valuation, the insured can recover ratably from the several underwriters the salvage he has had to pay, or only such part of it as is in the same proportion to the whole salvage paid as the total policy valuation is to the valuation on which salvage was awarded.

No question seems to be raised as to the amount to be paid for repairs to the vessel. It will be perceived that the question presented is a single one, and the concessions of the respective parties have greatly simplified it. The respondent's method of calculation is in accord with English law. The libelant's is in accord with American law. For brevity of statement, the one may be called "nominal proportion"; the other, "actual proportion."

The policy is a British contract, and is to be interpreted accordingly. It is, however, "competent to an underwriter on an English policy to stipulate, if he think fit, that such policy shall be construed and applied, in whole or in part, according to the law of any foreign state, as if it had been made in and by a subject of the foreign state." Greer v.

Poole, 5 Q. B. D. 272. The policy of the defendant contains the following provision:

"General average, salvage and special charges as per foreign custom, payable according to foreign statements or per York-Antwerp rules, or York-Antwerp rules of 1890, or per rules of port of discharge, if in accordance with contract of affreightment at the option of assured."

Precisely this form of words is not found in any of the cases cited upon the briefs, but it seems to us reasonably easy of interpretation. As was stated before, without some such clause, the assured on a valued policy was liable to pay in some foreign port general average charges at one rate, and when he came to his underwriter for indemnity would be paid at a different rate, receiving less than he had paid, and not securing complete indemnity. The same rule applied to claims for salvage loss as to claims for general average loss. Steamship Balmoral Company v. Marten, L. R. App. Cases (1902) 511. Naturally the assured sought to correct this by some special provision which the underwriter might be willing to assent to. A provision quite frequently adopted was, "General average according to foreign custom;" also, "General average as per foreign statement." Such provisions have been considered by British courts, and in each instance it was held that the underwriter could not dispute the adjustment as to the propriety of particular items, or as to correctness of the apportionment, and was bound by the decision of the foreign average stater, or by the custom of the foreign port, both as to fact and law on the subject of general average. Mavro v. Ocean Ins. Co., L. R. 9 C. P. 595; The Mary Thomas, Prob. Div. (1894) 123; Harris v. Scaramanga, 1 Asp. Mar. Cas. 344; De Hart v. Compania Anonima, 9 Asp. Mar. Cas. 345, affirmed 8 Commercial Cases, 314. The last citation contains the following:

"The general effect of the memorandum [to pay general average as per foreign statement, if so made up] is to make the underwriters liable as to general average for whatever the owners of the goods might be called upon to pay on that account by the foreign statement of adjustment. * * * If an adjustment has to be effected in a foreign port, it is obviously convenient that there should be a provision that in such a case the underwriter should stand in the shoes of those primarily liable upon it."

In none of the cases cited was the proposition raised, as it is here, that, although the assured might have paid general average charges on actual valuation, his claim for such loss should nevertheless be readjusted by scaling it down to a "nominal proportion." It would certainly seem that the manifest object of the clause would be defeated by so narrow an interpretation. "General average as per foreign custom" would be a declaration not wholly lived up to, if foreign custom made the assured pay on one basis, but the memorandum clause allowed him to collect only on another. No authority, British or other, is cited which is persuasive to so narrow an interpretation of a clause obviously intended to relieve the assured from the risk of meeting disaster without being compelled himself to meet the added risk of the geographical location of his ship when the loss was incurred and the port of safety was reached. Indeed, it would seem that the avoidance of this geographical risk was the genesis of the clause.

The phraseology of the clause in the policy now under consideration is broader than in the cases cited, for it submits to "foreign custom," whether there be an adjustment or not, "salvage and special charges." We concur entirely with the District Judge in the conclusion that under that clause the settlement of salvage losses under the policy must be in conformity to the law of the country in which the assured pays them.

The decree is affirmed, with interest and costs.

DICKINSON et al. v. SAUNDERS et al.

(Circuit Court of Appeals, First Circuit. April 13, 1904.)

No. 516.

1. FOREIGN CORPORATION—DECREE APPOINTING RECEIVERS CONSTRUED.
   A decree appointing receivers for a foreign corporation, and directing that they continue to operate the property until otherwise directed, and from the moneys coming into their hands pay all sums due to employés and all expenses of carrying on the business, construed, under the circumstances, as requiring the receivers to pay from the proceeds of the corporation's property all claims for wages earned prior to their appointment, as well as wages earned thereafter.

2. SAME—PRIORITY—WAGES OF EMPLOYÉS.
   Where a federal court could have acquired jurisdiction to appoint receivers for a foreign corporation only by consent of the parties, and no objection was made by any party to such appointment, or to a decree requiring the receivers to pay from the proceeds of the corporation's property all sums due employés, together with all the expenses of carrying on the business, the receivers could not thereafter, under the circumstances of this case, refuse to pay in full claims for wages earned by employés of the corporation prior to the receivers' appointment, none of which exceeded $300 in amount, in preference to other unsecured claims.

Appeal from the Circuit Court of the United States for the District of Massachusetts.

Guy Cunningham, for appellants.

Henry T. Lummus (Charles N. Barney, with him on the brief), for appellees.

Before PUTNAM, Circuit Judge, and ALDRICH and BROWN, District Judges.

PUTNAM, Circuit Judge. This appeal arose out of a bill in equity filed in the Circuit Court for the District of Massachusetts on the 7th day of August, 1902, by the Boston & Gloucester Steamboat Company and others against the Cape Ann Granite Company, incorporated under the laws of Maine, but said to have a usual place of business at Gloucester, in Massachusetts. The bill alleged that the Cape Ann Granite Company in March, 1894, executed a mortgage of its franchises and all its property to secure an issue of bonds, and that all the complainants were holders of portions thereof, either absolutely or as collateral security, and also of certain shares of capital stock-

that the mortgage was in default; that the defendant corporation had an amount of property of various kinds, and was largely indebted; that its property had been attached by various creditors; that the corporation was wholly insolvent, and that it was likely that a race of diligence would ensue between its different creditors, all of which would result in a multiplicity of suits, and in dismemberment and sale of its property by piecemeal and at a sacrifice; that its personal property, consisting principally of machinery and equipment, was of great value as attached to and part of its plant, but of little value when separated therefrom, and that the value of all its property consisted largely in its continued working operation as a unit; and that it was necessary, for the protection of its bondholders and creditors and for the preservation of its assets, that all its property within the jurisdiction of the court be taken into its judicial custody by the appointment of a receiver. Thereupon the bill prayed that the rights of the parties in interest might be ascertained and protected; that the court would administer the entire property of the corporation, and for such purposes would marshal its assets and enforce the various rights, liens, and equities; and that a receiver be appointed to take possession of all the assets, with authority to manage and preserve the same till the same should be sold and the proceeds distributed.

Thus the bill looked not merely to a foreclosure of the mortgage in which the complainants were interested, but to a winding up and distribution of the assets of the corporation, and the consequent intervening control and management of its affairs, with the view of making its assets of most available value. Thereupon, the same day the bill was filed, the appellants were appointed interlocutory receivers as prayed by the bill, and were authorized to retain possession of all the properties until sold, and to operate and continue the business until otherwise directed, and from the moneys coming into their hands to pay all sums due to employés and all expenses of carrying on the business. No objection to these proceedings seems to have been taken from any quarter, so that we have no occasion to consider any question except that which is now expressly before us.

Subsequently to filing the bill, on May 16, 1903, certain petitioners intervened, setting forth that they were "workmen and servants" employed by the defendant corporation during April, May, June, July, and August, 1902; that they had claims against it for the various amounts stated in the schedule attached to the petition, as wages earned during the months specified for labor necessary to its business from day to day; that the claims were contracted as a part of current expenses in the ordinary course; that the receivers had sold and converted into cash a large amount of personal property which was not covered by the mortgage in question; that they had applied none of the same to the payment of the claims of the petitioners, and had refused to do so; and that it was likely that the property and money remaining in their hands, if distributed among all the unsecured creditors, would be insufficient to pay in full. Thereupon they prayed that their claims might be allowed as

preferred, and have priority over all other unsecured claims, and that, so far as the petitioners were entitled to priority, the receivers might be ordered to pay them.

The receivers put in an answer to this petition, and objected to the granting thereof. There is nothing in the record showing a diversion of assets as alleged. With that exception, the case rests on the substance of the petition as we have given it. The court decreed that the debts of the petitioners should be allowed as preferred, and that the receivers should pay the same. From this decree the receivers seasonably appealed.

It does not appear that the assets of the defendant corporation have ever been disposed of under the form of a decree of distribution, but it is admitted that some of the property not covered by the mortgage has been sold by the receivers and converted into cash, which at the time of the filing of the intervening petition was in their hands. It also appears that thus the receivers have in their hands a sum, not bound by the mortgage, sufficient to pay the petitioners in full, but that such payments, if made, would leave almost nothing for the other unsecured creditors. The claims allowed by the court cover a period of something more than four months prior to the appointment of the receivers, and the total of some of them was in excess of $100, but none in excess of $300. The learned judge of the Circuit Court filed no opinion, so that the grounds on which he made his decree are not before us.

The record presents no equity in behalf of the intervening petitioners, other than that they were workmen. The defense rests on the ground that their claims differ in no way from any of the unsecured liabilities to which they ask to be preferred. The proposition is also made that the defendant is not a quasi public corporation, the continued operation of which is of general interest. The receivers maintain that the decisions of the Supreme Court allowing priorities relate to corporations which owe duties to the public, on which account, in order that there may not be a cessation of the performance thereof, they say special concessions have been made.

There have been numerous voluminous opinions of the Supreme Court with reference to priorities involved in the administration of the property of quasi public corporations like railroads, which it would be laborious and unnecessary to digest and classify. A late general statement of them will be found in Southern Railway Company v. Carnegie Steel Company, 176 U. S. 257, 20 Sup. Ct. 347, 44 L. Ed. 458. It is true that, so far as such corporations are concerned, the court has said that, inasmuch as they owe duties to the public, their mortgagees acquiring security thereon do it with the implied equitable undertaking on their part that no summary action by them shall interfere with the performance of such duties. Therefore it has been said that if mortgagees, instead of relying upon their strictly legal rights and legal remedies, see fit to go into equity, they must consent to equitable terms in reference thereto. In the same way the court has recognized another equity in behalf of indebtedness created from hand to mouth in favor of laborers, mechanics, and dealers supplying material for day to day operation, to the effect that, if mortga-

gees, after a railroad corporation becomes insolvent, accept payment of interest, and allow to be applied thereto moneys which ought to have been used in disbursing the cost of the operation of the property, another equity arises, by virtue of which what has thus been taken from the immediate hand to mouth creditors shall be restored to them. But the equity which is claimed here is of an entirely different character. It is simply a question between different classes of unsecured creditors; that is, between those who, on the one hand, are understood to give credit, and those who, on the other, furnish labor with no intention of credit, but with the expectation of immediately being paid from day to day out of the accruing earnings of the property. Therefore the questions arise whether there is such an equity, and, if yes, what is its extent? This equity, if it exists at all, is, of course, applicable to all classes of employers whose property comes into the hands of chancery for administration.

Some courts recognize this equity. Perhaps it never has been put better than in Jones v. Arena Publishing Company, 171 Mass. 22, 50 N. E. 15. The opinion in behalf of the majority of the court said at pages 27 and 28, 171 Mass., and page 16, 50 N. E., as follows:

"The questions whether taxes and debts due to workmen for labor are entitled to priority may be considered together. The relief sought is merely the getting in and the distribution of what are known in equity as 'legal assets.' In the course of the administration of assets, courts of equity follow the same rules in regard to legal assets which are adopted by courts of law, and give the same priority to the different classes of creditors which is enjoyed at law: thus maintaining a practical exposition of the maxim, 'Æquitas sequitur legem.'

"It would be a plain injustice if a general creditor, by resorting to equity for the administration of his debtor's goods, merely for the reason that by the aid of equity the amount to be divided would be larger, could gain a further advantage by reducing to the level of common creditors workmen whose wages would have priority if the assets were left to be administered at law, or could thus place his own debts upon an equality with taxes which would have been paid in full had not equity interfered. The defendant corporation was subjected to our insolvency law by force of St. 1890, c. 321; and, if equity had not come in to conserve and distribute its legal assets, the wages of its workmen and the taxes due from it would have priority in the distribution of its assets by the usual agencies of common law. Those agencies could not keep its business going at the time when the bill was filed. For this reason only, the creditors, merely to increase the amount of the fund, asked equity to interfere in behalf of all creditors alike. It would be unjust if that interference should be at the sole cost of the workmen and of the public, through depriving claims for labor and taxes of the priority of payment which they would have had if equity had not intervened."

At the time the decree appealed from was made there was an existing statute in Massachusetts, now found in Rev. Laws 1902, c. 150, § 29, as follows:

"The following claims shall, in the settlement of estates by receivers, be entitled to priority in the order named:

* * * * * * * * *

"Second. Wages to an amount of not more than one hundred dollars due to an operative, clerk or servant for labor, either performed within one year last preceding the appointment of the receiver or for the payment for which a suit, which was commenced within one year after the performance of the labor, is pending or was terminated within one year after said appointment."

The bankruptcy act of July 1, 1898, c. 541, § 64b, 30 Stat. 563 [U. S. Comp. St. 1901, p. 3447], provides priority for wages due to workmen, clerks, or servants, earned within three months before the date of the commencement of proceedings in bankruptcy, not to exceed $300 to any claimant. Turning, therefore, either to the local statute, or to what, for the federal courts, is the higher authority, a priority in favor of creditors of the class of the interveners in this case is declared as a rule of administration, not only for quasi public corporations, but for all corporations, and in the federal statute for corporations and individuals. Although the statute of the state of Massachusetts could not, of course, control proceedings in the federal courts, and undoubtedly had no direct relation to receivers appointed by those courts, and although it may be possible for the appellants to claim that this particular corporation was not within the classes of corporations subject to proceedings under the bankruptcy statutes, yet each legislative system declares a policy which a chancellor, in hunting about for some analogy to guide the equitable administration of his office, might lay hold of under some circumstances. While not strictly bound by either, he might be justified, if his duty required it, in taking into consideration each or both in disposing of a question like that before us.

Judicial discretion, it is true, is subject to rules, and not arbitrary. It must, of course, be governed by reasonable considerations, and is so far from involving pure discretion that it may be reviewed on appeal. The present case, however, is peculiar in such substantial respects that it does not require that we should sharply determine the questions suggested; and it affords little opportunity for our revising the action of the Circuit Court, unless clearly unreasonable. The defendant corporation having its habitat in Maine, the Circuit Court for the District of Massachusetts had, according to well-settled rules, no jurisdiction over a bill of the character in question, unless by consent; and that it took jurisdiction implies that it was by the consent, and, indeed, it may be said at the request, of all the parties to the proceeding. No one intervened to object thereto. The statutes of the state of Maine, where this corporation was created, provide precise and peculiar methods for winding it up and distributing its assets, which neither contemplate nor authorize a proceeding of the kind instituted in the Circuit Court. Neither do the statutes of Massachusetts provide for proceedings of this character with reference to foreign corporations. Neither was the case framed to come within the eighth section of the act of March 3, 1875 (18 Stat. 472, c. 137), providing specially for the administration of real or personal property within the district. The extent to which the authorities have given federal courts jurisdiction in their own right with reference to winding up corporations or marshaling their assets is in instances where the state statutes provide for their dissolution, and for equitable proceedings for that purpose, which, of course, may be adopted by the federal courts, as in Terry v. Commercial Bank of Alabama, 93 U. S. 454, 23 L. Ed. 620, and in Mellen v. Moline Malleable Iron Works, 131 U. S. 352, 9 Sup. Ct. 781, 33 L. Ed. 178, or in instances of ordinary creditors' bills after judgment and execution returned nulla bona, like Central Trust Company v. McGeorge, 151 U.

S. 129, 14 Sup. Ct. 286, 38 L. Ed. 98, or in instances when called on to collect and dispose of the assets of dissolved corporations, domestic or foreign. The case, therefore, against the Cape Ann Granite Company, as made in the Circuit Court, was purely of the parties' own selection, as well as was the tribunal itself.

But in this case the distinctive feature is that the decree appointing the receivers contained the following direction which we have already stated, namely: "From the moneys coming into their hands to pay all sums due to employés and all expenses of carrying on said business." That the expression "sums due to employés" means the very sums in controversy here, follows logically from the fact that all wages due them, accruing after the appointment of the receivers, were covered by the words "all the expenses of carrying on said business." Therefore the expression "all sums due to employés" means sums due at the time of the decretal order appointing the receivers, and which accrued before it. It has for a long time been customary, where parties apply for interlocutory receivers of a going concern, for the court to insert some provision of this character in the decretal order appointing them. Sometimes this is done at the motion of the court or of one of the adversary parties. Under such circumstances, some of the observations in Kneeland v. American Loan & Trust Company, 136 U. S. 89, 10 Sup. Ct. 950, 34 L. Ed. 379, apply, so that, even though the order appointing interlocutory receivers designates certain rights of priority, this will not justify an unreasonable exercise of judicial power in reference thereto.

The present record, however, shows that the decretal order appointing the receivers was summarily entered on the same day with the filing of the bill against the defendant corporation; and inasmuch as, for the reasons we have already stated, the proceedings under the bill must have been by the consent of all concerned, it is a reasonable interpretation of the record that the decretal order, and all the terms thereof, were simultaneously assented to by all concerned. Under those circumstances, the observations in Kneeland v. American Loan & Trust Company have no pertinency, unless there was a clear mistake or clear injustice, or unless it appeared that new parties, having an interest not represented before the court when it took jurisdiction and appointed the receivers, had subsequently intervened. Nothing of either kind appears here. So far as the record shows, the parties to it are the same who came into the court originally and voluntarily agreed to all that occurred. The proceeding was therefore purely voluntary on all sides. The complainants in the original bill in the Circuit Court must be assumed to have understood the probability that, unless a provision like that which we have cited was inserted in the decree, the corporation might be held to be within the statutes of bankruptcy, and proceeded against accordingly, in which event substantially the same priorities would have been acquired as are now sought to be enforced. We must therefore hold that it is in harmony with the reason of the case, and with the probable intention of the parties, that the provision which we have cited from the interlocutory order appointing the receivers, with reference to "sums due to employés," is to be construed as we construe it. As we have already said, we must hold that this ex-

pression was voluntarily assented to. It follows that, as parties to the original proceeding have got whatever advantages they could out of it, they must accept the consequential burdens.

It is not essential that the bankruptcy statutes were not strictly applicable to this defendant corporation, if such were the fact. It is sufficient that there was a probability that they were. The same is true as to the fact that the time limit in those statutes for preferred wages is three months, while the limit in the case at bar appears to have been four. No amount allowed any employé by the order appealed from was equal to the maximum permitted by the statutes, so that, merely on account of the departure as to length of time, it cannot be said that the policy declared by Congress is inapt or was not sufficiently regarded. Taking this analogy in connection with the peculiar circumstances of this proceeding to which we have referred, including the provision which we have cited from the decretal order appointing the receivers, and the circumstances under which it was assented to, it is impossible for an appellate tribunal to find that there was anything unjust in the requirement of the Circuit Court that that provision should be literally and fully complied with.

Therefore, without definitely deciding that the rules with reference to receivers of corporations of a quasi public character can be properly extended to other employers, we are required by the peculiar circumstances of the case before us to affirm the decree of the Circuit Court. In this we reach, under substantially the same circumstances, the same conclusion as was arrived at by the Circuit Court of Appeals for the Fifth Circuit, with reference to a corporation organized for mere private gain, in Reinhart v. Augusta Min. & Inv. Co., 94 Fed. 901, 36 C. C. A. 541.

The decree of the Circuit Court is affirmed, and each party will pay its costs on appeal.

MINNESOTA S. S. CO. v. LEHIGH VALLEY TRANSPORTATION CO. et al.

LEHIGH VALLEY TRANSPORTATION CO. v. MINNESOTA S. S. CO. et al.

(Circuit Court of Appeals, Sixth Circuit. March 22, 1904.)

Nos. 1,229, 1,230.

1. COLLISION—SUDDEN SHEERING OF VESSEL—BURDEN OF PROOF.
   A vessel which suddenly sheers from her proper course in ordinary weather, in a fairly ample space for navigation, and under no apparent stress of circumstances occurring without her fault, and, in consequence of such sheering, comes into collision with another vessel, is presumptively in fault for the collision, and has the burden of exonerating herself.

2. SAME—STEAM VESSELS MEETING—PROCEEDING ABREAST IN CHANNEL.
   The steamer Mariposa, with the barge Martha in tow on a line 600 feet long, both heavily laden with iron ore, was coming down the dredged channel through Lake St. Clair in the evening at a speed of about 7 miles; the channel being 800 feet wide. When near the south end of the cut, signals for passing port to port were exchanged between the Mariposa and the steamers Troy and Wilbur, which were coming up lightly laden, and were then just below the bend at the entrance to the channel, and about three-fourths of a mile away. The two steamers came on abreast the Troy on the starboard side, and the Wilbur about 40 feet away, at a

speed of 13 miles or more, and passed the Mariposa safely, but about that time the Wilbur took a sudden sheer to port, and struck and sunk the Martha. The weight of testimony tended to show that when the signals were exchanged the Mariposa was about on the range line in the middle of the channel; that she then ported, and, on seeing that the two meeting steamers were abreast, ported again, the Martha following each time, and that at the time of collision they were each about 150 feet to the westward of the center of the channel; also that the Wilbur passed the Mariposa at a distance of about 50 feet, and was at no time east of the range line. She called to the Troy to stand off and give more room, which being refused, she slackened speed just before meeting the Mariposa, which brought her stern within the suction at the stern of the Troy, and caused the sheer. *Held*, that neither the Mariposa nor the Martha was in fault, it appearing that the latter ported again on seeing the Wilbur sheer, but could not then get out of the way, but that the collision was due to the fault of the Wilbur and the Troy, for coming up abreast, as they did, so near the center of the channel; the Troy also being in fault for unnecessarily crowding the Wilbur toward the meeting vessels.

3. ADMIRALTY—TRIAL—EXCLUSION OF EVIDENCE.

In the trial of an admiralty cause, where the testimony is taken before the court, all testimony offered, although objected to, should be admitted, subject to the objection for the benefit of the appellate court, unless so utterly irrelevant or immaterial that there can be no question of its inadmissibility.

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

These are appeals from a decree of the district court, in admiralty, rendered in a cause of collision between the steamer E. P. Wilbur and the barge Martha on the evening of October 26, 1900, near the lower end of Lake St. Clair, and in a channel or cut extending from a point not far above the place where the waters of the lake pass down into the Detroit river, upward through the shoal water of the lake for several miles. The channel is straight, is 20 feet deep, and of the width of 800 feet. The Peche Island Range, running through its center, makes a course about two points to the left of the last course below on which vessels come up out of the Detroit river. The western side of the channel is marked by white lights a mile and a half or more apart. On the eastern side are red lights opposite to the others, and, of course, the same distance apart.

The steamer Mariposa, with the Martha in tow, on a line 600 feet long, both laden with iron ore, was coming down the channel on her way to Lake Erie ports. The Wilbur was going up, lightly laden, and was moving alongside the steamer Troy, also going up, lightly laden; the Wilbur being on the port side of the Troy. Signals were exchanged between the Mariposa and the Wilbur and the Troy in due season, while the two latter were below the cut, and nearly three-quarters of a mile distant from the Mariposa, signifying an agreement to pass on the port hand. The Mariposa was moving at a speed of about 7 miles an hour, and the up-bound steamers at a speed of 13 miles, or a little more. The Wilbur and the Troy passed the Mariposa at a safe distance and without trouble, but at that time the Wilbur took a sudden sheer to port, and, striking the Martha on the bluff of her bow, broke into that vessel for a distance of 26 feet, and beyond her collision bulkhead. The bow of the Martha immediately filled with water and sank to the bottom. The after part of the vessel floated for a brief time, and then went down. The damage from the collision to the Martha amounted to $43,000 and over, and the Wilbur sustained damage to the amount of over $15,000. The collision occurred about half past 9 o'clock, a half mile above the lights at the lower end of the cut. The night was somewhat dark, though the weather was clear and calm. There is a current in the cut of about a mile an hour. The Mariposa was 330 feet long. Her breadth of beam was 45 feet, and her draught 17 feet. The Martha's length was 352 feet, her breadth was 44 feet, and her draught 17 feet and 6 inches. The Wilbur was 290 feet long, 40 feet beam, and 14½ feet

draught. The Troy was 402 feet long, 45 feet beam, and had a draught of 14 feet. More particular details of many of the principal facts are stated in the opinion, which follows.

The owner of the Martha, the Minnesota Steamship Company, libeled the Wilbur and the Troy for her damage; alleging that the misconduct of the latter contributed to the sheer of the Wilbur, whereby the mischief was done. The Lehigh Valley Transportation Company, claimants of the Wilbur, answered for that vessel, denying all fault, and, by cross-libel and petition, charged the Troy, the Mariposa, and the Martha with responsibility for the damages suffered by the Wilbur. The Western Transit Company, claimants of the Troy, answered, denying all fault, and by petition brought in all the other vessels; charging them with various faults, and praying that they be charged with the damages ensuing in exoneration of the Troy. Answers to the cross-libel and petitions having been filed, and testimony taken, the parties were heard thereon. By the decree the Wilbur and the Mariposa were condemned, and each decreed to pay one-half of the whole damage. The Troy and the Martha were exonerated. The Minnesota Steamship Company and the Lehigh Valley Transportation Company have severally appealed.

Hermon A. Kelley (Hoyt, Dustin & Kelley, of counsel), for appellant Minnesota S. S. Co.

John C. Shaw (Martin Carey and Shaw, Warren, Cady & Oakes, of counsel), for appellant Lehigh Valley Transportation Co.

Harvey D. Goulder (S. H. Holding and F. S. Masten, of counsel), for appellee Western Transit Co.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

SEVERENS, Circuit Judge, having made the preceding statement, delivered the opinion of the court.

The outline of the controversy, as above shown, indicates that we should first consider the case of the Wilbur, whose sudden departure from her course was the immediate cause of the disaster. Having regard to the general facts already stated, without more, a presumption of fault on the part of that vessel arises, which she takes the burden of dispelling. She is bound to explain how it was that, in ordinary weather, in a fairly ample space for navigation, and being under no stress of circumstances occurring without her fault, she should have been suffered to go off on so dangerous a course. The Olympia, 61 Fed. 120, 9 C. C. A. 393; The F. W. Wheeler, 78 Fed. 824, 24 C. C. A. 353; The Mitchell Transportation Co. v. Green, 120 Fed. 49, 60, 56 C. C. A. 455; Davidson v. American Steel Barge Co., 120 Fed. 250, 56 C. C. A. 86; The Australia, 120 Fed. 220, 222, 224, 56 C. C. A. 568.

She has endeavored to explain, by charging that her sheer was produced by the improper conduct of the Troy and the Mariposa, in that those vessels wrongfully and unlawfully maintained a course so close to her, on either hand, that she could not control her own movements, and was powerless to avoid the disaster to which those vessels impelled her. But her answer gives color for a belief which is abundantly confirmed by the testimony that the Wilbur and Troy had been coming up the river ever since they left Detroit, eight miles below, at a rapid gait abreast of each other, "neck and neck," as one of the officers of the Troy expresses it in his testimony, apparently struggling for precedence. It appears that, when the vessels arrived at Detroit, the Wilbur was ahead, but that she stopped or slackened speed there momentarily, to pick up the mailboat, and the Troy got by her, or nearly by her, before

she got under full speed again. At all events, she drew up alongside of the Troy, and the vessels maintained that position, at varying distances apart, going up the river at a pace so rapid as to attract the attention and remark of those they passed, and exciting apprehension of danger to other craft which they met or passed. The court below was complaisant enough to accept the statement of the officers of the Wilbur and the Troy that they were not racing. But it matters little by what expression their conduct is characterized. We are convinced that the purpose of those on each of the steamers was that the other should not be allowed to get ahead of her, and that they were more intent on that purpose than to observe the habits of prudent navigation of their ships. The officers of the Wilbur say that she came around for the entrance of the cut only a few feet—30 to 50—from the lower white light on the west side, and the Troy was about the same or a little further distance off on the starboard hand of the Wilbur. We are not prepared to say that, if these vessels had been proceeding separately, their speed was improper; and there is no reason to suppose in the present instance that, if the vessels had come up singly, the disaster would have occurred. But they had no sufficient reason for supposing that those coming down would know that they were coming up in that form, and would make preparation to give them a wide berth. The danger of sudden sheers from passing other vessels, especially when going at great speed, is well understood; and the danger is increased when two vessels are moving in the same direction, close to each other, but at varying speed, so that the stern of the one is liable to fall into the trough behind the other. The result in this instance is one of which there was risk. A prudent navigator would have taken account of it. A giddy one, intent on a contest of speed, might not. The captain of the Wilbur testifies that he was conscious of the risk; that he did not like to have the Troy so near him; that he felt uncomfortable; that he checked twice to permit the Troy to go ahead before they entered the channel, but that she did not, and came up into the cut not more than 100 feet away from the Wilbur. But he also says that there would have been no difficulty in checking the Wilbur to the extent necessary in order to follow the Troy, and it is manifest this was so.

When the captain of the Wilbur testifies, as he does, that his sense of the danger he was in became so great after the two steamers rounded to, and were about to meet the down-bound vessels, that he checked his own vessel, and that she immediately began to sheer, and he was unable thereafter to stop her until the collision happened, the immediate cause of the disaster becomes clear. The Troy was considerably larger than the Wilbur. The sterns of the vessels were opposite. The stem of the Troy was 100 feet in advance of that of the Wilbur, and the two vessels were on parallel lines, and about 40 feet apart. When the Wilbur checked, her stern was sucked into the wake of the Troy by the inflowing waters at the stern of the latter; and this influence, combined with the impact of the water displaced by the bow of the Troy upon the forward starboard side of the Wilbur, and the high speed at which the vessels were moving, would naturally effect the uncontrollable sheer which the captain of the Wilbur says his vessel experienced. As the speed of the vessels was still nearly alike, these

influences were not momentary, but were sustained for a time. It is contended on the part of the Wilbur and the Troy that the Mariposa produced, or at least contributed to produce, the sheer of the Wilbur. But that vessel, by the account of the Wilbur herself, was nearly twice as far away from her as the Troy. Besides, she was a meeting vessel, and in such case her influence was only momentary; and, her speed being moderate, the suction at her stem could not have been great—not greater than would be frequently experienced in ordinary navigation.

The influences which operated here, and which are so constantly observed by intelligent seamen, were discussed and in great measure explained by this court in the case of The Alexander Folsom, 52 Fed. 403, 3 C. C. A. 165. And in several cases since we have had occasion to observe their decisive effect in contributing to disastrous collisions. The Ohio, 91 Fed. 547, 33 C. C. A. 667; The Fontana, 119 Fed. 853, 56 C. C. A. 365; The Australia, 120 Fed. 220, 56 C. C. A. 568.

When the steamers came around into the channel, they knew what the position of the Mariposa and her tow was. If there was danger, they could see it. They were three-quarters of a mile off. But they at no time gave any signal to the Mariposa of apprehended danger. For reasons which we shall state hereafter, we are convinced that the Mariposa and the Martha were for some distance, before they met the upbound steamers, on the western side of the middle of the fairway or dredged channel. It is certain, and it is the one thing about which there is no dispute, that the Wilbur and the Troy were advancing abreast and very close to each other—not more than 40 feet apart. Those on the Wilbur called to the Troy to stand off and give the Wilbur more room, or to check her speed. This request was met by an obstinate refusal. The Troy justifies herself by the allegation that she was already well over to the eastern side of the channel, and could not prudently give more room. Moreover, the captain of the Troy testifies that there was ample distance between the Troy and the Mariposa and her tow to allow the Wilbur free passage by, with proper management. And here we stop to notice the attitude of the Troy and her testimony in making her defense. Her officers are responsible for the story that, at the time the Wilbur sheered off, the Troy was about 40 to 50 feet from the eastern side of the channel; that the Wilbur was abreast of her (that is, their sterns were opposite each other); that the Mariposa was on a course 250 feet westward of the Troy. This would bring the Mariposa considerably east of midchannel. We think this testimony savors of a self-serving purpose, and, in respect to the Troy's position in the channel, it is so opposed to the weight of the testimony, and the probabilities arising from facts which we feel quite sure of, that we are constrained to regard it as unreliable. We refuse to believe that the Troy was where she says she was, and are convinced that the complaint of the Wilbur that during the critical period the Troy wrongfully crowded her too far over to the westward is well founded. As will be shown later on, sufficient reasons appear for believing that the collision occurred quite to the westward of the middle of the channel, and at a place where the Wilbur had no right to be; and, further, that she has not excused herself for being there. We

think the Wilbur was at fault in not taking counsel of her fear, and in going up alongside of the Troy at the speed they were moving—a menace to meeting vessels. We do not say that of itself her checking her speed in extremis was an actionable fault. But she voluntarily placed herself in a position where she was liable to be in extremity. She cannot, therefore, plead the peril she came into as an excuse. The Australia, supra; 7 Cyc. 309.

From the necessity of the case, we have been obliged, in discussing the conduct of the Wilbur, to deal with the conduct of the Troy also. We think she shared in the fault of the Wilbur in going up the channel in the relation with her that she held, and at the speed they maintained, and that she unnecessarily crowded the Wilbur into too close proximity with the course of the Mariposa and the Martha—whether from perversity or recklessness, we do not say—and refused to give room, when she had ample opportunity for doing so without danger to herself, when she knew of the straits the Wilbur was in. Her fault was even greater than the Wilbur when the final catastrophe was brought on.

When we say the Troy crowded the Wilbur into too close proximity with the Mariposa and the Martha, we have in mind the speed of the Troy and the Wilbur, and their relation to each other.

Counsel for both the Wilbur and the Troy have given considerable space in their briefs to the question as to which of those two vessels was to be regarded as the one overtaking the other, with a view to claiming for their respective vessels the privilege given by rule 22 (Act Feb. 8, 1895, c. 64, 28 Stat. 649 [U. S. Comp. St. 1901, p. 2891]), to the one overtaken. The claim of the Troy is that she passed the Wilbur while the latter was under check at Detroit, and thus gained the favored position. For the Wilbur it is claimed that the Troy came up only to a position where she lapped the Wilbur, and did not deprive the Wilbur of the leading position. We do not feel called upon to decide this question. A disagreement over such a matter furnished no apology for engaging in a reckless contest in navigable waters, and putting others who were exercising their lawful rights therein to hazard and ultimate loss; nor did it give either the right to obstinately persist in a course which would bring the other into peril.

It remains to consider what judgment ought to be pronounced in regard to the Mariposa and the Martha. If the testimony of the officers of these vessels is to be believed, there is no reasonable ground for thinking that either of them was at fault. From that it would appear that, in coming down through the cut, they first met the Majestic, a steamer going up, and, turning to starboard, passed her by the port hand. Thereupon they swerved back toward the range line, when, the signals for passing the steamers below having been given and answered, they again turned out to starboard, and proceeded on that course until they saw the vessels coming up abreast of each other, when the Mariposa ported again; the Martha following her. The steamers passed the Mariposa safely, the Wilbur being rather close and already beginning to sheer. Nothing could then be done. Only the fraction of a minute elapsed after the Wilbur passed the Mariposa before the crash came. Meantime the Martha, seeing the Wilbur coming, had vainly

ported again. The stem of the Wilbur stove in her port bow, and penetrated to the collision bulkhead. The distance from her bottom to the bed of the channel was only 2½ feet, and she sank on her fore foot immediately. The after part swung around somewhat to port, filled, and went down. The captain of the Martha did not pay attention to the range, but kept his vessel properly headed on his steamer. No fault can be found if he did as he says. For the Wilbur it is urged that he ought to have seen the sheer of the vessel earlier, and have taken measures to get out of the way. But the combined speed of the meeting vessels was 20 miles an hour. When the Wilbur was first perceptibly sheering off, she was probably not much, if any, more than 1,000 feet from the Martha. They would come together in from one-half to three-quarters of a minute. We do not think it would have been possible for the Martha to have escaped. Besides, the peril was extreme from the time the sheer became decisive; and we should think the indulgence due to his situation would excuse the master of the Martha, even if he did not do all that he might have done, or did not do it as quickly as he would but for the excitement of the moment. The Ohio, 91 Fed. 547, 33 C. C. A. 667; The Bywell Castle, 4 Prob. Div. 219; The Elizabeth Jones, 112 U. S. 514, 5 Sup. Ct. 468, 28 L. Ed. 812; The Maggie Smith, 123 U. S. 349, 8 Sup. Ct. 159, 31 L. Ed. 175.

The testimony of those navigating the Mariposa was given by those who were charged with that special duty, and they give the course, which they run with particular reference to the range lights which they say they all the while observed. It is a standard rule, approved by many decisions, that "more weight is to be given to witnesses who testify as to the movements of their own vessel than to witnesses on other moving vessels or onlookers." 7 Cyc. 397, tit. "Collisions," where numerous cases are cited. There is other testimony, however, to which we are referred, tending to a different conclusion in reference to some of the questions involved—mainly, however, to the question on which side of the channel the collision occurred. This testimony comes from those not on the Mariposa or the Martha, and who, from lack of observation or the opportunity of observation, testify from estimates made from their recollection of the situation. There is nothing based on certain data which conflicts with the testimony of the officers of the Mariposa. Moreover, the testimony of these latter, as respects the point now in question, is corroborated by the position in which the Martha was found by the wreckers, and this is shown beyond doubt to have been athwart the channel; her head lying 175 feet west of mid-channel, and her stern extending just over it. This was her position when she went down. When it is remembered that she was heavily laden, and the blow of the Wilbur was a violent and crushing one, we do not think it probable that she was carried by the shock very far out of her course. Both her captain and the watch testify that the bow of the Martha dropped instantly, and did not swing after the collision. These indications point to the conclusion that the fore end of the Martha sank quickly to the bottom, and that her stern was turned around to port on the pivot of her fore foot by the pressure of the current while her stern was sinking. If this conclusion is correct, the fair inference

is that the place where the vessels came together was as much as 150 feet to the westward of midchannel. The course taken by the Wilbur on turning around the lower light on her port side to go up the cut also tends to confirm the testimony from the Mariposa. As we gather from the testimony of those concerned with the navigation of the Wilbur, she passed about 40 feet distant, and then steadied to a bearing on the second red light on the eastern side of the channel, 1½ miles distant. As the collision happened only one-third of that distance up, it seems more than doubtful whether the Wilbur could have crossed the range line in the middle of the channel when she sheered off to the westward. If that be so, the whole departure of her sheer was in the western half of the channel, and locates the Mariposa and the Martha about where they say they were. And in the cross-libel of the Wilbur she avers that, as they were meeting the Mariposa, the Troy, "instead of checking or directing her course to starboard in accordance with the announced intention, kept her speed and held near the center of the cut." As the Wilbur was on the port side of the Troy, and 40 feet away, and her own width was 40 feet, and she passed the Mariposa 50 feet distant, the Mariposa having a breadth of beam of 40 feet, it would follow that the Mariposa's course was 150 feet to the westward of midchannel.

It is contended for the Wilbur that the Mariposa should have known that the Wilbur and the Troy were coming up abreast, and that they would need more ample room than she gave them. We think that she gave them ample room, whether she knew they were coming abreast or not. But we think, also, that there is no just ground for contending that while the steamers were below the cut the Mariposa should be expected to know that the steamers were coming abreast. The lights of other vessels were there. The Troy and the Wilbur had separated somewhat at that time, and there was nothing in the indication of their lights from which alone their position could be seen, which should warn the vessels above of any such intention. After they made the turn and began to come up, they could, we should suppose, be seen, and probably were, for the Mariposa ported again. All the while the latter vessel was entitled to suppose that, passing signals having been given and understood, the steamers would turn out when it should become necessary; and this expectation might justly last until it became evident they were not doing their duty. When this did become evident, the Mariposa could have done nothing to mend the situation. At the speed the steamers were going up, it was scarcely two minutes from the time they came around the lower light until they were passing the Mariposa. If the Troy had ported, as she should, there probably would have been no trouble. And as it was, it is very doubtful whether there would have been any collision if the master of the Wilbur had not incautiously checked his vessel, and thus subjected her to the influence by which she was turned off. Neither the Wilbur nor the Troy is privileged to charge it as the fault of the Mariposa that she relied on them to do their duty, so long as they did not clearly show that they did not intend to do it.

We observe that in a number of instances the district court, upon objection, excluded testimony tendered at the hearing (which was had

in open court) upon various grounds which were assigned by the court. In several of these instances we think the testimony tendered and rejected was material and competent. But it happens in this case we are able to form definite conclusions without the aid of that which was rejected, and that which was rejected was in support of these conclusions. We think, however, we should call attention to the error and inconvenience of this practice. If the court of first instance was empowered to make the ultimate judgment, there might be little or no objection to the course pursued. But as its determination is subject to appeal, and the appellate court might have a different opinion in regard to the competency and materiality of the rejected testimony, the difficulty becomes obvious. In such circumstances it might become necessary to undo all that had been done subsequent to the taking of the testimony and go over the ground again, and thus involve much cost and delay. The proper course is to receive the testimony tendered, subject to the objection, unless, indeed, it be so utterly irrelevant or immaterial that there could not possibly be any doubt about it. The power of the court to punish with the costs the bringing in of flagrantly indirect and useless testimony should ordinarily be a sufficient deterrent.

We think the district court was right in holding the Wilbur and discharging the Martha, but we cannot approve its decree in discharging the Troy and holding the Mariposa. We are very clear that the Wilbur and the Troy were the parties who should be held responsible for the disaster, and should be condemned to pay the damages. Upon the conclusions already stated, and the reasons given therefor, we think the Wilbur and the Troy should satisfy the damages of the former by equal contribution; the lien of the Wilbur to be subordinate to that of the owners of the Martha for her damage.

The decree of the district court, so far as concerns the responsibility of the Wilbur and the Martha, is affirmed as herein modified by the judgment against the Troy, with costs of both courts. So far as it concerns the responsibility of the Mariposa and the Troy, it is reversed, with directions to enter a decree charging the Wilbur and the Troy with the damages of the Martha and interest, and with the costs of both courts, to be collected one-half from the stipulators for each, with the proviso that, if such moiety cannot be collected from each, recourse may be had upon the other to the extent of its stipulation above the sum of such other's moiety of damage decreed against her, and charging the Troy, in favor of the Wilbur, with one-half the damages of the latter, with interest thereon; each of those parties to pay its own costs here and in the court below, the lien of the Wilbur to be subject to that in favor of the Martha upon the Troy for her damage, interest and costs, as herein decreed.

Following will be found the opinion of the court below:

SWAN, District Judge (orally). The three steamers which figure in this case are all charged with fault—the Wilbur, the Troy, and the Mariposa. So far as the Troy is concerned—for I will commence at the easiest end of the case—the situation is this: I find, as I stated during the argument, that the Troy passed the Wilbur when nearly abreast of Woodward avenue; that the Wilbur there renounced her priority of right, and made herself the overtaking vessel. I think that is the fair weight of the testimony. There is on this

point the usual conflict of evidence that attends admiralty cases, and would attend any case, whatever the subject-matter, where the witnesses must speak as to matters that are not plainly visible, not illuminated by daylight—the matters occurring in the dark; but I think that the Troy was thenceforth continuously ahead—at some times further ahead than others. If we throw out all the interested testimony in the case, it fairly appears in the testimony of the mail carriers—the two witnesses from the mailboat, whose names have escaped me—that the Troy had fairly cleared the Wilbur while the latter was waiting for the mail. That being the case, the Wilbur was to her an overtaking vessel. That continued to be the relation between them, and gave to their navigation the appearance of being engaged in a contest of speed. Both masters deny that their course up the river had any such character, and I must accept their denial, and believe they were going up there at their ordinary gait—12 or 13 miles an hour, though I think the man that was ahead was very glad to keep his position, and the man behind would have been glad to have exchanged with him. They proceeded upon the usual course, both of them being competent mariners, and I believe both mean to tell the truth—they proceeded upon the course which each regarded as safe. There was nothing to intimate danger to them, nothing to induce apprehension. They ran at a speed of 12 or 13 miles an hour, keeping safely away from each other and from other vessels, and navigating without incident until they had entered the mouth of the cut or dredged channel of Lake St. Clair, when they exchanged signals with the steamer Mariposa, which had the schooner Martha in tow, bound down. The Mariposa at that time was about midchannel, and I do not think changed that position. I think she came down with the usual inclination of a vessel having the ranges and being on the ranges to adhere to them. I won't use the term commonly applied to that navigation which monopolizes the ranges, because it is habitually done by most masters, often from timidity inspired by the size and draft of the vessels—a morbid fear of possibly grounding if on either hand of midchannel. The signals between the Mariposa, the Troy, and the E. P. Wilbur were seasonably exchanged. The mutual relations of the Troy and of the Wilbur continued safe as they went up the cut until just before they came abreast of the Mariposa. That is the testimony of Capt. Gillies. It is the testimony of Capt. Fuller. Neither of them saw any appearance of danger in the situation, and both approved its safety until just before the collision. Now, each vessel, there is no doubt, had a right to go up there just as fast as she could, provided she exercised that right with due regard to the interest and safety of others; and the vessel that was ahead had a right to keep ahead, if she could, providing, as I say, she exercised that right reasonably. Therefore the Troy is not censurable for keeping ahead, as she was safely away from the Mariposa and Martha. Nor is the Wilbur to be condemned for getting along as fast as she could, but, as she was the overtaking vessel, she was bound to exercise that right with much greater circumspection, so as not to approach too closely to the Troy, or bring herself within the operation of the latter's suction; and, if she did so, she must abide the consequences. She put herself voluntarily in that position. She could not lawfully attempt to pass the Troy without the latter's consent, for which she did not ask. According to the testimony, they were at a safe distance from each other, and there was no sign on the part of either boat that it was affected by the proximity of the other until they were getting nearly abreast of the Mariposa. Then it was seen by the master of the Wilbur that his vessel was dropping off to port and towards the course of the Mariposa. It then became his instant duty to check or drop behind the Troy. This he failed to do, but, in his efforts to avoid the Mariposa, drew in so closely to the Troy as to get within her suction, when, of course, and as was to be expected, the Wilbur sheered to port, and held her sheer until she struck the Mariposa's consort, the Martha. No fault can be imputed to the Troy. I think she was navigating properly, and I do not think Capt. Fuller's testimony—any reading of it—will condemn Capt. Gillies' conduct there. Capt. Fuller, as was pointed out in the argument, did not question that the Troy was as far east as she could go, and his judgment upon her course is confirmed by Mr. Montgomery, the lookout of the Wilbur. The witnesses on the Wilbur agree that the distance between the vessels was 75 or 100 feet, until they had proceeded up the cut

some distance, and pronounced that distance safe. When it was reduced to 30 or 40 feet or less by the approach of the Wilbur to the Troy, that was the voluntary act of the Wilbur, which the Troy could not prevent, and for the consequences of which she cannot be condemned. The Troy's witnesses testify that the steamers were much further apart coming up the cut, and when the Wilbur took her sheer; but as the duty of keeping clear was, by the White Law Rule 22, and pilot rule 6, wholly upon the Wilbur, and the Troy, clearly complied with those rules, the latter is faultless. The Troy neither attempted to cross the bow or crowd upon the course of the Wilbur, which took all the risks of her own course, and cannot ask the Troy to share its consequences with her.

No one who ever tried an admiralty case ever found that the witnesses on moving vessels, speaking of distances in the nighttime and of moving vessels, ever got within any reliable distance of anything. The Troy, I think, was safely over to the eastward, and when Capt. Gillies, of the Troy, was called upon by the master of the Wilbur to give him more room, he answered back: "I cannot. I am as far over as I can go." The Wilbur's master then said: "Why don't you check, then?" Capt. Gillies replied: "Why don't you check yourself?" or something of that kind. Capt. Fuller responded: "I have checked." Now, as I have said, Capt. Fuller voluntarily put himself in that situation. The checking of the Troy would not have helped the Wilbur at that time. Perhaps Capt. Fuller thought there was room enough between the Troy and the Mariposa, and rightly thought so, had it not been that he unguardedly brought his steamer within the Troy's suction. That was the springhead of this disaster. I think that at that time the Troy was nearer the distance stated by Capt. Gillies from the east bank than the witnesses for the Wilbur have put it, and I do so for these reasons: (1) Gillies was in a better position to estimate that distance than the master of the Wilbur, who admits that he could not. (2) According to the master of the Mariposa, he thought that the Wilbur was 75 feet away from him. Add to this estimate the Wilbur's beam, about 40 feet, and the distance between the Wilbur and the Troy, 35 to 40 feet, and the beam of the Troy, 45 feet, would put the Troy out about 150 or 165 feet from the Mariposa, upon the judgment of the witnesses on the part of the Mariposa and the Wilbur alone. The weight of the testimony satisfies me that the Troy was fully 250 feet away, at least, from the Mariposa, for a nearer position is irreconcilable with admitted facts. (3) The misfortune in the case was the unfortunate move by the Wilbur, which caused her to sheer off. She went off very rapidly, and when she struck the Martha she did not expend all her energy in that blow. The proofs are clear that she struck the Martha, swung around simultaneously with the blow, which was delivered at a speed of 12 or 13 miles an hour, recoiled, and swung right across stream. The Troy passed her when she had recoiled across the channel. One of the witnesses says he could have jumped aboard the Troy from the Wilbur. Another says there was a distance of 40 feet there. I don't care which it is. It would show that the Troy was considerably further to the eastward when the Wilbur moved out from the Martha simultaneously with the impact than the hurried views of the witnesses on the moving Mariposa and the Wilbur estimated. The Wilbur is 290 feet long between perpendiculars, and probably 310 or 315 feet over all. If 250 feet of her length was across or nearly across the channel—if the Troy cleared her 10 feet when the Wilbur's bow lay on the Martha, or 40 feet, as the Troy's witnesses state—the Troy was about 300 feet to eastward of midchannel at the collision. She perhaps could have gone a little further to eastward, but that her master could not know. His judgment erred on the side of the safety of his own vessel, and cannot be impeached because the event showed he might have gone further. The Star of Hope, 9 Wall. 230, 19 L. Ed. 638; The City of Antwerp and The Friederick, L. R. 2 P. C. 25. Especially is this true in the sudden emergency created by the Wilbur's too close approach. It is incumbent upon the Wilbur to show that she was brought into contact with the Martha through no fault of her own. She is prima facie the wrongdoer. I don't think she has met that burden. She occupies the same position in this case as did the Santiago in the case preceding. Through misfortune or fault or the facts of the case, she is unable to meet that burden, and should be condemned.

The last question is one of more difficulty, and that is as to the Mariposa and the Martha. The misfortune fell upon the Martha. I think that the weight of the testimony shows that certainly the Martha was not further west than the range line at the time she was struck. She was about the center of the channel, and perhaps a little to the eastward of it. I think that her changed position and heading were produced by the energy of the blow with which the Wilbur hit her, which slued her around at that point. The Mariposa was responsible for her position, and ought to share the consequences of the collision. The two vessels which are to be condemned here are the Wilbur, as the first wrongdoer, and the Mariposa, as the second. The Troy is dismissed from the action, with costs.

Mr. Shaw: What does your honor do with the Martha?

The Court: The Martha was helpless. I think the damages should be divided between the Mariposa and the Wilbur—the Wilbur being chiefly in fault; but the Mariposa is blameworthy for not having taken timely and sufficient action to avoid the up-coming vessels and allow them room. There would have been no accident had it not been for the sheer of the Wilbur and her unfortunate navigation, and there probably would not have been any accident if the Mariposa had put her consort in the right place. The Mariposa did not follow her own signal, and, although she announced that she was directing her course to starboard, she did not, and therefore I think the damages should be divided between the Wilbur and the Mariposa.

While the navigation of steam vessels at high speed when approaching other vessels, or under conditions portending possible danger, cannot be too strongly reprobated, and not infrequently is ground of condemnation of both, when one only inflicts the injury, yet in this case the active and proximate instrument of wrong was the Wilbur, which voluntarily took upon herself the hazard of the known danger of too close proximity to the Troy, which, in the judgment of her master, was running as close to the there unmarked easterly boundary of the channel as was prudent—a judgment which is not even now questioned by the master of the Wilbur.

The master of the Troy had a right to navigate his vessel in the belief that the Wilbur would be properly and prudently navigated, and would not attempt to pass the Troy without the latter's consent, and, of course, that she would not draw into dangerous proximity. This fault the Wilbur recklessly committed at a time when no preventive measure could have been taken by the Troy, and the Wilbur therefore has no right to call upon the Troy for contribution.

STONE, Collector, v. WHITRIDGE, WHITE & CO.

(Circuit Court of Appeals. Fourth Circuit. March 14, 1904.)

No. 518.

1. CUSTOMS DUTIES—FOREIGN COINS—FLUCTUATION IN VALUE.

Section 25, Tariff Act Aug. 28, 1894, c. 349, 28 Stat. 552, prescribes that the value of foreign coins shall be estimated in money of the United States on the basis of the pure metal found therein, as estimated by the director of the mint and proclaimed by the Secretary of the Treasury, subject to the proviso "that the Secretary of the Treasury may order the liquidation of any entry at a different value whenever satisfactory evidence shall be produced to him showing that the value in United States currency of the foreign money specified in the invoice was at the date of certification at least ten per centum more or less than the value proclaimed during the quarter in which the consular certification occurred." *Held*, that the fluctuation to which this proviso has reference is that of the metallic value, and not of the exchange or commercial value.

2. SAME—LIQUIDATION BY ORDER OF SECRETARY OF THE TREASURY—REVIEW—JURISDICTION OF BOARD OF GENERAL APPRAISERS.

Where, assuming to act under section 25, Tariff Act Aug. 28, 1894, c. 349, 28 Stat. 552, authorizing the Secretary of the Treasury to order the reliquidation of any entry on the basis of a value different from that

estimated by the director of the mint when satisfied that there has been a fluctuation of at least 10 per cent. from the proclaimed value of the currency specified in the invoice, the secretary directs a collector of customs to reliquidate on the basis of the exchange or commercial value of a certain foreign coin, and not of the metallic value, *held*, that he goes beyond his authority, and that the action of the collector pursuant to such direction may be reviewed by the Board of General Appraisers and the courts, under sections 14 and 15, Customs Administrative Act June 10, 1890, c. 407, 26 Stat. 137, 138 [U. S. Comp. St. 1901, p. 1933].

3. SAME—BOARD OF GENERAL APPRAISERS—RELATIONS WITH TREASURY DEPARTMENT.

The Board of General Appraisers, acting within its jurisdiction, is an independent tribunal, empowered by law (sections 13, 14, Customs Administrative Act June 10, 1890, c. 407, 26 Stat. 136, 137 [U. S. Comp. St. 1901, pp. 1932, 1933]) to pass upon certain controversies between the government and the importer, and in this respect is not subordinate to the Treasury Department.

Appeal from the Circuit Court of the United States for the District of Maryland.

This appeal was brought by William F. Stone, collector of customs at the port of Baltimore, from an affirmance of a decision of the Board of General Appraisers (In re Whitridge, G. A. 5110—T. D. 23,632), which reversed the collector's assessment of duty on certain merchandise imported by Whitridge, White & Co.

John C. Rose, U. S. Atty. (Morris A. Soper, Asst. U. S. Atty., on the briefs), for appellant.

Albert Comstock and William R. Sears, for appellees.

Before SIMONTON, Circuit Judge, and BOYD and KELLER, District Judges.

BOYD, District Judge. The facts in this case are substantially as follows: Stone, the appellant, is collector of customs for the district and port of Baltimore, Md. In June, 1900, Whitridge, White & Co., the appellees, imported from India into the port of Baltimore a cargo of gunny bagging. The gunnies were purchased by the importers at Calcutta, and were invoiced in rupees, which is a silver coin of India. The Barrowmore, in which the gunnies were brought into this country, arrived in Baltimore on the 18th of June, 1900, and the goods were entered for consumption on that day. On the 11th of July, 1900, the collector at Baltimore liquidated the duty on the said goods by converting into United States gold dollars the rupees of the invoices at the rate of 32 cents for each rupee. To this liquidation the importers entered a protest in writing on the 16th day of July, 1900, and on the 29th of May, 1901, the collector, acting under instructions from the Secretary of the Treasury, reliquidated the duty on said goods by converting into United States gold dollars the rupees of the invoices at the rate of 20.7 cents for each rupee. That thereafter, on the 12th day of June, 1901, the collector again reliquidated the invoices, and placed the value of the rupee at 32 cents. This last action of the collector was in response to instructions from the Secretary of the Treasury, relative to these invoices, as follows:

"In this regard I have to inform you that satisfactory evidence has been produced, to the Secretary of the Treasury, showing that the value, in United

States currency, of the foreign money of the invoices, namely, the rupee of India, was 32 cents at the date of certification, which is ten per cent. more than the value proclaimed during the quarter in which the consular certification occurred. In view of the fact stated, you are hereby directed to reliquidate the entries hereinbefore mentioned, on the basis of this latter value, under the authority conferred upon the Secretary of the Treasury, by the proviso to section 25 of the act of August 28th, 1894."

To this reliquidation the appellees duly filed a protest in writing with the collector at Baltimore. The goods imported are dutiable at five-eighths of a cent a pound upon the weight as taken in the reliquidation of June 12, 1901, and in addition thereto at the rate of 15 per cent. of their dutiable value. It is admitted that the metallic value of the rupee on April 19, 1900, the date on which the invoices in this case were certified, was substantially 20.7 cents, and at no time between the 1st of April, 1900, and the 1st of July, 1900, did the metallic value of the rupee even approximate 32 cents. It is further admitted that the reliquidation made by the collector on the 12th of June, 1901, to which the importers objected, and which is the basis of this proceeding, in which the Indian rupee was valued at 32 cents, was the exchange value of the rupee at the date of the certification of the invoices, as shown and attested by the certificate of the United States consul general at Calcutta. On the 1st of April, 1900, acting under the authority of law, the director of the mint had estimated the metallic value of an Indian rupee to be 20.7 cents, and this valuation was duly proclaimed by the Secretary of the Treasury. The action of the Secretary of the Treasury in directing a reliquidation of the invoices upon which the present controversy arises was based upon an opinion of the secretary that, after the estimate of the director of the mint, and the proclamation thereon, the value of the Indian rupee during the quarter had varied as much as 10 per cent.; that its value had appreciated this much, or more, and that the invoices of the gunnies imported by the appellees should be reliquidated for duty at the exchange or commercial value of the Indian rupee, which was certified by the consul, and not at the metallic value, which had been estimated by the director of the mint. As before stated, against the reliquidation of June 12, 1901, made by the collector of Baltimore under the instructions of the Treasury Department, the appellees protested, and this protest, with the facts in the case, was submitted by the collector to the Board of General Appraisers at New York. This board rendered a decision adverse to the collector, declaring, in effect, that the metallic, and not the commercial, value of the Indian rupee at the time of the invoices was the true basis of liquidation. From this decision the case was brought by petition on behalf of the collector to the Circuit Court for the District of Maryland. The Circuit Court affirmed the decision of the Board of General Appraisers, and the collector appealed to this court.

The appellant lays down two propositions, namely, that the liquidation of June 12, 1901, was the decision of the Secretary of the Treasury, and was final, and that the Board of General Appraisers had no jurisdiction to review it. The question here is, therefore, can these positions, or either of them, be maintained? We think not. The Customs Administrative Act of June 10, 1890, c. 407, § 14, 26 Stat. 137 [U. S. Comp. St. 1901, p. 1933], plainly provides that, when the col-

lector of customs has liquidated invoices for duty the owner or importer may, after such liquidation, give notice in writing to the collector of his objections thereto, and, if the merchandise is entered for consumption, shall pay the full amount of the duties and charges ascertained to be due thereon; and upon such notice and payment the collector shall transmit the invoice, and all the papers and exhibits connected therewith, to the Board of three General Appraisers, which shall be on duty at the port of New York, etc., which board shall examine and decide the case thus submitted, and their decision, or that of a majority of them, shall be final and conclusive upon all persons interested therein. * * * Section 15 of said act provides for an appeal from the decision of the Board of General Appraisers to the Circuit Court of the United States on behalf of either party.

The appellant contends that the action submitted to the Board of General Appraisers was not that of the collector of customs at Baltimore, but was a decision of the Secretary of the Treasury, made in the discharge of the duties imposed upon him by law, and that the Board of General Appraisers has no authority in law to review him. It is insisted on the part of the appellant that Congress could not have intended to submit the decision of the Secretary of the Treasury, upon matters in which the statute imposes upon him the responsibility of deciding, to review, and possibly reversal, by subordinate divisions of his own department. We cannot agree that in exercising the powers of review vested in the Board of General Appraisers by law the board is a subordinate division of the Treasury Department. On the other hand, the members of the Board of General Appraisers are appointed by the President, by and with the advice and consent of the Senate, and, acting within its jurisdiction, the board is an independent tribunal, empowered by law to pass upon certain controversies between the government and the importer, and in this respect the board is no more subordinate to the Treasury Department than is any other court. As bearing upon this view, we may refer to the fact that by section 15 of the administrative customs act it is provided, among other things, that, if the Secretary of the Treasury is dissatisfied with the action of the board, his only relief is by appeal to the Circuit Court of the United States. It may be well at this juncture to give the full text of section 25 of the act of Congress of August 28, 1894, c. 349, 28 Stat. 552, upon the construction of which the questions involved in this case depend. That section reads as follows:

"That the value of foreign coin, as expressed in the money of account of the United States, shall be that of the pure metal of such coin of standard value, and the values of the standard coins in circulation of the various nations of the world, shall be estimated quarterly by the director of the mint, and be proclaimed by the Secretary of the Treasury immediately after the passage of this act, and thereafter quarterly on the first day of January, April, July and October, in each year, and the values so proclaimed shall be followed in estimating the value of all foreign merchandise exported to the United States during the quarter for which the value is proclaimed, and the date of the consular certification of any invoice shall, for the purposes of this section, be considered the date of exportation: provided, that the Secretary of the Treasury may order the liquidation of any entry at a different value whenever satisfactory evidence shall be produced to him showing that the value in United States currency of the foreign money specified in the invoice was, at the date of cer-

tification, at least ten per centum more or less than the value proclaimed during the quarter in which the consular certification occurred."

In disposing of the questions presented, and especially that in which it is insisted by the appellant that the reliquidation of June 12, 1901, was a decision of the Secretary of the Treasury, and therefore final, without power in the Board of General Appraisers or the courts to review it, it is perhaps as well to consider the reasons which must have led to the enactment of the law which we have just quoted, and by this method we may arrive at the true meaning of the legislation. We find that for many years in the administration of our tariff laws great difficulties had been encountered in so adjusting the value of goods purchased in foreign countries and invoiced in foreign money as to be altogether fair, in every instance, to the government and to the importer. Especially was this true of importations of goods which had been purchased in countries where silver coin was the standard money. This condition gave rise to disagreements between the government and the importers, and often the aid of the courts was invoked to relieve the situation. The Congress, no doubt appreciating existing conditions, undertook to set the matter at rest by the act of March 3, 1873, c. 268, 17 Stat. 602, by which it was enacted:

"That the value of foreign coin as expressed in the money of account of the United States shall be that of the pure metal of such coin of standard value, and the values of the standard coins in circulation of the various nations of the world shall be estimated annually by the director of the mint, and be proclaimed on the first day of January by the Secretary of the Treasury."

This act was plain, and there could be no doubtful construction of its terms. It provided that the metallic value of foreign coin should be estimated annually by the director of the mint, and proclaimed on the 1st day of January by the Secretary of the Treasury. When so estimated and proclaimed, the value of foreign coin for the purposes of liquidation of invoices of imported goods was settled, and had the force of a statute, which controlled the action of the collectors and other officers of the customs in determining import duties, and it was in view of this statute that the decisions in Hadden v. Merritt, 115 U. S. 25, 5 Sup. Ct. 1169, 29 L. Ed. 333, and The United States v. Klingenberg, 153 U. S. 93, 14 Sup. Ct. 790, 38 L. Ed. 647, were made, as was also the decision in Cramer v. Arthur, 102 U. S. 612, 26 L. Ed. 259, that the valuations of foreign standard coins made by the director of the mint and proclaimed by the Secretary of the Treasury were conclusive and binding both on collectors of customs and on importers, and that evidence to show that such valuations were inaccurate was not receivable. In the latter case the principle declared in Collector v. Richards, 23 Wall. 246, 23 L. Ed. 95, was cited and reaffirmed. These several decisions are upon the ground that the director of the mint, in basing his estimate upon the metallic value of foreign coin, had acted within the scope of the authority conferred upon him by the statute, and, having so acted, his finding of fact became the law as fully as if his estimate had been incorporated in the statute itself.

Section 25 of the act of August 28, 1894, excepting the proviso, was a substantial re-enactment of the law of 1873, the only change being that the director of the mint should make his estimates of the value

of foreign coin quarterly, instead of annually, as provided in the previous law. And then comes the proviso:

"That the Secretary of the Treasury may order the liquidation of any entry at a different value, whenever satisfactory evidence shall be produced to him, showing that the value in United States currency of the foreign money specified in the invoice was, at the date of the certification, at least ten per centum more or less than the value proclaimed during the quarter in which the consular certification occurred."

That frequent fluctuations in the metallic value of foreign coins led to the act of 1894 would seem to be indisputable. The law as it stood since 1873 empowered the director of the mint to make his estimate of the metallic value of foreign coin on the 1st day of January in each year, but Congress saw the necessity of having this estimate made quarterly, instead of annually, but still adhered to the metallic value as the basis of the estimate. Then where can we find a reason to conclude that it was the intention of Congress to make a departure from the metallic principle which permeated its legislation, and confer upon the Secretary of the Treasury an exclusive power to arbitrarily adopt another basis? Is it not more in accord with the language of the statute, the purposes for which it was enacted, the conditions it was intended to meet, and fair construction, to hold that the proviso was inserted in the act simply to authorize the Secretary of the Treasury, in case there should be a variation in the metallic value of the foreign coin after the director of the mint had made his estimate at the first of the quarter, and before, by the terms of the law, he could make another estimate at the beginning of the next quarter, to order liquidations when it was made satisfactorily to appear to him that such variations in the metallic value to the extent of 10 per centum had taken place? If such is not the law, then under the proviso to section 25 the Secretary of the Treasury is absolutely unrestrained. He is neither limited by the metallic value nor by the exchange value of the foreign coin, but he may, at his option, prescribe any value for foreign coin, and direct its use by officers of the customs in the invoicing of foreign goods for duty; and, following out the contention of the appellant in this case, the importer would have no remedy whatever, either through the Board of General Appraisers, or the courts. Certainly Congress did not intend to confer such unbridled power upon the head of an executive department.

This question is admirably discussed in two very learned opinions recently delivered, the one in the Circuit Court of the United States for the District of Massachusetts, in the case of The U. S. v. Beebe, 117 Fed. 670, and the other in the same case in the Circuit Court of Appeals for the First Circuit, 122 Fed. 762, 58 C. C. A. 562. It is not necessary for us to go further than to cite the opinions in these two cases, which we think declare the law as it is, and proceed upon a line of reasoning which leads irresistibly to the conclusion that, when the Secretary of the Treasury undertook to order a reliquidation of the foreign invoices for duty upon a basis other than the metallic value of the foreign coin in which such invoices were certified, he went beyond his authority, and his act had no legal effect.

We then come to the consideration of the question as to whether the decision of the Secretary of the Treasury and the subsequent ac-

tion of the collector of customs thereunder can be reviewed by the Board of General Appraisers and by the courts. We cannot put this question more forcibly than by quoting from the comprehensive opinion of Judge Colt in the Beebe Case, 117 Fed. 670, the following language:

"Can the secretary choose any standard of value for the foreign coin he pleases—as, for example, the exchange value—and will such action be final although it is outside of the authority and jurisdiction conferred upon him by the proviso? Can the secretary first adopt an illegal standard of value, and then make an order or finding based upon such illegal standard which cannot be impeached? If the doctrine of conclusiveness goes to this extent, then the importer is no longer governed by the laws which Congress enacts, but by the secretary's interpretation of them; and the result might be that under the form of reliquidation the pure metal rule of value in the assessment of duties, which has prevailed since the origin of the government, may to a large extent be nullified."

It is conceded that, if the ascertained metallic value of the silver rupee of India, either that made by the director of the mint at the first of the quarter and proclaimed by the secretary, or a metallic value determined by the secretary under the proviso of section 25, had been adopted by the collector, in making the reliquidation of invoices of the appellees' goods on the 12th of June, 1901, under the decisions before cited, such action by the collector would have been conclusive. But the collector did not do this. On the other hand, acting under instructions from the Secretary of the Treasury, he adopted as a basis of liquidation the commercial value of the rupee, as certified by the American consul at Calcutta, at the date of the invoices. The instruction was the act of the secretary, but the liquidation ascertaining the dutiable value of the goods and determining the amount of duty to be paid by the importer was the act of the collector. "The action of a collector in declining to accept the proclaimed value of a foreign standard coin and in adopting another standard, thereby increasing the amount of duty on imported merchandise, does not relate to a disputed appraisement, but to the amount of duties; and under Customs Administrative Act June 10, 1890, §§ 14, 15, is reviewable on the protest of the importer by the Board of General Appraisers and the Circuit Court." U. S. v. J. Allston Newhall & Co. (C. C.) 91 Fed. 525. In the present case the collector ignored the metallic value of the rupee—20.7 cents—which had been proclaimed for the quarter in which the importation of the goods was made, and adopted the exchange value of 32 cents, which appeared from the certificate of the consul, and thus increased the amount of duty upon the importation. The principle declared in the Newhall Case, which we hold to be the law, applies here, and, in our opinion, the Board of General Appraisers and the Circuit Court of the United States had jurisdiction.

As bearing upon this point, and in entire accord with the position we take, we quote again from the learned opinion of the Circuit Court of Appeals for the First Circuit in the case of The United States v. Beebe & Sons, 122 Fed. 762, 58 C. C. A. 562, in which Judge Putnam, in delivering the opinion of the court, says:

"The United States raises a question of the jurisdiction of the Board of General Appraisers. On that point we need add but very little to what was said in the Circuit Court. The act of June 10, 1890, c. 407, 26 Stat. 131, is the

law which established this tribunal. The United States rests on the words 'decision of the collector,' found in section 14, and they claim that in the case at bar the 'decision' was not that of the collector of Boston, but of the Secretary of the Treasury. This is a narrow construction of the expression, because the ultimate tribunal which reliquidated was not the secretary, but the collector; so that at common law mandamus would lie only against the latter, and not against the former. This position, moreover, begs the question, because, if the action of the secretary was unlawful—as we hold it was—the collector could rest nothing done by him on that action, and whatever he did was his own."

The judgment of the Circuit Court is affirmed.

HENNESSY et al. v. TACOMA SMELTING & REFINING CO. et al.

(Circuit Court of Appeals, Ninth Circuit. March 9, 1904.)

No. 961.

1. RES JUDICATA—DECREE HOLDING JUDGMENT AN ESTOPPEL—EFFECT OF REVERSAL OF JUDGMENT PENDING APPEAL.
   A decree based in whole or in part on a plea of res judicata will be reversed on appeal where pending such appeal the judgment held to constitute an estoppel has been reversed, the fact of such reversal being one of which the appellate court may take judicial notice.

2. FEDERAL COURTS—PENDENCY OF PRIOR SUIT IN STATE COURT—COMITY.
   In a suit by minority stockholders, the Supreme Court of a state decided that a lease of its property by a corporation to a new corporation, which had acquired a majority of its stock, was ultra vires and void, and enjoined the old company from recognizing any vote cast by the lessee as a stockholder, on the ground that, under the laws of the state, it had no power to hold such stock. Thereupon it transferred its stock to individuals, by whose vote it was determined that the old corporation should dissolve and sell its property. The minority stockholders then commenced a second suit in a state court to enjoin such action, for the removal of the trustees, the appointment of a receiver, and the cancellation of the stock transferred by the new company; alleging that it was still, in fact, the owner thereof, and that the proposed action was in its interest, to enable it to obtain the property. Such suit having been dismissed by the court, the complainants commenced a second suit in a federal court, involving to some extent the same issues. Subsequently the judgment of the state court dismissing the suit therein was reversed on appeal by the Supreme Court of the state, and the cause remanded for trial. *Held* that, under the circumstances, the federal court should await the final action of the state courts, which had first obtained jurisdiction, before proceeding with the hearing of the case before it.

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

On December 6, 1898, the Tacoma Smelting & Refining Company, a corportation owning and operating a smelter near Tacoma, in the state of Washington, made a lease of its entire smelting plant and all its property for a term of 10 years to the Tacoma Smelting Company, a corporation created for the purpose of taking the lease. The first company will in this opinion be designated the "old company," and the second company the "new company." The resolution to execute the lease was approved by the majority of the stockholders of the old company, but was opposed by a minority repre-

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¶ 2. Conflict of jurisdiction between state and federal courts, see note to Louisville Trust Co. v. City of Cincinnati, 22 C. C. A. 356.

senting from 12 to 15 per cent. of the stock, who filed a written protest against the same. Shortly after its execution the minority stockholders requested the trustees of the old company to take legal proceedings to cancel the lease on the ground that it was ultra vires and void. The request was denied. Thereafter the minority stockholders commenced an action in the superior court of the state of Washington for Pierce county, suing as stockholders and in behalf of their corporation, to set aside the lease. In that action it was finally determined by the Supreme Court of Washington that the lease was ultra vires of the old corporation and void, on the ground that, at the meeting at which the resolution was adopted authorizing the lease, the majority of the stock of the old company was held and voted by the new company, the statutes of the state giving to no corporation created under its laws the power to hold stock in another corporation; also on the ground that the articles of the old company contained no expressions of the power of that company to execute a lease of its property. The judgment of the court enjoined the old company from recognizing any vote cast by the new company, or by any one in its behalf. This decision was rendered July 12, 1901. The new company at that time held 5,669 shares of the stock of the old company, out of a total of 6,776 shares. On July 20th the certificates of the shares held by the new company were by the trustees of the old company canceled, and new certificates were issued to F. W. Bradley, William Alvord, Henry Bratnober, and W. R. Rust, who were all stockholders of the new company. On December 21, 1901, these persons assigned all of said shares to Chester Thorne. Thorne took the same with full notice of the judgment in the said action. After the decision W. R. Rust, then vice president of the new company, and at the same time secretary of the old company, bought 255 shares of the stock of the old company, and on January 20, 1902, he transferred 20 shares thereof to 20 persons; giving 1 share to each, and 235 shares to W. G. Hellar. On March 7, 1902, Hellar transferred 8 of the shares held by him to 8 persons. This distribution of shares was avowedly made for the purpose of securing a two-thirds majority in number of holders of shares in the old company, as well as two-thirds of the stock. The purpose was to effect a dissolution of the old company, and a sale of its property. It was at this point in the course of events that the minority stockholders, being the same persons who are the appellants in the case which is now before us, commenced a suit in the superior court of the state of Washington for Pierce county (Case No. 19,209) against the two corporations and the trustees of the old company, Browne, Oakes, Rust, Clark, Daily, Craig, and Heilig, alleging in their complaint, in brief, that, notwithstanding the decision of the Supreme Court of the state of Washington above alluded to, the new company still retained the possession of the leased property; that the trustees of the old company were merely its tools, and that as long as they remained in office no action would be taken to recover the property from the new company; that the stock held by Thorne still belonged to the new company; and that the transfer to him was a sham—and praying for relief as follows: That the trustees of the old company, Browne, Rust, Clark, Oakes, Daily, Craig, and Heilig, be restrained from acting as officers or trustees of that corporation, and that they be removed from office; that the new company and the aforesaid trustees of the old company be enjoined from tearing down or removing from the smelting plant or buildings of the old company any machinery then in the buildings, and from interfering with any of the old company's property; that a receiver be appointed to take charge of and manage the said property; that Thorne be enjoined from transferring his stock, and that the stock so held by him be declared void; that the old company and its officers be restrained from allowing him to vote the same; that an accounting be had with the new company, and said trustees so named, of all their doings with said property, and that they be required to restore all of the same to the old company; and that the new company account for its profits made while in possession thereof. In that suit a temporary restraining order was issued, and thereafter, on motions to extend the order pending the suit and to appoint a receiver, the court, on March 6, 1902, denied both motions and dismissed the suit for want of equity in the bill of complaint. The plaintiffs promptly

filed their motion to vacate the judgment, on the ground of irregularity in entering the same. The motion was taken under advisement, and was not decided until after the entry of the final decree in the court below in the present suit.

In the meantime, on March 7, 1902, a meeting of the stockholders of the old company was held, at which it was ordered by the holders of more than two-thirds of the stock that the corporation be dissolved, and its property sold and assets distributed. On March 19, 1902, the new company commenced an action in the superior court of Pierce county, state of Washington, against the old company, to recover judgment for $141,640.28, upon an alleged account stated on the adjustment of all matters in dispute between the two companies. Subsequently one of the minority stockholders, by leave of the court, intervened in that action, contesting the validity of the claim, and the right of the plaintiff therein to recover upon said alleged account stated. That action was still pending at the date of the entry of the decree which is appealed from in the present case. On April 25, 1903, on the motion of the plaintiff in that action, that cause was dismissed. On March 26, 1902, the stockholders who had been the plaintiffs in the action in the superior court of the state commenced the present suit in the United States Circuit Court for the District of Washington against the old company and its then directors, Browne, Oakes, Mottet, Albertson, Hellar, Thorne, and Fogg. The new company was not made a party to the suit. The bill contained many of the allegations that had been embodied in the bill of complaint in case No. 19,209 in the superior court, and it alleged that the trustees named were unfit persons to carry on the proceedings of winding up the corporation; that they were the creatures of the new company, pledged to secure it the smelting plant, and allow its claim for improvements made thereon, to which, the bill alleged, it was not entitled. It was alleged that the new company had been in the possession of the smelting plant and property of the old company under said void lease a little more than three years, and had realized large profits therefrom; that the old company had allowed a claim in the sum of $141,640.28 in favor of the new company; that the allowance of that claim and the proceedings looking to a sale of properties were part of a scheme to avoid the effect of the judgment of the superior court in which it had been declared that the lease was void, and to enable the new company to acquire the property of the old company. It prayed that the trustees named be restrained from acting as such officers of the old company or on behalf of its creditors and stockholders, and from selling or charging with a lien any of its property, and from carrying out the sale proposed to be made; that a receiver be appointed of its property; and that a liquidation of the affairs of the corporation be had through him. On September 3, 1902, the appellants filed a supplemental bill, alleging that on August 7, 1902, the board of trustees of the old company held a meeting at which they considered two bids which they had received for the smelting plant and property—one a cash bid for $250,000, the other a bid of $250,000 made by the new company; that they had accepted the latter, and had directed that a contract of sale be executed in accordance therewith; that in the contract of sale so executed it was recited that the new company had a valid claim against the old company for $141,640.28; that the new company agreed to procure assignments from the holders of not less than 5,931 shares of the stock of the old company of all dividends that may at any time be declared thereon; and that the new company was to make payment for the said purchase by receipting its bill for $141,640.28, by receipting for dividends on said 5,931 shares of stock, and by paying the sum of $31,799.72 in cash, provided that, if it should be found that it had paid too much in cash, the balance should be refunded; and, if it had paid too little, it should pay whatever further sums should from time to time be deemed necessary by the old company.

The appellees answered, and, among other defenses, pleaded that the decree of the superior court of the state of Washington in case No. 19,209 was a judicial determination of all matters and issues stated in appellants' bill. At the commencement of the suit the appellants moved for the appointment of a receiver, and for a temporary injunction enjoining the appellees

from going forward with the proposed sale. These applications were taken under advisement by the court. On July 22, 1902, the trustees of the old company having caused a new notice of sale to be given, the appellants filed their motion for an injunction to enjoin them from making the sale, and from charging with any claim the smelting plant and properties of the old company. The motion was denied upon the appellees' giving a bond to the appellants in the sum of $43,000.

Testimony was taken upon the issues, and on November 26, 1902, a final decree was entered dismissing the appellants' bill, the court ruling that the decree of the superior court in case No. 19,209 was conclusive and binding upon the parties in the present suit as to all questions which were or might have been litigated in that case; that that decision not having, in terms or in legal effect, annihilated any of the stock of the old company, nor denied the right of the new company to transfer the stock which it held, nor precluded its vendees from voting that stock, but having judicially determined that Thorne acquired a majority of the stock of the old company lawfully, the issues in the present case were therefore narrowed and limited by the plea of res judicata to the question whether the appellants were entitled to any relief in equity by reason of the facts and transactions since March 6, 1902, the date of that decree. The court confined its consideration to the relief sought concerning the election of the new board of trustees of the old company, the attempted settlement of accounts between the old company and the new, the initiation of proceedings to dissolve the old company, and the sale of its property, and the application for the appointment of a receiver. As to all these matters the court was of the opinion that the appellants were entitled to no relief. Concerning the allowance of the claim of the new company for $141,640.28, the court made no finding or special adjudication in the decree, but in the course of the opinion remarked: "All questions as to the lawfulness and righteousness or unrighteousness of the settlement referred to are or may be the subject of litigation in an action at law pending in the superior court, in which the new company is plaintiff, and is asking for a judgment for the amount of the balance so agreed to. The fact that the same controversy is involved in a pending lawsuit between the same parties in another court of concurrent jurisdiction does not oust this court of jurisdiction, and, although it may uselessly add something to the burdens of the court, the parties have a right to a hearing and decision." These remarks were made with reference to the action at law in the superior court of Pierce county, state of Washington, brought by the new company against the old to obtain judgment upon an account stated for $141,640.28. The court in the opinion proceeded thereupon to discuss that claim, and, without entering into the items of the account, expressed the opinion that the adjustment which was made was neither unfair nor unlawful. The court further said: "I have considered the propriety of retaining the case for final liquidation after the action still pending in the superior court [the action on the account stated] shall have been terminated, but to do so will delay an appeal for an indefinite time; and, in my judgment, it is expedient for the parties to have a final decree entered, which may be appealed from at once."

T. L. Stiles, E. L. Parsons, A. N. Fitch, and James M. Harris, for appellants.

Charles S. Fogg and W. H. Bogle, for appellees.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

GILBERT, Circuit Judge, after stating the case as above, delivered the opinion of the court.

One of the assignments of error is that the court held that the judgment of the state court in case No. 19,209 operated as a bar or as an adjudication of any of the matters involved in the present case. We need not enter into a consideration of the disputed questions involved on this assignment, further than to advert to the fact that, subsequent

to the final decree rendered by the court below, the judgment so relied upon as an estoppel was reversed by the Supreme Court of the state of Washington. On November 26, 1902, the date of the entry of the final decree which is here appealed from, the suit in the state court was pending therein on the motion of the plaintiffs for an order to vacate the judgment on the ground of irregularity in entering the same. On January 2, 1903, that order was denied. The plaintiffs therein, desiring to appeal from the order, and having been denied by the trial court a statement of facts necessary for the prosecution of their appeal, applied to the Supreme Court of the state of Washington for a mandamus to the judge of the superior court, requiring him to sign the desired statement. On July 2, 1903, that application was allowed. State ex rel. Hennessy v. Huston, 72 Pac. 1015. The Supreme Court, in rendering its judgment, disapproved the ruling of the superior court that there was no equity in the complaint, and held, upon the facts alleged in the petition for the writ, that the judgment had been irregularly entered. The court issued the writ, and thereafter the desired statement was made, and the appeal was presented to the Supreme Court. On December 10, 1903, the decision of that court was rendered thereon. Hennessy v. Tacoma S. & R. Co., 74 Pac. 584. It was held that the judgment of the superior court had been prematurely entered, and it was adjudged that the judgment be reversed, and the cause remanded to the superior court, with instructions to proceed with the trial on the issues joined. It has been held that the effect of a reversal of a judgment completely destroys its efficacy as an estoppel, and that an appellate court may take judicial notice on the appeal of such a reversal occurring after the date of the decision appealed from. Butler v. Eaton, 141 U. S. 240, 11 Sup. Ct. 985, 35 L. Ed. 713. In that case the Supreme Court had before it for review on writ of error the judgment of the Circuit Court for the District of Massachusetts, in which it had been adjudged that a certain prior judgment of the Supreme Judicial Court of Massachusetts constituted an estoppel as to a portion of the amount sued for. After the date of the judgment of the Circuit Court the decision of the Supreme Judicial Court of Massachusetts was, upon writ of error from the Supreme Court of the United States, reversed. The latter court, in deciding the case of Butler v. Eaton, took judicial notice of that reversal, and said that, when the judgment so relied upon as an estoppel "was given in evidence in this case, it was effective for the purpose of a defense, but its effectiveness in that regard is now entirely annulled. * * * It is apparent from an inspection of the record that the whole foundation of that part of the judgment which is in favor of the defendant is, to our judicial knowledge, without any validity, force, or effect, and ought never to have existed. Why, then, should not we reverse the judgment, which we know of record has become erroneous, and save the parties the delay and expense of taking ulterior proceedings in the court below to effect the same object?" The court therefore reversed the judgment of the Circuit Court, and remanded the cause, with directions to enter judgment for the plaintiff in error for the whole amount sued for in the action. On the authority of that case, we entertain no doubt that the decree of the lower court in the present case must be reversed.

Only one other assignment of error need be referred to. That is that the court erred in holding that the claim of the new company against the old in the sum of $141,640.28 was a valid and lawful claim. The determination of the validity of that claim, and all questions concerning the allowance or disallowance of credits for the value of the betterments or improvements placed upon the property by the new company, and the items thereof, if allowed, are involved in the issues presented in case No. 19,209 pending in the state court. As that court had obtained jurisdiction of these issues before the present suit was begun, and the cause is there pending for final determination, all questions involved in that suit should, we think, be left for the adjudication of that court, unaffected by any views that have been expressed in the opinion in the court below. The bill in the present suit prayed for no relief concerning the allowance or disallowance of the claim for improvements, or any of the items thereof, except that it prayed that the appellees be enjoined from charging or suffering to be charged with any claim, lien, or demand any of the properties of the old company. This evidently had reference to the allegations in the bill that the purpose of the original parties to the action on the account stated was to suffer a judgment to be taken therein which should become a lien on the property of the old company. But the case made upon the bill in the Circuit Court involves issues and seeks relief in addition to those which are pleaded in the case in the state court. It may be that the latter court will, in its final decree, afford such relief and so effectually dispose of all the matters in controversy as to leave no necessity for further action in the case in the Circuit Court.

We think that, under the circumstances, the decree of the Circuit Court should be reversed, and the cause remanded, with instructions to await the final disposition of the cause in the state court. Such will be the order of the court.

The following is the memorandum decision of the Circuit Court:

HANFORD, District Judge. It is the opinion of the court that the final decree of the superior court in case No. 19,209 is equally as conclusive and binding upon the parties as to all questions which were or might have been litigated in that case as the decision of the Supreme Court in the case which was prosecuted by Mr. Parsons in behalf of the minority stockholders. That decision did not in terms, nor in legal effect, annihilate any of the stock of the Tacoma Smelting & Refining Company, nor deny the right of the Tacoma Smelting Company (the new company) to transfer the stock which it held, nor preclude its vendees from voting that stock and participating in the business of the old company; and the decree in case No. 19,209 is a judicial determination by a court of competent jurisdiction that Mr. Thorne acquired a majority of the stock of the old company lawfully. That decree has not been attacked for fraud, and this court has no power to set it aside. Therefore the issues in this case are narrowed and limited by the plea of res adjudicata to the question whether the complainants are entitled to any relief in equity by reason of the facts and transactions since the date of that decree, viz., March 6, 1902. These transactions include the election of a new board of trustees, the attempted settlement of accounts between the old smelting company and the new one, the initiation of proceedings to dissolve the old corporation, and the sale of its property.

The election of a new board of trustees is not of itself ground for any complaint whatever. Minority stockholders are certainly entitled to be protected in all their legal and equitable rights, but it is equally true that the major-

ity have the right to prevail in the choice of trustees who are charged with responsibility for managing the business of a corporation. The trustees elected at the meeting of March 7th are all legally qualified, and each of them is a business man of good reputation. Whilst it is true that they were predisposed to be friendly towards the policy of the majority stockholders, and opposed to the confiscation of the investments made in betterments of the smelting plant, on the other hand the evidence does not justify the denunciation of these gentlemen as conspirators to defraud the complainants.

After a patient examination of the pleadings and evidence in this case, and consideration of the arguments and the authorities cited on both sides, and a great deal of deliberation, I am not strongly impressed with the appeal which the complainants are making to a court of equity. The company in which they are stockholders, as a business enterprise, was not a success; and, after contending against adverse conditions for years, it reached a point where it had to give up the struggle, and make a sale of its plant under conditions which meant a sacrifice, or else make some such arrangement, as it did make. The promoters of the new organization did not attempt to "freeze out" the minority stockholders. They secured the capital required to improve the plant, and expended it in the hope of avoiding a complete wreck of the old company; and, after the lease had been adjudged to be invalid, they offered to share with them, on a fair basis in proportion to their holdings, all the advantages of a proposed reorganization of both companies. The minority stockholders refused to do anything to help extricate the old company from its predicament, or to accept any terms offered them, and have ever since shown a disposition to make themselves obnoxious, so as to compel their associates to buy their stock at $100 per share, although when it was originally issued the company only received $50 per share, and it has never been worth in the market more than was originally paid for it.

On the 7th of March, 1902, when the new board of trustees were elected, the company had no friends, and its minority stockholders were actively hostile. There was no money in the treasury with which to carry on a business which, to be successful, requires a large amount of ready cash. It was obvious, therefore, that a sale of the plant and dissolution of the corporation was necessary. This being so, the complainants had a right to apply to a court of competent jurisdiction for the appointment of a receiver, to gather up and dispose of the assets, pay debts, and distribute whatever should remain among the stockholders, and this court might have lawfully taken the property into its custody, through a receiver, for the purposes mentioned; but there is a practical as well as a legal side to this case, and a court of equity is required to exercise a sound discretion in dealing with property of litigants. To illustrate, the value of the property and the price obtainable for it would necessarily be affected by the continued operation or shutting down of the smelter, because the actual operation of the smelter could not be stopped and started again without the loss of a large sum of money, and the interruption of its business would necessarily depreciate its value. Taking these matters into consideration, and also considering that the new trustees were men of good reputation and financial responsibility, the court considered that it could not choose a receiver who would do better for the litigants in protecting their interests, in carrying on the business and disposing of it, than the new board of trustees. The decision of the court denying the application for the appointment of a receiver, made at the beginning of the litigation, commends itself to my mind now, after the final hearing, as being for the best interests of all.

The smelter plant has been sold under the direction of the board of trustees. In their argument upon the final hearing, the solicitors for the complainants disputed the adequacy of the price obtained, but no showing has been made of a probability that upon a resale of the property by a commissioner or agent of this court, under any conditions which might be prescribed, a better price can be obtained. Therefore it is my conclusion that the complainants have not made out a case entitling them to have the court interfere, by the appointment of a receiver or otherwise, with the disposition of the smelting plant, and the court cannot prevent consummation of the dissolution proceedings which have been inaugurated by the holders of the requisite amount of stock.

Only one subject of controversy remains to be considered, and that is the adjustment of the claims of the two companies against each other, in which the new board of trustees admitted and allowed a balance in favor of the new company of $141,000. All questions as to the lawfulness and righteousness or unrighteousness of the settlement referred to are or may be the subject of litigation in an action at law pending in the superior court, in which the new company is plaintiff, and is asking for a judgment for the amount of the balance so agreed to. The fact that the same controversy is involved in a pending lawsuit between the same parties in another court of concurrent jurisdiction does not oust this court of jurisdiction, and, although it may uselessly add something to the burdens of the court, the parties have a right to a hearing and decision. And upon that question it is my opinion that notwithstanding the rule that an intruder upon real estate, or a tenant unlawfully holding over after the termination of his tenancy, cannot compel the owner of the premises to pay the value of improvements made without his consent, the Supreme Court of the United States has recognized the palpable injustice of allowing a corporation which is a party to an ultra vires contract to seize and retain, without paying for it, valuable property transferred or created upon the faith of the contract. In the case of Central Transportation Company v. Pullman's Car Company, 139 U. S. 60, 11 Sup. Ct. 488, 35 L. Ed. 55, I find the following declaration of the law by the Supreme Court: "A contract ultra vires being unlawful and void, not because it is in itself immoral, but because the corporation, by the law of its creation, is incapable of making it, the courts, while refusing to maintain any action upon the unlawful contract, have always striven to do justice between the parties, so far as could be done consistently with adherence to law, by permitting property or money parted with on the faith of the unlawful contract to be recovered back, or compensation to be made for it. In such case, however, the action is not maintained upon the unlawful contract, nor according to its terms; but on an implied contract of the defendant to return, or, failing to do that, to make compensation for, property or money which it has no right to retain. To maintain such an action is not to affirm, but to disaffirm, the unlawful contract." That was an action to recover rent upon the covenants of a lease. A judgment of nonsuit was granted on the ground that the lease was ultra vires, and the Supreme Court affirmed the judgment. Before the decision of the Supreme Court holding the lease to be ultra vires had been rendered, the Pullman Company, which was the lessee, filed a bill in equity for an injunction to restrain the lessor from bringing other actions to collect rent, and in that suit the lessor filed a cross-bill asking for a judgment in its favor for the value of the property which it had delivered pursuant to the lease; also for the value of certain contracts and patent rights assigned, and for compensation for the ruin of its business. The Supreme Court sustained the cross-bill, but held that "in no way, and through no channels, directly or indirectly, will the courts allow an action to be maintained for the recovery of property delivered under an illegal contract, where, in order to maintain such recovery, it is necessary to have recourse to that contract. The right of recovery must rest upon a disaffirmance of the contract, and it is permitted only because of the desire of courts to do justice as far as it is possible to the party who has made payment or delivered property under a void agreement, and which, in justice, he ought to recover." For the reasons stated in the above quotation, the judgment of the court below, which was in favor of the lessor, upon its cross-bill, for over $4,000,000, was reversed; the Supreme Court holding that the recovery should be restricted to the actual value of the physical property which the lessee had absorbed. With respect to this branch of the case the court said: "We conclude that the cross-defendant is not liable for the contracts and patents transferred, nor for the possible damage the Central Company may have sustained, as above stated. It is liable for the value of the cars, furniture, etc., transferred. It is a liberal estimate of the value of this property to say that it amounted in 1885 to as much as it did in 1870, yet we are disposed to deal in as liberal a manner with the cross-complainant as we fairly may, while not violating any settled principle of law, in order to give to it such measure of relief as the circumstances of the case seem to justify. We therefore take the value of the property in the cars, etc., in 1885 at the sum of $710,846.50. To that, we think, should be

added the $17,000 cash received from the Central Company, making a total of $727,846.50, and interest from January 1, 1885, for which the cross-defendant is liable, together with costs." Pullman's Car Company v. Transportation Co., 171 U. S. 138, 161, 18 Sup. Ct. 808, 817, 43 L. Ed. 108. Upon the principles of that decision, the Tacoma Smelting & Refining Company had no valid claim to recover from its lessee the profits of the smelting business while the plant was being operated by the latter company, nor to recover anything except property which it parted with on the faith of the contract, or the value of any part thereof which could not be restored, and I hold that the rights of the parties were reciprocal; that is to say, the right of the lessor to recover its property, or compensation for it, is not stronger in equity than the right of the lessee to have compensation for the investments which it made in betterments on the faith of the ultra vires contract. In the eyes of the law the two corporations were equally in fault, and a court of equity will not permit either to appropriate and retain property of the other unconscionably. It is true that the minority stockholders who protested against the lease are entitled to special consideration, and their rights are not exactly the same as the rights of their company. But even they have no standing in a court of equity to unjustly insist upon profiting by a forfeiture. Equity does not favor forfeitures. The value of their interests involved is to be measured by the value of their stock, as it would be unaffected by the ultra vires contract, and they have no just claim for anything more.

This court would not uphold the trustees of a corporation in giving away its property or in creating fictitious debts, whereby the assets might be dissipated; but, in view of the decisions of the Supreme Court of the United States referred to, the trustees of the Tacoma Smelting & Refining Company were not obliged to yield to the demands of the minority stockholders to repudiate all liability to pay for permanent and unmovable additions to the smelting plant which were necessary to the successful operation thereof. The adjustment which was made is, in my opinion, neither unfair nor unlawful. I say it is not unfair, because the promoters will get back less than they put in, deductions were made of estimated depreciation in value of the improvements by use thereof, and a set-off for rent was allowed, and the complainants have not suffered by it in the diminution in value of their stock. They will not receive as large a dividend as they would if the court would lend itself to aid in the confiscation of property created by others, but the amount of their dividend will not be less than the probable value of their stock in 1898 or now, if the ultra vires contract had not been made, unless the amount shall be further diminished by reason of expensive litigation for which they only can be held to be responsible.

I have considered the propriety of retaining the case for final liquidation after the action still pending in the superior court shall have been terminated, but to do so will delay an appeal for an indefinite time, and, in my judgment, it is expedient for the parties to have a final decree entered, which may be appealed from at once.

By reason of an intimation from the court at the time of denying the application for appointment of a receiver, the sale of the smelting plant was postponed, and the terms of the sale were modified. For this reason, I hold that the costs should be divided.

Let a decree be entered dismissing the case on the merits, and awarding to the defendants one-half of their taxable costs.

RADFORD v. UNITED STATES.

(Circuit Court of Appeals, Second Circuit. March 8, 1904.)

No. 55.

1. FEDERAL COURTS—APPEAL—RECORD—REDUCTION.
On an appeal to the Circuit Court of Appeals, where there is no question raised as to the credibility of any witness, or as to the weight of his testimony, and it is not important that the court should know just how the testimony was given, the testimony should not be printed in question and answer in the appeal record, but should be presented in narrative form.

2. CRIMINAL LAW—INDICTMENT—MOTION TO QUASH—EVIDENCE BEFORE GRAND JURY.
The denial of a motion to quash an indictment, on the ground that it was based on incompetent evidence of essential facts before the grand jury is a matter of discretion, and is not a proper subject of exception.

3. SAME—AFFIDAVITS.
The affidavit in support of a motion to quash an indictment on the ground that it was founded on incompetent testimony was to the effect that no other or different evidence than that given by deponent, which was objected to, was produced, or taken before the grand jury, pertaining to the question in issue, and that deponent was present "in and about the grand jury during the entire session thereof," was insufficient to show that no other testimony was introduced.

4. SAME—JURORS—ORDER OF CHALLENGE—OBJECTIONS—WAIVER.
Where, in a criminal prosecution in the federal courts, there was a dispute between counsel, while the jury was being impaneled, as to the order in which their respective peremptory challenges should be used, but neither counsel called the court's attention to it, and the United States attorney reserved one of his challenges until after talesmen had been drawn, it was not error to permit the government's attorney to exercise such challenge after defendant's challenges had been exhausted.

5. STATE STATUTES—APPLICATION.
Code Cr. Proc. N. Y. § 385, providing the order in which jurors drawn for the trial of criminal cases shall be challenged, is not binding on the federal courts sitting in that state for the trial of criminal cases.

6. SAME—CONSPIRACY—EVIDENCE—OBJECTIONS.
Where, in a prosecution for conspiracy, the court held that certain evidence introduced was admissible as against one of the conspirators only, and called the government attorney's attention explicitly to the fact that it was inadmissible as against the others, the admission of such evidence was not subject to exception on the part of the other defendants.

7. SAME.
In a prosecution for conspiracy to defraud the United States by the execution of straw bail, the introduction of affidavits of justification could not be objected to under Rev. St. § 860 [U. S. Comp. St. 1901, p. 661], prohibiting the introduction of evidence obtained from a party or witness by means of a judicial proceeding, by any of the conspirators except those who made the affidavits.

8. SAME—ELEMENTS OF OFFENSE—LOSS.
In a prosecution for conspiracy to defraud the United States by the execution of straw bail, it was not necessary that the government should prove that the accused did not appear on the day required, since the government was defrauded when the accused were released on the strength of a recognizance, apparently good, but worthless in fact.

¶ 5. See Courts, vol. 13, Cent. Dig. § 908.

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

This cause comes here upon a writ of error to review a judgment of the District Court, Western District of New York, convicting plaintiff in error of a violation of section 5440, Rev. St. U. S. [U. S. Comp. St. 1901, p. 3676], which reads as follows: "5440. If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, all the parties to such conspiracy shall be liable to a penalty of not less than one thousand dollars and not more than ten thousand dollars, and to imprisonment not more than two years." The two indictments, which were duly consolidated by order of the court and tried together, charged four persons—Radford, Parrish, McLaren, and James—with entering into an unlawful agreement and combination and conspiring together to defraud the United States. The details of the conspiracy were as follows: Two Chinamen—Moy Dong Gin and Aye Yub—were under arrest charged with having unlawfully entered the United States, and were each held for trial before a United States commissioner. It was charged that the defendants agreed together that adjournments should be asked for and application made to admit to bail, and that upon the fixing of the bail Parrish and James should offer themselves as sureties. All four of them knew that the proposed sureties were not worth anything above just debts and liabilities, and therefore, in order to enable them ostensibly to justify by specifying and describing property as their own, it was agreed that Radford should convey to James and McLaren should convey to Parrish certain pieces of real estate specifically set forth in the indictment, which property was so conveyed for no other purpose than to be referred to in the sureties' justification. It was further charged that the properties so conveyed were not worth any sum above the amount of the incumbrances thereon, that this was well known to all of the accused, and that the whole scheme was one to defraud the United States by securing the release of the Chinamen upon recognizances apparently good, but in reality worthless, so that upon the failure of the Chinamen to appear for trial the government would be defrauded of the amount of the recognizances. The acts charged to have been done in furtherance of the conspiracy were the conveyance by Radford to James of three lots on St. Lawrence avenue, Buffalo, and three lots on Stone street, Tonawanda, and by McLaren to Parrish of a lot on Crowley avenue, Buffalo; also the giving of recognizances by James and Parrish, with affidavits of justification referring to the pieces of property so conveyed. The bail was accepted by the commissioners, and the Chinamen released. The latter failed to appear for trial, and the recognizances were duly estreated. The four accused persons were tried together. The jury found Radford and Parrish guilty, and acquitted McLaren and James.

C. A. Dolson, for plaintiff in error.

Chas. H. Brown, for defendant in error.

Before LACOMBE, TOWNSEND, and COXE, Circuit Judges.

LACOMBE, Circuit Judge (after stating the facts as above). Before entering upon a discussion of the points raised by assignment of errors and here argued, we must call attention to the character of the record presented to this court. It consists of 580 printed pages and a supplement of 96 pages in typewriting containing exhibits. The appeal is by Radford only, and there was no motion to direct acquittal as to him, or, indeed, as to any of the others. In view of the issues involved, the testimony is most voluminous, and it has been presented to us without the slightest effort to assist the court by concentrating its attention to the parts material to the assignments of error. Apparently it was thought that the only labor required of counsel was to fasten together the stenographer's min-

utes and the exhibits, and have them certified by the clerk of the District Court. In a note at the end of this opinion will be found a fair illustration of the result of such practice. Had this wearisome succession of question and answer been presented in narrative form, it is altogether probable that the record would have shrunk to a quarter, at least, of its present size, and this court have been spared the labor of winnowing wheat from chaff. Of course, there are many occasions when it is quite important to know just how the testimony was given, what hesitation there may have been on the part of a witness, what contradictions, how much of his answer was suggested by a question, so that there may be proper appreciation of the weight to be given to his testimony. But on this appeal there is no question raised as to the credibility of any witness or as to the weight of his testimony. Concededly, at the close of the case, all such questions were to be left to the jury, and they were so left. Counsel should appreciate that, although their first duty is to their client to see to it that everything material to that client's case, however trivial, is laid before the reviewing court, they also, as members of the bar practicing before that court, owe it a duty. We need not expatiate further on this point. It is thought—as it is hoped—that those who read the footnote and these criticisms will hereafter be more careful to discharge their full duty as counselors of this court.

Of the 25 errors assigned a few only have been presented in argument. These only need be discussed here. It is assigned as error that the court denied a motion to quash the indictments, which was based on the proposition that the grand jury acted upon incompetent evidence of the essential facts on which the charge was predicated, it appearing that a clerk in the office of the county clerk of Erie county (whose office is in Buffalo) attended before the grand jury in Lockport, and testified that upon a search of the records made by him he found certain deeds, mortgages, and judgments on file. It would be a sufficient answer to this assignment to call attention to the well-settled rule that such a motion is ordinarily addressed to the discretion of the trial court. The reason for entertaining motions to quash on grounds such as that above indicated is well set out in U. S. v. Farrington (D. C.) 5 Fed. 343:

"No person should be subjected to the expense, vexation, and contumely of a trial for a criminal offense unless the charge has been investigated, and a reasonable foundation laid for an indictment or information."

After conviction this reason no longer exists, because an intelligent and impartial jury of his peers, after a careful investigation, at which he has been represented by counsel, with full power to cross-examine, to introduce evidence, to tell his own story if he so choose, and to plead his cause, has reached the conclusion not only that there was a reasonable foundation for the charge, but that the charge was true. "The motion to quash was clearly determinable as a matter of discretion. It was preliminary in its character, and the denial of the motion could not finally decide any right of the defendant. The rule laid down by the elementary writers is that a motion to quash is directed to the sound discretion of the court,

and, if refused, is not a proper subject of exception." U. S. v. Rosenberg, 7 Wall. 580, 19 L. Ed. 263. But, if this were not so, the motion to quash would be held to be wholly without merit. By reason of the circumstance that the one affidavit on which it was made was among the typewritten exhibits, it did not come to our attention on the argument, and for the future guidance of counsel in other causes it should now be referred to. The clerk from the county clerk's office, after setting forth what he testified to as to the records he had found on file, avers that no record or document from that office was taken to the grand jury, and that none were exhibited to him when he gave his testimony. The remaining portion of his affidavit is as follows:

"That no other or different testimony or evidence [than his own] was produced or taken before said grand jury pertaining to the deeds, mortgages, or judgments appearing in the name of or against the said Ernest L. Parrish, as deponent verily believes; and the reason for his belief is that deponent was the only person from the said Erie county clerk's office before said grand jury; that deponent was present in and about the grand jury during the entire session of the said grand jury at the city of Lockport, as aforesaid; that deponent saw no books, records, or documents from said Erie county clerk's office before said grand jury at Lockport."

The expression, "present in the grand jury during the entire session," is of dubious meaning, but, if it stood alone, it might be construed as averring that he was in the grand jury room from the beginning to the end of every one of their meetings when this case was considered. But the affiant manifestly makes no such claim. He swears only that he "was present in and about the grand jury." How a person who is "about" a grand jury thereby becomes qualified to state everything which that body did and did not do is not apparent. How does he know that the grand jury did not have before them duly authenticated copies of every deed, mortgage, and judgment to which he testified? How does he know what other evidence they may have had of the transactions on which the charge was based? The belief of a person "present about a grand jury" is unimportant, and his assertion as to what took place in the grand jury room (except when he happened to be in it) is devoid of all weight. A motion to quash the indictments on such an affidavit as the one found among the exhibits was preposterous, and the effort to review the ruling of the trial judge thereon is frivolous.

Error is assigned in that the court permitted the United States attorney to excuse a particular juryman against objection. The record is not quite clear as to what occurred. It appears that after examinations on the voir dire, and the exercise of all defendants' peremptory challenges, there were less than 12 men in the box, and the panel was exhausted. Talesmen were summoned and examined, the box was filled, and defendants' counsel announced that they were content with the jury. There is nothing to show that the government had made a like announcement. Thereupon the United States attorney proceeded to ask some questions of one of the jurymen. Whether or not he was one of those who entered the box after defendants had exhausted their challenges does not appear. Objection was made that the prosecuting officer was "bound to exhaust

his objections before the defendant takes up the objections." There seems to have been some dispute between counsel while the jury were being impaneled as to the order in which their respective peremptory challenges should be used, but neither of them called the court's attention to it. Upon hearing the objection above quoted, the court remarked that, if counsel had asked for a ruling, it would have made one; but that, not having done so, the challenge to the juror would be allowed. We see no error in this. Counsel apparently relies on section 385 of the New York Code of Criminal Procedure, which provides that "challenges to an individual juror must be taken first by the people and then by the defendant." Apparently this statute contemplates that when the box is filled with 12 men, who have successfully passed examination on the voir dire, they shall be taken up one by one in regular order, and as to each one so taken up the prosecutor first shall be required to state whether he challenges or not, and, if he do not challenge that juror, then the defendant shall be required to state whether or not he challenges him. If either challenge, and the vacant seat be filled by another juror, then the same order of propounding challenges to him should be observed; and the challenging should proceed in like order till the number of peremptory challenges allowed are exhausted, or both sides are on record as having specifically declined to challenge every one of the twelve in the box. This seems to be an excellent method of presenting the challenges, and would no doubt tend in practice to expedite the selection of a jury by cutting off some of the finessing with which that operation is so often obstructed. But, though it may quite appropriately be followed in the federal courts, the state statute does not lay down the rule for those tribunals in criminal trials (Logan v. U. S., 144 U. S. 263, 12 Sup. Ct. 617, 36 L. Ed. 429), and there is no error assignable if the trial judge fails to conform to state practice. As has been already indicated, there was no error in the disposition of the case at bar. Certainly upon no reasonable theory could either side have been compelled to exhaust its challenges until there were 12 men in the box to select from; and, if either side chose to exhaust its allowance without first making some request of the court as to regulating the order of challenge, it cannot complain if the other side has more prudently reserved one or more of its challenges to meet the selections from a new panel of talesmen, of whose names no one was advised until after the trial had begun, and as to whose antecedents, therefore, there has been no opportunity for inquiry.

It is next assigned as error that the court admitted in evidence "the deeds to the Virginia property." The defendant Parrish, in his affidavit of justification, stated that, in addition to the Crowley avenue property, he owned 542 acres of land in Virginia, free and clear of incumbrances. It was sought to be proved that this land had been conveyed to him by Radford, and that title had been divested by certain tax sales. Objection was made to the tax deeds because it was not shown that the preliminary steps to a tax sale had been taken. It will be unnecessary to examine any of these objections. The record shows that the government called a deputy

clerk of the Virginia court, and asked him some question about the title. Thereupon objection was taken, and the court ruled that the evidence would be received on the question of intent against Radford and Parrish. Before the question was answered, a further objection was raised that the witness was incompetent, and he was withdrawn, the United States attorney stating that he would show the state of affairs otherwise, and he offered a deed. Before the deed was received, defendants' counsel said: "If the court please, you announced this evidence would be received as to Radford. I think your honor should receive it as to Parrish only." To which the court replied, "Yes, I will recall that. Correct my ruling in that regard;" and thereupon three deeds covering the Virginia property were received, the court again stating, as the third was presented, that the evidence was received as tending to show that Parrish had no title in the property, and as to characterizing his intent and guilty knowledge. And as the last of the Virginia deeds—the fourth one—was marked in evidence the court said: "Of course, you understand, Mr. District Attorney, that this proof is offered solely as against Mr. Parrish, and not as against any of the other alleged conspirators," to which the District Attorney replied that he certainly so understood it. Under these circumstances the plaintiff in error Radford cannot complain of the admission of this evidence. If, when the case went to the jury, he had any apprehension that the jury might forget that the evidence was received only against Parrish, he should have asked to have them further instructed to disregard it as against himself. This he did not do.

Exception was reserved to the admission in evidence of the affidavits of justification—i. e., ownership of property—which defendants Parrish and James submitted with the recognizances they signed on the ground that such affidavits were "evidence obtained from a party or witness by means of a judicial proceeding," and as such within the provisions of section 860, Rev. St. U. S. [U. S. Comp. St. 1901, p. 661]. Such voluntary affidavits are apparently not within the section, but, if they were, the only persons who could invoke its provisions were those who had made the affidavits—Parrish and James. The plaintiff in error Radford could not properly object to their introduction against him.

The sole remaining assignment of error which has been argued is to a refusal to charge the following proposition:

"It is absolutely necessary to establish under this indictment that the defendants agreed that the Chinamen should not appear upon the adjourned day, because, if they did appear, no loss could occur upon the bond, and it would be an agreement, by the result of which the United States could not possibly have a loss. It must therefore be affirmatively proven as one of the essential elements of the crime charged that the defendants, and each of them, knew beforehand, and when they made the agreement, that these Chinese would not appear upon the adjourned day. A loss must occur, or at least there must be an agreement that could be effectuated."

The exception to the refusal so to charge was unsound. The United States were defrauded when the release of the Chinamen was obtained on the strength of a recognizance, apparently good, but in reality worthless. It was not necessary to go further, and

show that the defendants conspired to remove the Chinamen from the jurisdiction of the commissioner. The jury, from the proof, was entirely warranted in finding that it was the expectation of the conspirators that the persons who were left foot-loose when the bail bonds were accepted would avail themselves of the opportunity to decamp. The gist of the offense under section 5440 is the conspiracy to defraud, coupled with a single overt act. Whether or not the conspiracy is successful is wholly immaterial.

The judgment is affirmed.

NOTE.

Excerpts from Record.

Cross-examination of a witness for the prosecution, who had testified that he had bought a piece of property in Tonawanda, for the consideration of some watches given to the vendor: "Q. Was it more than one watch? A. I believe so, yes. Q. Are you sure? A. No. Q. Silver watch, was it? A. No. Q. Sure? A. Yes. Q. It must have been brass, then? A. No. Q. What? A. Not necessarily. Q. Copper one? A. No. Q. Do you know what the watch was worth? A. I couldn't tell you now. Q. Will you swear it was worth $10? A. Yes. Q. $12? A. Yes. Q. $15. A. Yes. Q. $20? A. Yes. Q. How much? A. I couldn't tell you the exact amount, as I said. Q. Could you tell me within $10? A. I don't think so. Q. Could you tell me within $20? A. Probably not. * * * Q. Have you ever acted as straw man for anybody? A. Never. Q. Isn't that part of your business? A. Part of my business? Q. Generally? A. Indeed, not. Q. Don't laugh at it. Just answer my question. A. Indeed not. Q. Do you know Samuel H. Cowles? A. I do not. Q. Did you ever see him? A. Not to my knowledge. Q. Do you know Harry Cowles? A. Harry Cowles? I do not. Q. Do you know Walter Cowles? A. I know W. C. Cowles. Q. Well, Walter C. Cowles, do you know him? A. Yes, sir. Q. Did you take the property as straw man for Walter? A. I did not. Q. As his agent? A. I did not. Q. Did you have any interest in the property —real interest? A. I did. Q. Ever have? A. I did. * * * Q. What is your business now? A. Gem expert. Q. What? A. Gem expert. Q. Working for any special firm, or generally on your own hook? A. Work for a firm in New York City. Q. What firm? A. J. Dreiser & Son. Q. What is the name? A. J. Dreiser & Son. Q. What is the address? A. 292 5th avenue. Q. How long have you been at work for them? A. 5 years and a half. Q. As gem expert? A. I have. Q. For that length of time? A. For that length of time. Q. Where do you live in New York? A. 31 W. 82d street. Q. Married man? A. Yes. Q. How long have you lived there? A. About a year. Q. Where did you live before that? A. 1254 Lexington avenue. Q. Keep house there? A. Yes. Q. How long did you live there? A. About 8 months. Q. Where did you live before that? A. 201 W. 106th street. Q. Did you keep house there? A. Yes, sir. Q. How long did you live there? A. A year. Q. Where did you live before that? A. I don't believe I can give you the number. Q. Well, give me the street. A. 25th street. Q. How long did you live there? A. I should say about a year. Q. Can you be any more definite than that? A. No. Q. Where did you live before that? A. Several different places where we boarded. Didn't keep house before that. Q. Well, you have been in New York only since '97. How many places have you boarded at since you have been there, before you commenced to keep house? A. Perhaps three. Q. Or more? A. I don't think so. Q. How long did you stay in each place? A. I couldn't tell you exactly; several months, perhaps. Q. And perhaps not? A. Longer in some; shorter in others. * * * Q. Did you ever pay any taxes on the property? A. Never did. Q. Did you ever receive any rents from anybody? A. Never did. Q. What? A. I never did. Q. That was in 1890? A. That was in 1890. Q. You remained here until 1897? A. 1897. Q. Never paid a dollar taxes? A. Never did. Q. Never paid a penny interest? A. Never did. Q. Never received a penny rent? A. Never did. Q. Never attempted to pay any part of the mortgage? A. Never did. Q. Never assumed

possession of the property? A. Except as it stood in my name. Q. Well, you never assumed possession? You never went there and took possession? A. I never went there and took possession, no. Q. No. You never had anybody there in possession for you, so far as you know? A. No. Q. You a man of wealth at that time? A. No. Q. Quite limited circumstances, were you not? A. Comparatively so."

In the examination of this witness alone there are many more pages of similar evidence without objection to a single question or motion to strike out a single answer. And the testimony of the other witnesses is presented in the same slovenly manner.

Excerpt No. 2.

The question to the witness, a searcher in the county clerk's office, asked if he found a certain deed on record. There is a whole printed page of elaborate objections, but at the end of the discussion the objections are overruled, and no exception taken, the witness answering in the negative. This is a sample of many other pages where multitudinous objections, which challenge attention and analysis, are needlessly presented, since no exception is reserved.

DUGAN v. BECKETT.

(Circuit Court of Appeals, Fifth Circuit. March 8, 1904.)

No. 1,241.

1. CHATTEL MORTGAGES—VALIDITY—FRAUD—FEDERAL COURTS—STATE LAW—RULE OF DECISION.

   In determining whether a chattel mortgage executed by a bankrupt was fraudulent on its face, the federal courts follow the decisions of the courts of last resort of the state in which the controversy arose, the law on the subject being regarded as a rule of property.

2. SAME—MORTGAGOR'S POSSESSION—EFFECT.

   Where a chattel mortgage on a bankrupt's stock of goods authorized the mortgagor to continue in possession and sell the goods, but required that he should deposit to the mortgagee's bank account each day the receipts for sales over the amount of the running expenses of the store, to be applied on the debt, and that, if he failed so to do, the trustee named in the mortgage should at once take possession and sell the stock at public auction, such mortgage was not fraudulent on its face.

Appeal from the District Court of the United States for the Northern District of Mississippi.

On February 26, 1901, Joe A. Cohen executed and delivered the following mortgage:

"In consideration of the sum of one dollar, I convey and warrant to J. C. Baptist, as trustee, the following property now situated in the storehouse now occupied by J. A. Cohen in the City of West Point, Clay County, Mississippi, to-wit:

"All the stock of goods, wares and merchandise now in said storehouse, together with all showcases, counters, fixtures and iron safe. Also all goods, wares and merchandise to be hereafter acquired and placed in said storehouse, on all of which this incumbrance shall immediately attach, together with all notes, securities, accounts and bank [book] debts now made and due him in the course of his business or hereafter to be made or acquired by him in the course of said business.

¶ 1. State laws as rules of decision in federal courts, see notes to Griffin v. Overman Wheel Co., 9 C. C. A. 548; Wilson v. Perrin, 11 C. C. A. 71; Hill v. Hite, 29 C. C. A. 553.

¶ 2. See Chattel Mortgages, vol. 9, Cent. Dig. § 410.

"In trust, to secure R. C. Beckett a promissory note from me to him for the sum of twenty-three hundred and twenty-five ($2,325.00) dollars, of this day and date, due and payable on the 1st day of November, 1901, bearing interest at the rate of 8% from date.

"Now the consideration of this deed of trust is that the said R. C. Beckett has paid on his indorsement for said J. A. Cohen and for advancements this day made to said J. A. Cohen to pay his debts, and for money also this day advanced to said J. A. Cohen, to enable him to make cash purchases in a replenishment of his said stock of goods now on hand, so as to enable him to sell the same to the best advantage. And the agreement being that the said J. A. Cohen is to deposit the net proceeds from said business, over and above running expenses thereof, each day, to the credit of R. C. Beckett in the Bank of West Point, Miss., until said indebtedness is fully paid off and satisfied, and it being further agreed that all the purchases hereafter made by the said J. A. Cohen are to be for cash from the said fund so advanced, and also, that in the event of any other purchases being made, or any other purchases being made on credit, that the seller shall first be notified, in writing, of the existence of this trust deed.

"Now, therefore, if the said J. A. Cohen shall faithfully comply with all the provisions of this trust, and pay said amount at or before maturity, then this trust is to be void.

"But if said J. A. Cohen shall violate any of the provisions of this deed, or shall not have the same fully paid off and discharged at the maturity thereof, together with all interest, then, in either event, the said trustee at the request of said R. C. Beckett or his assigns or legal representatives, shall immediately take charge of all of said property mentioned and included in this trust deed, and in the true intent and meaning thereof, and shall proceed to sell the same at public outcry to the highest bidder for cash, in front of the Courthouse door of said county, after giving ten days' notice of the time, place and terms of sale by written or printed notices put up in at least three public places in said county, and out of the proceeds shall first pay all the costs and charges incident to the execution of this trust; and shall then pay whatever balance is due to said R. C. Beckett, until the same is fully paid off and satisfied, and the balance shall be paid to said J. A. Cohen or whoever may at the time be legally entitled thereto.

"The said J. C. Baptist accepts the provisions of this trust. If the said J. C. Baptist should die, or remove from the state, county or town, or should become unable or unwilling or fail or refuse to execute this trust, then said R. C. Beckett, or his assigns or legal representatives, may appoint another trustee, who shall have and exercise the same powers and duties, and this power to appoint a substituted trustee shall exist as often and so long as any vacancy from any of the above causes shall occur or exist.

"Witness our signatures this Feby. 26, 1901.

"[Signed] Joe A. Cohen.

"I accept this trust. J. C. Baptist, Trustee.

"R. C. Beckett."

The mortgage was duly acknowledged by the parties to it on the day of its date, and was duly filed and recorded in the proper office on the same day. On a petition filed in the lower court December 2, 1901, Joe A. Cohen was adjudicated an involuntary bankrupt, and Henry Dugan was appointed his trustee in bankruptcy. Cohen having made default in the payment of the mortgage to secure the debt to Beckett, F. G. Barry, who had been substituted as trustee in the mortgage, took possession of the mortgaged goods. Barry, as such trustee under the mortgage, sold the goods under an agreement between all the parties in interest that he would deposit the proceeds of the sale in bank, and that they should be turned over, without deduction, to the trustee in bankruptcy, subject to the rights of R. C. Beckett and others. On January 29, 1902, R. C. Beckett filed his petition in the bankruptcy court claiming under the mortgage the proceeds of the sale of the goods. On February 24, 1902, Henry Dugan, trustee in bankruptcy, answered Beckett's petition, alleging that the mortgage was void as to creditors because Cohen was allowed to remain in possession of the merchandise and to continue to sell the same. Beckett's petition was referred to the referee, and on a hearing before him he found

and reported to the court that the mortgage was not void on its face, and that it was not invalid as matter of fact. And he thereupon ordered that the proceeds of the sale of the goods to the amount of $2,177.85, with interest thereon, be paid to R. C. Beckett by the trustee in bankruptcy out of money in his hands derived from the sale of the property described in the mortgage. The referee's report was confirmed by decree of the district court, and thereupon Henry Dugan, trustee in bankruptcy, appealed to this court, and assigns that the court below erred in the decree rendered.

T. W. Brame (Ivy & Ivy and Brame & Barnes, on the brief), for appellant.

R. C. Beckett, pro se.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

SHELBY, Circuit Judge, after stating the case as above, delivered the opinion of the court.

The appellant's contention is that the mortgage to secure the debt to Beckett is void under the common law and the statutes of Mississippi. If that is true, although it was executed more than four months before the adjudication in bankruptcy, it could not be enforced as a valid lien on the bankrupt's estate against the creditors of the bankrupt. The appellant contends (1) that the mortgage is void for actual fraud, and (2) that it is void on its face. There is nothing in the record to sustain the first contention. The evidence shows without conflict that Beckett only sought to secure the payment of a just debt. If it be conceded that Cohen's conduct was fraudulent after the execution of the mortgage, there is no proof whatever that Beckett, or the trustee named in the mortgage, was connected with it, or even had any knowledge of it. Such fraudulent conduct on the part of the grantor, if it be proved, would not affect the rights of Beckett under the mortgage. Baldwin v. Little, 64 Miss. 126, 8 South. 168; Emerson v. Senter, 118 U. S. 3, 6 Sup. Ct. 981, 30 L. Ed. 49. The question to be decided is whether, as matter of law, the mortgage on its face is valid or invalid. More than 20 years ago a learned writer on mortgages said that whether a mortgage of the stock of goods of a trader, which permits the mortgagor to sell the mortgaged property in the usual course of trade, is necessarily fraudulent, is one of the disputed questions of our jurisprudence. Jones, Chat. Mort. 379. The same conflict of authority on the question continues, the courts of last resort in the several states differing greatly in their conclusions. 6 Cyc. 1104. In deciding the question the federal courts follow the decisions of the courts of last resort of the state in which the controversy arose, the law on the subject being regarded as a rule of property. Such a mortgage was by the Supreme Court held void in Indiana (Robinson v. Elliott, 22 Wall. 513, 22 L. Ed. 758), but it would "not be held, as a matter of law, to be absolutely void or fraudulent as to other creditors" in Michigan (People's Savings Bank v. Bates, 120 U. S. 556, 561, 7 Sup. Ct. 679, 30 L. Ed. 754); and such a mortgage is valid in Iowa (Etheridge v. Sperry, 139 U. S. 266, 11 Sup. Ct. 565, 35 L. Ed. 171). In the latter case, after deciding the question as one of local law, the court observed that: "If this were an open question, we could not be blind to the fact that the tendency of this commercial age is towards increased facilities in the transfer of property, and to uphold such transfers so far as they

are made in good faith." There are well-considered authorities that sustain the position that it is not fraud per se for the mortgagor of chattels to retain a power of sale, and that the retention of such power is only a circumstance to be considered by the court or jury, as the case may be, in determining the question of fraud in fact. Jones on Chat. Mortgages (3d Ed.) 379; 6 Cyc. 1104. The mortgage before the court, the validity of which is in question, is not simply a mortgage on a stock of goods which permits the mortgagor in the usual course of trade to sell the mortgaged property, but it contains other provisions which must be considered in connection with this retained power of sale. It permits Cohen, the mortgagor, to retain possession of the merchandise and to continue his business, and as to the disposition of the money, the proceeds of sales, it is provided: "And the agreement being that the said J. A. Cohen is to deposit the net proceeds from said business, over and above running expenses thereof, each day, to the credit of R. C. Beckett in the Bank of West Point, Miss., until said indebtedness, is fully paid off and satisfied." It is provided, also, that if the mortgagor "shall violate any of the provisions of this deed" the trustee, at the request of the beneficiary, shall immediately take charge of the property and foreclose the mortgage. In Robinson v. Elliott, supra, in which, following the local law, a mortgage was held void, the mortgagor having retained the power of sale in the usual course of business, the court was careful to say:

"We are not prepared to say that a mortgage under the Indiana statute would not be sustained which allows a stock of goods to be retained by the mortgagor, and sold by him at retail for the express purpose of applying the proceeds to the payment of the mortgage debt. Indeed, it would seem that such an arrangement, if honestly carried out, would be for the mutual advantage of the mortgagee and the unpreferred creditors."

And in Etheridge v. Sperry, supra, Mr. Justice Brewer, speaking for the Supreme Court, said:

"In neither of those cases [referring to Means v. Dowd, 128 U. S. 273, 9 Sup. Ct. 65, 32 L. Ed. 429, and Robinson v. Elliott, supra] is it affirmed that a chattel mortgage on a stock of goods is necessarily invalidated by the fact that either in the mortgage or by parol agreement between the parties the mortgagor is to retain possession, with the right to sell the goods at retail. On the contrary, it is clearly recognized in them that such an instrument is valid, notwithstanding these stipulations, if it appears that the sales were to be for the benefit of the mortgagee."

Under the rule indicated by these cases, the mortgage in question here clearly should not be held invalid on its face, unless we are required to do so by the laws of Mississippi. By statute in Mississippi every conveyance of goods or chattels, by writing or otherwise, contrived of fraud or collusion with the intent or purpose to hinder, delay, or defraud creditors, is void as against creditors of the grantor. Rev. Code 1892, § 4226. But such conveyance is not void as to subsequent creditors unless made with the intent to defraud them. Id. § 4228. In Harman v. Hoskins, 56 Miss. 142, the court held that a mortgage given by a merchant on his stock of goods, which authorized him to remain in possession and continue business under the direction of a named trustee, was upon its face fraudulent and void. An examination of the case shows that it is not out of harmony with the cases that we have already

cited. The mortgage evidently on its face showed that it did not serve as a genuine security. The mortgagor was left in possession of the stock of goods, with the power to sell the same, and to make purchases to replenish his stock in the usual course of business. It did not provide that a dollar of the money for which he sold the goods should be applied to the payment of the debt apparently secured by the mortgage. The court, in declaring the mortgage void on its face, laid stress on the fact that "nothing is said about cash sales or money thus derived." In Joseph v. Levi, 58 Miss. 843, 846, the court held that a like mortgage was void on its face as to creditors, although it provided for monthly accounts to be rendered to the trustee, and for payment to him of the money received, to be applied, however, to payment of the current expenses of the business and in making purchases to replenish the stock. It will be noted that it made no provision for the application of the proceeds of the sale of the goods in payment of the debt secured. The court said:

"As the money was not to be applied to the discharge of the debt secured by the terms of the deed of trust, and was to be kept in the business, the instrument is not distinguished from those which have been held to be incurably vicious and void."

In each of these cases it seems clearly implied that, if provision had been made in the mortgage for an application of the proceeds of the sale of the goods to the payment of the debts secured, they would not have been held void on their face. The fact that the mortgage permits the mortgagor to hold the property and deal with it does not make the mortgage void. The rule, as announced in Mississippi, is that "it is only where the conveyance so unmistakably reserves the right to the mortgagor to deal with the property mortgaged as his own that all evidence to the contrary should be excluded as contradicting the writing that a court can declare the deed fraudulent in law." Britton v. Criswell, 63 Miss. 394, 401. The provision in the mortgage in question here requiring the proceeds of the sale of the goods to be applied to the payment of the debt secured by the mortgage makes it unlike the mortgages which the Supreme Court of Mississippi holds to be necessarily invalid. The court is of the opinion that the mortgage, on its face, is not invalid.

The decree of the District Court is affirmed.

ALEXIS v. UNITED STATES.

(Circuit Court of Appeals, Fifth Circuit. April 5, 1904.)

No. 1,134.

1. LARCENY FROM THE MAILS—INDICTMENT—STAMPED PACKAGE.

In a prosecution under Rev. St. U. S. § 5467 [U. S. Comp. St. 1901, p. 3691], for larceny from the mails, an indictment charging that the stolen package had been placed in the mail, and came into defendant's possession in his capacity as a mail clerk, was sufficient to authorize the admission of evidence that the package had been stamped, and the manner of such stamping.

2. SAME—NAMES OF PERSONS—IDEM SONANS.
Where an indictment charged defendant with extracting from the mails, embezzling, and stealing the contents of a package addressed to "L. Krowder," evidence that the package was addressed to "L. Krower" did not constitute a variance, such names being idem sonans.

3. SAME—TRIAL—REOPENING CASE.
Where there was nothing in defendant's affidavit accompanying his application to have the case reopened, and to be permitted to introduce further evidence after the testimony had been closed, either as to the nature of the evidence sought to be added, as to the witnesses by whom it was expected to be given, or the reason why it had not been offered sooner, to require the granting of the application, it was not an abuse of the court's discretion to deny the same.

4. SAME—REQUESTS TO CHARGE.
Where, in so far as requests to charge were correct, they were given by the court, either in modifications thereto or in the general charge, and each of them contained matter that was either erroneous, or not pertinent to the proof, the requests were properly denied.

5. SAME—INSTRUCTIONS—WITNESSES—CREDIBILITY OF ACCUSED.
Where the court charged that defendant had a perfect right to testify, and, having done so, his testimony should be treated like that of any other witness, and that it was for the jury to find whether or not he had told the truth, it was not error to add that, in considering defendant's testimony, which, if true, entitled him to an acquittal, the jury should consider the very grave interest which he had at stake in the case.

6. SAME—REASONABLE DOUBT.
Where the court properly charged the law relating to reasonable doubt, and declared that defendant was presumed to be innocent, and that such presumption obtained until the government convinced the jury beyond a reasonable doubt that he was guilty, it was not error to add that, if a doubt arose which was an unreasonable doubt, the jury should pay no attention thereto.

7. SAME—OMITTED INSTRUCTIONS.
The omission of the court to give instructions that were not requested by defendant was not ground for reversal.

8. SAME—NEW TRIAL—PRESENCE OF DEFENDANT.
A defendant in a criminal case has no right to be personally present at the hearing of a motion in his behalf for a new trial, and his absence at such hearing will not invalidate a sentence subsequently passed on him.

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

W. W. Howe, U. S. Atty.
W. O. Hart, for defendant.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

McCORMICK, Circuit Judge. The indictment in this case contains two counts, each based on the last paragraph of section 5467 of the United States Revised Statutes [U. S. Comp. St. 1901, p. 3691], which is substantially as follows:

"Any such person (that is, any such post office employé) who shall steal any of the things aforesaid (that is, the contents out of any letter, packet, bag or mail of letters) which shall have come into his possession, either in the regular course of his official duties, or in any other manner whatever, and provided the same shall not have been delivered to the party to whom it is directed, shall be punishable by imprisonment at hard labor," etc.

¶ 8. See Criminal Law, vol. 15, Cent. Dig. § 2412.

The charging part of each of these counts was, substantially, that on the 16th day of February, 1900, at the city of New Orleans, the defendant, being then and there employed in a department of the postal service of the United States, to wit, as a clerk in the post office at the city of New Orleans, did unlawfully, willfully, and feloniously steal, take, and carry away (certain articles named), all being the property of one F. M. Hamilton, and the (articles named) were then and there stolen and taken as aforesaid by the said George D. Alexis from and out of a certain package then lately "put into the mail" of the United States at the post office in said city of New Orleans, and which then and there had come into his possession in his capacity as such clerk, as aforesaid, and by virtue of his said office and employment; and the said package was directed in the tenor following, that is to say, "John W. Francis, care of W. R. Irby & Co., New Orleans, La.," and had not been delivered to the party to whom the same was directed, contrary to the form of the statute, etc. In the second count the articles named were different, the ownership laid the same, and the count in other respects the same, except that it alleges that the said package was directed in the tenor following; that is to say, "Leonard Krowder, New Orleans, La." There was a general verdict of guilty on both counts, and the accused was sentenced to imprisonment at hard labor for a term of one year and one day. This sentence does not exceed the punishment that might have been imposed on either one of the counts of this indictment.

The first, third, and fifth errors assigned relate to the admission of evidence in reference to the fact of the package having been stamped, the manner in which it was stamped, and the absence of an allegation in the count as to its having been stamped at all. These assignments are not well taken, because it was not necessary to allege that the package was stamped. Neither the language of the provision of the statute under which the indictments were found nor the reason of the statute requires any such allegation. The indictment having charged that the package then lately put into the mail had come into his possession in his capacity as such clerk was sufficient averment on that point to admit the evidence over defendant's objection taken when the evidence was offered. United States v. Hall (D. C.) 76 Fed. 568.

The second assignment is not well taken. It is in these words:

"Because the court erred in allowing L. S. Woods, a witness on behalf of the United States, to testify on December 20, 1901, regarding the contents of the package said to have been addressed to L. Krower, when the indictments charge defendant with abstracting, embezzling, and stealing the contents of a package addressed to L. Krowder."

The tenth assignment presents the same question.

"A name need not be correctly spelled in an indictment, if substantially the same sound is preserved. The following are cases in which the variance between the names as alleged and as proven was at least as great as in the present, and in which it was held that the variance was not material: Bubb and Bopp [Myer v. Fegaly], 39 Pa. 429 [80 Am. Dec. 534]; Heckman and Hackman [Bergmann's Appeal], 88 Pa. 120; Hutson and Hudson [Cato v. Hutson], 7 Mo. 147; Shaffer and Shafer [Rowe v. Palmer], 29 Kan. 337; Woolley and Wolley

[Power v. Woolley], 21 Ark. 462; Penryn and Pennyrine [Elliott v. Knott], 14 Md. 121 [74 Am. Dec. 519]." Faust v. United States, 163 U. S. 452, 16 Sup. Ct. 1112, 41 L. Ed. 224.

The fourth assignment of error is directed to the action of the court in not reopening the case for further evidence after the testimony had been closed. There was nothing in the affidavit accompanying the application either as to the nature of the evidence sought to be added to what had already been received, or as to the witnesses by whom it was expected to be given, or as to reason why they had not been offered sooner, to require the reopening of the taking of proof. The motion was addressed to the discretion of the trial judge, and his discretion was properly exercised.

The sixth, seventh, and ninth assignments of error are based on the refusal of the judge to give certain requested charges. So far as these requests were correct, they were given by the judge, either in certain modifications thereof that he made and gave, or in his general charge, and for this reason, and also because each of them contained matter that was either not sound or not pertinent to the proof, they were rightly refused.

The eighth error assigned is substantially embraced in the seventh.

The eleventh error assigned is because the court erred in the general charge in giving this part thereof to the jury, to wit:

"Therefore I say to you, in considering the testimony of the defendant, which, if true, entitles him to acquittal, you are to consider the very grave interest that he has at stake in this case."

This is only the closing line of the judge's charge on this subject. This is the context:

"When a defendant in a case of this kind takes the stand (which he has a perfect right to do), he is subjected to all the obligations of a witness, and his testimony is to be treated like the testimony of any other witness; that is to say, it will be for you to say, remembering the matter of his testimony, and the manner in which he gave it, his cross-examination, and everything else in the case, whether or not he told the truth. Then, again, it is for you to remember—you have a perfect right to do so, and it is your duty to do so—the very grave interest the defendant has in this case. Now, that does not mean, and you must not understand me to say that it means, that whenever a man is accused of a crime, and takes the stand in behalf of himself, he will naturally commit perjury; but, of course, as he places himself as a witness, he stands like any other witness. But his interest, or bias, or anything else that may affect his testimony, is a matter which, of course, the jury is bound to take into consideration. Therefore I say to you, in considering the testimony of the defendant, which, if true, entitles him to an acquittal, you are to consider the very grave interest which he has at stake in this case."

This charge is not erroneous. Reagan v. United States, 157 U. S. 301–311, 15 Sup. Ct. 610, 39 L. Ed. 709.

The twelfth error assigned is:

"Because the court erred in the general charge by giving this part thereof to the jury, to wit: 'Of course, if a doubt arising in your mind is an unreasonable doubt, you should pay no attention to that doubt.'"

The judge had, in the language used by the defendant's counsel in one of his requests, given the jury the following:

"The case of the United States against the defendant must be made out completely to your satisfaction, and beyond all reasonable doubt."

Afterwards, in the general charge, he instructed the jury thus:

"In a case of this kind you cannot find the defendant guilty, unless you are satisfied of his guilt beyond a reasonable doubt. You must remember that in a criminal case the amount of proof that is required on the part of the government is different from the amount of proof that is required of the successful party in a civil suit. In a civil suit the verdict goes in favor of the party who has the preponderance of proof. That means the party who has more proof than the other side. But in a criminal case you start out with the presumption that the man brought to the bar of the court is an innocent man, and the jury sit in their seats, and await the time, if it ever comes, when the government convinces them beyond a reasonable doubt that the man is guilty. Whenever that condition of things is produced in your minds, then it is your bounden duty to find the defendant guilty, regardless of what the consequences may be; and if you are satisfied beyond a reasonable doubt that the defendant is guilty, then you have no right to withhold that verdict simply because of some question of sentiment on your part, or some question of mercy, or some question of prejudice. * * * While I have said to you that you must be convinced beyond a reasonable doubt, do not make the mistake to believe that you must be satisfied beyond all possible doubt, because that is not the law, and it would not be reasonable, either, that you must be satisfied beyond every possible doubt. There is nothing certain except in the domain of mathematics. I do not know what could be proven beyond all possible doubt. All that you are called upon to do is to determine whether or not this defendant has been proven to you to be guilty in such a way that there is no reasonable doubt arising in your minds. Of course, if the doubt arising in your minds is an unreasonable doubt, you should pay no attention to that doubt. But if, as reasonable men, considering a matter of grave importance, you should come to the conclusion that a certain amount of proof establishes that conclusion in such a manner that you have no reasonable doubt about it, then that is the condition of mind in which you must be before you find this man guilty; but you are not required to go beyond that and be convinced beyond every possible doubt."

The thirteenth assignment of error is:

"Because the court erred in not specially charging the jury as to their duties under each count of the indictment, and that they might acquit as to one and convict as to the other."

It is no ground for reversal that the court omitted to give instructions that were not requested by the defendant. Isaacs v. United States, 159 U. S. 487, 16 Sup. Ct. 51, 40 L. Ed. 229.

The fourteenth assignment of error presents an action of the trial judge which is not reviewable in this court.

The fifteenth assignment of error—that the court erred in overruling the motion in arrest of judgment—is disposed of by the action we have taken on the previous assignments. The grounds of that motion were the same as the suggestions of error we have already considered.

The sixteenth and last error assigned is:

"The court erred in hearing and deciding the application made for a new trial when defendant was not present in court."

"A defendant in a criminal case has no right to be personally present at a hearing of a motion in his behalf for a new trial, and his absence will not invalidate a sentence subsequently passed upon him." This is the syllabus to the case of Commonwealth v. John S. Castello, 121 Mass. 371, 23 Am. Rep. 277. Judge Gray, who delivered the opinion in that case, uses this language:

"The rule that the defendant has a right to be present at every step of the proceedings against him in behalf of the commonwealth, from arraignment

to sentence, does not apply to a motion for new trial, which is not a necessary step in those proceedings, and is not made by the commonwealth, but by the defendant himself, and is addressed to the discretion of the court, and is not followed by any new judgment against him."

Montgomery v. United States, 162 U. S. 410, 16 Sup. Ct. 797, 40 L. Ed. 1020; Coffin v. United States, 162 U. S. 664, 16 Sup. Ct. 943, 40 L. Ed. 1109; Sparf and Hansen v. United States, 156 U. S. 51, 15 Sup. Ct. 273, 39 L. Ed. 343—are referred to in support of the general views advanced in the foregoing opinion.

Having noticed the numerous grounds of error assigned, we find them all without merit, and the judgment is therefore affirmed.

AMERICAN S. S. CO. v. AMERICAN STEEL BARGE CO. et al.

(Circuit Court of Appeals, Sixth Circuit. April 2, 1904.)

No. 1,251.

1. COLLISION—CONTRIBUTORY FAULT—BURDEN AND MEASURE OF PROOF.
Where the fault of one vessel is palpable and adequate to account for a collision, she cannot impugn the management of another vessel, except on clear proof of contributory fault.

2. SAME—STEAMER PASSING BETWEEN MEETING TOWS.
The Crescent City, a large lake steamer, laden with iron ore, when coming down the St. Clair river, at night, overtook and attempted to pass the steamer Trevor, with two barges in tow tandem, each on a line 750 feet long, just as they were passing round the Southeast Bend. At the same time the Maricopa, with the large barge Manila in tow, both in water ballast, was passing up. The meeting vessels were within sight of each other's lights when the Crescent City started to pass the overtaken tow, and soon thereafter passing signals were exchanged, and in pursuance thereof the descending steamer and tow kept toward the western side of the channel, while the Maricopa and tow were as close as possible to the eastern bank. As the Maricopa was rounding the bend she was passed by the Crescent City, which then took a straight course, making toward the Canadian or eastern shore, and kept it without checking her speed of about 12 miles by the land until she collided with the Manila, then sheered off, and struck the towline behind the Trevor, throwing her across the channel, where she was struck by the first tow before she could get out of the way. There was a distance of about 200 feet between the ascending and descending tows. The Trevor was going at a speed of 9½ miles by the land, and the Maricopa of 8 miles. There was a wind from the southeast, which tended to drift the Manila toward the center of the channel. *Held*, that the Crescent City was clearly in fault, both because of her excessive speed while trying to pass between the two tows at such a place, and for the course she took after passing the Maricopa, directed toward the course of the Manila; that neither of the other vessels was in fault, the speed of the Maricopa apparently being necessary to prevent the Manila from drifting, and it appearing that the latter was following her steamer, and did all that was possible to avoid the collision.

Cross-Appeals from the District Court of the United States for the Eastern District of Michigan.

Goulder, Holding & Masten, for appellant.

Hermon A. Kelley (Hoyt, Dustin & Kelley, of counsel), for appellee American Steel Barge Co.

John C. Shaw (Charles B. Warren, William B. Cady, and Herbert K. Oakes, of counsel), for appellee Minnesota S. S. Co.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

RICHARDS, Circuit Judge. The series of collisions out of which this case arose took place on the St. Clair river between 8 and 9 o'clock the night of August 9, 1899. The night was dark, but clear. A wind was blowing across the channel from about S. S. E., probably strong enough to drift a slow-going tow. Six vessels were involved. The whaleback steamer John B. Trevor, with the barges 131 and 118 in tow, all loaded with ore, was bound down, followed by the steamer Crescent City, also loaded with ore, while the steamer Maricopa, with the barge Manila in tow, both in water ballast, was bound up. The Trevor was 308 feet long, the "131" was 292 feet, and the "118" was 285 feet. The tow lines were each about 750 feet long. The Trevor and her barges each drew about 18 feet, and were making about 7½ miles an hour through the water. The Crescent City was 426 feet long, drew about 18 feet, and was making about 10 miles through the water, or 12 miles by the land. The Maricopa was about 428 feet long, and the Manila about 450 feet long; the towline between being about 800 feet long. The Maricopa drew about 15 feet aft and 1 or 2 feet forward, the Manila drew about 7 feet aft and 6 feet forward, and their speed was about 10 miles an hour through the water, or about 8 by the land. The scene of the collisions was what is known as the "Southeast Bend," beginning about 2¼ miles above the upper end of the St. Clair Flats Ship Canal. The river here winds through the low marshland known as the "St. Clair Flats." There is nothing on the Canadian side to obstruct the view. So a vessel entering the upper end of the bend commands the entire bend and river to the ship canal. The navigable channel varies in width, being about 900 feet at the points of collision, but less above, and is very crooked; a descending vessel turning from a course about northwest to a course almost southwest, while an ascending vessel swings from a course about northeast to a course nearly southeast. When the Crescent City reached the bend, coming down, she was fast overtaking the Trevor and her tow. The Maricopa and Manila were then approaching or entering the bend, coming up, and their lights were in plain view over the flats on the Canadian side. The Crescent City gave a two-blast signal, which was answered, and proceeded, without checking her speed, to pass the Trevor tow to port. While the Crescent City was thus overtaking and passing the Trevor tow in the bend, the Trevor, and later the Crescent City, exchanged one-blast signals with the Maricopa, thus agreeing to pass port to port, which required the Crescent City to direct her course between the Trevor tow and the Maricopa tow. The Crescent City met and passed the Maricopa safely. The distance between the Maricopa and the Trevor tow at that time was at least 200 feet, and between the Crescent City and the Maricopa between 50 and 75 feet. The Maricopa was on a curved course, gradually swinging, under a port wheel, around the bend. The Manila was following her. About this time the Crescent City adopted a southwesterly course, bear-

ing towards the Canadian shore, which is described by her captain. This course was straight, and she kept it without checking her speed until she collided with the Manila; the port bow of the Crescent City coming in contact with the port quarter of the Manila. The distance between the Manila and the Trevor at this time was about 200 feet. From this collision the Crescent City sheered sharply to starboard, and brought up in the bight of the towline between the Trevor and the "131," barely missing the stern of the Trevor. The Trevor was thrown broadside the channel, heading for the Canadian shore. She backed, and, as the towline dropped below the stem of the Crescent City, cut it. The Crescent City then went ahead and under a starboard helm, straightened up, and passed on down. The Trevor immediately started her engines, but, before she could get out of the way, the "131," coming down at a speed of about 6 miles, struck her on the port side aft, staving a large hole, and making it necessary to beach her on the Canadian bank. The court below condemned the Crescent City, the Maricopa, and the Manila—the first two because of their speed, and the last because of her position; taking the view that the stern of the Manila was wrongfully in the course of the Crescent City, but that, if the Crescent City and the Maricopa had checked down after signaling to pass, there would have been time, after discovering the danger ahead, to avoid the collision. The Trevor and her barges were held blameless. From the decree based on this finding, the parties have appealed.

1. The negligence of the Crescent City was palpable and persistent. It began with her speed, was aggravated by her course, and rendered inexcusable by her persistence in both, despite a threatened collision. When she reached the upper end of the bend, she had a clear view of the canal. She could see not only the Trevor tow in the bend ahead, going down, but the Maricopa tow below it, coming up. She should have considered the danger of trying to pass these tows in that crooked channel without checking her speed. But she wanted to pass the Trevor tow before it should reach the canal, so as not to be delayed there, and for this reason kept her speed, and hurried headlong between the descending and ascending tows. As was said in The Syracuse, 9 Wall. 672, 676, 19 L. Ed. 783: "She had no right thus to hurl herself like a projectile into the midst of the vessels before her, taking the hazard of the consequences." So much the learned judge below found, and we concur in this conclusion.

2. But the fault did not end with the speed, for the Crescent City, before she was out of the bend or had passed the Maricopa, adopted a straight course, which converged toward the Canadian side, up which the Maricopa and Manila were then working on a curved course. The Crescent City had not yet passed the "131." The straight course taken constituted a short cut across what remained of the bend, inevitably carrying the Crescent City close to the course of the Maricopa tow. Such a course, under the circumstances, was inexcusable, yet it is clear it was taken. The captain of the Crescent City says that when they met the Maricopa his boat was going steady on a straight course. "There is a little curve there, but we were going straight then." This course was not changed until he struck the Manila. He

marked this course upon the map, and the point of collision was where the line approached the Canadian side. The second mate stated they were working toward the Canadian shore while passing the Maricopa. The captain of the "131" said the Crescent City was heading a point or a point and a half further toward the Canadian bank than he was. The captain of the Maricopa testified that, when the Crescent City passed him, she appeared to be heading not quite a point on to the Canadian side. The second mate stated that, when the Crescent City passed the Maricopa, she was drawing in all the time on their course. All this makes it plain that the Crescent City took a course which carried her over toward the Canadian shore. At this time there was a space, variously estimated at between 200 and 300 feet, left for her between the descending and ascending tows. All the vessels were in the bend. The Trevor and her tow were on the American side of the range, near the middle of the channel. The Maricopa, with the Manila 800 feet behind, was gradually swinging around the bend, hugging the Canadian bank. She was without cargo, and so was her tow. The Manila was a very large barge—450 feet long—and was drawing only 6 feet forward and 7 feet aft. She exposed a broad surface to the wind, and the wind was blowing across the channel from the Canadian side. Under these circumstances, in order to prevent the Manila drifting to leeward, it may have been advisable not only to tow her at a good speed, but to some extent to hold her in to the wind. Such being the situation, it was the plain duty of the Crescent City to divide the space between the two tows and follow a winding course, keeping her distance from the ascending tow until she had cleared it. Instead of doing this, in reckless disregard of the existing conditions, the Crescent City laid her course a point or a point and a half more toward the Canadian side than the course of either the descending or ascending tows, and, with strange persistence, held it until she struck the Manila.

3. The captain of the Crescent City admitted that when abreast the stern of the Maricopa he discerned the Manila, and realized she was across his course. At that time a distance of some 1,200 feet separated the Crescent City and the aft quarter of the Manila. The captain was asked whether he tried to change his course or check his speed, and answered that he did not. He was asked, "Why not?" and gave three different excuses: First, that he did not have time; second, that he did not think it was necessary; and, third, that he did not have room. None of these excuses are satisfactory. In our opinion, there was time and opportunity both to check and to port. If this had been done, we cannot but believe the Crescent City would have cleared the Manila. Twenty feet to starboard would have taken her by. There was ample space between the Manila and the Trevor to have made this maneuver. The captain stated there was at least 200 feet. Why nothing was done, we can hardly conjecture.

4. We come now to consider the conduct of the Manila and the Maricopa. The lower court condemned both—the former on account of her position, the latter on account of her speed. For the reasons we have given, the fault of the Crescent City is palpable. Both her speed and her course were reckless and inexcusable. The doctrine of

The City of New York, 147 U. S. 72, 85, 13 Sup. Ct. 211, 37 L. Ed. 84, followed by this court in The Australia, 120 Fed. 220, 224, 56 C. C. A. 568, is therefore applicable. The fault of the Crescent City being adequate to account for the collision, she may not impugn the management of either the Manila or the Maricopa without clear proof of contributing faults on their part. As was said by the Supreme Court in the case of The Victory, 168 U. S. 410, 423, 18 Sup. Ct. 149, 155, 42 L. Ed. 519, quoted by this court in the case of the steamer Philip Minch, 128 Fed. 578:

"As between these vessels, the fault of the Victor being obvious and inexcusable, the evidence to establish fault on the part of the Plymothian must be clear and convincing in order to make a case for apportionment."

Now, the charge against the Manila (sustained by the lower court) is that she got into the path of the Crescent City by failing to follow her steamer, and that against the Maricopa is that she towed the Manila too fast to permit her to get out of the way of the Crescent City. But if the Crescent City had no right to take the course she did, then the Manila did not get into her path. It was not the path of the Crescent City, but that of the Manila, which was infringed. If the Crescent City had divided the space between the two tows, she would not have been against the Manila when the Manila was 200 feet from the Trevor. The Crescent City made no complaint of the course of the Maricopa, and the proof fails to show that the Manila was not following the Maricopa as closely as prudent navigation permitted. In rounding the bend with the wind off the Canadian shore, she may have tailed some—it may have been advisable to hold her up some. But this should have been foreseen and allowed for by the Crescent City. The apparent swing of the Manila's stern into the stream was doubtless the result partly of her proper navigation in rounding the bend with a wind abeam, and partly of the wrongful course of the Crescent City. If the Crescent City had been pursuing a course midway between the two tows, and parallel with theirs, the stern of the Manila would not have seemed to swing out into the stream. It is conceded that, when the Crescent City was discovered bearing down upon the Manila, every precaution was taken on the latter. Her helm was gradually ported until hard aport, and, when the Crescent City reached her bow, was put hard astarboard. As to the speed of the Maricopa: This steamer was proceeding at about 10 miles an hour through the water, or 8 by the land. The signal of the Crescent City compelled her to take the Canadian side, from which the wind was blowing. It was necessary not only to keep close to that side, but to keep her tow there; that is, to keep going at a speed which would prevent the tow from drifting. Her master testified that he considered it imprudent to check down, for fear the Manila would sag to leeward. Under the rule, the proof must satisfy us that the master of the Maricopa was clearly wrong in not checking down. It does not. Both as to the Manila and the Maricopa, the evidence fails to meet the rule which we have quoted. In neither case is it so clear and convincing as to establish the fault charged. We are not satisfied that the Manila was where she had no right to be, nor are we convinced that the Maricopa was towing the Manila at too great a speed.

5. The second collision—that between the Trevor and the "131"—can be disposed of in a few words. The Crescent City, being at fault in the collision with the Manila, must be held responsible for the collision with the towline between the Trevor and the "131." The sole question is whether the Trevor or the "131" neglected to do anything that could have been done to avert or avoid the collision which took place when the Crescent City got out from between them and passed on down. We are not satisfied that anything effective could have been done. The vessels were then in extremis. There was no time for either the Trevor to acquire headway, or the "131" to respond to a port helm. They were so close together and the time so limited that the accident was inevitable.

The decree of the court below is reversed, and the case remanded, with directions to assess the damages and costs against the Crescent City.

NATIONAL SURETY CO. v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. March 21, 1904.)

No. 1,936.

1. BOND OF LETTER CARRIER—LIABILITY OF SURETY—COLLECTING LETTERS TO BE REGISTERED.

The bond of a letter carrier and of his surety for the faithful discharge of the duties and trusts imposed upon the former as a letter carrier, "either by the postal laws of the United States or the rules and regulations of the Post-Office Department of the United States," binds the surety for the faithful discharge by his principal of the duty of collecting letters and packages to be registered which was imposed upon the letter carrier by an order of the Post-Office Department during the term of the bond.

2. SAME—CONSTRUCTION—ACCORDING TO LAWS AND REGULATIONS.

The parties to a bond for the faithful discharge of the duties of an office according to laws and regulations, which the obligee has the right and power to change at any time, necessarily contemplate and intend to guaranty thereby the discharge of the duties of the office imposed upon the principal by the subsequent legislation or regulation of the obligee during the term of the bond, which are within the scope of the office, and are germane to, and naturally connected with, its duties when the bond is made. They do not warrant or intend to guaranty the discharge of duties beyond the scope of the office, disconnected with its business or foreign to its duties at the time of the execution of the bond.

3. SAME—DUTY OF COLLECTING LETTERS TO BE REGISTERED GERMANE TO FORMER DUTIES.

The duty of collecting letters and packages to be registered imposed upon letter carriers by the order of the Postmaster General of December 5, 1899, is within the scope of the office of a letter carrier, and germane to previous duties pertaining to it.

4. SAME—UNITED STATES MAY RECOVER OF SURETY FOR THEFT BY PRINCIPAL—BAILEE FOR HIRE.

The United States may maintain an action against the surety on the bond of a letter carrier who has stolen letters to be registered for the value

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¶ 1. Liabilities of sureties for acts of officers under color of office, see note to Chandler v. Rutherford, 43 C. C. A. 222.

¶ 4. See Bailment, vol. 6, Cent. Dig. §§ 98–100, 136.

of the contents of the stolen letters, where the contents of no single letter exceeded $10 in value, although the owners of the letters have made no claim against the government for indemnity, and nothing has been paid to them.

A bailee for hire of services may maintain an action of trespass, trover, or conversion for the disturbance of his possession by a wrongdoer, and may recover the value of the property as damages.

(Syllabus by the Court.)

In Error to the District Court of the United States for the District of Nebraska.

Ralph W. Breckenridge (Charles J. Greene and James C. Kinsler, on the brief), for plaintiff in error.

W. S. Summers and S. R. Rush, for the United States.

Before SANBORN, THAYER, and HOOK, Circuit Judges.

SANBORN, Circuit Judge. On April 1, 1899, 79 letter carriers at the city of Omaha in the state of Nebraska, as principals, and the National Surety Company, as their surety, gave a bond to the United States in the sum of $79,000, conditioned that if each of the principals "shall faithfully perform all the duties and trusts imposed upon him as such letter carrier either by the postal laws of the United States or the rules and regulations of the post-office department of the United States and shall faithfully account for and pay over to the postmaster at Omaha, Nebr., all moneys which shall come into his hands as such letter carrier, and shall, upon the termination of his office, return to the proper officer all property of every kind and description which shall be in his possession as such letter carrier," then the obligation should be void, but otherwise of force. At the time this bond was executed these letter carriers were forbidden to collect or receive letters or packages to be registered, but it was a part of their duties to deliver registered mail, and to collect and deliver other letters and packages. Postal Laws & Regulations 1893, § 1049. In December, 1899, the Postmaster General made an order to the effect that letter carriers in the residential districts of certain cities, one of which was Omaha, should collect certain letters to be registered. Order No. 762, Dec. 5, 1899; Postal Laws and Regulations 1902, § 805. Under this order, John Eich, one of the principals in the bond, collected three letters to be registered, which contained, respectively, $6, $3.50, and $1.50, and rifled them of their contents. The United States has made no restitution of any of this money to either of the senders or addressees of the letters. It has, however, brought this action against the surety company to recover the $11 which the letters contained, and a judgment for that amount has been entered in its favor, pursuant to a peremptory instruction to the jury that the plaintiff was entitled to their verdict.

The peremptory instruction of the court, and the judgment which followed it, are challenged in this court upon two grounds: (1) That the imposition of the duty of collecting letters and packages to be registered, upon the principal, Eich, after the bond in suit was given,

added to the duties of the office of the letter carrier a new duty and a new responsibility, for which the surety was not liable upon its bond; and (2) that the United States is entitled to no recovery in any event, because it has neither incurred any liability, nor suffered any loss, by the theft of the money by the principal in the bond.

The agreement of a surety must be strictly construed. His responsibility may not be extended by implication beyond the terms of his bond. An additional liability, which his contract does not clearly show to have been within the reasonable contemplation and intention of the parties to it when it was made, cannot be imposed upon him by the subsequent action of the obligee or of the principal in the bond. Miller v. Stewart, 9 Wheat. 680, 701, 6 L. Ed. 189; U. S. v. Singer, 82 U. S. 111, 122, 21 L. Ed. 49.

But the contract of a surety, like all other contracts, must have a reasonable construction—an interpretation, which, while it carefully restricts his responsibility to that which he agreed to undertake, does not fail to hold him to that liability which, by the plain terms of the agreement, he contracted to assume. The surety in the case in hand agreed with the United States to be liable for the faithful discharge by its principal, Eich, of all the duties and trusts imposed upon him as a letter carrier either by the postal laws of the United States, or by the rules and regulations of the Post-Office Department of the nation. When this bond was executed the United States had the right and power, by act of Congress, and the Postmaster General had the right, by rule or order, to increase, diminish, or modify the duties of the principal in this bond, as a letter carrier, at any time they saw fit; and all the parties to this contract were aware of this fact. The proposition has become too well settled to admit of discussion that an obligation of a surety for the faithful discharge of the duties of an office according to the laws and regulations which prescribe those duties, made to one who has the right and power to change such laws and regulations at any time, is, in its true interpretation and meaning, a contract for the faithful discharge of the duties of the office according to the laws and regulations, not only as they are at the time when the bond is made, but also as they shall subsequently become during the term of the bond, provided only that subsequent legislation or regulation adds no new duty or responsibility which is not germane to the duties or within the scope of the office at the time of the making of the bond. All duties prescribed by subsequent legislation or regulation which are of the same kind as those previously pertaining to the office, which are within its scope and which naturally belong to its business, are within the reasonable contemplation and evident intention of the parties to such a contract, because they know the necessity and probability of changes in the duties of the office, and the bond binds principal and surety alike for their faithful discharge. U. S. v. Singer, 82 U. S. 111, 122, 21 L. Ed. 49; U. S. v. Powell, 81 U. S. 493, 500, 20 L. Ed. 726; U. S. v. Gaussen, 25 Fed. Cas. 1267, 1269, No. 15,192; Postmaster General v. Munger, 19 Fed. Cas. 1099, 1103, No. 11,309; Boody v. U. S., 3 Fed. Cas. 860, 864, No. 1,636; White v. Fox, 22 Me. 341, 347; U. S. v. McCartney (C. C.) 1 Fed. 104, 106, 111; Chadwick v. U. S. (C. C.) 3 Fed. 750, 755; King v. Nichols, 16 Ohio St.

82; U. S. v. Cheeseman, 25 Fed. Cas. 414, No. 14,790; Murfree on Official Bonds, §§ 711, 712, 713.

When this bond was executed the collection and distribution of letters and packages which were not registered, and which might nevertheless contain money or other articles of value, and the distribution of registered letters and packages, were some of the duties of the principal as a letter carrier. The collection of letters and packages to be registered was a duty of the same kind as the duty of the distribution of registered letters and packages. It was a duty within the scope of and naturally connected with the business of the office. Hence the liability of the surety for its discharge falls within the true interpretation of its obligation to answer for the faithful discharge of the duties of its principal according to the laws and regulations which prescribe them.

The second objection to the judgment is that the United States has neither incurred any liability nor suffered any loss by the theft of the contents of the letters, and hence it cannot maintain an action for damages on account of it. In support of this contention, attention is called to the fact that section 3926 of the Revised Statutes [U. S. Comp. St. 1901, p. 2685]* provides that the Postmaster General shall make rules under which the owners of first-class registered matter shall be indemnified by the United States for losses thereof through the mails, to amounts not exceeding $10 for any one registered piece; that such rules have been prescribed; that these rules require that claims for indemnity shall be made within one year from the dates of the losses (Postal Laws & Regulations 1902, § 900); that there is no averment or proof that any claim for indemnity for the loss of any of the moneys here in question has ever been made; and that the government admits that it has never paid anything to any one on account of it. The right of the nation, however, to a recovery in this action, is not necessarily limited by the acts or omissions of the owners of the stolen money since the theft. It depends upon the facts and circumstances when the money was stolen. When this was done, the money was in the custody—the possession—of the United States under its contract with those who had intrusted the letters to its care to safely carry and deliver them to their addressees for the valuable consideration which it had received by virtue of the stamps upon the letters which had been purchased from it. The contract between the United States and the owners of the letters was a bailment of the class known as "locatio operis mercium vehendarum." It was a carrier—a bailee of the letters and their contents for hire of labor or services. From this carrier or bailee Eich took and converted the letters and their contents to his own use. But a bailee may maintain an action of trespass, of trover, or of conversion against a wrongdoer for his disturbance of his possession of the property. The Beaconsfield, 158 U. S. 303, 307, 15 Sup. Ct. 860, 39 L. Ed. 993; The New York (D. C.) 93 Fed. 495, 499; Shaw v. Kaler, 106 Mass. 448; Eaton v. Lynde, 15 Mass. 242; Burdict v. Murray, 3 Vt. 302, 21 Am. Dec. 588. The United States, therefore, was not without sufficient interest in the subject-matter to enable it to recover of Eich, the letter carrier, the entire value of the property he took, as its damages for the conversion of the money. But Eich converted the

letters and their contents when he was in the act of performing his duty of collecting and delivering them to the postmaster at Omaha, and when he and the surety company were under an agreement with the plaintiff that they would pay all damages, not exceeding $1,000, which resulted to it from Eich's failure to discharge his duties faithfully, and to account and pay over to the postmaster all moneys which should come into his hands as a letter carrier. Since the government was entitled to recover the value of the letters as its damages for their conversion, this value was also the measure of the damages it sustained under the bond, and a cause of action against the obligors in the bond to recover these damages arose as soon as the theft of the letters was completed. As soon as the conversion was effected, the United States had a complete right of action against the obligors upon the bond for the value of the property taken by the principal, and each of the respective owners of the letters had an indefeasible claim against the government for the value of the contents of his letter. The right of action of the United States, however, was not conditioned, created, released, or affected by the fact that the owners of the letters presented or failed to present their claims for indemnity to the government, and this fact constituted no defense to this action.

The judgment below must accordingly be affirmed, and it is so ordered.

JOHNSTON v. FAIRMONT MILLS et al.

(Circuit Court of Appeals, Fourth Circuit. February 2, 1904.)

No. 478.

1. SALES—CONTRACT MADE THROUGH BROKER—REQUIREMENT OF CONFIRMATION BY PRINCIPAL.
   Where there was an established custom in the cotton trade for both buyer and seller to confirm to each other in writing a sale made by a broker, an offer by a broker to sell cotton for future delivery to a cotton mill, accepted by the mill company "subject to confirmation" by the seller named in the offer, did not create a contract, and the acceptance was subject to withdrawal at any time before such confirmation.

2. SAME—ACCEPTANCE OF OFFER.
   A proposal to accept an offer for the purchase of cotton on terms varying materially from those offered is a rejection of the offer, and does not create a contract binding the purchaser.

3. SAME—WAIVER OF CONFIRMATION.
   Where an offer by a broker to sell cotton for future delivery was accepted subject to confirmation by his principal, as customary in the trade, and before confirmation the seller became insolvent, a demand for security by the intending purchaser was not a waiver of the requirement of confirmation.

In Error to the Circuit Court of the United States for the District of South Carolina.

For opinion below, see 116 Fed. 537.

This is a writ of error to a judgment of the Circuit Court of the United States for the District of South Carolina rendered on the 4th day of August,

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¶ 2. See Sales, vol. 43, Cent. Dig. § 47.

1902, dismissing at the cost of the plaintiff a certain action at law instituted in said court against the defendants. The facts may be briefly stated as follows: The appellant instituted this action for the recovery against the Fairmont Mills, a corporation of the state of South Carolina, and L. Guy Harris, as receiver of said corporation, damages for the breach of two alleged contracts entered into between the said Fairmont Mills and himself on or about the 10th and 15th days of October, 1900, under which the plaintiff contracted to sell and deliver to the Fairmont Mills 500 bales of cotton, 100 of said bales to be delivered during each of the months of February, March, April, May, and June, 1901, to be paid for as follows: For the cotton delivered in February, March, and April, 1901, 10⅜ cents per pound; for the remainder, 10⅛ cents per pound. That after the making of said contracts cotton declined rapidly, and on or about October 28, 1900, the Fairmont Mills notified the plaintiff that it canceled the contracts, and would not accept, receive, or pay for the cotton. That the plaintiff was always ready to carry out the contract on his part, and was prevented from so doing by the action of the defendant. That, owing to the decline in the price of cotton, plaintiff was prevented from placing the cotton at the price agreed upon, and, as a consequence, was damaged in the sum of $4,687.50. The defendants deny the existence of the contracts, and, while conceding that there were negotiations through one C. P. Mathews, a cotton broker, looking to such contracts, they insist that the broker did not submit to the two parties the same terms, and never reached an agreement as to the terms, and the contracts were never consummated. Defendants further assert that, while negotiations were pending, plaintiff became insolvent, whereupon they warned him, unless he furnished a proper guaranty that he could perform the contract on his part, if completed, by noon of the 27th of October, 1900, they would not conclude the same; that the plaintiff failed to do this, and the defendant mills notified him that the deal was off, and sought cotton elsewhere.

A jury trial being waived, pursuant to the act of Congress, the case was submitted to the judge of the court below, who, after stating the facts to be:

"The transaction occurred through the agency of C. P. Mathews. Mr. Mathews is a cotton broker residing in Spartanburg, South Carolina, doing business in the Carolinas, chiefly with cotton mills. On 10th October, 1900, Mr. Harris, president of the Fairmont Mills, made an offer to him, as such broker, to buy cotton, 100 bales for each of the months of February, March, and April, at 10⅜ cents. He communicated the offer by telegram to the plaintiff, at Meridian, Mississippi, and received by telegram, the same day, authority to accept the offer of 300 bales at 10⅜, shipments named. He communicated by telephone to Mr. Harris the receipt of this authority, and on the next day (11th October) wrote Mr. Harris as follows:

"'I beg to confirm sale to you of 300 B–C to you at 10⅜ landed Moore's So. Ca., for a/c of A. S. Johnston, Meridian, Mississippi. The cotton to be half each, st. and good mid., to be shipped 100 B–C each in February, March and April; wts. guaranteed within three pounds. Please confirm sale and oblige,

"'Yours truly, C. P. Mathews.'

"It does not appear, except by this letter, that Mr. Harris knew who would furnish the cotton. On receipt of this letter, Mr. Harris replies:

"'I have your letter of this date [11th October] confirming sale to us of 300 B–C, landed at Moore's, So. Ca. The cotton to be half each st. and good mid., and 100 bales delivered each month of February, March and April next, wts. guaranteed within three pounds, and hereby accept offer of same subject to A. S. Johnston's confirmation.

"'Yours truly, W. I. Harris, Pres.'

"On the 15th October, 1900, Mr. Harris made another offer to C. P. Mathews for the purchase of 200 bales of cotton at 10⅛, deliverable 100 bales each in months of May and June, 1901. This was communicated also to A. S. Johnston, at Meridian, Miss., by wire, and Johnston, by wire, answered, 'Confirm sale 100 bales, each May and June, st. mid. to good mid., 10⅛.' On its receipt, Mathews notified Harris, and on the next day he wrote a letter identical in terms, except as to number of bales and the price, with his former letter. To this Harris replies, using the same terms as his reply to the former letter, varying only as to the number of bales and the price, and ending, as in his

former letter, 'sold to us by A. S. Johnston, Meridian, Miss., and subject to his confirmation.' The usage of the mills is always to require confirmation by the principal of contracts made through the broker, and this confirmation is made to the purchaser direct—sent either by mail or through the broker. In the present instance, Mathews requested Johnston to confirm direct to Harris. After the 15th, and between that day and the 25th, of October, unpleasant rumors were in circulation as to the solvency of Johnston. Whereupon Mr. Harris, on 25th October, demanded from Mathews security for the performance of these contracts by Johnston. Mathews wired this demand to Johnston, who replied, referring to C. W. Robinson and John Kenyon. Mathews telegraphed to these gentlemen to confirm this, but got no reply. On 27th October, Mathews not furnishing the security demanded, Harris canceled the contracts. On the 29th October, 1900, Mathews inclosed to Harris letter of Johnston confirming the contract of 10th October, except that the place of delivery was stated to be Spartanburg, S. C., instead of Moore's, as stated by Mathews. On or about 1st November, 1900, Johnston went to Spartanburg, and, in company with Mr. Bozeman, his attorney, and Mr. Caine, of Mississippi, offered Mr. Caine as his surety for delivery of the cotton as per contracts. Mr. Harris made no objection to the character and sufficiency of the security, but refused to accept it, as the contracts were canceled. Mr. Mathews says that in this transaction he acted merely as agent of each party in making the sale, and assumed no responsibility."

—Announced his findings thereon, and conclusions of law, as follows:

"Findings of Fact.

"(1) The plaintiff is a citizen and resident of the state of Mississippi, and the defendant corporation, the Fairmont Mills, and L. Guy Harris, receiver, are citizens and residents of the state of South Carolina.

"(2) C. P. Mathews is a cotton broker at Spartanburg, South Carolina, doing business in the Carolinas.

"(3) On 10th October, 1900, negotiations were entered into between W. J. Harris, president of Fairmont Mills, and C. P. Mathews, for the purchase of three hundred bales of cotton, strict to good middling, at 10⅜ cents per pound, deliverable 100 bales each in the months of February, March and April, 1901, at Moore's, S. C. And on 15th October, 1900, other negotiations were entered into between the same parties for the purchase of 200 bales of cotton at 10⅛ cents per pound, deliverable 100 bales each in the months of May and June, 1901, at Moore's, S. C.

"(4) These negotiations culminated in a written offer on the part of Mathews, acting for A. S. Johnston, the plaintiff, for the delivery of the above-mentioned bales of cotton at the prices and terms and place specified, one-half of each delivery to be good, and one-half strict middling, with the terms added; weights guarantied not to lose more than three pounds per bale.

"(5) Pending these negotiations, telegrams had been passed between Mathews and Johnston, in which the outlines of the proposition were stated. The offer of Mathews gave the offer in detail, and for the first time.

"(6) The detailed offer of Mathews was accepted by Harris, subject to confirmation by Johnston. This is the usage of the trade in Spartanburg by the mills in purchasing cotton for future delivery.

"(7) The confirmation by Johnston not having been received, on 27th October, 1900, Mr. Harris, president of Fairmont Mills, canceled the transaction.

"Conclusions of Law.

"The contract between plaintiff and defendant, never having been completed, was not binding, and the verdict must be for the defendant."

C. P. Sanders and S. J. Simpson, for plaintiff in error.

William M. Jones (Nicholls & Jones, on the brief), for defendants in error.

Before GOFF, Circuit Judge, and WADDILL and McDOWELL, District Judges.

WADDILL, District Judge (after stating the facts as above). There are a number of assignments of error in this case, but they all relate, in one form or another, to three questions involved: First, whether or not valid contracts were ever entered into between the parties, as set up in the pleadings; second, whether or not, under the circumstances of this case, the defendant the Fairmont Mills was justified in imposing upon the plaintiff the requirement of a guaranty of his ability to carry out the alleged contracts, his insolvency being admitted; and, third, what was the effect of this requirement, as bearing upon the question of the existence of the prior contracts?

This case turns upon the question of fact as to whether the alleged contracts were in fact entered into between the plaintiff and the defendant the Fairmont Mills. Upon that point the learned judge of the lower court decided that they had not, and, after a most careful review of the entire evidence, with the light of the arguments of able counsel thereon, we have reached the same conclusion.

That the minds of parties must meet, and give mutual assent to all of the essential and material features of a contract, is elementary. It cannot be said that such was the case here. The transaction was conducted between the parties through C. P. Mathews, a broker, and he clearly did not have the right, under the facts of this case, to bind either party without their assent; and certainly he had no such authority to speak for the defendant the Fairmont Mills. The evidence conclusively shows that the custom in the trade was for both buyer and seller to each confirm to the other the broker's action in writing. This is testified to by the broker himself, who says:

"When Mr. Harris submitted the offer, I submitted the offer to Mr. Johnston. I had no authority until I got authority from Mr. Johnston to confirm the contract. * * * It was always customary for the mill to confirm to the buyer, and the buyer to the mill. I was acting only as intermediary, and each side wanted the contracts confirmed. * * * There was probably something in the offer that Mr. Johnston would confirm the sale by letter. It was understood that Mr. Harris was to receive written confirmation from Mr. Johnston."

While sundry letters and telegrams passed between Mathews and Johnston, and some between Mathews and Harris, the president of the mill, still it is entirely clear from the whole correspondence that Harris was to receive written confirmation of the sale from Johnston. Mathews' reply to the telegram from Johnston to him confirming the sales of February, March, and April, concludes, "Please confirm contract to W. I. Harris, president, Spartanburg, South Carolina;" and Harris' letter of the 11th of October acknowledging the receipt of the letter from Mathews, relative to confirming the sale concludes, "Weights guaranteed within three pounds, and hereby accept offer of same subject to A. S. Johnston's confirmation." The subsequent letters written by Johnston direct to Harris, president, but received after the cancellation of the contract by Harris, likewise show that Johnston was to have given a written confirmation. In addition to this, the correspondence between Mathews and Johnston also shows that this confirmation was to have been given, and on the day before the cancellation of the contract, October 26, 1900, Mathews wrote:

"If you had only confirmed these sales promptly, there would have been no trouble. A lawyer told one of the mills that the only ground he had for getting

out, would be that you had failed to confirm the sale. Even now I have never been able to get the sales properly confirmed by you. I returned the confirmations to you on the 17th for correction; since then I have not had a line from you."

And on the 27th of October, the day on which the notice was given that the contracts would be canceled if no guaranty was given, Mathews wrote Johnston:

"I will say, however, that all the sales have been confirmed to me regularly, and only awaited your confirmation to the mills for them to confirm. I do not consider you have treated me fairly in the matter."

Johnston thus clearly failed to confirm, in writing, the contracts to Harris. But this is not the only particular wherein the transaction was not consummated. Their minds never met upon other material and essential portions of the undertaking. They agree as to the quantity of the cotton and the price, but in other essentials entirely differ. Harris understood that the cotton was to be delivered at Moore's, S. C. Johnston's confirmation, in so far as it designates a place at all, is at Spartanburg; and it is not entirely clear that he obligated himself to do more than ship the cotton from the place of sale, Meridian, Miss., within the time named. Harris prescribed that the cotton was to be half each strict and good middling, and emphasized in his second letter by stipulating for strict to good middling cotton, one-half each grade. Johnston agreed only that the cotton should be strict good middling, and not one-half each grade. Harris required the delivery of 100 bales each for the months of February, March, April, May, and June; weights to be guarantied within three pounds. Johnston gave no undertaking as to weight, and, as above stated, had in view manifestly shipments, rather than deliveries—at least, his telegrams and letters are liable to this interpretation—which might have resulted disastrously to Harris, but showed clearly that in this, as in other particulars, there was an utter failure of the minds of the parties to meet on these essential features of the undertaking. To bind Harris on his offers, it was necessary that the same should be accepted in the identical terms in which they were made; otherwise his offers imposed no obligation upon him; and a proposal to accept, or an acceptance on terms varying from those offered, is a rejection of the offer.

In Minneapolis Ry. Co. v. Columbus Rolling Mills, 119 U. S. 149, 7 Sup. Ct. 168, 30 L. Ed. 376, it is said:

"As no contract is complete without the mutual assent of the parties, an offer to sell imposes no obligation until it is accepted according to its terms. So long as the offer has been neither accepted nor rejected, the negotiation remains open, and imposes no obligation upon either party. The one may decline to accept, or the other may withdraw his offer, and either rejection or withdrawal leaves the matter as if no offer had ever been made. A proposal to accept, or an acceptance upon terms varying from those offered, is a rejection of the offer, and puts an end to the negotiation, unless the party who made the original offer renews it or assents to the modification suggested. The other party, having once rejected the offer, cannot afterwards revive it by tendering an acceptance of it."

In 1 Chitty on Contracts (11 Am. Ed.) it is said at page 15:

"Where an agreement is sought to be established by means of letters, such letters will not constitute an agreement, unless the answer be a simple acceptance of the proposal, without the introduction of any new term. And

again: "If the original offer leave anything to be settled by future arrangement, it is merely a proposal to enter into an agreement. * * * The agreement is not complete until there is upon the face of the correspondence a clear accession on both sides to one and the same set of terms."

In 1 Parson on Contracts (6th Ed.) p. 476, it is said:

"The assent must comprehend the whole of the proposition, it must be exactly equal to its extent and provisions, and it must not qualify them by any new matter."

Applying these principles to the facts in this case, it is manifest that no valid contracts were entered into between the parties, unless it be that Harris' requirement of a guaranty on or before the 27th of October should be treated as a confirmation of the incomplete contracts theretofore existing. This action of Harris clearly should have no such effect, since it is apparent from the entire evidence that he was acting in good faith in what he did. He made the offers as early as the 10th and 15th of October, which were never accepted, and pending this condition of affairs it developed that Johnston had failed in business—his insolvency being admitted, as of the 20th day of October, 1900; and he had the right to withdraw the offer, or otherwise terminate the transaction, which he did not do in undue haste, but insisted that a proper guarantee of the ability of Johnston to perform the contracts on his part should be given him, designating a day beyond which he would not wait. Johnston promised to give this guaranty, and endeavored to do so; but, as is apparent from the correspondence between himself and Mathews, he was unable to furnish the guaranty, and Harris, on the day indicated, declared the transaction at an end. Several days after this date, Johnston was enabled to furnish the guaranty; but Harris then declined to reopen the negotiations, and the transaction thus ended. Harris was under no obligation to conclude his offers, the same never having been accepted; and hence, when there was a failure to comply with the condition that he generously made, he was legally and morally relieved from any liability to Johnston by reason of the transactions in question.

From what has been said, it follows that the action of the lower court should be affirmed.

LAMAR et al. v. HALL & WIMBERLY et al.

(Circuit Court of Appeals, Fifth Circuit. March 1, 1904.)

No. 1,274.

1. TRUST FUND—PROTECTION—COMPENSATION.

One jointly interested with others in trust funds, who in good faith maintains for himself and others interested like him necessary litigation to secure or protect them, is entitled to reimbursement out of the funds protected or secured. The principle on which such allowance is based is that the plaintiff represented the others for whom he sued. But a solicitor cannot make another person his debtor by rendering services in his behalf without his express or implied assent.

2. CORPORATIONS—DISSOLUTION—RECEIVERS—TRUST FUNDS—ATTORNEY'S FEES—ALLOWANCE.

Suits having been brought by lien creditors against a corporation, and a receiver having been appointed, petitioners, as attorneys for a minority

stockholder, filed a bill on his behalf, and on behalf of all others similarly situated who should come in and become parties and share in the expense of the proceedings, alleging that the former suits had been brought in bad faith, etc. The bill contained a prayer for the appointment of a receiver to operate the property, pay the debts, and thereafter to turn over to the stockholders the property remaining. A co-receiver was appointed on such petition, the suits consolidated, and after trial, in which the allegations of fraud of the minority stockholder's bill were not proved, the court ordered a sale of the property for the payment of debts. A sale was had, and, on petitioners' application, was set aside for inadequacy of price, and another sale ordered, and an upset price fixed, which was $40,000 higher than the amount bid at the previous sale, and the property was subsequently sold to the lien creditors for such sum, which was insufficient to pay the liens. *Held*, that the petitioners were not entitled to attorney's fees, payable out of the proceeds of such sale.

Appeal from the Circuit Court of the United States for the Southern District of Georgia.

Wm. K. Miller, for appellants.

Marion Erwin, John I. Hall, and Olin J. Wimberly, for appellees.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

SHELBY, Circuit Judge. Hall & Wimberly and Erwin & Callaway, attorneys and solicitors, filed a petition in the court below praying that fees for services rendered by them be fixed and allowed, and paid out of a trust fund which was in court for distribution. The petition was referred to a special master, who made a report adverse to it; but, on exceptions filed by the petitioners, the report of the special master was disapproved by the court, the exceptions sustained, and a decree entered allowing the petitioners $1,500 as compensation for their services as solicitors, and directing that the same be paid by the receiver out of the trust funds in court. William Firth Co. v. Millen Cotton Mills, 129 Fed. 141. This appeal was taken from that decree, and it is assigned that the court erred in sustaining the exceptions to the master's report, because the solicitors named were not entitled to have their fees paid out of the trust fund in court.

In order to understand the question to be decided, it is necessary to make a statement of the facts:

Three bills in equity were filed in the court below:

(1) William Firth Company et al. v. Millen Cotton Mills. This was a suit brought January 6, 1902, by creditors having liens upon the property of the Millen Cotton Mills, a corporation. The bill described the debts and liens, and prayed for their enforcement by a sale of the property of the defendant corporation, and a distribution of the assets among the lien creditors. There was a prayer, also, for the appointment of a receiver of the property of the defendant. The circuit court on January 6, 1902, appointed John R. L. Smith receiver, who took possession of the property of the defendant corporation.

(2) C. E. Riley & Co. et al. v. Millen Cotton Mills et al. In this suit, brought April 11, 1902, it was asserted that the complainants had furnished machinery to the defendant corporation, and the complainants claimed liens therefor, and sought to enforce them. It was alleged that the court was already in possession of the defendant corpo-

ration's property, and that the complainants' liens were superior to the mortgage debts; that defendant corporation was insolvent; and that the stockholders had no interest in the property of the defendant corporation "until they pay or cause to be paid off its debts."

(3) Southern Cotton Mills & Commission Co. v. Millen Cotton Mills et al. The bill beginning this suit was filed on January 23, 1902, after a receiver had been appointed under the first bill, and after he had taken possession of the property of the defendant corporation. In this suit the complainant's solicitors were Hall & Wimberly and Erwin & Callaway, the petitioners in the court below, whose compensation is involved in the present appeal. The complainant in this suit, a minority stockholder in the Millen Cotton Mills, alleges that the first suit was—

"A part and parcel of a fraudulent and wrongful scheme, purpose, and conspiracy on the part of the defendants herein named to wreck the said Millen Cotton Mills, and cause its properties to be sold and purchased for the benefit of the majority stockholders of the Millen Cotton Mills, to the utter destruction of the rights and interest and property of the minority stockholders therein."

The third paragraph of the bill is as follows:

"Your orator, the Southern Cotton Mills & Commission Company, is a minority stockholder in said Millen Cotton Mills, and brings this bill against the said Millen Cotton Mills and its officers, directors, and majority stockholders, and the other defendants named, colluding and confederating with them; and your orator brings this as a stockholders' bill, for the benefit of itself and all other stockholders similarly situated who may come in and be made parties hereto, and share the expense and costs of this proceeding."

The details of the wrongful scheme are stated, but it is unnecessary to repeat them. It is alleged that the mill properly operated could reduce and in time pay its indebtedness, and that in that way the property could be saved to the stockholders. In brief, the purpose of the bill was to prevent the sale of the Millen Cotton Mills, on the ground that the suit brought by the William Firth Company and others was a fraudulent scheme between the complainants in that suit and the majority stockholders of the defendant corporation, and to provide for the payment of its debts by operating the mills. The prayer was for the appointment of a receiver or receivers, and that the court "may, through its receiver, hold said property until said property can be turned over to the stockholders who are not participants or guilty of any of the fraudulent acts or wrongs hereinbefore complained of."

This bill was presented to a judge of the court below on January 21, 1902, and an order was made appointing Tracy I. Hickman and John R. L. Smith temporary receivers to take charge of all the property and assets of the Millen Cotton Mills, and its books and papers, "and continue the possession now exercised by John R. L. Smith as temporary receiver." It was further ordered that the receivers investigate the condition of the property, and report to the court the practicability of operating and paying off the debts, in accordance with the "declared purpose of the bill." The defendants named in the several bills filed their several answers. On April 12, 1902, it was ordered

that "the said several cases [referring to the three chancery suits] be consolidated and tried as one cause," and that the temporary receivers be made permanent receivers. On June 7, 1902, an order was made in the cases directing the sale of the property of the Millen Cotton Mills. It provided that the successful bidder should deposit a certified check for $10,000 on account of his bid. The property was purchased for $50,000 by Joseph R. Lamar, trustee for the lien creditors. He made the deposit of $10,000 required by the order. The sale having been reported to the circuit court, the Southern Cotton Mills & Commission Company, represented by Hall & Wimberly and Erwin & Callaway, filed objections to the confirmation of the sale. These objections were sustained, the circuit court refusing to confirm the sale. The circuit court directed the commissioners, who were theretofore ordered to sell the property, to advertise for bids, and to endeavor to procure a bid for it at "an upset price" of $90,000. Under this order Joseph R. Lamar, trustee for the lienholders, increased his bid to $90,000, and at that price the sale was confirmed. Lamar, as trustee, having deposited $10,000 in court under the order, paid the remainder of the purchase money ($80,000) by crediting the amount on established liens against the property. After paying costs and other allowances out of the money deposited in court, and applying the balance of the purchase money to the lien creditors, there was due to them and unpaid $7,888.76. Under the order of the circuit court, $2,000 of the $10,000 deposited in court was retained in the hands of the commissioners to await the decision of the court on the solicitors' petition for fees.

The single question to be decided is whether or not the solicitor's fees due to Hall & Wimberly and Erwin & Callaway for services which we have described are a proper charge on the trust fund in court.

We wish to say in the beginning that we do not doubt the distinguished attorneys who have made the claim on the trust fund for fees have done so in good faith and under full conviction of the rightfulness of their claim, that the record shows they have rendered services for which they should be compensated, that the amount claimed by them and allowed by the circuit court is not unreasonable, and that we would not hesitate to allow the sum to be charged on the trust fund, if, under established equitable principles, it were a proper charge on that fund.

It may be stated as a general and unquestioned principle that each client should compensate his own solicitor, and that an attorney cannot make another person his debtor by voluntarily rendering services in his behalf without his express or implied assent. The cases which allow compensation to attorneys out of a trust fund are not in conflict with this principle, but are founded upon it, for they depend on the principle of agency; the actual plaintiff being the representative of the beneficiary of the trust. The application of this principle is of everyday occurrence in the courts. Executors, administrators, guardians, receivers, and other trustees, being the agents and legal representatives of the beneficiary or beneficiaries of the trust, are allowed credit for necessary and reasonable charges, including attorney's

fees, incurred by them in the protection and administration of the trust fund. The same principle is extended to other cases. One jointly interested with others in trust property, who in good faith maintains for himself, and others interested like him, the necessary litigation to save it from waste and to secure its proper application, is entitled to the reimbursement of his costs, as between solicitor and client, out of the fund to be administered. Trustees v. Greenough, 105 U. S. 527, 26 L. Ed. 1157; Central Railroad v. Pettus, 113 U. S. 116, 5 Sup. Ct. 387, 28 L. Ed. 915. In such cases the counsel who is employed by certain creditors or other beneficiaries of the trust, and who sues for them and others situated as they are, in a sense represents all of them; those suing having assumed to retain him for all. There is usually an express promise by the parties plaintiff to pay their solicitor, and, if not, a promise to pay him is implied by the performance and the acceptance of the solicitor's services. It seems equally clear that the creditors or other beneficiaries of the trust who come into court and accept a part of the proceeds of the property recovered or preserved by the litigation are bound by an implied promise to pay out of the proceeds of the trust fund received by them their proportionate part of the reasonable compensation allowed the solicitor who successfully conducted the litigation. The underlying principle upon which those who do not appear as plaintiffs are charged with a proportionate part of the solicitor's fees, or upon which such fees are charged on the fund, is that the plaintiffs represented the others for whom they also sued (Farmers', etc., Trust Co. v. Green, 79 Fed. 222, 24 C. C. A. 506; Hand v. Railroad, 21 S. C. 162); and this agency, and the ratification of the course taken, are usually shown by the appearance in court of the other creditors or beneficiaries, and their claiming to share in the results of the suit.

The solicitors whose claim for fees is before the court represented minority stockholders in the defendant corporation. Before they filed the bill for the minority stockholders, lien creditors of the corporation had brought suit to enforce their liens and to have a receiver appointed, and the court's receiver already had possession of the corporation's property. The minority stockholders did not, therefore, by their bill, bring the property into court. The purpose of the bill was antagonistic to the lien creditors, and to the majority stockholders controlling the Millen Cotton Mills. In fact, both were charged with a fraudulent scheme to sacrifice the property. This charge was not sustained, and we are justified in saying that it was unfounded. The property was sold pursuant to the prayer of the creditors' bills, and contrary to the prayer of the minority stockholder's bill. These facts seem conclusive against petitioners' claim on the trust fund. Hobbs v. McLean, 117 U. S. 567, 6 Sup. Ct. 870, 29 L. Ed. 940. It is true that, by the opposition of the minority stockholder to the confirmation of the first sale, the bid was increased from $50,000 to $90,000. But at both sales it was purchased by the trustee for the lienholders, and at both sales it failed to bring enough to pay the lien debts. It made no difference whether the property sold for $50,000 or $90,000. It was paid for in either case by a credit on debts which were worthless, so far as any balance was

concerned which was left unpaid after the application of the amount of the bid as a credit. The interposition of the minority stockholder was of no benefit to the lien creditors. On the contrary, it was to their detriment more than $2,000, the amount of the increased costs of the litigation. The appellants should not be required to pay out of the fund for services which diminished the fund. Buckwalter v. Whipple, 115 Ga. 484, 41 S. E. 1010. But if the interposition of the minority stockholder had been of incidental advantage to the lien creditors, it would not make its attorney's fees a proper charge upon the trust fund. Farmers', etc., Trust Co. v. Green, supra. There is no implied promise to pay an attorney whom one has not employed, because of incidental benefits derived from his services. Grimball v. Cruse, 70 Ala. 534, 544; Roselius v. Delechaise, 5 La. Ann. 481.

But it is urged that after the cases were "consolidated" the solicitors for the minority stockholders aided in obtaining the orders to sell the property and in the administration of the fund. We think that is immaterial. In Hubbard v. Camperdown Mills, 25 S. C. 496, 1 S. E. 5, the defendant corporation's property was sold pursuant to the prayer of the minority stockholders' bill; but, the property being insufficient to pay the debts, the court held that the fees of the solicitors for the minority stockholders were not a proper charge on the trust fund. In the case at bar the minority stockholders failed to sustain their bill. And it was a bill opposing the sale of the property and charging fraud. It imposed on the lien creditors the expense of answering it. We are unable to see that it recovered, increased, or protected the trust fund, or that it benefited the lien creditors of the corporation, or that the minority stockholder, the complainant in the bill, for whom the petitioners appeared as solicitors, represented in any way the interest of the lien creditors.

The court is of opinion that the claim of the petitioners, the appellees, is not within the principle which authorizes compensation for their services to be made a charge upon the trust fund in court. The decree of the circuit court, therefore, must be reversed, and the cause remanded, with instructions to dismiss the petition and proceed in conformity to the opinion of this court.

THORNTON et ux. v. MAYOR, ETC., OF CITY OF NATCHEZ.

(Circuit Court of Appeals, Fifth Circuit. April 5, 1904.)

No. 1,253.

1. DEEDS—USE OF PROPERTY—CONDITION SUBSEQUENT.

A deed, for a consideration alleged to have been nominal, conveying land to a city to be used as a burying ground, and forever kept, used, and inclosed in a decent and substantial manner, and for no other use or purpose whatsoever, in which the grantors made no record of any intention on their part that the land should ever under any circumstances revert to them or their representatives, should not be construed as requiring the land to be maintained as a public burying place literally in perpetuity, without regard to the welfare of subsequent generations; and hence such provision was not a condition subsequent, the breach of which would terminate the title of the grantees.

2. SAME—BILL—DEMURRER.

Where the members of a firm conveyed land to a city, to be used as a public burying ground forever, a bill by the legal representatives of the members of such firm to recover the land on the ground that its use had been illegally changed, which failed to show that plaintiffs were entitled to the reversion, or that they had any interest or right in the further carrying out of the purpose of the grant, was demurrable.

3. SAME—LACHES.

Lands sued for had been conveyed by plaintiffs' decedents in 1817 to a city for cemetery purposes, and for no other use whatsoever. In 1890 the city took up the remains of the bodies previously buried therein, and deposited them in a mound in a remote portion of the land, marked with a plain stone, and thereafter improved and used the land conveyed as a public park. *Held*, that since the personal representatives of the grantees, by the exercise of reasonable diligence, could have had knowledge of such change of use shortly after it occurred, and before 1901, when suit was brought to recover the land, they were barred by laches from maintaining the same.

Appeal from the Circuit Court of the United States for the Southern District of Mississippi.

On July 25, 1902, M. E. Thornton and his wife, averring themselves to be the sole surviving legal representatives of William Rutherford and of William Rutherford and John P. McNeel, who in the year 1817 composed the commercial firm of William Rutherford & Co., filed their bill in the lower court, in which, inter alia, they alleged that Rutherford and McNeel in the year 1817, for the nominal consideration of $500, conveyed to the president and selectmen of the city of Natchez, and to their successors, forever, certain lots in the city of Natchez, which were then the property of said commercial firm, to have and to hold the same "for the uses and purposes of a burying place and so to be forever kept, used and enclosed in a decent and substantial manner and to and for no other use or purpose whatsoever"; that the land continued to be used for the purposes to which it was dedicated by the grantors until about the year 1890, when the board of mayor and aldermen of the city of Natchez, without the knowledge or consent of complainants, who then resided in North Carolina, and without notice to them, contriving and intending to defeat the said trust, and to convert the land to another and a different purpose, but at the same time to deceive the complainants, and to preserve the semblance of the trust, while defeating the intent of the grantors without an actual, apparent repudiation of the trust, caused the remains of the deceased persons interred in said land, with the tombstones, coffins, and all other evidences of the use of the land as a burying ground, to be dug up and removed, and the land to be graded down and leveled and converted into a public park, for the purposes of diversion and recreation, for the use of the city of Natchez, and ceased altogether to use the land for the purpose of a burying ground, but that, for the purpose of deceiving complainants, or others who might have notified them, said city authorities caused an excavation to be dug in a remote part of the land, and the remains of some of the deceased persons formerly buried in said land to be placed therein, and a small mound of earth to be placed thereon, with a plain slab of stone, and then contended and still contend that in so doing they are executing the trust in conformity to the terms of the grant; that, by reason of the fraud so attempted to be practiced on them, complainants had no notice of the breach of trust and of the fact that the lands had ceased to be used for the purpose of a burying place, and had been converted to another and entirely different use, until the year 1901; that by the misuser and nonuser of the land, which is of the value of $10,000, the same has reverted to the complainants. The prayer is that the land be decreed to have reverted to the complainants, and that the defendants pay rents and revenues at the rate of $1,000 per annum from January 1, 1890, or, in the alternative, that defendants be perpetually enjoined from further user of the land for any other different purpose than that of a burying place. A demurrer was interposed on a number of grounds, among which are the following: Want of equity

in the bill. Want of jurisdiction in the court, because the suit is an action of ejectment; and, if it be a bill to remove clouds from title, it cannot be maintained, because complainants are not, and the defendants are, in possession. That complainants do not show that they have acquired or hold the interest of McNeel in the land. That by the terms of the deed, as shown in the bill, the fee passed absolutely and unconditionally to the city of Natchez, and that no provision was made in the deed by which the grantors, their heirs or legal representatives, could be reinvested with the title. That complainants are barred by their laches. That the suit is barred by the 10-year statute of limitations. That the bill does not show that complainants' cause of action was fraudulently concealed. That the bill shows that defendants exercised such public ownership over the land as to render it impossible that complainants, had they exercised reasonable diligence, would not have known of their rights more than 10 years before the filing of this suit. That complainants' alleged want of knowledge will not excuse them from the bar of the statute of limitations. The demurrer was sustained, the bill was dismissed, and the complainanfs have appealed.

Wade R. Young, for appellants.
McWillie & Thompson, for appellees.

Before McCORMICK and SHELBY, Circuit Judges, and PARLANGE, District Judge.

PARLANGE, District Judge. We are satisfied, after full consideration of the matter, that the grant was not made on condition subsequent. Such a condition is not favored in law. 4 Kent's Com. marg. p. 129. Even when a provision is stated in terms to be a condition, a court will determine for itself, not from the statement alone, but from the whole deed or grant, whether a condition was really intended. In this case no condition was stated in terms. A consideration of $500 was paid the grantors, and the grant was not made purely and exclusively from motives of charity or benevolence. No provision whatever was made for re-entry by or reversion to the grantors or their heirs or legal repesentatives. The land was maintained as a public burying place for nearly three-quarters of a century. There is nothing averred in the bill from which we could gather that the grantors intended that the land should be maintained as a public burying place literally in perpetuity, and without regard to the necessities and welfare of all the generations which were to follow. In the absence of any declaration of such an intention, and of anything in the grant from which it could be reasonably inferred, we are to conclude that the grantors meant that the land should be used for the purposes for which they desired it to be used, as long as it was right and proper to do so, in view of the nature of the grant and of its purposes.

But, in any event, it is beyond question that the grantors made no record of any intention on their part, either expressed or intimated, that the land should ever under any circumstances revert to them or to their representatives. The appellants have not stated a case entitling them to the reversion. They have not even shown that they have an interest or a right in the further carrying out of the purposes of the grant.

The matter in hand was carefully considered in the able opinion in Rawson v. Inhabitants of School District No. 5 in Uxbridge, 89 Mass. 125, 83 Am. Dec. 670. Also see Greene v. O'Connor (R. I.) 25 Atl.

692, 19 L. R. A. 262 (see notes); Sohier v. Trinity Church, 109 Mass. 1–19; Episcopal City Mission v. Appleton et al., 117 Mass. 326; Barker et al. v. Barrows, 138 Mass. 578; Stanley v. Colt, 5 Wall. 119, 18 L. Ed. 502.

We are furthermore fully satisfied, after consideration of the statutes of limitations of Mississippi, that the appellants have by their laches debarred themselves from prosecuting this action. The conversion of a public burying ground into a public park, and the other acts which the appellants averred in support of the fraud and concealment alleged by them, could not but have been open, public, and notorious. Concealment of those acts would have been impossible. The bill, it is true, avers that the appellants had neither notice nor knowledge. But such an allegation, in a matter like the one in hand, is a mere conclusion of the pleader, not binding on demurrer, unless facts are stated from which the court can determine for itself whether the conclusion was correctly drawn. See Wood v. Carpenter, 101 U. S. 135–140, 25 L. Ed. 807.

The acts complained of took place in the year 1890. Either the appellants knew of those acts prior to the year 1901, or else they could have had the knowledge by exercising reasonable diligence. The appellants, having allowed such a lapse of time to occur before bringing their action, cannot be heard to complain at this late hour. In view of the statutes of limitations of Mississippi, we do not understand that the appellants' counsel contends that the appellants were entitled to actual notice. But see Elder v. McClaskey et al., 70 Fed. 529, 17 C. C. A. 251.

There are other matters averred in the demurrer which have much force. But we deem it sufficient to rest our affirmance of the decree appealed from on the two grounds stated.

The decree of the lower court is affirmed.

BRISTOL v. UNITED STATES.

(Circuit Court of Appeals, Seventh Circuit. April 12, 1904.)

1. PAUPERS—PROSECUTION OF SUITS—COMMON LAW.
   St. 11 Hen. VII, c. 12, providing that every poor person having a cause of action against another shall have writs, according to the nature of his cause, without payment of fees, and assignment of counsel by the court, who shall act for him without reward, had reference only to a plaintiff prosecuting a civil action, and did not apply to criminal appeals.

2. SAME—FEDERAL STATUTES—CRIMINAL CASES—WRITS OF ERROR.
   Act Cong. July 20, 1892, 27 Stat. 252, c. 209 [U. S. Comp. St. 1901, p. 706], providing that any citizen entitled to commence any action or suit in any court of the United States may commence and prosecute to conclusion any such suit or action without being required to prepay fees or costs, or give security therefor, before or after bringing suit or action, does not entitle a defendant in a criminal case to prosecute a writ of error out of the United States Circuit Court of Appeals in forma pauperis, such writ constituting a continuation of the original litigation, and not a commencement of a new action.

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

J. J. McClellan, for plaintiff in error.
S. H. Bethea, U. S. Dist. Atty.

Before JENKINS, GROSSCUP, and BAKER, Circuit Judges.

JENKINS, Circuit Judge. The plaintiff in error, having been convicted in the court below upon an indictment charging the use of the post-office department for a fraudulent purpose, and thereupon sentenced to a term of imprisonment, has sued out a writ of error from this court, and now moves the court, upon a conceded showing of poverty, for leave to prosecute such writ of error in forma pauperis. At the common law no plaintiff has the right to sue in forma pauperis. Any such right must rest upon statute. By 11 Hen. VII, c. 12, every poor person having a cause of action against another could have writs according to the nature of his cause without payment of fees, and assignment of counsel by the court, who should act for him without reward. This statute came to us as part of the common-law existing at the time of the Revolution. It is followed as well by the federal as the state courts, unless the matter is otherwise regulated by the Congress of the United States or by the Legislature of the respective states. It is clear that this statute had reference only to a plaintiff prosecuting a cause of action. It comprehended only civil actions, there being at the time of its adoption, and for five centuries thereafter, no review in England of a criminal action. If, then, this application can be sustained, it must be by force of some statute of the United States. Section 691, Rev. St., provides for review, by appeal or writ of error, of civil actions. This provision was adopted in 1789. 1 Stat. 84, c. 20, § 22. No review of a criminal cause, except upon a certificate of division of opinion among the judges of the Circuit Court (2 Stat. 159, Rev. St. §§ 651, 697), was allowed until the act of February 6, 1889, 25 Stat. 656 [U. S. Comp. St. 1901, p. 569], and then only in cases of conviction of a capital crime. United States v. Sanges, 144 U. S. 310, 321, 12 Sup. Ct. 609, 36 L. Ed. 445. The first act allowing generally a review in criminal cases is that of March 3, 1891, 26 Stat. 826, c. 517 [U. S. Comp. St. 1901, p. 549]. Prior to that time provision had been made in aid of poor persons indicted for an offense. The court was authorized to issue subpœnas for his witnesses, who were to be paid by the government (Act 24th Sept. 1789, 1 Stat. 91, Rev. St. U. S. § 878 [U. S. Comp. St. 1901, p. 668]), and the court, by virtue of its inherent power, could appoint counsel to defend the poor prisoner. The act of July 20, 1892, 27 Stat. 252, c. 209 [U. S. Comp. St. 1901, p. 706], provides that any citizen "entitled to commence any action or suit in any court of the United States, may commence and prosecute to conclusion any such suit or action without being required to prepay fees or costs or give security therefor before or after bringing suit or action," and upon filing a statement under oath that because of his poverty he is unable so to do, and his belief that he is entitled to the redress sought, and setting forth briefly the nature of his alleged cause of action. There exists a divergence of opinion in the federal courts whether this act embraces an appeal or writ of error in civil causes. First Circuit: Volk v. B. F. Sturdevant, 99

Fed. 532, 39 C. C. A. 646; Sixth Circuit, Reed v. Pennsylvania Company, 111 Fed. 714, 49 C. C. A. 572, upholding that contention, and The Presto, 93 Fed. 532, 35 C. C. A. 534, denying it. The first two cases hold that proceedings on appeal or writ of error are within the spirit of the statute, and are not excluded by the letter, the act authorizing a poor person to "commence and prosecute to conclusion his cause of action." The last case limits the act to the proceeding in the court of original jurisdiction. All of the cases to which we have been referred or which we have been able to find which construe the act are civil causes, where the plaintiff makes the application claiming to have a meritorious cause of action to enforce. We have searched in vain for any federal decision construing this act with reference to its application to criminal cases. It is clearly the design to permit a poor person who is "entitled to commence any action or suit" to "commence and prosecute to conclusion" upon a showing of poverty, and his belief that he is entitled to the redress sought, and setting forth the nature of his alleged cause of action. Can such an act be applied to a defendant in a criminal prosecution? This act does not give him a right to defend as a poor person in the court of original jurisdiction. He obtains that right from prior law. The statute, then, has no reference to criminal cases in the court of original jurisdiction, for the action is not commenced or prosecuted by the defendant, and does not involve a cause of action existing in him. If the statute be applicable, it can only be applied upon the suing out of a writ of error to review a conviction. Is such a writ of error the "commencement of an action or suit" within the meaning of the act, or is it not rather the continuation of the old suit in which he is defendant, and to obtain a new trial therein? The office of a writ of error, said Chief Justice Marshall, is simply to bring the record into court, and to submit the judgment of the inferior tribunal to re-examination. A writ of error has been called an original writ, because it issued out of a reviewing court and was directed to the trial court; but it acts upon the record rather than upon the parties, removing the record into the supervising tribunal. The Supreme Court declares it to be "rather a continuation of the original litigation than the commencement of a new action." Nations v. Johnson, 24 How. 195, 205, 16 L. Ed. 628; In re Chetwood, 165 U. S. 443, 461, 17 Sup. Ct. 385, 41 L. Ed. 782. We do not think that it can properly be said that a writ of error is a suit or action within the statute so far as respects a writ of error in a criminal case. Were it not for the words "prosecute to conclusion," we doubt if any court would hold that the act applied to an appeal or writ of error in a civil cause. The applicant by the statute must declare the nature of his cause of action. Surely an erroneous ruling by the trial court cannot be held to furnish a "cause of action," as that phrase is commonly understood. The statute by that term, in our judgment, refers to a legal demand by one against another, not to the rulings of a trial court. Under a somewhat similar statute of the state of New York, its Supreme Court, speaking through Judge Cowen, held that the provisions of the statute do not extend to writs of error. Moore v. Cooley, 2 Hill, 412. The law is generous, giving to a poor defendant in a criminal cause full right of defense, producing in court his witnesses, giv-

ing him the services of experienced counsel, and that without expense to him. It provides for him a full and fair trial before an impartial court and jury. If the Congress designed to give him the opportunity of a review of that trial at the further expense of the government, it should have expressed such design in unambiguous terms.

The motion is denied.

UNITED STATES v. DOWNING et al.

(Circuit Court of Appeals, Second Circuit. February 25, 1904.)

No. 70.

1. CUSTOMS DUTIES—CLASSIFICATION—CARBONS FOR ELECTRIC LIGHTING—EARTHY OR MINERAL SUBSTANCES.

Sticks of carbon intended and adapted to be used in electric lighting, but requiring to be cut into shorter lengths and to have the ends shaped before they are suited for such use, are dutiable under the provision in paragraph 97, Tariff Act July 24, 1897, c. 11, Schedule A, 30 Stat. 156 [U. S. Comp. St. 1901, p. 1633], for "articles and wares composed wholly or in chief value of * * * carbon, not specially provided for, * * * if not decorated," and not under paragraph 98 of said act, 30 Stat. 156 [U. S. Comp. St. 1901, p. 1633], as "carbons for electric lighting."

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

This is an appeal by the United States from a reversal (120 Fed. 1014) of a decision of the Board of General Appraisers (G. A. 5,020, T. D. 23,353), which affirmed the assessment of duty by the Collector of Customs at the port of New York on merchandise imported by R. F. Downing & Co.

D. Frank Lloyd, for appellant.

Albert Comstock, for appellees.

Before WALLACE, LACOMBE, and TOWNSEND, Circuit Judges

WALLACE, Circuit Judge. The question in this case is whether the importations in controversy were dutiable as "carbons for electric lights," under Tariff Act July 24, 1897, c. 11, § 1, Schedule A, par. 98, 30 Stat. 156 [U. S. Comp. St. 1901, p. 1633], or as "carbon, not specially provided for" under paragraph 97 of that act. They were sticks of carbon intended and adapted to be used in electric lighting, but not yet completed for such use when imported. They were of different lengths, but required to be cut into shorter lengths, and to have the ends pointed or ground, before they could be adapted to use in electric lighting. Paragraph 97 reads as follows:

"97. Articles or wares composed wholly or in chief value of earthy or mineral substances or carbon not actually provided for in this act, if not decorated in any manner, thirty-five per centum ad valorem; if decorated, forty-five per centum ad valorem."

The Board of General Appraisers were of opinion that the importations were dutiable under paragraph 98 by similitude, because they were not enumerated in paragraph 97. The question was de-

cided by this court in United States v. Reisinger, 94 Fed. 1002, 36 C. C. A. 626, a case where the importations were precisely like those now in controversy, and the question arose under the same two paragraphs of the tariff act. We held that, because it was necessary to bestow further labor on them in order to fit them for use in electric lighting, they were not included in paragraph 98. We said:

"Inasmuch as they are not specifically provided for in paragraph 98, they come within the general phraseology of paragraph 97, being articles or wares composed wholly of carbon. This paragraph, it should be noted, is changed from a similar one in Act Aug. 27, 1894, c. 349, § 1, par. 86, 28 Stat. 513, Schedule B, which was recently considered by us in United States v. Reisinger, 91 Fed. 112, 33 C. C. A. 395, by the insertion of the word 'carbon.'"

In the Reisinger Case, previously decided, the court considered the question whether carbon points for arc lights were dutiable under paragraph 86 of the act of 1894, which reads as follows:

"All articles composed of earthen or mineral substances, including lava tips for burners, not specially provided for in this act, if decorated in any manner, forty per centum ad valorem; if not decorated thirty per centum ad valorem."

In its opinion the court held that carbon points were not enumerated in this section, because the broad and general phrase "articles composed of earthen or mineral substances" should be restricted to articles susceptible of decoration, or, more accurately expressed, to articles of a class which sometimes are decorated and sometimes are not. The court deemed this construction the correct one, because of the collocation of paragraph 86 with other paragraphs of the schedule, and because otherwise Congress would not have deemed it necessary to provide specially for "lava tips," as they would be included in the general phrase. The majority of the Board of General Appraisers in the present case seem to have been misled by this decision, and to have overlooked the distinction between the old provision and the new, created by inserting "or carbon," and to which we adverted in the later Reisinger Case. The earlier decision was, in effect, that, reading paragraph 97 as though the words "or carbon" had been omitted, it would not cover the importations in controversy. The later decision was that, reading it as it stands, with the words "or carbon" inserted, it covers the importations because they are articles made wholly of carbon, not decorated. There is no inconsistency in the two decisions, as is clearly shown in the opinion of Mr. Appraiser Somerville, dissenting from the decision of his colleagues.

The decision of the court below reversing the decision of the Board of General Appraisers is affirmed.

THOMAS, Collector of Customs, v. WANAMAKER.

(Circuit Court of Appeals, Third Circuit. February 17, 1904.)

No. 33.

1. CUSTOMS DUTIES—CLASSIFICATION—DRESS GOODS—EMBROIDERED WOOLEN ARTICLES—WEARING APPAREL.

Held, that so-called wool "dress robes" or "dress patterns," consisting of women's dress goods of wool, embroidered with silk, imported in single patterns in separate lengths and pieces, each pattern comprising the material for the body and trimming of a dress, are "dress goods," and are dutiable under the provision in paragraph 369, Tariff Act July 24, 1897, c. 11, § 1, Schedule K, 30 Stat. 184 [U. S. Comp. St. 1901, p. 1667], for "women's * * * dress goods * * * composed wholly or in part of wool," which is limited by the expression "not specially provided for in this act," and not under paragraph 371 of said act, c. 11, § 1, Schedule K, 30 Stat. 185 [U. S. Comp. St. 1901, p. 1667], which provides, without such limitation, for "articles embroidered, * * * made of wool," nor under paragraph 370 of said act, c. 11, § 1, Schedule K, 30 Stat. 184 [U. S. Comp. St. 1901, p. 1667], relating to "articles of wearing apparel of every description, * * * manufactured * * * in part, * * * composed wholly or in part of wool."

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

For opinion below, see 123 Fed. 193.

This appeal was brought by C. Wesley Thomas, Collector of Customs at the port of Philadelphia, from an affirmance (123 Fed. 193), by the Circuit Court of two decisions of the Board of General Appraisers covering importations by John Wanamaker, and reversing the assessment of duty.

Following is one of the opinions filed by the board, which fully covers the issues in the case:

De Vries, General Appraiser. This merchandise consists of wool robes or dress patterns. It was assessed for duty at the rate of 50 cents per pound and 60 per cent. ad valorem, under the provisions of paragraph 371, Tariff Act July 24, 1897, c. 11, § 1, Schedule K, 30 Stat. 185 [U. S. Comp. St. 1901, p. 1667], as "embroideries" or "articles embroidered by hand or machinery, * * * made of wool, or of which wool is a component material." The protest claims as follows: "We claim that said goods should have been assessed at 44 cents per pound and 55 per cent. ad valorem under paragraph 368, 369, or 366, 30 Stat. pp. 184, 185 (U. S. Comp. St. 1901, pp. 1666, 1667); or at 11 cents per square yard and 55 per cent. ad valorem under paragraph 369; or that the appraiser should have segregated the values of the plain dress goods and the embroidered pieces, and classified the plain pieces of the dress goods at 44 cents per pound and 55 per cent., or at 11 cents per square yard and 55 per cent. ad valorem, under the provisions of above paragraphs; and should have classified the embroidered pieces at the rate of 50 cents per pound and 60 per cent. ad valorem under paragraph 371, or at 60 per cent. ad valorem under paragraphs 390 and 339, 30 Stat. pp. 187, 181 (U. S. Comp. St. 1901, pp. 1670, 1662), or 44 cents per pound and 55 per cent. ad valorem under paragraphs 368, 369, or 366." The protest was submitted without the introduction of any evidence in support thereof, and no appearance was made in behalf of the importers. The return of the collector recites, among other things: "I beg to state that the merchandise in question consists of women's dress goods in single patterns, each pattern comprising material for the body of the dress and material for trimming the same, in separate lengths or pieces. All of said material, both for the foundation or trimming, is embroidered in silk; and the claim that only a portion of the material is embroidered, and should

be so assessed, is without foundation." In default of contradictory evidence the presumption of correctness attending the return of the collector prevails. We assume for the purpose of decision, therefore, that that return is true. The important fact which it introduces into this record as true is that the whole of the merchandise covered by this protest was embroidered, and that with silk. In the case of In re Crowley, 55 Fed. 283, 5 C. C. A. 109, merchandise exactly similar to this was the subject of decision. The paragraph interpreted by that decision was 398 of the tariff act of 1890 (Act Oct. 1, 1890, c. 1244, § 1, Schedule K, 26 Stat. 597). The gist of the decision was that woolen dress patterns embroidered with silk or silk and metal are not dutiable as woolen "embroideries," but were dutiable as woolen "dress goods," under paragraph 395 of said act (26 Stat. 597). Paragraph 371 of the tariff act of 1897 (Act July 24, 1897, c. 11, § 1, Schedule K, 30 Stat. 185 [U. S. Comp. St. 1901, p. 1667]), is the one corresponding to paragraph 398 of the tariff act of 1890. The former was enacted since the decision cited was rendered, and differs in important particulars from said paragraph 398. Said paragraph 398, so far as pertinent, reads: "398. On webbings * * * and embroideries * * * made of wool * * * or of which wool is the component material, the duty shall be * * *." Said paragraph 371 reads as follows: "371. Webbings, * * * embroideries and articles embroidered by hand or machinery, * * * made of wool or of which wool is a component material, * * * fifty cents per pound and sixty per centum ad valorem." It will be noted that Congress, in the act of 1897, has added the words, "and articles embroidered by hand or machine." While it may be true that under the text of paragraph 398, the subject of said decision, there may be no escape from the conclusion that only woolen embroideries, or embroideries made in part of wool, are meant, and while it may be equally true that that meaning attaches to the word "embroideries" as used in paragraph 371, the addition of the words, "and articles embroidered by hand or machinery," therein, presents the question whether or not this language is intended to embrace a larger class of merchandise, to wit, woolen articles embroidered by whatsoever material the embroidery may be composed of, as well as woolen embroideries. Whatever our conclusion might be on that point, we think this case is concluded by the fact that the protestant invokes the application of paragraph 369 of the act of July 24, 1897, c. 11, § 1, Schedule K, 30 Stat. 184 [U. S. Comp. St. 1901, p. 1667], as covering the merchandise in question. The language of that paragraph, in so far as pertinent, is: "369. On women's and children's dress goods * * * and goods of similar description or character * * * composed wholly or in part of wool, and not specially provided for in this act, the duty shall be," etc., "according to weight, value," etc., thereby asserting the claim that the merchandise is properly described as "women's and children's dress goods" and dutiable as such under said paragraph. In G. A. 4890 (T. D. 22,893) a precisely similar question arose. The issue there was whether or not certain articles of wearing apparel were dutiable under said paragraph 371 as "articles embroidered by hand or machinery," or paragraph 370 of the tariff act of 1897, as "articles of wearing apparel of every description." This board held that the said provisions of said paragraph 370 were more specific than the said provisions of paragraph 371. In conformity with the board's decision in that case, we hold that the provisions of paragraph 369, relating to "women's and children's dress goods," which are descriptive of the merchandise the subject of this protest, are more specific than the provisions of paragraph 371 assessing duty upon "articles embroidered by hand or machinery." The conjoint provisions of the proviso to paragraph 339 and paragraph 390 of said act are a part of protestant's claim. These provisions, however, when read together, prescribe merely a minimum rate of duty upon such merchandise, which is much less in this case than that prescribed by paragraph 369, found applicable. The protest, therefore, claiming the merchandise properly dutiable under paragraph 369, according to the value and the weight thereof, is sustained. In all other respects the protest is overruled, and the decision of the collector affirmed. Reliquidation will follow.

In support of the collector's appeal from the circuit court it was argued (1) that the merchandise is not known commercially as "dress

goods," but as "dress robes," and is therefore not included within the enumeration of the former in said paragraph 369; (2) that it is dutiable under said paragraph 370 as "wearing apparel * * * made up * * * in part"; and (3) that, conceding the merchandise to be dress goods, within the meaning of paragraph 369, it is specially provided for in said paragraph 371 as "articles embroidered," and is thereby removed from the former paragraph, which contains the qualifying expression "not specially provided for," and which in this respect differs from paragraph 371, which contains no such limitation.

James B. Holland and Wm. M. Stewart, for appellant.

Frank P. Prichard and Thomas S. Gates, for appellee.

Before ACHESON, DALLAS, and GRAY, Circuit Judges.

DALLAS, Circuit Judge. Nothing need be added to the opinion of the Board of Appraisers. We think it adequately supports the decision made by the board, and the decree of the Circuit Court sustaining that decision is therefore affirmed.

RUTLEDGE v. NEW ORLEANS & N. E. R. CO.

(Circuit Court of Appeals, Fifth Circuit. April 5, 1904.)

No. 1,317.

1. CARRIERS—INJURIES TO PASSENGERS—TIME TO ALIGHT.
   Where a train stopped for a passenger to alight, and when he was in the act of doing so, and without allowing a reasonable time for that purpose, it was suddenly started with a jerk, whereby he was thrown from the car and injured, he was entitled to recover therefor.

2. SAME—CONTRIBUTORY NEGLIGENCE—EVIDENCE.
   In an action for injuries to a passenger while attempting to alight, there being conflict in the evidence on the issue as to his alleged contributory negligence in stepping off the train while it was moving, it presents a question for the jury.

   Pardee, Circuit Judge, dissenting.

In Error to the Circuit Court of the United States for the Southern District of Mississippi.

This action was brought in the state court by William Rutledge, a citizen of Mississippi, against the New Orleans & Northeastern Railroad Company, a Louisiana corporation, and was, on petition of the defendant company, removed to the court below. Plaintiff claimed $25,000 damages, alleging that he was a passenger on one of the defendant's trains, having paid his fare from Hattiesburg, Miss., to Ellisville, Miss., and that the train was scheduled to stop at Ellisville for passengers to get off, and that it did stop, or come practically to a stop, and that plaintiff was alighting from the train, but that, while he was in the act of alighting, the train, by the negligence and carelessness of the defendant, through its servants, was suddenly jerked and moved forward, whereby the plaintiff was thrown down and under the train, and so injured as to deprive him of an arm and a leg, and cause him much suffering. Defendant pleaded "Not guilty," and, for further plea, alleged that the injuries complained of were brought about by the plaintiff's own negligence. There is no conflict in the evidence that the plaintiff was injured to the extent

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¶ 1. See Carriers, vol. 9, Cent. Dig. § 1228.

of losing his arm. When the car first stopped at the station, the plaintiff failed to get off. There is conflict in the evidence as to whether his failure to alight was caused by the press of other passengers getting into the train, and the crowd that was getting off, or whether he unnecessarily delayed alighting. The train left the station without his alighting, and the pivotal question in the case is whether he got off the train while it was moving so as to make his act dangerous to him, or whether the cars were stopped for the purpose of letting him off, and started again with a sudden jerk at the instant that he attempted to alight. On that subject he testified as follows: "Q. And by the time you had passed through coach and got to platform, the train had started? A. Yes; the train had started, and I couldn't get off. I wouldn't get off before the train stopped. Q. You wouldn't get off till the train stopped again? A. No, sir. Then the flagman or some one told me, 'Old man, get off,' and I told him I wouldn't get off till the train stopped; and I thought it had stopped, and went to step off, and did step, but they gave a sudden jerk, and I fell. Q. Jerked what? The train? A. Yes, sir; just as I went to step off, they moved or jerked the train, and I fell down. * * * Q. And when it came to a stop again, you stepped off, and the train gave a jerk, and you fell? A. The train came to a stop, and as it came to a stop I stepped off, and, as I was stepping off, the train gave a sudden jerk, which threw me down." The plaintiff was corroborated by J. E. Sharbrough, who also got off the train at Ellisville. He testified that, "when we had gotten out and taken a few steps, the train started —pulled out—and then the train came to a little stop." Several other witnesses testified that the train did not stop a second time, and that the plaintiff got off while the train was moving. The trial court instructed the jury to return a verdict for the defendant, and it is assigned that the court erred in directing the verdict.

A. J. McLaurin, for plaintiff in error.

Harry H. Hall, John W. Fewell, and Thomas G. Fewell, for defendant in error.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

SHELBY, Circuit Judge, after stating the case as above, delivered the opinion of the court.

If the plaintiff jumped or stepped off the train while it was moving at such a rate as to make his act obviously dangerous, he was unquestionably guilty of contributory negligence, and would not be entitled to recover. 2 Wood on Railroads (Minor's Ed. 1894) § 305; Watkins v. Birmingham, etc., Company, 120 Ala. 147, 24 South. 392, 43 L. R. A. 297. But if it be true that the train was stopped to let him get off, and when he was in the act of getting off, and without being allowed a reasonable time for that purpose, it was suddenly started again with a jerk, whereby he was injured, he would be entitled to recover. Bartholomew v. New York Central Railroad Company, 102 N. Y. 716, 7 N. E. 623; Jeffersonville Railroad Company v. Hendricks Adm'r, 26 Ind. 228–233. We are of the opinion that the evidence in the record shows that the question of contributory negligence should have been submitted to the jury. Nelson v. New Orleans, etc., Railroad, 100 Fed. 731, 40 C. C. A. 673, and cases there cited; Mexican Central Railroad v. Townsend, 114 Fed. 737, 52 C. C. A. 369.

The judgment is reversed, and the cause remanded for a new trial.

PARDEE, Circuit Judge, dissents.

CHRISTENSEN ENGINEERING CO. v. WESTINGHOUSE AIR BRAKE CO.

(Circuit Court of Appeals, Second Circuit. February 13, 1904.)

No. 64.

1. CONTEMPT—PROCEEDINGS FOR VIOLATION OF INTERLOCUTORY INJUNCTION—REVIEW.

Under the rule laid down by the Supreme Court in the case of In re Debs, 158 U. S. 564, 15 Sup. Ct. 900, 39 L. Ed. 1092, an order in an equity suit adjudging the defendant guilty of contempt for violating an interlocutory injunction restraining infringement of a patent cannot be reviewed by the Circuit Court of Appeals, except upon an appeal from the final decree in the cause.

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

See 123 Fed. 632; 126 Fed. 764.

Wm. A. Jenner, for plaintiff in error.

Frederic H. Betts, for defendant in error.

Before WALLACE, TOWNSEND, and COXE, Circuit Judges.

WALLACE, Circuit Judge. This is a writ of error to review an order of the court below adjudging the defendant in an equity suit brought to restrain the infringement of a patent guilty of contempt for violating an interlocutory injunction restraining such infringement.

This court has decided that such an order cannot be re-examined here, unless upon an appeal from a final decree in the cause. If it can be reviewed in the court in which it was made at the final hearing of the cause, it is not a "final decision," within the meaning of section 6 of the act conferring jurisdiction upon this court. We reviewed such an order in Gould v. Sessions, 67 Fed. 163, 14 C. C. A. 366, but that case was decided before the decision of the Supreme Court in Re Debs, 158 U. S. 564, 573, 15 Sup. Ct. 900, 39 L. Ed. 1092. After the decision in Re Debs, the question arose again in Nassau Electric R. Co. v. Sprague Electric Co., 95 Fed. 415, 37 C. C. A. 146, and we dismissed the writ of error with this observation: "Upon the authority of the Debs Case, we are constrained to hold that the order cannot be reviewed, except upon an appeal from the final decree in the cause." In Cary Manufacturing Company v. Acme Company, 108 Fed. 873, 48 C. C. A. 118, we reviewed on writ of error an order imposing a fine upon the defendant in an equity suit for the violation of an injunction. The injunction, however, was not interlocutory, but was granted by the final decree. This circumstance was not referred to in the opinion, but explains the apparent conflict between the decision and that in Nassau Electric R. Co. v. Sprague Electric Co. The order was final, in the sense that it was a judgment in a criminal case, which was independent of and separate from the original suit, and which could not be reviewed on an appeal from the final decree in that suit. Ex parte Kearney, 7 Wheat. 38, 5 L. Ed. 391; New Orleans v. Steamship

Co., 20 Wall. 387, 392, 22 L. Ed. 354. In Butler v. Fayerweather, 91 Fed. 458, 33 C. C. A. 625, 63 U. S. App. 120, the question whether an order like the present could be reviewed by this court was not involved. The order reviewed there was made in a cause to which the plaintiff in error was not a party, and committed him for his refusal to answer certain questions propounded to him as a witness; and the decision was placed upon the ground that in such a case the aggrieved party "has no opportunity to be heard when the cause is before the court at final hearing, and as to him the proceeding is finally determined when the order is made."

Whether the present order can be re-examined at the final hearing of the cause, at which time all previous interlocutory orders are open for review, is a question which we are not now called upon to decide. Unless it can, there can, of course, be no review by an appeal from the final decree. In Worden v. Searls, 121 U. S. 14, 7 Sup. Ct. 814, 30 L. Ed. 853—an equity cause to restrain the infringement of a patent—two orders fining the defendant for contempt for the violation of a preliminary injunction were reviewed and reversed upon an appeal from the final decree. In that case, however, the court regarded the orders as only nominally proceedings in contempt.

The hardship of compelling a party to wait until he can appeal from a final decree to obtain a review, especially in cases in which the defendant has been committed and is suffering imprisonment, is manifest, and we should be glad to be able to see our way clear to depart from our former decision. That decision, however, was constrained by the decision in the Debs Case, and the Debs Case is an authority which cannot be disregarded. This was an equity cause in which some of the defendants were adjudged guilty of contempt for the violation of a preliminary injunction and sentenced to imprisonment. Having been committed to jail, they applied to the Supreme Court for a writ of error, and also for one of habeas corpus. The court denied the writ of error, and it is stated by the reporter that it was denied "upon the ground that the order of the Circuit Court was not a final judgment or decree." When the application was made, the act establishing Circuit Courts of Appeals (Act March 3, 1891, c. 517, § 5, 26 Stat. 827 [U. S. Comp. St. 1901, p. 549]) authorized the Supreme Court to review by writ of error convictions in cases of infamous crime; and if the denial had been placed upon the ground that the case was not one of a conviction for an infamous crime, and therefore was reviewable only upon a certificate of division of opinion, there would have been no conflict between the decision and that in New Orleans v. Steamship Co., 2 Wall. 387, 22 L. Ed. 354, in which the court held that contempt of court is a criminal offense, and the imposition of a fine is a judgment in a criminal case. We are not at liberty to assume that the Supreme Court overlooked its former decision in New Orleans v. Steamship Co., or that its reporter incorrectly reported the later decision.

The writ of error is dismissed.

THE DUMPER NO. 8.

(Circuit Court of Appeals, Second Circuit. January 25, 1904.)

No. 54.

1. SALVAGE—NATURE OF SERVICE BY MASTER AND CREW—EFFECT OF TOWAGE CONTRACT BY OWNER.

A contract by an owner of tugs to tow dumpers from their dumps in the city to sea and return imposed no obligation on the master and crew of one of the tugs to go to the rescue of a dumper which had been abandoned by another tug, and had drifted out to sea; and where they did so, and at considerable peril to themselves rescued her, and brought her safely to port, the service was voluntary, and they are entitled to compensation as salvors.

2. SAME—AMOUNT OF AWARD.

A salvage award of $1,175 to the master and crew of a tug, consisting of nine men, for the rescue of a dumper worth $8,000 to $10,000, which had become derelict, and drifted 25 miles out to sea in a gale, and would probably have been a total loss, *held* not excessive, where the service was entirely successful, and was performed at considerable personal risk.

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

This cause comes here upon appeal by claimants from a decree of the District Court for the Eastern District of New York awarding libelants salvage to the amount of $1,175.

Le Roy S. Gove, for appellant.

Peter S. Carter, for appellee.

Before LACOMBE, TOWNSEND, and COXE, Circuit Judges.

TOWNSEND, Circuit Judge. At about half past 10 o'clock on the morning of February 8, 1902, the master of the steam tug De Witt C. Ivins, having been notified by its owner, Michael Moran, that two of claimant's dumpers, which had been in tow of one of Moran's steam tugs, were adrift, and in danger, started to rescue them. On arriving at Sandy Hook he learned that they had last been seen about 11 o'clock. After proceeding in an east southeast course for some 25 miles he found the two dumpers abandoned by their tug, with no one on board, and drifting out to sea. The wind was blowing northwest, 50 or 60 miles an hour, there was a heavy sea on, and it was freezing weather. Dumper No. 8, the one saved by libelants, was covered with ice four inches thick all over her bow and sides. The mate of the Ivins volunteered to go aboard said dumper, provided the tug could be put along side of her. The proposed undertaking involved risk to the tug of collision with the dumper, and risk of drowning to any one attempting to board the dumper. The risk was assumed, the undertaking was successfully accomplished, involving damage to the tug to the amount of $200, and the dumper was made fast and towed back to New York, reaching there the following morning at 7 o'clock. Another tug, the Ellis, also belonging to Moran, went down to look for the dumpers, and

¶ 2. Salvage awards in federal courts, see note to The Lamington, 30 C. C. A. 280.

found the other one, but her master testified that he was unable to get any one aboard of her, on account of the danger involved in rough sea and other conditions as stated above. The Ivins was worth $30,000; the dumper some $7,000 to $10,000. The owner of the Ivins having released the dumper and her owners from any claim of said tug for salvage, the court awarded salvage to the libelants as follows: To the captain of the vessel, $300; the mate, $200; the two deck hands, $100 each; the two engineers, $100 each; the two firemen, $100 each; the steward, $75—a total of$1,175.

There is no question as to the existence of two of the elements necessary to constitute a valid salvage claim, namely, a marine peril and success. The claimants rest their appeal on the contention that these services were not voluntary, but were included under the contract between the claimants and Moran. This contract provided that Moran should tow the dumpers from the different dumps around New York and Brooklyn to sea, and return them to the different dumps, or to the foot of Court street if they needed repairs, for a stated price. Counsel for claimants insists that these libelants were not volunteers because they were only occupied in the usual service for which they were employed and paid. There is nothing in the contract to support this contention. It was a mere contract of towage. The evidence fails to show any obligation resting on Moran, or on the crews of his tugs, to undertake to save a dumper when derelict. When the Ivins reached the dumper, under conditions already shown, the sole question was one of a voluntary service on the part of the master and crew. They were under no obligation to risk their lives and the safety of the tug in an attempt to rescue the dumper. The mate volunteered, the master acquiesced, and all voluntarily participated in the danger incident to the marine peril. The rule invoked by counsel for claimants that a master and crew thus employed are not volunteers is generally confined to those aboard the ship in peril. 3 Parsons, Contracts, 317, and cases noted. There it is generally held that the services must be considered as rendered under contract, because it would be unwise to tempt the sailors to let the ship incur perils, and afterwards allow them compensation in the nature of a reward for success in averting such perils. The Clara and Clarita, 23 Wall. 1–16, 23 L. Ed. 146. Mr. Justice Clifford says:

"A salvor is defined to be a person who, without any particular relation to the ship in distress, proffers useful service, and gives it as a volunteer adventurer, without any pre-existing contract that connected him with the duty of employing himself for the preservation of the vessel." Page 16.

The test as to whether services are voluntarily rendered is whether such services are rendered by those who are under no legal obligation to render them. Hughes, Admiralty, 129.

In The Connemara, 108 U. S. 352, 2 Sup. Ct. 754, 27 L. Ed. 751, a tug was employed to tow a ship, and both came to anchor at night. A fire broke out in the night, and the officers and crew of the tug assisted in extinguishing the flames, and were awarded salvage therefor. The Supreme Court held that the contract of the towboat and of her crew was to tow the ship, and that for such other services as rescued the ship from an unforeseen and extraordinary peril the owner,

officers, and crew of the tug boat were entitled to salvage. We conclude that the services rendered were the proper subject of a salvage award.

It is further contended that the award is excessive. Whether the amount was determined upon a valuation of the dumper at $8,000 or $10,000 is immaterial. The evidence shows that the other dumper was never found; that this one was derelict, and drifting out to sea, and would probably have been a total loss except for the efforts of these salvors. We think the award was reasonable.

The decree of the District Court is affirmed, with interest and costs.

SAWYER v. ATCHISON, T. & S. F. R. CO. et al.

(Circuit Court of Appeals, Second Circuit. February 25, 1904.)

No. 29.

1. RAILROADS — PROPERTY — TRANSFER—BONDHOLDERS — EQUITY — REMEDY AT LAW.

   Where the property of a railroad company was acquired by another railroad company under foreclosure proceedings which were void as against a holder of bonds guarantied by the mortgagor company, such bondholder was not entitled to sue the purchasing company in equity to apply the assets so transferred to the payment of his bonds, until he had exhausted his legal remedies against the mortgagor.

2. SAME—RECOVERY OF BONDS—ACTIONS—JOINDER.

   Where a holder of bonds guarantied by a railroad company deposited them with a trust company for specific uses, and thereafter such company wrongfully refused to deliver the bonds on demand, the owner could not join an action to recover them with a suit against another corporation, which had acquired the assets of the guarantor company under void foreclosure proceedings, to apply such assets in payment of the bonds; such company being in no way responsible for the trust company's withholding of the bonds.

3. SAME—DAMAGES—PROOF.

   Where railroad bonds were deposited for specific uses with a trust company, which afterwards wrongfully refused to return the same on demand, the fact that, because the bonds were not dealt in on the exchanges, and were obligations of a corporation which had become practically defunct, it was rendered difficult to establish their value, did not justify plaintiff in resorting to a court of equity to recover the same.

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

For opinion below, see 119 Fed. 252.

John Ford, for appellant.

Alfred Opdyke, for appellee Atchison, T. & S. F. R. Co.

A. H. Van Brunt, for appellee Central Trust Co.

Before WALLACE and COXE, Circuit Judges.

WALLACE, Circuit Judge. The material facts set forth in the very voluminous bill of complaint in this cause, and the prayers for relief, are concisely and adequately summarized in the opinion of the court below, and any recapitulation is unnecessary. The propositions

of law which control the case are so plain as to require no amplification or citation of authority.

An analysis of the bill shows that the complainant is a creditor of the Atchison, Topeka & Santa Fé Railroad Company, by reason of the guaranty by that company of the payment of 20 negotiable bonds made by the Colorado Midland Railroad Company, the guaranty being indorsed upon the bonds; that these bonds are in the possession of the Central Trust Company, having been placed there by the complainant for certain specific uses, and the trust company wrongfully retains them and refuses to return them to complainant; and that the Colorado Midland Railroad Company and the Atchison, Topeka & Sante Fé Railroad Company have denuded themselves of all their property, and the same has been acquired by the Atchison, Topeka & Santa Fé Railway Company by proceedings which, as against the complainant, were a nullity.

After recovering a judgment against the railroad company, and upon the return of his execution unsatisfied, the complainant will be in a position to pursue the property in the hands of the Atchison, Topeka & Santa Fé Railway Company, which was formerly the property of the railroad company; but it has no equitable cause of action against the railway company until these remedies have been exhausted. His cause of action is purely a legal one as against the defendants the trust company and the railroad company, and he has as yet no equitable cause of action against the defendant the railway company. His remedy against the trust company is by an action at law in trover or replevin, and his remedy against the railroad company is by an action at law upon the guaranty. No action can be maintained against the trust company and the railroad company jointly, because the latter has taken no part in the conversion of the complainant's bonds, and the former is not a party to the guaranty. The fact that it may be difficult to prove the value of his bonds or of the guaranty in an action against the trust company does not supply a reason for resorting to a court of equity to recover of the trust company. It is always difficult to establish the value of the obligations of an extensive corporation which has become practically defunct, because they are not dealt in on the exchanges; but it can be established, and not infrequently is, in actions where the question is in controversy.

The court below properly held that the demurrers of the trust company and the railway company upon the grounds of want of equity and multifariousness were well taken, and the decree is

Affirmed, with costs.

STAR BRASS WORKS v. GENERAL ELECTRIC CO.

(Circuit Court of Appeals, Sixth Circuit. April 2, 1904.)

No. 1,317.

1. APPEAL—INTERLOCUTORY DECREE GRANTING INJUNCTION—ADVANCEMENT OF CAUSE.

A decree on the merits, finding infringement of a patent, awarding a permanent injunction, and directing a reference to ascertain damages and profits, is an interlocutory decree granting an injunction, appealable under section 7 of the act creating the Circuit Courts of Appeals (Act March 3, 1891, c. 517, 26 Stat. 828), as amended by Act June 6, 1900, c. 803, 31 Stat. 660 [U. S. Comp. St. 1901, p. 550], and the appeal is entitled to precedence, as provided in said section, and to be advanced on the calendar for hearing, subject, however, to the rules of the court as to the filing of briefs, unless for reasons of exigency shown a special order is made for an earlier hearing.

On Motion to Advance Cause.

See 109 Fed. 950.

Fred L. Chappell, for appellant.

Betts, Betts, Sheffield & Betts and Joseph Wilby, for appellee.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

LURTON, Circuit Judge. This is an appeal from a decree upon the merits, finding infringement, awarding a permanent injunction, and directing a reference to ascertain damages and profits. It comes on now to be heard upon the motion of the appellant to advance the cause under section 7 of the Court of Appeals act (Act March 3, 1891, c. 517, 26 Stat. 828) as amended June 6, 1900 (31 Stat. 660, c. 803 [U. S. Comp. St. 1901, p. 550]). That section, as amended, reads as follows:

"Sec. 7. That where, upon a hearing in equity in a District Court or in a Circuit Court, or by a judge thereof in vacation, an injunction shall be granted or continued or a receiver appointed, by an interlocutory order or decree, in a cause in which an appeal from a final decree may be taken under the provisions of this act to the Circuit Court of Appeals, an appeal may be taken from such interlocutory order or decree granting or continuing such injunction or appointing such receiver to the Circuit Court of Appeals: Provided, that the appeal must be taken within thirty days from the entry of such order or decree, and it shall take precedence in the appellate court; and the proceedings in other respects in the court below shall not be stayed, unless otherwise ordered by that court, or by the appellate court or a judge thereof, during the pendency of such appeal: Provided further, That the court below may in its discretion require as a condition of the appeal an additional bond."

Although the injunction order appealed from is not a preliminary injunction intended to operate only until a hearing upon the merits, it was nevertheless an "interlocutory decree," inasmuch as the decree was not final in an appealable sense. This appeal was taken within 30 days. The cause is therefore one which is entitled to take "precedence" upon the calendar of this court. But this does not mean that

¶ 1. Review of interlocutory decrees granting or continuing injunctions in patent cases by Circuit Court of Appeals, see notes to Consolidated Piedmont Cable Co. v. Pacific Cable Ry. Co., 3 C. C. A. 572; Southern Pac. Co. v. Earl, 27 C. C. A. 189; New York, N. H. & H. R. Co. v. Sayles, 32 C. C. A. 484.

the rules of the court with reference to the filing of briefs are to be ignored. Precedence is given by advancing the cause upon the calendar over other cases not advanced, so that it may be called when ripe for hearing under the rules, or earlier if counsel shall choose to expedite the preparation of the cause, or upon a special order made by the court for special reasons of exigency made to appear.

The motion to give this cause precedence is allowed, and it will be set down for hearing as soon as the briefs are due under the rules, or so soon as the record shall be printed and the briefs filed, if counsel shall by diligence file same before due.

THE ANSON M. BANGS.

(Circuit Court of Appeals, Second Circuit. March 2, 1904.)

No. 125.

1. COLLISION—STEAM TUG AND SCHOONER.
   A tug held solely in fault for a collision with a schooner on a crossing course for persisting in her course, on the theory that the schooner would not run out her tack which she was privileged to do, with the duty resting on the tug to keep out of her way.
2. SAME—DAMAGES—EVIDENCE.
   Hearsay testimony introduced on a hearing before a commissioner to determine the damages caused by collision must be treated as of no probative force, although not objected to until the filing of exceptions to the commissioner's report, and will not warrant a finding not supported by other evidence.

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

Le Roy S. Gove, for appellant.
Chas. C. Burlingham, for appellee.

Before WALLACE and COXE, Circuit Judges.

WALLACE, Circuit Judge. The concise opinion of Judge Thomas in the court below covers the facts and the law of the case as regards the responsibility of the tug for the collision so adequately that little further need be said. We have carefully examined the record and concur in his conclusions. It will not be useful to discuss the evidence. The primary fault which led to the collision was the persistency of the tug in keeping her course along the westward side of the channel upon the theory that the schooner would not run out her starboard tack, when a slight change of her course to port at the time she made a slight change of her course to starboard would have carried her astern of the schooner. The schooner was privileged to run out her tack, and it was her duty in doing so not to change her course unless required by the exigencies contemplated by the twenty-fourth rule of navigation, and it was obligatory upon the tug as a steam vessel to keep out of the schooner's

¶ 2. See Admiralty, vol. 1, Cent. Dig. § 618.

way. Although the schooner held her course for a short time after it was apparent that she would strike the tug's hawser or scow unless the tug made a decisive change of course, that conduct is not to be deemed a fault. It was her duty to hold her course until it was plain that the tug could not so maneuver as to avert the peril. The absence of a lookout on the schooner, or one who was attending to his duty, did not contribute in the least to the collision, as the collision took place in the daylight, and the master of the schooner, who was in charge of her navigation, was himself keeping a lookout, was otherwise unoccupied, and observed the tug vigilantly for the half or quarter of an hour which intervened before the risk of collision and actual collision.

We must assume, from the assignments of error and argument at the bar, that the appellants seriously care to contest the award of damages. Eliminating the hearsay testimony which was introduced by the libelants before the commissioner, the amount of the loss was not sufficiently established, and, although no objection was taken to this testimony until exceptions were filed to the report of the commissioner, it must be treated as of no probative force.

The decree will be reversed, without costs in this court, and with instructions to the District Court to ascertain the amount of damages, and decree for the libelants, with costs of that court.

LOPEZ v. COLLIER.

(Circuit Court of Appeals, Fifth Circuit. April 5, 1904.)

No. 1,331.

1. APPEAL—FINDINGS OF TRIAL COURT—CONFLICTING EVIDENCE—REVIEW.
A finding of fact by the trial court based on conflicting evidence will not be reversed on appeal where it is not clearly erroneous.

Appeal from the District Court of the United States for the Southern District of Florida.

J. M. Phipps and George G. Brooks, for appellant.

G. Bowne Patterson and Joseph Paxton Blair, for appellee.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PER CURIAM. This is a suit for a balance due for work done upon a naphtha launch belonging to Lopez, defendant in the court below, and appellant here, and for materials furnished in the course of the work. The total alleged cost of the material, work, etc., was $1,693. Payments on account and credits amounted to $803. The balance claimed was $889.61. The defendant claims that it was agreed and understood that the work was not to cost more than $1,000; that it was not good work; that the payments made, added to the amounts paid out, subsequent to the return of the boat by Collier, to have work done which should have been done by Collier, leave nothing due to libelant. There was a decree in favor of the libelant for $604.67, from which this appeal is taken.

The case presents simple questions of fact. The evidence is conflicting. Several witnesses testified for libelant, and proved up his case. They were contradicted by several witnesses produced by defendant to prove up his case. The testimony was all taken in presence of the trial judge, who thus had an opportunity to see the witnesses and observe their demeanor while testifying; and, on the evidence, we are not able to say that he reached an erroneous conclusion.

The decree appealed from is affirmed.

BULLOCK ELECTRIC & MFG. CO. v. WESTINGHOUSE ELECTRIC & MFG. CO.

(Circuit Court of Appeals, Sixth Circuit. March 8, 1904.)

No. 1,242.

1. CONTEMPT—VIOLATION OF INJUNCTION—NATURE OF PROCEEDINGS TO PUNISH.
   The willful violation of an injunction by a party to the cause is a contempt of court, which constitutes a criminal misdemeanor, and the proceeding to punish therefor is in its nature a criminal proceeding, entirely independent and distinct from the suit in which the injunction decree was entered, and a judgment of conviction therein is reviewable by writ of error, and not by appeal.

2. SAME—REVIEW—JURISDICTION OF CIRCUIT COURT OF APPEALS.
   A judgment of a Circuit Court imposing a fine on a party for contempt for the violation of an injunction is a judgment in a criminal case, and if unconditional and absolute, so that nothing remains but to execute it, is final and reviewable by the Circuit Court of Appeals on a writ of error.

3. CONTRIBUTORY INFRINGEMENT.
   The making and selling of a single element of a patented combination, with the purpose and expectation that such element should be sent to a foreign country and be there used in combination with other elements, or in the practice of a method covered by the patent, is not contributory infringement, inasmuch as there was no intent that the element should be put to an infringing use; the protection of the patent not extending beyond the limits of the United States.

4. PATENTS—INJUNCTION AGAINST INFRINGEMENT—ACTS CONSTITUTING INFRINGEMENT.
   A preliminary injunction was granted restraining the defendant in an infringement suit from "the making, using, or selling of any apparatus embodying the inventions recited or specified" in the claims of three patents. The first two covered combinations of mechanical elements, one element in each being a motor which operated by the method of the third patent, covering such method alone. Pending the suit defendant made and shipped to a customer in Canada the motor of the patent, with the expectation and intent that it would be there used in the devices of the combination claims of the first two patents and in the practice of the method of the third patent. *Held*, that defendant was not chargeable with infringement nor guilty of a violation of the injunction, since (1) the making or selling of a single element of a combination is not an infringement of a patent covering the combination, but not the elements separately; (2) the making or selling of a machine adapted to practice the method of the third patent was not an infringement of such patent; and (3) the use of the patented combinations, or the practice of the patented method, in Canada, was not an infringement of the United States patents, and consequently defendant was not chargeable with contributory infringement.

In Error to the Circuit Court of the United States for the Southern District of Ohio.

The Westinghouse Electric & Manufacturing Company filed an original bill against the Bullock Electric & Manufacturing Company to restrain the infringement of certain letters patent granted to Nikola Tesla, being patents Nos. 381,968, 382,279, and 382,280. Upon the pleadings and upon certain affidavits the court below, upon motion and notice, granted an injunction pendente lite, restraining the defendant, its officers, agents, and servants, "from infringing upon claims 1 and 3 of patent 381,968, claims 1, 2, and 3 of patent 382,279, and the claim of patent 382,280, or any of them." The injunction as actually issued and served commanded the defendants to "desist from making, using, or selling any apparatus embodying the inventions recited or specified in claims 1 and 3 of patent 381,968, claims 1, 2, and 3 of patent 382,279, and the claim of patent 382,280, or any of them, or in any manner infringing upon the rights of the complainant thereunder." Subsequent to the service of this injunction the defendant made and shipped a certain motor to Canada to be there used as an element in the combinations covered by the claims involved of patents Nos. 381,968 and 382,279, and in the method claim of patent No. 382,280. Upon a motion supported by affidavits, and upon the admission of counsel representing the defendant that the motor complained of had been made and shipped to Canada to be there used in the devices of the patent, and that it was installed and so used, the court adjudged that the claims of the patents involved had been thereby infringed and the preliminary injunction violated, and that the defendants were in contempt, and ordered to pay a fine of $500. A bill of exceptions was allowed, and this writ of error sued out to reverse this judgment.

Arthur Stem, George Heidman, and Clarence E. Mehlhope, for plaintiff in error.

Frederic H. Betts, Thomas B. Kerr, and C. Hammond Avery, for defendant in error.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

LURTON, Circuit Judge, after making the foregoing statement of the case, delivered the opinion of the court.

1. The willful violation of an injunction by a party to the cause is a contempt of court constituting a specific criminal offense. Ex parte Kearney, 7 Wheat. 38, 42, 5 L. Ed. 391; Crosby Case, 3 Wilson, 188; New Orleans v. Steamship Co., 20 Wall. 387, 392, 22 L. Ed. 354; Hayes v. Fischer, 102 U. S. 121, 26 L. Ed. 95; 4 Ency. Pl. & Pr. 766 et seq.

It is immaterial to consider the distinction sometimes noticed between criminal and civil contempts, inasmuch as both kinds involve the vindication of the authority of the court, whether the remedy incidentally inure to the benefit of a party or not. Cyclo. Law & Proc. 6 et seq.

The proceeding to punish for a contempt is in its nature a criminal proceeding, whether the result be partially remediable or not, and the same rules prevail which govern in the trial of indictments, the defendant being entitled to the benefit of any reasonable doubt. Accumulator Co. v. Consolidated Electric Co. (C. C.) 53 Fed. 793; In re Acker (C. C.) 66 Fed. 291; Harwell v. State, 10 Lea, 544; 4 Ency. Pl. & Pr. 768 et seq.; U. S. v. Jose (C. C.) 63 Fed. 951.

Although the contempt consist in the violation of an injunction granted by a court of equity, the proceeding for its punishment "is a new and distinct proceeding, and is quite independent of the equities

of the case on which the decree is founded," and "an appeal is not an appropriate remedy for obtaining a review." City of Frankfort v. Deposit Bank of Frankfort (decided at February session of this court) 127 Fed. 812; New Orleans v. Steamship Co., 20 Wall. 387, 392, 22 L. Ed. 354; In re Chetwood, 165 U. S. 443, 17 Sup. Ct. 385, 41 L. Ed. 782.

Is it reviewable by a writ of error? A contempt proceeding is classified as a misdemeanor and not as a felony. In re Acker (C. C.) 66 Fed. 291. Misdemeanors are reviewable by this court upon writ of error by virtue of the broad appellate powers conferred by the act of March 3, 1891, c. 517, 26 Stat. 826 [U. S. Comp. St. 1901, p. 547], establishing Circuit Courts of Appeal, and defining and regulating the appellate powers of United States courts. If, therefore, the imposition of the fine complained of "was a judgment in a criminal case" as it is defined to be in New Orleans v. Steamship Co., 20 Wall. 387, 392, 22 L. Ed. 354, it was a judgment in a misdemeanor case; for contempts are universally classified as misdemeanors, and not felonies. In re Acker (C. C.) 66 Fed. 291. If a judgment in a misdemeanor case, it is reviewable upon writ of error by this court. This conclusion was reached by the Circuit Court of Appeals for the Second Circuit in Gould v. Sessions, 67 Fed. 163, 14 C. C. A. 366. But in Nassau Electric R. Co. v. Sprague Electric Co., 95 Fed. 415, 37 C. C. A. 146, and Christensen Engineering Co. v. Westinghouse Air-Brake Company (decided Feb. 15, 1904) 129 Fed. 96, writs of error were dismissed upon the authority of In re Debs, 158 U. S. 564, 573, 15 Sup. Ct. 900, 39 L. Ed. 1092.

In the statement of the Debs Case, at page 573, 158 U. S., and page 903, 15 Sup. Ct., 39 L. Ed. 1092, it is stated that the defendants in that case had "applied to this court for a writ of error, and also one of habeas corpus. The former was denied, on the ground that the order of the Circuit Court was not a final judgment or decree." The only report of the decision on the writ of error is found in 159 U. S. 251, 15 Sup. Ct. 1039, where the statement is, "Petition denied."

The Supreme Court had no jurisdiction in respect of writs of error in misdemeanor cases, and the writ of error upon this ground was necessarily denied. The reporter's statement that it was denied because the order "was not a final judgment or decree" is doubtless an error. Certainly we do not feel justified in departing from the well-settled doctrine, so often enunciated in former cases, in respect of the distinctness of a judgment imposing a fine for a contempt from the case in which the disobeyed order was made, upon so slender an authority. If the judgment, as in this case, was in fact unconditional and absolute, so that nothing remained but to execute it, it was in every sense a final judgment.

The claim that a defendant in such circumstances must await the final result of the cause in which the injunction was granted before he can have the judgment inflicting fine or imprisonment reviewed upon the theory that the judgment is not final is absolutely unsupportable. If it be an independent and distinct proceeding from the residue of the case, it will be no more final after that case has reached a final decree than when the fine was imposed. To say that he may pay his fine

or endure his imprisonment and review the legality of the matter at some indefinite time in the future is to deny, in effect, the right of review at all. The motion to dismiss the writ is denied.

Was the defendant, on the conceded facts of the case, guilty of contempt as matter of law? Upon this writ of error no question as to whether the injunction was rightly or wrongly, providently or improvidently, issued can arise. The court confessedly had jurisdiction of the parties and of the subject-matter, and the bill of exceptions recites that the temporary injunction was issued upon bill, answer, exhibit, affidavits, "and upon the agreement of the defendant."

Neither is the result to turn upon any question of conflicting fact, for it is not the province of a reviewing tribunal to weigh the facts upon a writ of error.

The claims which defendant was enjoined from infringing were the first and third of patent No. 381,968, granted to Nikola Tesla, May 1, 1888, and read as follows:

(1) "The combination, with a motor containing separate or independent circuits on the armature or field magnet, or both, of an alternating current generator containing induced circuits connected independently to corresponding circuits in the motor, whereby a rotation of the generator produces a progressive shifting of the poles of the motor, as herein described."

(3) "The combination with a motor having an annular or ring-shaped field magnet and a cylindrical or equivalent armature, and independent coils on the field magnet or armature, or both, of an alternating current generator having correspondingly independent coils and circuits including the generator coils and corresponding motor coils, in such manner that the rotation of the generator causes a progressive shifting of the poles of the motor in the manner set forth."

The first, second, and third claims of patent No. 382,279, granted May 1, 1888, to Nikola Tesla, and are in these words:

(1) "The combination, with a motor containing independent inducing or energizing circuits and closed induced circuits, of an alternating current generator having induced or generating circuits, corresponding to and connected with the energizing circuits of the motor, as set forth."

(2) "An electro-magnet motor having its field magnets wound with independent coils and its armature with independent closed coils, in combination with a source of alternating currents connected to the field coils, in combination with a source of alternating currents connected to the field coils and capable of progressively shifting the poles of the field magnet, as set forth.

(3) "A motor constructed with an annular field magnet wound with independent coils and a cylindrical or disk armature wound with closed coils, in combination with a source of alternating currents connected with the field magnet coils, and acting to progressively shift or rotate the poles of the field as herein set forth."

And the single claim of patent No. 382,280, granted May 1, 1888, to the same patentee, which reads as follows:

"The method herein described of electrically transmitting power, which consists in producing a continuously progressive shifting of the polarities of either or both elements (the armature or field magnet or magnets) of a motor by developing alternating currents in independent circuits, including the magnetizing coils of either or both elements, as herein set forth."

Confessedly the five claims of the first two patents are combination claims. The single claim of the third patent is not a mechanical claim, but a claim for a method of electrically transmitting power. A

motor constructed according to the specifications of the patent is one of the elements in each of the combination claims, and the evidence tended to show that such a motor must operate by the method of the third patent.

The plaintiff in error was adjudged to be in contempt because, pending the injunction, it made and shipped to a customer in Canada the motor of the patent, with the expectation and intent that it would be there used in the devices of the combination claims and in the practice of the method of transmitting electrical power protected by the claim of the method patent. Was this, as matter of law, a contempt of the authority of the court?

The injunction forbid "the making, using, or selling of any apparatus embodying the inventions recited or specified" in the claims of the three patents heretofore set out. The monopoly of a patent extends to the making or selling, as well as the using, of the patented device within the United States. Adams v. Burks, 17 Wall. 453, 456, 21 L. Ed. 700; Heaton-Peninsular Button Fastener Co. v. Eureka Specialty Co., 77 Fed. 288, 291, 25 C. C. A. 267, 35 L. R. A. 728; Dorsey Rake Co. v. Bradley M. Co., 12 Blatchf. 202, Fed. Cas. No. 4,015.

While it is true that the monopoly of the plaintiff's patents did not extend beyond the limits of the United States, yet it would be no defense to say that the patented article had been made in the United States only for the purpose of being sold and used in a country to which the protection of the laws of the United States did not extend. The patentee is entitled to monopolize the making of his device in the United States as well as a monopoly of there selling or using it. Dorsey Harvester Co. v. Bradley Co., 12 Blatchf. 202, Fed. Cas. No. 4,015; Ketchum Harvester Co. v. Johnson Co. (C. C.) 8 Fed. 586; Adrian Platt Co. v. McCormack Co. (C. C.) 55 Fed. 288. Gould v. Sessions, 67 Fed. 163, 14 C. C. A. 366, is not in conflict, for in that case the only question concerned the alleged violation of an injunction against the future making, selling, or using of the patented article.

The articles sold in supposed violation of the temporary injunction had been made before the injunction was granted, and pending the injunction were shipped to Canada and there sold. There had been, therefore, no violation of the injunction, because there had been no making or selling or using of the patented device after the allowance of the injunction, within the limits of the United States. But it is elementary that neither the making, selling, nor using of one element of a combination is infringement. Prouty v. Ruggles, 16 Pet. 336, 10 L. Ed. 985; The Corn Planter Patent, 23 Wall. 181, 224, 23 L. Ed. 161; Rowell v. Lindsay, 113 U. S. 97, 101, 5 Sup. Ct. 507, 28 L. Ed. 906. In the corn planter patent Mr. Justice Bradley said:

"Where a patentee, after describing a machine, claims as his invention a certain combination of elements, or a certain device, or part of the machine, this is an implied declaration as conclusive, so far as that patent is concerned, as if it were expressed that the specific combination or thing claimed is the only part which the patentee regards as new. True, he or some other person may have a distinct patent for the portions not covered by this; but that will speak for itself. So far as the patent in question is concerned, the remaining parts are old or common and public."

In Rowell v. Lindsay, Mr. Justice Wood said:

"The patent of the plaintiffs is for a combination only. None of the separate elements of which the patent is composed are claimed as the invention of the patentee; therefore none of them, standing alone, are included in the monopoly of the patent."

It must follow, therefore, that, unless there be something to take this case out of the general rule, the making or selling or using of a single element of a combination patent does not per se constitute an infringement of a combination claim. Neither can it be said, in a legal sense, that any one element of a combination patent is an "apparatus embodying the invention," within the meaning of the injunction which the defendant is supposed to have disobeyed.

It may be true, as claimed, that the Tesla motor constitutes the real essence of the three Tesla inventions covered by the claims of the patents in suit. Tesla, however, neglected to claim the motor as a separable device. He deliberately elected to claim it only as he claimed the other elements of his combination claims, and thereby abandoned any claim to its novelty or to a monopoly of its use, except as a part of one or other of his combination claims. The method claim is not for any apparatus at all. The mere fact that the Bullock Company made and sold such a motor does not per se constitute an infringement of such a method claim. We are not now dealing with the question of contributory infringement for that will be considered later. What we decide is that the mere fact that one has made and sold an apparatus adapted to be used in following the methods of Tesla's method claim does not constitute infringement. He is not entitled to extend that claim so as to include apparatus adapted to its practice. A licensee thereunder may practice the method with any motor adapted to such method, and we see no reason, if the motor itself is not patented, why such a licensee might not supply himself with a motor adapted to so operate from any manufacturer.

But the Circuit Court found that after the granting of the injunction pendente lite the defendant company made and shipped to one John McDougal, of the Caledonia Iron Works, Montreal, Canada, a motor made according to the description of the Tesla patents in suit, and that this was done with the intent and expectation that the motor would be there installed and used in the devices of the patents in suit. Judge Thompson held upon these facts that the defendants "had not only infringed the plaintiff's patents by contributing to the device set up in Canada, but directly infringed the claim of patent No. 382,280."

But did the defendants infringe either of the combination claims, or disobey the injunction of the court, by making and sending to Canada a single element of those claims with the intention and for the purpose of being there used in one or other of the combinations of the patent. The monopoly of the patents did not extend to Canada. The patented devices were open to be there made or sold or used because the monopoly of the patent is limited to the United States and its territories. Unless, therefore, the making and selling of a single element of a patented device, within the limits of the United States, with the intention that it shall be sent without the United States, and there used in association with the other elements of the combination, constitutes

infringement, the defendants did not disobey the order of the court. But unless the making and sale of the single element was with the intention and purpose of aiding and abetting another to infringe there would be no contributory infringement under the well-settled law upon that subject.

No better definition of contributory infringement can be found than that given by Judge Taft when speaking for this court in Thomson-Houston Electric Co. v. Ohio Brass Works, 80 Fed. 712, 721, 26 C. C. A. 107, where that learned judge said:

"It is well settled that when one makes and sells one element of a combination covered by a patent with the intention and for the purpose of bringing about its use in such a combination he is guilty of contributory infringement, and is equally liable to the patentee with him who in fact organizes the complete combination. * * * An infringement of a patent is a tort analogous to trespass or trespass on the case. From the earliest times, all who take part in a trespass, whether by actual participation therein, or by aiding and abetting it, have been held to be jointly and severally liable for the injury inflicted. There must be some concert of action between him who does the injury and him who is charged with aiding and abetting, before the latter can be held liable. When that is present, however, the joint liability of both the principal and accomplice has been invariably enforced."

The intent and purpose that the element made and sold shall be used in a way that shall infringe the combination in which it is an element constitutes the necessary concert of action between him who furnished the single part and he who actually does the injury by the assembling and using of all the parts in such a way as to be an infringement. This principle runs through all the cases upon contributory infringment. Heaton-Peninsular Button Fastener Co. v. Eureka Specialty Co., 77 Fed. 288, 297, 25 C. C. A. 267, 35 L. R. A. 728; Saxe v. Hammond, Fed. Cas. No. 12,411; Wallace v. Holmes, 9 Blatchf. 65, Fed. Cas. No. 17,100; Thomson-Houston Co. v. Kelsey Electric Co., 75 Fed. 1005, 22 C. C. A. 1; German-American Filter Co. v. Loew Filter Co. (C. C.) 103 Fed. 303, affirmed 107 Fed. 949, 47 C. C. A. 94.

In Snyder v. Bunnell (C. C.) 29 Fed. 47, Judge Coxe gave his emphatic approval to the principle laid down by Judge Shipley in Saxe v. Hammond, cited above, where it was said that "the mere manufacture of a separate element of a patented combination, unless such manufacture be proved to have been conducted for the purpose and with the intent of aiding infringment, is not in and of itself infringement." That the single element was made and sold was with the intent and purpose of aiding another in infringing must appear, or the necessary concert of action will be missing. This may be shown presumptively, as it is when the article is incapable of any other use than an infringing one. If, on the other hand, it be adapted to other uses "the intention to assist in infringement must be otherwise shown affirmatively." Thomson-Houston Co. v. Ohio Brass Works, 80 Fed. 712, 723, 26 C. C. A. 107. These principles we think determine this case.

The finding that the intent and purpose in making and selling this motor was that it should be used in the patented devices in Canada is a finding against any infringing purpose. It would not be an infringement to put the motor to the use intended, because that use was beyond the protection of the patent. The defense is as complete as

if the intent had been to furnish the motor to one having a license to make, sell, and use. In neither case would there be an intent to assist in an infringement, and without such intent the plaintiff in error was not infringing the patents or disobeying the order of the court.

What we have said applies as well to the method patent as to the combination claims. There must be shown an intent to assist another in an infringing use of the patented method. There being no intent to provide means by which another might unlawfully use the Tesla method, there is no contributory infringement.

The judgment, for these reasons, must be reversed, with directions to discharge the rule to show cause.

Following will be found the opinion of the court below (THOMPSON, District Judge):

This suit was brought to enjoin defendant of letters patent Nos. 381,968, 382,279, and 382,280 and for an accounting, etc. On the 2d day of August, 1902, an injunction was issued pendente lite restraining the defendant, its officers, etc., "from making, using, or selling any apparatus embodying the inventions recited or specified in claims 1 and 3 of patent No. 381,968, claims 1, 2, and 3 of patent No. 382,279, and claims of patent No. 382,280, or any of them, or in any manner infringing upon the rights of the complainant thereunder." Afterwards, to fill an order previously given by John McDougal, of Montreal, Canada, the defendant made, at its works, in the United States, near Cincinnati, in the state of Ohio, and on the 27th day of April, 1903, shipped to John McDougal, at Montreal, Canada, a 500 horse power induction motor, 13 feet in diameter, with 44 poles and operated from a "60 cycle, 2,200 volt, 3 phase circuit," the factory cost of which was $11,265.20.

This defendant admits that his motor was made and shipped to McDougal for the express purpose of being used in the device of the patents in suit, and that it was so used, but insists that the plaintiff's patents were not infringed thereby, because the making of the device took place in Canada. This claim is based on the assumption that there can be no making of a combination device, within the meaning of the patent laws, until all its parts are assembled and joined together, in accordance with the teachings of the letters patent, and as the assembling of the parts and the completion of the device in question took place in Canada, where the patent laws of the United States are inoperative, the patents of the plaintiff are not infringed. If this be true, the defendant, in evasion of the patent laws of the United States, may make all the parts of the device in the United States, ship them to Canada, and there assemble them and sell the device to its customers in disregard of the plaintiff's rights—may thus appropriate the plaintiff's invention to its own use without making compensation therefor.

But is this true? In issuing the patents in suit the government of the United States granted to the plaintiff "the exclusive right to make, use, and vend the invention or discovery throughout the United States and the territories thereof," and any making, use, or sale thereof within the territory of the United States, against the will of the plaintiff, is an infringement of its monopoly, and a violation of the patent laws of the United States. Neither the defendant nor McDougal were licensees of the plaintiff, but, on the contrary, joined in appropriating the plaintiff's invention to their own use without the plaintiff's consent and against its will. What the defendant did was done in the United States for the express purpose of enabling McDougal to complete the appropriation in Canada, not as the licensee of the plaintiff, but against the plaintiff's will, and was an infringement of the plaintiff's patents, and the wrong is not lessened by the fact that McDougal is not amenable to the laws which the defendant has violated. In making the motor the defendant not only infringed the plaintiff's patents by contributing to the device set up in Canada, but directly infringed the claim of letters patent No. 382,280, which provides that "the method herein described of electrically transmitting power,

which consists in producing a continuously progressive shifting of the polarities of either or both elements (the armature or field magnet or magnets) of a motor by developing alternating currents in independent circuits, including the magnetizing coils of either or both elements, as herein set forth."

The cases of Hobbie v. Jennison, 149 U. S. 355, 13 Sup. Ct. 879, 37 L. Ed. 766, and Gould v. Sessions, 67 Fed. 163, 14 C. C. A. 366, cited by the defendant's counsel, do not support defendant's claim. In Hobbie v. Jennison the assignee of the patent for Michigan sold the patented articles in Michigan, knowing that the purchaser intended to use them in Connecticut. As assignee of the patent for Michigan, he had the exclusive right to make, use, and vend the patented articles in Michigan without reference to where they might afterwards be used. The assignment contained no provision forbidding him to sell the patented articles to persons who might or would use them in other states.

In Gould v. Sessions, Judge Shipman says: "The record, which consists of the affidavits, without a finding of facts, shows that, after the injunction order had been served upon the plaintiffs in error, they shipped to Canada a quantity of the infringing articles, which had been made before the injunction, without previously offering them for sale, or notifying any one of their wish to sell. The goods were followed by one of the defendants, who sold them to a trunk dealer in Montreal, who had been a customer of Sessions', and had been in the habit of buying the noninfringing articles. Upon this naked state of facts, we are of opinion that there was no violation of the injunction order. The sale was made in Canada, of trunk catches then in Canada, to a Canadian trunk manufacturer, to be there placed upon trunks in the ordinary course of business, and, so far as is known, no one of the articles was thereafter used in the United States." In that case the infringing articles were made before the injunction was issued, and were afterwards shipped to Canada, and sold and used there. They were not sold or used in the United States, and were not made in the United States after the injunction order was issued. Judge Shipman further said: "Inasmuch as the articles were made before the injunction, the manufacturer was not in contempt of the court's order, and, as no preliminary arrangements for the sale were made in the United States, the sale did not come within the prohibition. It is probable that the Circuit Court had misgivings in regard to the good faith of the affiants, but, as there is no contradiction of their statements, we regard the question as one of law, upon a state of facts not in substantial controversy."

Here there is an intimation that if there had been a preliminary arrangement made in the United States for the sale of the infringing articles in Canada the sale would have come within the prohibition of the injunction. In the case at bar there is evidence which would perhaps justify the court in finding that the sale of the motor was made in the United States. The order for the motor was received by the defendant through its agent in Canada, but the contract was not made until the order was accepted by the defendant.

Upon the evidence presented by the affidavits and the admissions of the defendant, through its counsel, the court finds that the defendant made the motor in violation of the order of injunction, thereby committing a contempt of court, for which it should be punished.

It is urged in mitigation of the penalty to be imposed that the defendant acted under the advice of counsel and believed that it might lawfully make the motor. The defendant, however, made the motor in deliberate disregard of the plaintiff's rights. The defendant knew that it was to be used in the device of the patents in suit, and made it expressly for that purpose. The defendant may have believed that it was acting outside of the scope of the order of injunction, but did not hesitate to violate the rights of the defendant.

The court cannot permit litigants to construe orders of injunction to suit their own convenience and interest. If they be in doubt as to what is required of them, they must come to the court for instruction or for such modifications or amendments of the order as will make their duty plain. Writs of injunction are issued to meet emergencies and to prevent irreparable injury, and these purposes may be defeated if the courts permit them to be trifled with or disobeyed. It must be understood that the court will require prompt and implicit obedience to such orders. A fine of $500 will be imposed upon the defendant, which must be paid within 10 days.

NATIONAL CASH REGISTER CO. v. NEW COLUMBUS WATCH CO. et al.

SAME v. HALLWOOD CASH REGISTER CO. et al.

(Circuit Court of Appeals, Sixth Circuit. March 22, 1904.)

Nos. 1,220, 1,221.

1. PATENTS—ASSIGNMENT—INSTRUMENTS ENTITLED TO REGISTRATION.
An instrument which does not purport to convey any present interest in an existing patent, or one for which an application is pending, is not an "assignment, grant, or conveyance," within the meaning of Rev. St. U. S. § 4898 [U. S. Comp. St. 1901, p. 3387], and its registration does not operate as constructive notice to an assignee of a patent subsequently applied for, and granted to the person executing the same.

2. SAME—NOTICE TO ASSIGNEE OF EQUITABLE RIGHTS OF THIRD PERSONS.
Where the attorney for an inventor, having been requested by complainant to ascertain whether his client would sell a pending application for a patent, bought such application himself, without disclosing the fact that he was acting for any one else, and then resold and assigned the same to complainant for more than double the price he paid, complainant was not affected by his knowledge that others had an equitable interest therein.

3. SAME—BONA FIDE PURCHASE WITHOUT NOTICE.
Evidence of a fraudulent purpose, or conduct amounting to moral turpitude, is not necessary to deprive a purchaser of a legal title of the advantage of his position. If he is shown to have been aware of such facts as to put a reasonably prudent man upon inquiry, he is chargeable with all the facts which would have been developed if inquiry had been prosecuted with reasonable diligence.

4. SAME—FACTS TO PUT ASSIGNEE ON INQUIRY.
Complainant purchased and took an assignment of an application for a patent which had been pending in the Patent Office for some four years. Six months before the filing of such application, complainant had been in negotiation with the applicant and two other persons for the purchase of prior patents for inventions made by him relating to the same kind of machines, and issued to the three, and was then informed of an agreement between them by which, so long as it continued in force, the other two persons furnished the capital necessary to perfect and patent all inventions made by the inventor relating to such subject-matter, and were to have an equal interest in the patents therefor. In fact, the application bought by complainant covered an invention made under such agreement, and the two persons who furnished the capital were each the equitable owners of a third interest therein. *Held*, that the facts were such as to put complainant on inquiry, and to charge it with notice of all that might have been learned by such inquiry prosecuted with reasonable diligence, and that it did not acquire a title to the patent subsequently issued which would support a suit for its infringement.

Appeal from the Circuit Court of the United States for the Southern District of Ohio.

Edward Rector, Frank P. Davis, and J. B. Hayward, for appellant.
Paul A. Staley and Border Bowman, for appellees.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

LURTON, Circuit Judge. These bills were brought to restrain infringement of patent No. 599,625, issued to the complainant, as assignee of Harry M. Neer, for improvements in cash registers.

The defendants separately pleaded that the complainant was not the owner of the entire and complete interest in said patent, and that Thos. Reynolds and Oliver W. Kelly were each the owners of an undivided one-third interest in the inventions covered by said patent. Issue was taken upon the said plea, and the cases heard together upon the pleadings and evidence by District Judge Thompson, who sustained the pleas and directed the bills to be dismissed.

The invention involved was completed in July, 1893, and an application for a patent made by the inventor in September, 1893. In July, 1897, Neer assigned his pending application to W. H. Chamberlain, and the latter assigned to the complainant, which prosecuted the application and obtained a patent in February, 1898. When Neer made this invention, and when his application was filed, he was associated with Thos. Reynolds and O. M. Kelly under a contract by which the parties were to develop and finally manufacture cash registers and adding machines. Neer was a man of marked mechanical ability and inventive genius, but was without money or credit. Kelly and Reynolds obligated themselves to pay all expenses of prosecuting his inventions, including cost of patents, etc., and to allow him $10 per week for his individual maintenance. Neer agreed, upon these considerations, to assign to Kelly a one-third interest in every invention he should make while this contract lasted, and to Reynolds a like interest. This arrangement seems to have originated as far back as 1890, and prior to 1893 at least three patents had been taken out by Neer for improvements in cash registers; the patents issuing to Neer and to Kelly and Reynolds, assignees, of one-third each. To better secure his interest in all future improvements Reynolds took from Neer, under date of July 22, 1893, a document in these words:

"July 22, 1893.

"Received of Thos. Reynolds $30.00, in consideration of which I assign to him a one-third interest in all my improvements and inventions in Cash Registers or Adding Machines which I have been working on and yet uncomplete. Those completed, those for which application have been made for Pat. or I contemplate making application for Patent upon. In short, it is understood and agreed that he must be given a ⅓ interest in all such patents conceived by me. Harry Neer.

"Witness, W. M. Wise.

"Recorded Aug. 2, 1893."

This was recorded in the Patent Office August 2, 1893. The money thus receipted for was on account of expenses incurred by Neer in the invention here involved.

Neither Reynolds nor Kelly had parted with their equitable interest in this invention when Neer assigned the application in July, 1897, and we agree with the court below in its finding that Kelly and Reynolds were each the equitable owners of an undivided interest in said invention when Neer assigned in 1897, and when the patent issued to his assignees in 1898. The controversy turns wholly upon the question as to whether the complainant company was a bona fide purchaser, without knowledge or notice of this equitable interest of Kelly and Reynolds. This so-called assignment by Neer to Reynolds of July 22, 1893, is undoubtedly valid between the par-

ties, as an assignment of a one-third interest in any future inventions made by Neer. But it was not an assignment of any existing patent or pending application, for Neer had long before assigned a one-third interest in each of his inventions to Reynolds, and the patents had been issued according to the assignment. Neer having by his prior recorded assignments, which did not include improvements, conveyed to Reynolds the one undivided third in all existing patents, and there being no application pending for any patent, there was nothing upon which this document could operate which entitled it to registration as an assignment, grant, or conveyance, under section 4898, Rev. St. U. S. [U. S. Comp. St. 1901, p. 3387]; Robinson on Patents, §§ 411, 769, 785; Wright v. Randel, 8 Fed. 591; Carpenter v. Dexter, 8 Wall. 513, 532, 19 L. Ed. 426; Lynch v. Murphy, 161 U. S. 247, 16 Sup. Ct. 523, 40 L. Ed. 688.

That an assignment of a patent, together with any future improvements thereon, is recordable and operative as a notice to subsequent assignees of patents for improvements, may be conceded. Littlefield v. Perry, 21 Wall. 205, 22 L. Ed. 577; Aspinwall Co. v. Gill et al. (C. C.) 32 Fed. 697. But none of these former assignments included improvements, so that no question of the effect of such an instrument upon later assignees exists. What we decide is that an instrument which was not intended to convey any present interest in any existing patent is not an "assignment, grant, or conveyance," within the meaning of the statute, and that its registration did not, therefore, operate as constructive notice to the complainant company.

Neither do we think the complainants are charged with notice through the knowledge of Chamberlain. Chamberlain was Neer's attorney, and had charge of his application. He was asked to find out whether Neer would sell, and at what price. He bought the application from his client for himself, not disclosing to his client that he was buying for complainant, and then assigned the application to complainant at more than double the price he had paid. In the whole transaction he was acting in his own interest, and in such circumstances there is no presumption that he would disclose his information to his ostensible principal. Thomson-Houston Co. v. Capitol Electric Co. (C. C.) 56 Fed. 849; Pine Mountain Co. v. Bailey, 94 Fed. 258, 36 C. C. A. 229.

That the complainant did not have technical notice of the equitable interest of Kelly and Reynolds in this invention may also be conceded. The real contention is that it had information of facts which put the company upon inquiry, and that they are therefore chargeable with knowledge of all the facts which inquiry would have disclosed. Cordova v. Hood, 17 Wall. 8, 21 L. Ed. 587; Jonathan Mills Co. v. Whitehurst, 72 Fed. 496, 19 C. C. A. 130. At the date of the acquisition of this invention by the National Cash Register Company, it had not culminated in a patent. The right to a patent was pending upon a mere application. This application was filed September 9, 1893, and complainants are undoubtedly chargeable with knowledge of the contents of the file bearing upon that application. Mr. Frank J. Patterson, the general manager of the com-

pany, and its vice president, actively represented his corporation, and, upon an examination of the application, personally directed its purchase. Some steps to this end had been taken by Mr. Rector, the general counsel of the company at Chicago, and the opinion of local counsel at Dayton was subsequently taken as to the claims, and the value of the invention to the complainant; but neither of these gentlemen had, or in the course of their connection with the matter acquired, any knowledge of facts which would in any degree affect their client. Nor is either of them in the slightest degree chargeable with any negligence or bad faith to their client or any one interested in the matter.

Mr. Patterson was the responsible head of his corporation in respect to all such matters, and was the corporation in all that he said and did about the matter. The result must turn upon his knowledge of facts, and the sufficiency of the facts known to him when he brought this application to cast upon him the duty of inquiry. In February and March of 1893 an effort was made to sell to the complainant patents No. 476,295, of June 7, 1892, 490,304, January 24, 1893, and No. 491,020, of January 31, 1893, issued to Neer and to Kelly and Reynolds, assignees of Neer, for one-third each. Mr. Patterson was first approached and the negotiation opened in behalf of Neer by Mr. A. W. Cochran, a relative of Neer's. Patterson was then distinctly informed that Neer and Kelly and Reynolds were associated together for the purpose of devising an improved cash register, and also adding machines; that Neer was the inventor, and Kelly and Reynolds the capitalists; that Neer was under an engagement to assign to them an undivided one-third interest, each, in all of his inventions while in their employment. Cochran was greatly interested in securing for Neer a more favorable employment than he had with Kelly and Reynolds, and testifies as follows:

"I told them my cousin was a poor inventor, and that Kelly and Reynolds had plenty of money, and he was not liable to get his share of his inventions. Mr. Patterson asked me why I did not bring the machine. I told him the machines were at my house (the two cash registers, one in the metallic case, the other in the wooden case, now before us), but that, if he would come to Chicago, Harry would show him the machines. I also told him that Harry would sell with the consent of Kelly and Reynolds, and would come with them on a salary, and they could get the benefit of all his future inventions, of which he had several now in contemplation. Mr. Patterson said 'Yes,' he could see that Harry would not get as much out of it as he would if he had the money to put in it himself, but, of course, Kelly and Reynolds should have the benefits as long as they were furnishing the capital. Q. Did you say anything at that time as to whether Harry Neer could go with the National Company, and give them the benefit of his future improvements or inventions, without the company buying the machine; and, if so, state what you remember about this? A. I told the Pattersons that Harry could not leave Kelly and Reynolds, without these machines were sold first, and that then he would be free to come with them and give them the benefits of his future improvements. Q. Was anything said to the Pattersons about Neer's contract with Kelly and Reynolds as to inventions that he would make or improvements that he would get up in cash registers? A. Certainly. I already explained to the Pattersons that so long as he was with Kelly and Reynolds they would get the full benefit of his inventions, and I wanted them to buy this machine in order to get the benefits of very valuable improvements

which he already had in mind. I wanted to get them out of the way completely, as we had to get them out of the way before we could do anything with the Pattersons. Q. Who do you mean by 'them,' when you say you wanted to get them out of the way? A. Kelly and Reynolds, because Harry was to them under contract, and could not leave until these machines were sold, and the Kelly and Reynolds business was cleaned up."

As a result of this interview, Mr. Frank J. Patterson went to Chicago to see the model of the machine made under these three patents. Under date of March 8, 1893, he wrote to A. W. Cochran, declining to buy, and saying that Neer's machine infringed the patents of the company, though he did not then point out wherein. Shortly thereafter, and during the same month, the complainant company invited a further conference. For this purpose, Mr. Samuel Cochran, the father of A. W. Cochran, and an uncle of Neer's, together with Neer himself and O. W. Kelly, went to Dayton, and to the shops of the complainant company, and there exhibited and operated the Neer machine. This negotiation extended through parts of three days. Mr. Cochran's principal purpose seems to have been to secure for Neer an engagement as inventor, and he testifies that he told Patterson that he was anxious to get Neer away from Kelly and Reynolds, who were paying him only $10 per week. He had drawn up a proposed contract between Neer and the complainant, by which the complainant was to have the exclusive right to all of Neer's improvements and future inventions. This contract, he says, was exhibited to and read by Patterson, and also certain contracts between Neer, Kelly, and Reynolds in respect to the formation of a company to make machines. The witness testifies that he told Patterson that Reynolds and Kelly were to have all the benefits of Harry M. Neer's future inventions and improvements in the cash register business, and "that the benefits that I had put in their contract [referring to proposed contract for services of Neer] was the same that was in the contract between Kelly, Reynolds, and Neer." This contract was only proposed in the event the cash register company bought the Neer patents, for Patterson was told that any employment of Neer was dependent upon the sale of the patents owned by the Neer Company. This witness also says that he told Mr. Patterson that Neer had quite a number of improvements in cash registers, "but that I did not want to let Kelly and Reynolds know of those improvements, because I knew they would not raise his salary sufficiently for him to spend his time and remain with them." He also says that Neer showed Mr. Patterson certain "small diagrams, drawn on paper, of improvements, and a way by which he could get around some of the difficult questions that was raised in regard to opening the drawers and raising the tablets."

The sale of the patents and the employment of Neer were coupled together by Mr. Cochran, who demanded for Neer $600 per month, and a contract for five years. Representing, as he ostensibly did, all of the owners of the patents, he manifested a willingness to sacrifice the Neer Company, in the price of its patents, in order to secure greater advantages for his nephew in the matter of wages, and he confesses to using arguments of this character.

Without going further into the details of the conference and negotiations for the sale of the earlier Neer patents, it is enough to say that, upon the great weight of the evidence, Patterson was during those negotiations fully made aware of the relations between Neer and Kelly and Reynolds, and of their interest in all future improvements Neer might make in cash registers, so long as that association should continue. The negotiations came to nothing, Mr. Patterson claiming that the Neer automatic drawer and indicator infringed two patents owned by his company.

The evidence establishes that, after this failure to sell, Neer at once went to work upon an improved cash register which should obviate the infringements in respect to the drawer and indicating tablets pointed out or claimed by Patterson, and soon produced a model of the machine here involved. This model was sent to Mr. W. H. Chamberlain, a patent lawyer at Chicago, in July, 1893, for the purpose of preparing specifications and claims, and an application for a patent was filed September 15, 1893. All of the expenses incident to this new machine were borne by Kelly and Reynolds. This application hung in the Patent Office, and in 1895 an interference was declared with a pending application owned by the complainant in respect to certain claims common to both, in which the complainant company won out. This interference necessarily called attention to this new invention. As before stated, this application hung along until July, 1897, when, upon the suggestion of Mr. Rector, the complainant's general patent solicitor, who had represented complainant in the Erlach interference mentioned above, Mr. Patterson examined Neer's new application, and bought it for his company, without making any inquiry as to whether Kelly and Reynolds had any interest therein or not. The invention which was involved in the Neer application did not in express terms assume to be an improvement upon his earlier patents. In fact, however, it was an improvement by which Neer had attempted to obviate the infringement claimed by Patterson in respect to the automatic drawer and tablet. The character of the improvement was in itself adapted to recall the information he had received when Neer's earlier machine was offered to him. In addition to this, Mr. Rector, in his letter suggesting the purchase of this application, called attention to the Neer earlier patents, and suggested that, if "we take the Neer application, we had better take the entire lot."

Mr. Patterson does say that he cannot recall his having read any papers in connection with the effort made in 1893 to sell his company the three existing Neer patents. He does, however, admit a recollection of so much which occurred in that negotiation that it is difficult to believe that he had forgotten the relation of Neer to Kelly and Reynolds. He admits that he recalls the fact that the younger Cochran first came to open the way, that the elder Cochran and Neer then came, and that finally he saw the elder Cochran and Kelly and Neer on the third visit to his factory. Reynolds, it is conceded, had no part in the negotiations which then occurred, though Cochran says he explained to Mr. Patterson the reasons for his absence. Asked by his counsel to explain what occurred on the

occasion of the visit of Neer, Kelly, and the elder Cochran at the time the machine was exhibited, he says:

"These gentlemen came to visit the factory upon an invitation from me to exhibit their machine, and, as I understood the situation, Mr. Cochran was the promotor of the Neer Company. Mr. Neer, the inventor of the machine, came to apparently offset any remarks which might be made, calculated to keep Mr. Kelly from investing any money in their company; and, as Mr. Kelly was financially able to carry out any commercial enterprise into which he might engage, I endeavored to convince him that this machine of Neer's could not be made cheap enough or simple enough to ever become a successful cash register. I did not pay any attention to Mr. Neer or to Mr.Cochran, as I knew they would not pay any attention to anything I might say derogatory to their enterprise or machine. From subsequent events, Mr. Kelly declined to go into the enterprise at all. The cash register company was apparently abandoned. Mr. Cochran was very anxious to sell the Neer device and secure for Neer a good position, but, not being successful, he returned to Chicago, and I have heard nothing from him since. The details of all of these conversations, it is not necessary to relate, even if I could remember them. Suffice it to say that these same kind of interviews are constantly held with promoters and inventors of cash registering devices, and for that reason, after the interview was over, I do not often retain more than a casual memory of the circumstances."

While he does say that he has no recollection of ever examining any contracts, or of their contents, or of hearing the name of Reynolds mentioned, he does not in terms deny that he was then informed in respect of the engagement between Neer and his associates, and of the interest of the latter in his subsequent improvements. Neither is it claimed by counsel that he had forgotten what occurred during the 1893 negotiations. Indeed, the very able and frank solicitor for complainant resents the suggestion that he defends upon the ground that Mr. Patterson had forgotten in 1897 the facts which he knew in 1893 in respect of Neer's relations to Kelly and Reynolds. The contention, on the contrary, presented by the briefs, is, first, that complainant had no definite information at any time "that Kelly and Reynolds had or were to have any interest in Neer's future inventions, and that, whatever the character of the information possessed in 1893, the subsequent events known to it were such as, in the absence of knowledge of facts now disclosed by the record, but which were unknown to complainant, to create a reasonable presumption, upon which complainant was justified in acting, that four years later, at the time it purchased, in 1897, Neer was the sole and exclusive owner thereof."

We can see no ground for regarding the information possessed by Mr. Patterson as either vague or indefinite in respect of the interest of Kelly and Reynolds in any further improvements which Neer should patent in respect to cash register machines. The principal object of the negotiations, so far as they were conducted by the two Cochrans, was to secure for Neer with the cash register company a better contract than he then had with Kelly and Reynolds; and, if those witnesses are to be believed, they informed Patterson fully as to the interest of Kelly and Reynolds in his future inventions so long as his existing relations should last. Now, what were the "subsequent events" known to Patterson, when he bought, which are relied upon to create a presumption upon which he was

justified in assuming that the application was the "sole and exclusive property of Neer"? They are substantially as follows: (1) That this application had been on file four years without any assignment to Kelly and Reynolds being filed in the office, whereas such an assignment of his earlier patents had been filed either with the application or shortly thereafter; (2) that the contract between Neer and associates was terminable at will or upon 10 days' notice, and the interest of Kelly and Reynolds was only in such improvements as should be made while those relations lasted; (3) that in fact this partnership was terminated soon after the Dayton negotiations, and that Neer engaged in a different line of inventions; (4) that in April, 1894, a patent issued to Neer and Cochran upon an application filed in April, 1893; (5) that Neer represented that he had made no assignment, and so covenanted in his assignment to Chamberlain.

It is to be borne in mind, in giving due weight to the circumstances mentioned, that Patterson is chargeable with the knowledge that the application he was buying had been filed within about six months of the close of his negotiations for the purchase of the earlier Neer machine. The question he had to ask himself in 1897 was not whether the arrangement between Neer and his associates had continued up to that time, but whether it had not continued up to the time of an application for an improvement made, which had been filed within six months of the close of his former negotiations. Now, he did not know, and could not know, for the fact was otherwise, that Neer had ceased to work with and for Kelly and Reynolds when this application was filed. Neer finished the model for his improved machine in July, 1893, with their means, and placed it in the hands of an attorney to obtain a patent; the application being filed September 15, 1893. Some time about the time of this application, Neer and associates did dissolve, and he took work with the father of O. W. Kelly, and took up a new line of inventions. But the actual fact that the relations of these three men had terminated even in 1897 was not even then known to Patterson. All that he knew about the abandonment of the cash register business consists in the fact that he had heard nothing more about it, and had been told by a Mr. Mast, some two or three years after the negotiations of 1893, "that he [Mast] was of opinion that Mr. Kelly saw no outcome in the cash register, and had decided not to go into the field." This, of course, referred to the scheme of getting up a factory to make the Neer machines, which was a part of the purpose of the Neer Company made known to Patterson in 1893. But counsel frankly do not claim that he knew in 1897 that the Neer Company had broken up, and modestly only insist that Patterson had a right "to assume that it had been abandoned"—a correct assumption if the question was as to its continuance up to 1897, but an incorrect one if it be an assumption that the relation did not exist when the invention in question was made. The assumption that Patterson knew that in 1894 a patent had issued to Neer and Cochran upon an application made within a month after the close of the 1893 negotiations is unauthorized. The fact is true. But it does not appear that Patterson

knew it when he bought the later application. It was in fact a patent in which Kelly and Reynolds were interested, but it was taken out to Cochran and Neer because Cochran was dominating Neer, and wished it done to secure him in some advance he had made about it. As he was the agent for all the parties, he held it in trust, and so recognized himself as a trustee. That patent was not in the line of the title of any of the complainants' patents, and hence there is no constructive notice about its issuance. If Patterson did not himself know that such a patent had issued to Neer and Cochran, it could not mislead him, and could have cut no figure whatever in leading him to presume the relation of the parties ended when the application in question was filed in September of 1893. That he knew the contract between Neer and Kelly and Reynolds was to endure only so long as the parties wished, must be conceded. But why he should assume that an application for a patent, made so soon after he had declined to buy the first Neer machine, and which was to him manifestly intended to escape the charge of infringement which he had brought against the first Neer machine, should be the sole property of Neer, is not explained. Reasonably the presumption, under the facts known to him, was that such an improvement would be for the benefit of the partnership; and, in the absence of very clear evidence otherwise, he should have so assumed. The representation by Neer that he had made no assignment, and his covenant to that effect, is of no importance whatever. He did not even represent that no one had any equitable interest in his invention, and said nothing and was asked nothing about the dissolution of his partnership with Kelly and Reynolds. In view of the facts known to Patterson, the natural inquiry would have been, not, "Have you made any assignment?" but, "Are you equitably under any obligation to do so by reason of your contract with them? When did your agreement to give them an interest in your inventions come to an end?" But if he had caused these questions to be put to him, he would have acted with great negligence if he had failed to inquire of Kelly and Reynolds as to their claim of interest in this particular invention. The assumption that they had no interest in this invention, in view of the facts with which Patterson is chargeable with knowing, rests at last upon the fact that this application had been pending four years, and that no assignment had been recorded of which he was obliged to take constructive notice. In actual fact, an assignment, under date of July 22, 1893, had been spread upon the registry of the Patent Office, by which he had assigned to Reynolds a one-third interest in all of his improvements and inventions in cash registers which he had been working on, and for which he contemplated filing applications. This assignment did not operate as a constructive notice, because it was not such a grant or conveyance as was entitled to registration. Lynch v. Murphy, 161 U. S. 247, 16 Sup. Ct. 523, 40 L. Ed. 688; Carpenter v. Dexter, 8 Wall. 513, 532, 19 L. Ed. 426; Prentice v. Duluth Storage Co., 58 Fed. 437, 7 C. C. A. 293, 302; Robinson on Patents, § 785; Wright v. Randel (C. C.) 8 Fed. 591. Neither did it request the commissioner to issue any particular patent to an assignee, and the

commissioner therefore properly ignored it when he came to issue this patent. Rev. St. § 4895; Robinson on Patents, §§ 411, 769, 785; Wright v. Randel (C. C.) 8 Fed. 591. Neither is it shown that Patterson or any of the agents or attorneys of the complainant corporation had any actual knowledge of this document. But on the other hand, it is not shown that any search of the record was ever made to see if any assignment had been recorded. Such an actual search would undoubtedly have disclosed this assignment. There was therefore no actual misleading by the failure of the record to disclose any assignment, for the proper place for such an assignment would have been upon the registry, and not in the file. Rev. St. U. S. § 4895.

The court below, after an exhaustive examination of all the facts and circumstances of the case, reached the conclusion that the facts known to the complainant company at the time of its purchase were such as to put it upon inquiry. The facts which the complainant must be taken to have known pointed plainly to the probable existence of a right or title in conflict with that which they were about to buy. It became complainant's duty, therefore, to make inquiry as to the existence and extent of this probable outstanding equitable, but prior, right; and an inquiry of Neer only was not a reasonable compliance with this duty. The failure to make reasonable inquiry under such circumstances convicts complainant of a degree of negligence inconsistent with the claim to be a bona fide purchaser without notice. The knowledge which its representative in this transaction had did not consist of vague rumors as to the possible rights of another. It was knowledge that tended strongly to show that Kelly and Reynolds were interested in the invention he was about to buy, and was not materially weakened by any subsequent facts known to him at the time he was called upon to act. It may be that Mr. Patterson did not have at the time any purpose to deliberately shut his eyes to the facts which inquiry might disclose, for that would amount to mala fides or fraud, and we do not attribute any evil purpose to him. The price he was asked to pay was a small one for a great concern, such as that he represented. When asked about the extent of his examination of the application before buying, he said:

"I may or may not have examined the file wrapper, and cannot state positively upon this point. If the case was an important one, I should probably have an opinion submitted, or read it over myself. In this case I am under the impression that, the amount involved being so small, that I told Mr. Macauley he might buy the patent if the amount did not exceed $200. That is about all I remember about it."

Under such circumstances, he may well say, as he does, that he at the time had no knowledge that any one beside Mr. Neer owned or claimed any interest in the invention. But he did have information which made it his duty to inquire whether others did not have an interest in this inchoate property, and this he doubtless would have done but for the comparative insignificance of the matter, which induced a very negligent method of action, which justly deprives his corporation of its claim to be a bona fide purchaser without notice. Evidence of a fraudulent purpose or conduct amounting to moral

turpitude is not necessary to deprive a purchaser of a legal title of the advantages of his position.

The English cases for a time seemed to tend toward a rule requiring evidence indicating a deliberate shutting of the eyes to avoid light, and amounting to what some of the judges styled fraud. 2 Pom. Eq. § 606, and notes, and cases there cited. But the latest announcement seems to repudiate this extreme view. Oliver v. Hinton, 2 L. R. Ch. D. 1889, 264. The test of the American courts has not been so extreme. The inquiry has generally been whether the facts known were such as to put a reasonably prudent man upon his guard, and whether an inquiry has been prosecuted, with reasonable diligence. 2 Pom. Eq. § 606, and notes. The latest announcement of the Supreme Court of the United States is that found in Stanley v. Schwalby, 162 U. S. 255, 276, 16 Sup. Ct. 754, 763, 40 L. Ed. 960, where Justice Gray said:

"But in order to charge a purchaser with notice of a prior unrecorded conveyance, he or his agent must either have knowledge of the conveyance, or at least of such circumstances as would, by the exercise of ordinary diligence and judgment, lead to that knowledge; and vague rumor or suspicion is not a sufficient foundation upon which to charge a purchaser with knowledge of a title in a third person."

The decree of the court below must be affirmed.

NATIONAL METER CO. v. NEPTUNE METER CO. et al.

(Circuit Court of Appeals, Third Circuit. February 22, 1904.)

No. 14.

1. PATENTS—NOVELTY—WATER METERS.

The Nash patents, No. 527,534 and No. 527,537, for improvements in disk water meters, are void for lack of novelty, and also because the claims of the former are so broad as to cover practically everything in the prior art.

Appeal from the Circuit Court of the United States for the District of New Jersey.

For opinion below, see 122 Fed. 82.

J. Edgar Bull and Edmund Wetmore, for appellant.

Alfred W. Kiddle and William A. Redding, for appellees.

Before ACHESON, DALLAS, and GRAY, Circuit Judges.

ACHESON, Circuit Judge. This bill was brought to restrain infringement of two letters patent, No. 527,534 and No. 527,537, for improvements in disk water meters, granted on October 16, 1894, to the National Meter Company (complainant-appellant), as assignee of Lewis Hallock Nash. At the date of the making of the improvements in question, water meters of the disk type were old and in successful use. The structure described and shown in and by each of these patents, in shape, size, constituent parts, arrangement, and mode of operation, was old. The form and function of each of the constituent parts of the described structure are identical with those which had long been in common use prior to the alleged inventions. Moreover, all the ma-

terials specifically mentioned in these patents had previously been employed in various combinations in the manufacture of water meters. The learned judge below, in the course of his opinion, after particular reference to certain prior patents, justifiably said:

"It will thus be seen that metals and nonmetallic substances of the character specified, for one or the other of the different parts of a nutating meter, have been freely suggested and employed by other prior inventors, until there is hardly a combination of them which could be devised that would be in any respect new."

Patent No. 527,534 is much the broader of the two patents in suit, patent No. 527,537 being merely for one species or a particular form of the alleged invention of the other patent. The following explanatory paragraph of the specification of No. 527,534 sets forth alleged advantages possessed by the described structure:

"The disks of nutating pistons heretofore made have been comparatively fragile and liable to break. By making the disk of metal I altogether avoid difficulty. However, if both piston and case were made entirely of metal, the friction and wear occurring would make the structure of little or no value as a practical water meter. As the principal friction surfaces are at the ball of the piston and its seat in the case, by making these parts of different materials—for instance, one of metal and the other of nonmetallic material—the friction and wear become very slight. Thus the maximum strength and the minimum friction and wear are obtained, and a durable and efficient meter is made. Such a piston can be used in any suitable case. If the piston, as I prefer to make it, have a disk of metal and a ball of nonmetallic material, it may be used in a case composed of any material or materials, for but little friction and wear will be developed in the ball bearing, even if the seat in the case be of the same or similar nonmetallic material—as, for example, if both be made of hard rubber. When the walls of the case as well as the disk of the piston are made of metal, while the seat and ball are either both of nonmetallic material, or one is of nonmetallic material and the other is of metal, the wear on the opposing metallic surfaces, particularly between the spherical walls of the case and the rim of the piston, will, other things being equal, be faster than at the other parts, and hence the weight of the piston will always be supported on the ball bearing, where friction is least, and friction contact between the edge of the piston and the spherical walls of the case avoided."

The specification contains the further statement:

"In the claims I employ the words 'coefficient of abrasion' to indicate the rapidity with which wear will take place between opposing surfaces."

The widest claims of this patent and the ones particularly relied on by the complainant are the first and second claims, and those only we deem it necessary to quote. They are as follows:

"(1) In a water meter, a nutating piston, composed of ball and disk, combined with a case provided with seats for the piston ball, the disk of the piston and the spherical walls of the case being composed of substances having a larger coefficient of abrasion than the substances composing the ball of the piston and its seats in the case.

"(2) In a water meter, the disk of a nutating piston and the opposing case walls, made of similar materials, combined with the ball of said piston and the ball bearings in the case, made of dissimilar materials."

The specification of patent No. 527,537 repeats the statement that:

"As the principal friction surfaces are at the ball of the piston and its seat in the case, by making the ball of metal and its seat in the case of a nonmetallic material the friction and wear become very slight."

The single claim of this patent reads thus:

"In a water meter, the combination of a piston composed of a ball and disk, both made of metal, with a case made of metal and a seat for the ball made of nonmetallic material."

The charge of infringement made against the defendants below (the appellees) is based upon their manufacture and sale of two slightly different types of disk water meters, the structures of both of which, in form, constituent parts, and method of action, are conformable to this art as practiced before the alleged inventions of the patents in suit. One of the meters complained of is constructed with an all-metal case having all-metal seats for the ball of the piston, and a metal disk having a rubber ball for its journal. The other meter complained of is made under the Thomson patent, No. 568,642, of September 29, 1896, and has for the lower bearing of the metal ball of the piston a skeleton of metal provided with concentric blocks of graphite mounted in recesses in the metal socket. The alleged infringement lies in the combined use of the materials mentioned. Do these constructions, or either of them, violate any exclusive rights vested in the complainant by virtue of the patents in suit? The conclusion of the Circuit Court was adverse to the complainant's pretensions, and we think rightly so.

According to the explicit statement of both the patents in suit, the principal place of friction is at the ball of the piston and its seat in the case. Upon this assumption the patents rest. It is the basis of the alleged invention. The problem was to secure the minimum of friction and wear between the ball of the piston and its seat. That being obtained, the invention is realized. The specification of No. 527,534 states that by making the ball of the piston and its seat in the case "of different materials—for instance, one of metal and the other of nonmetallic material—the friction and wear become very slight"; and "thus the maximum strength and the minimum friction and wear are obtained, and a durable and efficient meter is made." What the patents unmistakably prescribe is an antifriction bearing for the ball. But that was an old and common expedient in water-meter construction. This is abundantly shown by the evidence. The specifications here do not disclose any new means for reducing friction between the ball of the piston and its seat in the case. It was a well-known fact that friction and wear between a journal and its bearing can be reduced by making these parts of dissimilar materials. This principle was of common application in machine construction before the date of the alleged inventions. The nonmetallic materials specifically mentioned in the complainant's patents are lignum vitæ, hard rubber, and vulcanized fiber. Now, the use of lignum vitæ for precisely the same purpose is described in Nash's patent, No. 379,805, of 1888; and the use of hard rubber for a piston ball working in a metallic seat is described in the same patent, and also in the Davies patent, No. 384,024, of 1888, and the British patent to Davies, No. 13,571, of 1886. The prior Nash patent above mentioned discloses a water meter almost identical with the structure of the patents in suit composed of an all-metal case with an all-metal piston, or of a hard rubber case with a hard rubber piston; the ball of the piston, whether of metal or hard rubber, having for its lower bearing or seat a plug of

lignum vitæ. Upon a fair review of earlier patents, the judge below made the clearly warrantable deduction that the very combination of materials suggested in the complainant's patent is to be found in the prior art, not as a matter of accident or undesigned, but definitely and distinctly indicated and provided for.

The brief of the appellant puts forward the proposition that "the gist of the patents in suit resides in the discovery that the piston can be made to maintain automatically the necessary clearance at its rim by putting there materials which wear away or abrade faster than the materials forming the ball and its socket," and it is said that the invention consists in the "paradoxical expedient" of increasing friction and abrasion between the edge of the piston and the chamber walls. It is difficult, if not impossible, by searching, to find out anything in the specifications tending to support this ingenious theory. As we have already seen, the inventor states that the principal friction surfaces are at the ball of the piston and its seat in the case, and that, by making these parts of different materials, the friction and wear become very slight. "Thus," the specification goes on to say, "the maximum strength and the minimum friction and wear are obtained and a durable and efficient meter is made," and it is added that "such a piston can be used in any suitable case." It is true that further on in the specification occurs the rather obscure statement that:

"When the walls of the case, as well as the disk of the piston, are made of metal, while the seat and ball are either both of nonmetallic material, or one is of nonmetallic material and the other is of metal, the wear on the opposing metallic surfaces, particularly between the spherical walls of the case and the rim of the piston will, other things being equal, be faster than at the other parts, and hence the weight of the piston will always be supported on the ball bearing, where friction is least, and friction contact between the edge of the piston and the spherical walls of the case be avoided."

If, however, friction contact between the edge or rim of the disk of the piston and the walls of the case be avoided, there can be no automatic clearance by abrasion. There may be friction without abrasion, but there cannot be abrasion without physical contact. This is a self-evident proposition. Even the appellant's expert assents to this.

But furthermore we are convinced by the proofs that the theory of automatic maintenance of adequate clearance between the rim of the disk of the piston and the walls of the case by abrasion is incapable of practical realization. We think that the patents themselves are opposed to such theory. As we read the specifications, the main thing to be done is to minimize the friction and wear between the ball of the piston and its seat, to the end that the piston shall "always be supported on the ball bearing," and "friction contact between the edge of the piston and the spherical walls of the case be avoided." Aside, however, from the patents, the clear weight of evidence is against the realization, in practice, of the appellant's theory of operation. Mr. Thomson, an engineer and a manufacturer of water meters, out of his large experience testifies thus:

"I do not believe, nor have I ever seen in practice, nor have I ever seen a practical demonstration in which, once the periphery of the disk is brought into contact with the spherical wall of the casing, it will then automatically

produce 'an adequate clearance.' * * * No such result would be obtainable in practice."

It is very significant that the complainant deliberately abandoned the construction shown and described in its patent No. 527,537. In its catalogue of 1900 it is said:

"A third plan is to use an all-metal disk, which is a combination long ago abandoned as being thoroughly unsatisfactory, both as to durability and close registration."

Moreover, it appears that the complainant had adopted and exclusively employs in its manufacture of disk water meters a construction in which the meter has an all-metal case, with all-metal sockets, and a piston composed of a hard rubber ball and disk, the disk being reenforced with metal embedded in and completely covered by the rubber, and shaped at its periphery into the form of a knife-edge composed wholly of rubber. Obviously, this construction is designed to diminish friction and wear between the rim of the piston and the chamber wall, not to increase friction and abrasion at that place. It will be noted that, in this construction, reliance is put upon the mechanical conformation of the periphery of the disk. This construction of disk water meters is made under a later patent, No. 527,539, granted to the complainant as assignee of Nash.

The claims of the patents in suit have an extraordinary sweep. They take in the whole range of substances or materials fit for water-meter construction whether heretofore used or not. They also embrace an unlimited number of combinations. The complainant's expert expressed the opinion that, "where the construction is such that the wear between the ball and its seat is less or more retarded than between the periphery of the disk and the inside wall casing, the alleged invention would be realized." He also expressed the opinion that a water meter of the knife-edge form of disk, made under patent No. 527,539, falls within the claims of the principal patent in suit, No. 527,534. If these views, which the appellant urges, be sound, and the defendants' water meters also are covered by those claims, it is safe to say that no practicable disk water meter can be made which could escape this monopoly, for an antifriction bearing at the ball of the piston is necessary to successful working—a fact which has always been recognized in this art.

We are of opinion that the learned judge below was entirely right in dismissing the complainant's bill, and the decree of the circuit court is affirmed.

McCARTHY v. WESTFIELD PLATE CO.

(Circuit Court of Appeals, Second Circuit. February 25, 1904.)

No. 127.

1. PATENTS—INFRINGEMENT—CASKET HANDLES.

The McCarthy patent, No. 478,168, for improvements in casket handles, claim 1, construed, and *held* not infringed by the device of the Klein patent, No. 559,898, in which the improvement, while having the same general purpose of strengthening the handle, does so by means which operate on a different principle.

Appeal from the Circuit Court of the United States for the District of Connecticut.

For opinion below, see 124 Fed. 897.

Howard P. Denison, for appellant.

Harold Binney, for appellee.

Before WALLACE, LACOMBE, and TOWNSEND, Circuit Judges.

WALLACE, Circuit Judge. We agree with the conclusions of the court below that the defendant's coffin handles, made conformably with letters patent No. 559,898 (granted to Klein, assignor, May 12, 1896), do not infringe the complainant's patent; and this being so, it will not serve any useful purpose to consider whether the claim in controversy is void for want of patentable novelty, or void because the alleged invention had in all essentials been previously patented by the complainant.

The patent in suit is for an improvement in folding-down handles, more particularly burial casket handles, which consists in providing an auxiliary support to the handle by means of a relief-bar connected with the handle-bar. In a prior patent to the complainant (No. 469,975, granted March 1, 1892) a cognate improvement was described and claimed, the general nature of which was stated to consist "in providing the handle with an auxiliary support or brace which will remove a part of the strain from the hinge-pins by which the handle arms are connected to the body-plates, and which, in case said pins break, will constitute the main support of the casket." The present patent covers a modification of the auxiliary support of the prior patent, and, without any other reference to the prior art, that patent itself imposes a limitation upon the construction of the present patent which restricts the application of the doctrine of equivalents.

In the folding-down handle in common use previous to either of the McCarthy patents the handle was carried by an arm attached to the body-plate of the casket by a hinge-pin pivoted in the ears of the body-plate. These ears projected from the sides of a recess in the body-plate formed to receive and afford a bearing to the end of the arm. The end of the arm was provided with a shoulder extending rearwardly beyond the hinge-pin, which when the arm was raised engaged with the top of a wall at the rear of the recess so as to limit the upward movement of the handle. The specification of the patent in suit describes the old folding-down handle with an additional recess in the body-plate consisting of an elongated slot through its outer face. It also describes a supplemental arm, called a relief-bar, which is secured rigidly or pivotally to the main arm near the handle, and extends beneath the main arm to and through the slot in the body-plate, where it engages with the inner face of the body-plate. To effect this engagement, it is provided with a head larger than the width of the slot. This bar is arranged and constructed so as to move with the main arm, but to have independent bearing connections with the body-plate. In operation when the handle is moved downwardly the bar will slide under the body-plate, and when the handle is raised the bar is drawn

out through the slot until its head engages with the inner face of the body-plate. By this engagement the bar relieves the strain on the hinge-pin, and if the hinge-pin breaks receives the whole strain and supports the casket. Thus the folding-down handle of the patent is the old device with an additional handle-arm movably attached to the body-plate by a slot and head engagement; the main arm and its hinge attachment to the body-plate are the main arm and attachment of the old device, and do their work precisely as they did in the old device; and the bar or new arm, and its attachment, do their work precisely as they would if the bar was rigidly or pivotally fastened to the handle instead of the main arm and there were no main arm.

The claim is as follows:

"The combination, with the handle, the arm carrying it, and the body-plate to which said arm is hinged, of a relief-bar connected to said arm and passing through a slot in said plate, and provided on its inner end with a head."

The only novelty in the combination of the claim resides in the peculiar organization of the relief-bar and the body-plate, and except in this respect it is the same combination described in the earlier patent to complainant. In the earlier McCarthy patent one form of the auxiliary support consists of an additional arm at one end pivotally connected with the handle-arm and at the other end provided with a T-shaped head which slides in a T-shaped groove in the body-plate. In this construction the supplemental arm moves with the main arm, and when the handle is raised to the extent permitted by the hinge connection of the main arm it engages in the end of the groove, and thus relieves the strain on the hinge-pin, and receives the whole strain in case the hinge-pin breaks.

The defendant's handle contains the parts employed in the old folding-down handle, and as therein combined, together with parts which re-enforce and strengthen the handle-arm and its bearings at the hinge-joint; but it does not contain the relief-bar of the claim, nor the slotted body-plate of the claim. Its handle-arm is strengthened throughout its entire length by a piece of sheet steel incorporated within the arm which at the body-plate end has a projection which extends beyond the pivot and rests upon one of the walls in the recess when the handle is raised. In all the parts except those that were employed in the old folding-down handle the defendant's handle differs so greatly in details of construction from the complainant's handle that it is difficult to compare them; but the most accentuated differences are those of principle. It contains no parts which relieve the strain upon the hinge-pin when the handle is raised, or which provide a support for the casket in the event of the breaking of the hinge-pin. Both McCarthy and Klein by their several endeavors have sought to improve upon the old folding-down handle, McCarthy endeavoring to do so by what is properly a secondary arm with independent body-plate connections, and Klein by strengthening the old arm and its hinge connections. As was said in the opinion of the court below by Judge Platt:

"The former departs in one direction, and the latter in another. The patent in suit is the outcome of a struggle to relieve the hinge-pin. The Klein patent is the outcome of a struggle to so strengthen the handle as to overcome the natural strain at the vital point."

The decree is affirmed, with costs.

GEORGIA PINE TURPENTINE CO. v. BILFINGER et al.

(Circuit Court, W. D. North Carolina. March 14, 1904.)

1. PATENTS—SUIT FOR INFRINGEMENT—RIGHT OF COMPLAINANT TO DISMISS.
Complainant, in a suit for infringement of a patent, who obtained a preliminary injunction, will not be permitted to dismiss without prejudice after all the proofs have been taken, which show that the charge of infringement was wholly unfounded. In such case the defendant is entitled to a decree adjudicating the questions at issue on the merits.

2. SAME—INFRINGEMENT—APPARATUS AND PROCESS FOR WOOD DISTILLATION.
The Bilfinger patents, No. 658,888, for a wood-distilling apparatus, and No. 674,491, for a process of distilling wood for the manufacture of charcoal and the saving of by-products, to be carried on by the use of such apparatus, construed, and *held* not infringed.

In Equity. Suit for infringement of letters patent No. 658,888 for a wood-distilling apparatus, and No. 674,491 for a process of distilling wood for making charcoal and saving the by-products, granted to Carl W. Bilfinger on a division of the same application. On final hearing.

Dickerson, Brown, Reagener & Binney and R. D. Douglas, for complainant.

Schreiter & Mathews, W. P. Bynum, Jr., W. C. Douglass, and Henry Schreiter, for defendants.

BOYD, District Judge. This is a suit in equity, by the Georgia Pine Turpentine Company v. the Naval Stores Supply Co. and Carl W. Bilfinger, for infringement of letters patent No. 658,888 and No. 674,491, granted to the defendant Bilfinger for an improved apparatus and process for manufacture of charcoal and saving of by-products, which said letters patent, the same having been granted in the years 1900 and 1902, were thereafter, with all rights and privileges thereunder, as alleged in the bill, duly sold, assigned, and transferred to the complainant, who, at the commencement of this suit, was the sole owner thereof. The further allegation in the bill is that, after complainant became the owner of said patents, the defendant Bilfinger organized the Naval Stores Supply Company, and in conjunction with the said company, and in violation of plaintiff's rights, was unlawfully using the same. Each of the defendants filed a separate answer, denying an infringement of the patent owned by plaintiff, and averring the right to have and use the apparatus and process connected with their business. The pleadings have been completed, both parties have taken proofs, and the case has been set down for final hearing upon the pleadings and the proofs.

At the final hearing complainant moved to have its bill dismissed, without prejudice, upon payment of defendants' costs. This motion must be denied. It is well settled by authorities that complainant cannot dismiss his bill at will after all proofs are taken and the case is set for final hearing. Such motion is addressed to the sound discretion of the court, but will not be granted in a case where "such proceedings have been taken as entitle the defendant to a decree." Chicago, etc.,

¶ 1. See Patents, vol. 38, Cent. Dig. § 551.

R. Co. v. Rolling Mill Co., 109 U. S. 702, 3 Sup. Ct. 594, 27 L. Ed. 1081. In other cases it is held that such motion will not be granted where the adverse party would be prejudiced or put to a disadvantage. Johnson v. Bailey (C. C.) 59 Fed. 670, Callahan v. Hicks (C. C.) 90 Fed. 539, and the cases cited there. In this case no reason is stated why complainant desires to dismiss its bill, except as it appears from the proceedings that complainant realizes the complete failure to make out a case against the defendants, though its proofs cover every feature of defendants' apparatus and the process carried on therein, showing that complainant's counsel and expert witness have diligently and skillfully exploited every path to that end. On the other side, defendants establish by their proofs, affirmatively, that the apparatus they use and the process they carry on in their plants at Biscoe and Aberdeen are fundamentally different from those set forth in the patents in suit. Would it, then, be just and equitable here to grant complainant's motion now, after defendants have been subjected to the trouble and expense of defending the suit and bearing the detrimental consequences of the litigation until it could be submitted for final decision? Would it be just and equitable to nullify their efforts and expense incurred in producing the proofs showing that the charge of infringement made against them was and is wholly unfounded?

Defendants are charged in the bill with infringement of letters patent; they were served with the process of the court, required to appear, answer, and to produce proofs in support of their answer. Whether complainant commenced this action on misinformation or from error of judgment, or for other reasons, the institution of the suit, the charge of infringement, the publicity given by the complainant to the pendency of the same, to the injunctive orders of the court, and to the proceedings in this case throughout the entire territory where defendants' business extends, must have had a detrimental effect on defendants' business. This effect is of such nature as would not be removed if the bill of complainant herein be merely voluntarily dismissed by an order on such motion as complainant now proposes. Such damage to defendants' reputation and business standing can only be removed by a judgment of the court deciding the controversy on the merits.

The bill of complainant should not be dismissed, as complainant now proposes, also because of the pendency of similar suits in other districts, involving the same apparatus, the same process, as in the case at bar, and based on these same patents. The pendency of at least one other suit of this kind (in the Western District of Georgia) is shown by the proofs in the case at bar, the fact having been brought out by the cross-examination of defendants' witness Bilfinger by complainant's counsel. This other suit was commenced after defendants answered here, and no proofs have yet been taken. If this suit here should now be merely dismissed by an order on request of complainant, the same issue will be required to be litigated in the other case. This procedure may be repeated by complainant as often as it may succeed in inducing the courts to dismiss its bills before judgment, and without prejudice after the proofs are taken and the case set down for final hearing. Such proceeding would certainly be vexatious to the utmost, and work irreparable injury to defendants' inter-

ests. For these reasons, complainant's motion is denied, and the case will be considered and decided by the court on the proofs, and a judgment entered therein.

The first of the two letters patent, No. 658,888, is for improvements in wood distilling apparatus; and the second, No. 674,491, is for a process of distilling wood for the manufacture of charcoal, and saving of by-products, to be carried on in the apparatus set forth in the first patent. The second letters patent were granted on a subdivisional application of the first. Originally only one patent was applied for—for the apparatus and the process; thereafter, the subject-matter of the process was embodied in a subdivisional application, under which the second patent (No. 674,491) issued. In the specification of the process patent, the inventor says (page 1, line 34) as follows:

"The objects of my improved process are, first, to decompose wood into (1) solids, (2) volatile and (3) nonvolatile liquids, and (4) gases; second, to separate these ingredients from each other; and, third, to prevent decomposition of any of the ingredients in the process of decomposing the raw material."

The several products shall also be recovered separated from each other; the solid ingredient as charcoal; the volatile and nonvolatile liquids as wood turpentine, oils, and tar; the gas as illuminating gas. Thus we may say that in these particular respects the process of the patent differs from other processes for distilling wood, and the apparatus for carrying on this process is particularly designed for it. This is the apparatus of the Bilfinger patent No. 658,888, and it is with respect to this apparatus that the inventor says, at the outset of the specification of his process patent:

"The apparatus necessary for the carrying on of the process is more fully described in my United States letters patent No. 658,888, granted October 2, 1900," etc.

This statement has an important bearing on the issue of infringement involved in the case at bar. It shows that the inventor realized that the process cannot be carried on in any other apparatus except the particular apparatus that he specifically sets forth in the other patent as an integral part of his invention. Defendants' exhibit "Bilfinger Plans of Defendants' Plants at Biscoe and Aberdeen," and as explained in the testimony of the defendant Bilfinger, shows clearly, on comparison with the drawings and descriptions of the Bilfinger patent No. 658,888, that the apparatus employed in defendants' plants at Biscoe and Aberdeen do not contain a solitary feature of that which is set forth in the patent as the improvement or invention designed for the purpose of carrying on the process, the subject-matter of the other Bilfinger patent, No. 674,491. The evidence shows that without these specific means—the sectional flues, dampers, outlets, and valves —the process cannot be carried on, or such results obtained as set forth in the patent. Defendants' plants comprise apparatus distinct from the ordinary wood-distilling plants in several respects, but every one of the specific features is also wholly different from what is disclosed in the Bilfinger patent No. 658,888, and these improvements, embodied in defendants' plants, are the subject-matter of another patent (defendants' exhibit, "Bilfinger & Hallock 1903 Patent"). They

serve for the carrying on of a process wholly different from the process specified in the Bilfinger patent No. 674,491, and producing wholly different results. The fact that the improvements embodied in the apparatus of defendants' plants at Biscoe and Aberdeen are covered by a subsequent patent is prima facie proof that defendants' plants are patentably different from the apparatus set forth in the patent in suit. That they are different also in every material or substantial respect was proved by the testimony for the defendants, and by the letters patent introduced in evidence at the close of defendants' proofs. Neither the proofs that the improvements embodied in the apparatus of defendants' plants at Biscoe and Aberdeen are the subject-matter of this patent, nor the proof made by the testimony of defendant Bilfinger that these apparatuses are differently constructed for a different process, and that, in fact, a wholly different process is carried on in defendants' plants at Biscoe and Aberdeen, was contradicted or rebutted in any manner. It must therefore be accepted as established by the proofs:

(1) That defendants' plants are not constructed according to the Bilfinger patent No. 658,888, in suit herein; and,

(2) That no such process as set forth and claimed in the Bilfinger patent No. 674,491, in suit herein, is carried on in the plants of the defendants.

A decree will be entered for defendants, dismissing the bill of complaint herein, with costs.

PERKINS ELECTRIC SWITCH MFG. CO. v. BUCHANAN & CO.

(Circuit Court, E. D. Pennsylvania. March 24, 1904.)

No. 51.

1. PATENTS—INFRINGEMENT—INCANDESCENT LAMP SOCKETS.
The Perkins patent, No. 626,927, for an incandescent lamp socket, was not anticipated, and, while the parts were old, covers a new combination of utility, and discloses patentable invention. Claims 3, 4, and 9 also *held* infringed.

2. SAME—COMBINATION AND AGGREGATION DISTINGUISHED.
Elements of the patent considered, and *held* to constitute, not a mere aggregation of separate elements, but a composite construction, in which the several parts co-operate to produce a common and combined result, which the law accepts and sustains.

In Equity. Suit for infringement of letters patent No. 626,927, for an incandescent lamp socket, granted to Charles G. Perkins June 13, 1899. On final hearing.

Howson & Howson, for plaintiffs.

Marcellus Bailey and Curtis B. Johnson, for defendants.

ARCHBALD, District Judge.[1] The issues in this case are few, and comprised within a narrow compass. While infringement is denied in the answer, it was not seriously disputed at the argument, and could

[1] Specially assigned.

not successfully be on the proofs. The socket manufactured by the defendants, in its general structure, is closely patterned after that of the complainants, and, whatever may be the incidental improvements, infringes upon it, for which, of course, the patent held by the defendants covering these improvements affords no excuse. Neither, in view of this, can they very well question its utility, having copied it. If it had no advantage over other existing structures, why not follow them instead?

The novelty of the invention is contested, but the references cited against it are few, and, however they may limit, do not otherwise seriously affect, it. The patent held by the complainants was issued to Charles G. Perkins June 13, 1899, and is for an incandescent electric lamp socket. The claims relied upon in this suit are as follows:

"(3) In combination in a lamp socket, a cap, a shell, two blocks of insulating material, with recesses arranged to form two insulating-chambers, a plate with a binding-screw located in one of the chambers, and having its ends secured to the respective blocks, a plate with a binding-screw located in the other of the chambers, and having its ends secured to the respective blocks, and grooves in the edges of the upper block for the passage of the circuit-wires of [to] the respective binding-screws, substantially as specified.

"(4) In combination in a lamp socket, a shell, two blocks of insulating material with recesses arranged to form insulated chambers, a plate with a binding-screw located in one of the chambers, a plate with a binding-screw located in the other of the chambers, and a switch-block located in one of the chambers, and adapted to make contact with the end of the plate in the same chamber, substantially as specified."

"(9) In combination in a lamp-socket, a cap, a shell, two blocks of insulating material located within the shell, insulated chambers formed by recesses in the insulation, and plates bearing outwardly-extending binding-screws located in the recesses, and having their ends secured by screws to the respective insulating-blocks, substantially as specified."

But four references are produced from the prior act, and of these the Snow and the Hubbell patents may be classed together. Both, in addition to a cap and shell, are made up of two blocks, or more properly disks, of insulating material, secured together by metal plates on either side, to which the circuit wires—introduced in the Hubbell through grooves on the edge of the upper block—are attached by outwardly extending binding-screws. So far there is a correspondence with the plaintiffs' device, but there it stops. Between the blocks or disks is a large, single, open chamber, in which the key or switch mechanism is set, and across which there is an uninterrupted course for the electric current in case a short circuit happens in any way to be induced, while in the Perkins the two blocks are brought close together, and separate contact chambers, insulated from each other, carved out of them, to obviate the danger which the others invite. Admittedly, this differentiates the two constructions, and does so with effect. The Wirt socket has little relevancy. It consists of a single block—for strength—between which and the screw extension for the lamp base a large, open chamber is left, to accommodate the switch mechanism, the same as in the others mentioned, with the additional danger that the bearded ends of the circuit wires may get in contact with the metal of the screw extension below, there being nothing in between to prevent. The Pass and Seymour—the only one remaining

to be noticed—is porcelain throughout. It is made up of two main parts—a base and a body—so assembled and fastened together as to leave an arcing chamber between them, in which, side by side, the two legs of the electric circuits end, separated by a projecting wall or curtain. It must be confessed that, in the separation in this way of the two contact plates, the device approaches somewhat closely to the one in suit. The idea, to a certain extent, may be said to be there; but there is a difference, amounting to a distinction, in developing it. In the Pass and Seymour the ends of the circuit wires are left in close proximity in the same chamber, with nothing but a low and narrow rib of porcelain intercepting them, which there is constant danger that the frayed strands may bridge over and short-circuit. But in the Perkins this is doubly prevented—first, by locating the contact plates at diametrically opposite sides of the blocks; and, second, by giving to each a separate recess or chamber therein. It is true that the wall between the chambers is slight, and that the imperfect contact of the upper and lower blocks leaves a small air space, which divides it; and in a badly fitted socket, like that produced by Mr. McIntire, this may be so great as to do away in great part with the benefit to be derived from this construction. But in the ordinary and proper form, made in accordance with the patent, the two-chamber feature has an important and distinctive function, which is not anticipated by anything to be found in the Pass and Seymour, any more than in the rest of the preceding art.

The patentability of the device, however, is questioned. The inventor, it is said, took a two-block socket, which was old (Hubbell), united the blocks with metal contact plates or standards on opposite sides, also old (Wirt), and then insulated the plates by an intermediate wall of porcelain—an expedient not only common, but expressly employed in the prior art (Pass and Seymour). But the merits of the invention, and the inventive skill involved, are not to be written down in any such way. The problem of providing an electric lamp socket which should be at the same time mechanically strong and easily handled, electrically safe, and commercially cheap, was by no means easy and obvious, as the many attempts at it, which have produced more than 300 patents in the last 20 years, abundantly show. An entire porcelain socket, such as the Pass and Seymour, has certain electrical advantages, but is bulky, liable to break when exposed to rough usage, and not readily connected up or handled. The use of metal, on the other hand, in cap, shell, and screw extension, while conducing to lightness and durability as well as strength and cheapness, detracts from it electrically. In the device in suit there is apparently a more complete solution of these difficulties than in anything which had preceded it, and, even though accomplished by the use of known expedients, the combination being a novel one, and the beneficial result obtained a substantial gain to the art, it must be regarded as involving the exercise of invention, such as the law was designed to protect. If not, then not only is this wanting in the other devices which have been put in evidence, which stand on no higher plane, but there would seem to be nothing further left that was patentable along existing lines in this branch of the electric art; and improvements therein must be relegated

to the unstimulated skill of the common artisan, rather than the genius of the inventor—a conclusion which we should be slow to reach.

It is further urged that the elements drawn together in the patent amount to a mere aggregation, but this loses sight of that which is involved. The object of the invention is the production of an electric lamp socket—an important commercial appliance, which, to meet the demands upon it, must have certain characteristics and qualities. It is necessarily made up of different parts, designed for different purposes, some of which contribute one thing, and some another. The cap, the shell, the upper and lower blocks, the insulating chambers, are nothing, apart and in themselves; but together they unite to form a complete socket, to be taken and used as a whole. This is not an aggregation of separate elements, each acting or standing by itself, but a composite construction in which the several parts co-operate to produce a common and combined result, which the law accepts and sustains.

Let a decree be drawn in the usual form in favor of the plaintiffs, and referring the case to a master to take an account, with costs.

GENERAL GASLIGHT CO. v. MATCHLESS MFG. CO.

(Circuit Court, S. D. New York. February 26, 1904.)

1. PATENTS—INVENTION—DESIGNS.
   Originality and the exercise of the inventive faculty are as essential to give validity to a patent for a design as for a mechanical invention.
2. SAME.
   Whenever ingenuity is displayed in producing a new design which imparts to the eye a pleasing impression, even though it be the result of uniting old forms and parts, such production is patentable.
3. SAME—INFRINGEMENT—DESIGN FOR LAMP.
   The Humphrey design patent, No. 35,481, for a cluster gas lamp, shows a novel design and discloses invention. Also *held* infringed.
4. SAME.
   Where it appears that, by uniting old elements perceivable in other lamp designs, a new lamp of different contour and construction is produced, and where the collocated elements also impart an ornamental and graceful appearance, not possessed by prior lamp designs, the conception is beyond what an ordinarily skilled workman is able to achieve.

In Equity. Suit for infringement of letters patent No. 35,481, for a design for a gas lamp, granted December 24, 1901, to Alfred H. Humphrey. On final hearing.

Dallas Boudeman, W. P. Preble, Jr., and Charles W. Culver, for complainant.

Edward C. Davidson, for defendant.

HAZEL, District Judge. This is a bill for an alleged infringement of design patent No. 35,481, dated December 24, 1901, issued to Alfred H. Humphrey, and by him assigned to the complainant corporation. The specifications state that the invention relates to a design for gas

¶ 1. See Patents, vol. 38, Cent. Dig. § 33.

lamps known as "cluster lights." The defenses chiefly relied upon are want of novelty and noninfringement. It is not seriously controverted that the design embodies features familiarly known, nearly all of which may in some form be found in pre-existing lamps. The proofs do not disclose the prior use of an ornamental lamp similar in design to that described in the specifications. On the contrary, the evidence establishes that no lamp having the shape, configuration, or ornamentation of the lamp design in suit was previously known to the trade. The design patent in question is not for an ornament, pure and simple. The shape and configuration of the lamp also permit its classification as a useful article of manufacture. According to section 4929 of the Revised Statutes [U. S. Comp. St. 1901, p. 3398], the design must be a new and original invention produced by the industry, genius, effort, and expense of the inventor. Whether the design possesses the characteristics of originality and newness must largely, if not altogether, be determined by the visual impressions resulting from its appearance. Matthews & Willard Mfg. Co. v. American Lamp & Brass Co. (C. C.) 103 Fed. 634; Pelouze Scale & Mfg. Co. v. American Cutlery Co., 102 Fed. 916, 43 C. C. A. 52; Smith v. Stewart (C. C.) 55 Fed. 481; Untermeyer v. Freund (C. C.) 37 Fed. 342. The shape and configuration of the lamp, in its entirety; the collocation of its mechanical features; the arrangement of the cluster lights and mantels; the contour and proportions of the bulbous globe; the two metal bands, with their twisted, plaited, and filigree ornamentation—contribute to the creation of a symmetrical form and pleasing appearance. The defendant contends that the prior art discloses substantially similar designs. It is also asserted that any additional elements or substituted features constituting complainant's patent accomplish an artistic result due solely to an assembling of parts obvious to any skilled designer, and not entitled to the dignity of invention. This contention is entitled to careful consideration. It is quite well settled, upon the authority of Smith v. Whitman Saddle Co., 148 U. S. 674, 13 Sup. Ct. 768, 37 L. Ed. 606, that the law which applies to a mechanical patent does not differ materially from that applicable to design patents. Hence originality and the exercise of the inventive faculty must be present in both instances. The mere adaptation of that which was old and familiarly known to new purposes is not invention, nor would the mere aggregation of known parts of other substantially similar designs to produce that under consideration constitute patentability. Perry v. Starrett, 3 B. & A. 485; Simpson v. Davis (C. C.) 12 Fed. 144, 20 Blatchf. 413; Gorham Co. v. White, 14 Wall. 511, 20 L. Ed. 731. It is quite true that the record shows many lamps of ornamental and graceful appearance, which were known prior to the conception of the design lamp in suit. Furthermore the collocation of different parts of such designs is frequently used to enhance their appearance and salability. The caprice of fashion constantly demands something novel in the art under consideration. However that may be, the principle, as applied to design patents, is unassailable, that whenever ingenuity is displayed in producing something new, which imparts to the eye a pleasing impression, even though it be the result of uniting old forms and

parts, such production is a meritorious invention and entitled to protection. The evidence establishes beyond doubt that the lamp under consideration met with immediate favor from the public on account of its artistic construction. It appears from the evidence of the patentee that his object was to design a lamp peculiarly appropriate for a gas arc lamp of ornate appearance, which would resemble an electric lamp. He began his design in August, 1900, completing the same in October of that year. No other similar lamp, which when lighted appeared like an electric light, was then known. A number of witnesses familiar with gas lighting and the sale of gas lamps testified that there were no lamps on the market resembling the Humphrey design, which insures the illumination of large areas, while its ornate appearance and novel shape quickly achieved popularity. I have looked in vain through the illustrated catalogues submitted in evidence for lamps like that in suit. The prior art does not disclose a lamp in its entirety (and that must be the test of anticipation) which justifies declaring void the Humphrey patent, and thus negativing the presumption of patentability secured to the inventor by the issuance of the patent. Every part used in the Humphrey design is trimmed and united in its construction with the sole object of forming a symmetrical and harmonious whole. This object was achieved as a result of effort, study, and skill, and it is therefore entitled to the dignity of invention.

The question of infringement: The defendant's lamp is apparently identical with that of complainant. There are a few minor differences in detail, but such differences are thought to be immaterial. Gorham Mfg. Co. v. Watson (C. C.) 74 Fed. 418; Whittall v. Lowell Mfg. Co. (C. C.) 79 Fed. 787; Sagendorph v. Hughes (C. C.) 95 Fed. 478; Hutter v. Broome (C. C.) 114 Fed. 655. The configuration, shape, and outline are the same, and only the closest inspection will disclose the slight difference of construction pointed out by the defendant at the argument.

Let a decree be entered for an injunction and accounting as prayed for in the complaint, with costs.

BRILL et al. v. PECKHAM MFG. CO.

(Circuit Court, S. D. New York. January 11, 1904.)

1. PATENTS—PRELIMINARY INJUNCTION AGAINST INFRINGEMENT—EFFECT OF PRIOR DECISION.

   Where a patent has been held valid and infringed by a court of another circuit after a contested hearing, it is the practice to grant a preliminary injunction on such decision unless new evidence is produced which is of such character that it may fairly be supposed that it would have changed the decision if it had been before the court in the prior suit.

2. SAME—STREET CAR TRUCK.

   A preliminary injunction granted against infringement of the Brill patents, No. 627,898 and No. 627,900, for a truck for street cars, on a prior decision involving practically the same issues.

¶ 1. See Patents, vol. 38, Cent. Dig. § 488.

In Equity. Suit for infringement of letters patent No. 627,898 and No. 627,900, for a truck for electric street cars, granted to George M. Brill June 27, 1899. On motion for preliminary injunction.

Edmund Wetmore, Francis Rawle, and Joseph L. Levy, for complainants.

Chas. H. Duell, for defendant.

LACOMBE, Circuit Judge. The patents in suit and similar infringing devices to those complained of were before the Circuit Court in the District of New Jersey on final hearing. 124 Fed. 778. Nearly all the prior patents now presented were then submitted, although the opinion does not specifically enumerate them. Under such circumstances the practice here is to inquire, first, whether the record contains anything not before the New Jersey court, and, if something new is found, to inquire whether it is of such a character that it may fairly be supposed that such court would have reached a different conclusion had it been presented in the earlier case. Badische Anilin & Soda Fabrik v. Klipstein (C. C.) 125 Fed. 543. There is nothing new here except prior patents to Beach and to Davenport and Bridges, and the file wrapper and contents. Neither of these patents shows the precise combination which would anticipate, and the old elements they show were already shown in the patents which were before the court in the other cause. It is not thought that any different result would have been reached had these and the file wrapper been originally put in proof. The Circuit Court in New Jersey, however, stayed the issuance of injunction until its decision could be passed upon by the Court of Appeals, and a similar disposition would seem proper in the case at bar. The ordinary injunction order will therefore be signed. Immediately upon its entry defendants may take an order suspending operation of the injunction upon defendant filing a bond for $20,000 and sworn statements of bimonthly sales of the infringing trucks; the suspension, however, to be limited to the time required to secure decision of appeal in the Third Circuit, with provision that in the case of any delay by appellants in that case complainants here may move to vacate the order suspending stay.

An injunction order will be signed in the suit against the old company, Peckham Motor Truck & Wheel Company, but no suspending order will be granted in that case.

WESTINGHOUSE ELECTRIC & MANUFACTURING CO. v. STANLEY INSTRUMENT CO.

(Circuit Court, D. Massachusetts. March 11, 1903.)

No. 1,084.

1. PATENTS—ANTICIPATION—ELECTRIC MOTORS.

The Tesla patents, Nos. 511,559 and 511,560, for a method and means of operating electric motors, *held* void for anticipation by the Ferraris publication at Milan, on evidence which failed to carry the date of Tesla's invention back of such publication.

In Equity. Suit for infringement of letters patent Nos. 511,559 and 511,560, for a method and means of operating electric motors, granted to Nikola Tesla, December 26, 1893. On final hearing.

Kerr, Page & Cooper and Frederick P. Fish, for complainant.
Mitchell, Bartlett & Brownell, for defendant.

COLT, Circuit Judge. Upon careful consideration of the evidence, I have reached the conclusion that the complainant has failed to establish, by sufficient proofs, the conception by Tesla of the inventions in suit prior to April 22, 1888, the date of the Ferraris publication. In complainant's supplemental brief I find no reasons stated or authorities cited which should lead the court to any different conclusion.

Since the hearing in the case at bar, the Circuit Court of Appeals for the Second Circuit, in a suit, involving the same patents, brought by this complainant against the Catskill Illuminating & Power Company, upon the same evidence which was before us, has held that the proofs were insufficient to establish invention by Tesla prior to April 22, 1888. This decision, which was passed down February 26, 1903, renders unnecessary an extended opinion by this court, since it would be only a repetition of the views so clearly expressed by Judge Townsend in the opinion of the court in the Catskill Case, 121 Fed. 831.

A decree may be entered dismissing the bill, with costs.

WILLIAM FIRTH CO. v. MILLEN COTTON MILLS. SOUTHERN COTTON MILLS & COMMISSION CO. v. SAME. C. E. RILEY & CO. v. SAME.*

(Circuit Court, S. D. Georgia, N. E. D. May 4, 1903.)

1. CORPORATIONS—LIENS—SALE OF ASSETS—ATTORNEYS FOR STOCKHOLDERS—FEES.

Suit having been brought to foreclose liens on a new cotton mill, the property of a corporation, petitioners filed a bill on behalf of certain stockholders, alleging that the suit to sell the property was in aid of a collusive combination to deprive such stockholders of their interest, and prayed that the court take charge of the property, and operate the same for the payment of the corporation's debts. The bill was consolidated with the prior proceedings without objection, and, on petitioners' initiative, an expert was appointed, who made a valuable report to the court as to the property and the advisability of operating the same, after which a decree of sale was ordered on the combined bill, at which only $50,000 was bid for property worth $160,000. This sale was set aside on petitioners' objection, and a resale ordered at an upset price of $90,000, for which the property was sold. *Held*, that petitioners, having rendered valuable services both to the court and to the creditors, were entitled to a fee of $1,500 out of the proceeds of the sale.

In Equity. Petition of Erwin & Callaway and Hall & Wimberly, for attorney's fees. Exceptions to master's report.

* Reversed on appeal. See 129 Fed. 79.

Marion Erwin, Merrel P. Callaway, John I. Hall, and Olin J. Wimberly, for petitioners.

William K. Miller, for J. R. Lamar, trustee, purchaser.

E. H. Callaway, for Millen Cotton Mills.

SPEER, District Judge (orally). The equity of solicitors for the applicant here is based upon the following facts: There was a bran new cotton mill of modern construction, with modern machinery, complete and ready for operation. It cost $160,000. Some of its directors were also creditors. They were entering into negotiations with other creditors for the purpose of bringing about a sale of the property at much less than its real value. There can be no doubt about these facts. One of these creditors, namely, the William Firth Company, brought an original bill seeking to foreclose certain liens and sell the property. The stockholders who had put their means in large amount in this venture saw that their all therein invested was threatened, and they brought a separate bill with a view to have the court take charge of the property, protect it from collusive combinations which threatened to ruin all except those in the alleged combination, and if possible have such an investigation made as would enable the court to determine if it could be operated profitably, and thus work itself out of debt. This bill, without any exception from any quarter, was by order of the court consolidated with the original bill for foreclosure, and thereafter the cases proceeded together. The sale was had under the consolidated bills. Adequate compensation, $1,500 in amount, was by the purchasers, and through a private agreement of which the court was not apprised until the hearing, paid the solicitors, who filed the original bill. It was stated in judicio by one of the solicitors for the purchasers, who were also the lienholders, that it was deemed safer to pay off these solicitors than to fight them, but all compensation is refused to Messrs. Hall & Wimberly and Erwin & Callaway, who brought the bill intended to conserve the properties, and who now apply for an allowance. In addition to these proceedings, C. E. Riley & Co. filed another bill to foreclose mechanics' liens, and their solicitors were paid. It is quite safe to conclude that their fees were deducted from the large values these purchasers secured by this litigation; in other words, from the fund in court. We, however, have no knowledge of the amount paid these gentlemen, who now represent the purchasers resisting the claim of Hall & Wimberly and Erwin & Callaway. Mr. E. H. Callaway, counsel for the Millen Cotton Mills, has also been paid by private understanding, presumably from the same fund. It is to be observed that his client through answer filed by him expressly approved the effort of the solicitors now seeking compensation to save the property by their attempt to have the receivers work it out of debt. Upon the averments of this bill such investigation was made, an expert was appointed, the receiver under the original bill of William Firth Company not having the requisite technical knowledge, and the expert Mr. Tracy I. Hickman made a careful investigation into the status and character of

the property and the facilities for operation, and with the co-receiver made a joint report to the court. This report was of undeniable value, not only to the court, but to all of the creditors. The receivers, it is true, reached the conclusion that the property could not be operated profitably by them, and that, in itself, was a matter of very great value to all the parties at interest, because otherwise the court might have gone forward in the effort to keep the enterprise a going concern, and might for the lack of information have entailed greater loss on the creditors. The investigation thus made by the receiver appointed under the bill filed by the attorneys making application for counsel fees was generally of great value to the court, and his general participation in the management and conservation of this property, he being an experienced mill man, was also advantageous to the trust fund. Finally, however, the property was brought to sale. It was alleged that the combination had been made to sell it for $40,000, and it is significant that the bid as made for it, in which the local directors and the other lien creditors were interested, was for $50,000, and those parties who were charged as combining to sell it in the first instance were in large measure intended to be the beneficiaries of this bid. The solicitors now seeking compensation filed objections to the price offered, and upon full hearing the bid was held inadequate. These gentlemen attended the hearing of the motion to confirm the sale, and made a full showing why it should not be confirmed. A resale was ordered, and the property brought the sum of $90,000, an increase of 44 per cent. over the bid originally made. This sale was approved.

Now, it cannot be questioned that the conduct of these solicitors was meritorious. They did not succeed in accomplishing all that they set out to do in the first instance, but it seems a just conclusion that they contributed to increase the aggregate value of the fund in court from $50,000 to $90,000. They appeared at all the trials of the various issues in the cause. These were numerous. Their counsel assisted the court in every way possible, they took part in all the efforts to resuscitate this venture which was earnestly and persistently attempted by the court with a view to save the creditors and stockholders as well, and to bestow upon the community where the mill was situated the great benefits to result from the operation of such an establishment.

In the exercise of the equitable discretion in such cases justified by the authorities, it seems justifiable to allow these gentlemen compensation for their services. Besides, there will be no great hardship on the syndicate of creditors and directors of the Millen Cotton Mills, who, as the result of these proceedings, have obtained a clear title to a new mill, with the most modern and costly machinery, worth $160,000, for $90,000 of their claims. The actual price they paid, reduced to a money basis, is in fact much less. It is apparent to the court that but for the action of the solicitors now seeking compensation the mill would have been sacrificed for a little more than half this sum, with utter ruin to every interest save the purchasers thus favored, and leaving $40,000 of liens unpaid, with the inevitable delay, litigation, and diminution of the trust fund which

must have resulted by the efforts of those parties to recoup themselves.

We conclude, therefore, that the solicitors before the court asking an allowance are entitled to compensation, under the circumstances; and since it is conceded on all hands that, if entitled at all, a fee of $1,500 will be entirely reasonable, that sum will be allowed.

KALAMAZOO CORSET CO. v. SIMON.

(Circuit Court, E. D. Wisconsin. March 20, 1903.)

1. CONTRACTS—CONSTRUCTION—USAGE.
   While proof of a general usage is admissible to explain a contract, in the absence of express stipulations, or where the meaning of the parties is uncertain, from the language used, usage cannot be shown to vary the legal import of the contract as made, or to add new terms thereto.
2. SAME—APPLICATION OF USAGE.
   Where numerous lots of corsets were offered for sale by letter as a "job lot" and as an entirety, the letter stating that "the enclosed stock sheet shows the quantity of each style and color," and that "the proportion of sizes," as shown, "is nearly perfect," which offer defendant declined, but selected and offered to take three of the lots as specified in the stock sheet, the acceptance of defendant's offer made a contract based on express stipulations, which was not within a usage that, in the purchase of job lots, the buyer is not obligated if the variation in the deliveries is considerable, and that it rests with the buyer to determine whether the discrepancy is reasonable or unreasonable.
3. SAME—VALIDITY—DEFINITENESS.
   A usage that, in sales of job lots of goods, the buyer is not obligated if the variation in the quantity delivered is considerable, and that it rests with the buyer to determine whether the discrepancy is reasonable or unreasonable, no definite test being recognized, is invalid for uncertainty.
4. SAME—PERFORMANCE OF CONTRACT—SUBSTANTIAL VARIATIONS.
   Where defendant purchased three job lots of corsets, represented on plaintiff's stock list as containing $251^{10}/_{12}$ doz., $204^{11}/_{12}$ doz., and $80^{9}/_{12}$ doz., and the deliveries offered contained $266\frac{1}{3}$ doz., $267^{1}/_{12}$ doz., and 78 doz., the variance was substantial, and entitled the buyer to refuse acceptance.
5. SAME—QUESTION FOR COURT.
   Where, in an action for breach of a contract of sale, the facts were undisputed, and a verdict for plaintiff would be unsupported by testimony or legitimate inference from any fact in evidence, it was proper for the court to determine the same without submitting it to the jury.
6. SAME—WAIVER.
   Where defendant agreed to purchase certain job lots of corsets according to a stock sheet showing the quantities, he did not waive his right to refuse to accept because of a material variance in the quantities delivered, by his mentioning only his own mistake in ordering one of the lots, when he intended to order another, which the seller refused to permit him to correct.

On Motion for New Trial.

Durant, Price & Cowen, for plaintiff.
Winkler, Flanders, Smith, Bottom & Vilas, for defendant.

SEAMAN, District Judge. The suit is for breach of contract of purchase, by refusal to accept the goods tendered as a delivery. The contract is in writing for the purchase of a large quantity of corsets

from the manufacturer, designated in the pleadings as a "job lot" or "job lots," and the facts are undisputed. Verdict was directed in favor of the defendant upon the ground that the goods tendered for delivery greatly exceeded the terms of the order in two of the lot numbers, and were slightly deficient in the other number. As the goods varied in size and color in each lot, and came intermingled, so that several days' work was involved in checking and storing, the defendant was justified in the rejection, if the letter of the contract governs the issue. The plaintiff made an offer by letter to close out numerous lots of corsets, each bearing a descriptive number, at prices named for each, inclosing a "stock sheet," which, the letter stated, "shows the quantity of each style and color. You will observe the proportion of sizes is nearly perfect." The defendant answered with an offer for three of the lots—Nos. 79, 20 and 249—referring to the stock list, at prices named by him, but refusing the others, and this was accepted. In the stock list, No. 79 contained $251^{10}/_{12}$ doz.; No. 20 contained $204^{11}/_{12}$ doz.; and No. 249, $80^{9}/_{12}$ doz. The plaintiff sent instead of No. 79, 266⅔ doz.; of No. 20, $267^{1}/_{12}$ doz.; and No. 249, 78 doz. Under well-settled rules, this tender is not performance of the contract, unless (1) the contract terms are subject to modification by the proof admitted of general custom in respect of job-lot transactions; and (2) the performance appears to be within a valid general custom or usage applicable thereto.

1. Proof of a general usage is admissible to explain a contract, either "in the absence of express stipulations, or where the meaning of the parties is uncertain upon the language used, and where the usage of the trade to which the contract relates, or with reference to which it was made, may afford explanation and supply deficiencies in the instrument." Oelricks v. Ford, 23 How. 49, 63, 16 L. Ed. 534, 5 Rose's Notes (U. S.) 966. So it may be that reference to a "stock sheet" in a simple offer and acceptance of a job lot may thus be open to explanation where no express stipulations appear to govern the interpretation. Nevertheless the rule stated by Mr. Justice Story in The Reeside, 2 Sumn. 567, Fed. Cas. No. 11,657—approved in De Witt v. Berry, 134 U. S. 306, 312, 10 Sup. Ct. 536, 33 L. Ed. 896—appears to prevail, namely, "that it can never be proper to resort to any usage or custom to control or vary the positive stipulations in a written contract, and a fortiori not in order to contradict them. An express contract of the parties is always admissible to supersede or vary or control a usage or custom." As stated in De Witt v. Berry, supra, "While parol evidence is sometimes admissible to explain such terms in the contract as are doubtful, it is not admissible to contradict what is plain, or to add new terms." Usage cannot be shown to vary the legal import of the contract as made. 27 Am. & Eng. Encyc. 862. In the light of these principles I am of opinion that the terms of reference to the stock sheet in each of the letters constituting the contract in question exclude the custom from consideration, even if the custom as shown is otherwise applicable to the transaction.

2. On the other hand, the custom stated by the witnesses cannot affect the contract for two reasons, at least: (1) Because the transaction

was not the ordinary job-lot sale to which the testimony of usage relates; and (2) because the terms of the usage are either too uncertain to admit of its consideration, or exclude the case of large excess shown in two of these lots. (1) The only transaction to which the testimony of usage can be deemed applicable is one of simple offer and acceptance of a recognized job lot upon the mere exhibition of a stock sheet, usually in the hands of a traveling salesman for that purpose. Here numerous lots were offered by letter, as a job lot and as an entirety, stating that "the enclosed stock sheet shows the quantity of each style and color," and that "the proportion of sizes," as shown, "is nearly perfect." The defendant declined this offer, but selected and offered to take three of the lots as specified in the stock list. Acceptance of this offer made the contract upon that basis as one of express stipulations, and not within the alleged usage. (2) In any view, however, the testimony concurs in the requirement that the stock sheet must show approximately the quantity of goods in the lot offered for sale, the only variations being for diminution or increase naturally arising in due course of the business before the sale is consummated; and the two disinterested witnesses concur in testifying that the buyer is not obligated under the custom if the variation is considerable, and that it rests "with the buyer to determine whether the discrepancy is reasonable or unreasonable," no definite test being recognized. On the last-mentioned version of the custom—shown on legitimate cross-examination, as I understand its import—uncertainty in its terms and obligation clearly bars it from entering into the alleged sale. Oelricks v. Ford, 23 How. 62, 16 L. Ed. 534. There was no meeting of the minds of parties upon the subject-matter to make an executory contract. It is true that a valid contract could be made for a specific lot, though the quantity was undetermined; that it could be made for such quantity as was produced or remained on hand at a given time or event. The quantity would then be determined by the event. But no such contract is made by the alleged usage. No such test is made binding. The question whether the quantity conformed to the offer and acceptance was contingent upon the buyer's view whether the variance was reasonable or unreasonable, and in any aspect no definite test was provided. Treated as "an absolute contract for a specific quantity within a reasonable limit" (Cabot v. Winsor, 1 Allen, 546, 551), it is plain that the variance is substantial. The facts being undisputed, the question thereupon was rightly determined by the court without submission to the jury. Cabot v. Winsor, supra. A verdict contra would be unsupported by testimony or by legitimate inference from any fact in evidence.

The contention that the defendant waived this defect by mentioning only the mistake made by him in ordering No. 79, when he intended No. 179, is not tenable. It is probable that he would have waived if that correction had been allowed, but it is clear that he did not do so when they refused, and he had ascertained the true state of facts.

The motion for a new trial is denied, and judgment will enter upon the verdict.

In re LEWIS.

(District Court, D. Delaware. April 5, 1904.)

No. 95.

1. BANKRUPTCY—INVOLUNTARY PETITION—DISMISSAL.
An involuntary petition in bankruptcy, in due form, by three creditors, will not be dismissed on the application of two of them, against the objection of the third, on the ground merely that the two "desire and consent that said petition and proceedings be dismissed."

(Syllabus by the Court.)

In Bankruptcy.

Robert H. Vandyke, for petitioners.
C. L. Ward, for Champion Mfg. Co., one of original petitioners.

BRADFORD, District Judge. An involuntary petition in bankruptcy, containing the proper averments and in due form, was filed March 26, 1904, by the Supplee Hardware Company, Samuel M. Mallalieu and the Champion Manufacturing Company against Louisa S. Lewis. On the same day a receiver of the estate of the alleged bankrupt was appointed, who has since qualified, and entered into possession thereof. Process issued pursuant to the prayer of the petition and was served March 28th. Two of the three petitioning creditors, namely, the Supplee Hardware Company and Mallalieu, have this day filed a petition praying that the petition in involuntary bankruptcy in which they joined, and the proceedings thereon, "be dismissed, and that notice be given to the creditors as provided by the bankruptcy law." On the presentation of this petition in open court the Champion Manufacturing Company, the remaining original petitioner, through its counsel, objected to the granting of the prayer thereof, and insisted that the case in bankruptcy should not be arrested. There are several independent objections fatal to the granting of the prayer of the petition for dismissal. It is unnecessary, however, to consider in this opinion more than one. The petition wholly fails to state any ground justifying a dismissal as prayed. The sole reason assigned is "that your petitioners desire and consent that said petition and proceedings be dismissed." Such a reason is palpably insufficient, even were there no other objections to the granting of the prayer for dismissal. The petition does not show how a dismissal could inure to the general benefit of the creditors, nor, indeed, does it aver that it would be of such benefit. To dismiss the proceedings in bankruptcy on the ground alleged would establish a harmful precedent. In the language employed in another connection by Judge Blodgett in the case of In re Heffron, Fed. Cas. No. 6,321, decided under the bankruptcy act of 1867, "It would lead to underhand and secret negotiations between the debtor and a portion of the creditors, and be a strong incentive for showing favors to a few creditors at the expense of the many." Therefore, if it be assumed that the petition for dismissal has not been prematurely presented, no list of creditors having been filed in the case, and if it be further assumed that the court could properly order a dismissal of the proceed-

ings in bankruptcy on the application of two of the original petitioners against the protest of the third, and if it be further assumed that the prayer for dismissal sufficiently discloses an existing pecuniary interest on the part of the Supplee Hardware Company and Mallalieu, or either of them, in the subject to which it relates, the court would still be obliged to deny the present application.

SOCIAL REGISTER ASS'N v. MURPHY.

(Circuit Court, D. Rhode Island. March 9, 1904.)

No. 2,617.

1. COPYRIGHT—INFRINGEMENT—DAMAGES RECOVERABLE IN EQUITY.
In a suit in equity for infringement of copyright there can be no recovery in the way of damages beyond the gains and profits which the defendant is shown to have realized from the infringement.

In Equity. On motion for entry of decree.
See 128 Fed. 116.

Gifford & Bull, for complainant.
Matteson & Healy, for defendant.

BROWN, District Judge. This is a motion for the entry of a decree for infringement of copyright. The complainant is entitled to an account of the profits, gains, and advantages which the defendant has received. It is not entitled to damages other than this. The complainant relies upon section 4964 of the Revised Statutes, which provides that an infringer shall "pay such damages as may be recovered in a civil action by such proprietor in any court of competent jurisdiction." This does not enlarge the jurisdiction of a court of equity. It is not analogous to section 4921, which confers upon the courts power, in patent causes, to render a decree for damages in addition to profits to be accounted for. The general principles governing courts of equity in such matters are explained in Root v. Railway Co., 105 U. S. 189, 207–215, 26 L. Ed. 975; Chapman v. Ferry (C. C.) 12 Fed. 693; Callaghan v. Myers, 128 U. S. 663, 9 Sup. Ct. 177, 32 L. Ed. 547. See, also, Stevens v. Gladding, 17 How. 447, 15 L. Ed. 155; 7 Am. & Eng. Enc. Law (2d Ed.) 590. This point was not involved in the decision of Belford v. Scribner, 144 U. S. 488, 12 Sup. Ct. 734, 36 L. Ed. 514. The decree simply awarded profits, and no distinction was made between profits and damages. While in some cases the profits to be accounted for are spoken of as damages, yet in no case that has been presented is it held that damages, as distinct from or additional to profits, can be decreed in equity in a copyright case, as in patent causes. While the word "damages" is used in decrees, it is used synonymously with "profits." Confusion can be avoided by omitting the word "damages," since the word "profits" is more accurate, and sufficient. The waiver of forfeiture removes all objection to the examination of the defendant on the accounting. The only proofs of infringement of

¶ 1. See Copyrights, vol. 11, Cent. Dig. §§ 81, 83.

specific copyrights that have been presented are those contained in the complainant's exhibit "Parallel Columns." The decree should be limited by striking out all copyrights other than those referred to in that exhibit. Clause 3 should be amended by striking out the words "one or more of the copyrights," and inserting a reference to the specific copyrights which the defendant has infringed as appears by said exhibit.

I find no sufficient reason for the denial of the usual costs to the complainant.

Let a draft decree be prepared accordingly.

DAVIS v. KANSAS & TEXAS COAL CO. et al.

(Circuit Court, W. D. Arkansas, Ft. Smith Division. April 1, 1904.)

1. FOREIGN CORPORATIONS—SERVICE OF PROCESS—CONSTITUTIONALITY OF STATUTE.

Act Ark. Feb. 26, 1901 (Acts 1901, p. 52, § 1), which provides that where a right of action shall accrue in favor of a resident or citizen of the state against a foreign corporation, whether arising on contract or in tort, and such corporation shall not have an agent in the state or have designated a person on whom service may be made, process may be served on the Auditor of State, and shall be sufficient to give jurisdiction of the person, when construed in connection with previous legislation requiring foreign corporations doing business in the state to designate agents therein on whom process might be served, is constitutional and valid, as applied to corporations which were doing business in the state after the passage of the act and at the time the cause of action sued on accrued therein in favor of a citizen, and a corporation cannot evade service in such case by thereafter withdrawing from the state and canceling the appointment of its designated agent.

On Motion to Quash Service.

T. B. Pryor, for plaintiff.

Ira D. Oglesby, for defendants.

ROGERS, District Judge. This suit was brought in the state court, and removed by the defendants to this court. A motion is now made by the defendant the Kansas & Texas Coal Company to quash the service. The service was made upon the Auditor of State, and the motion alleges that the service upon the Auditor was unauthorized, illegal, and insufficient, and conferred no jurisdiction to render personal judgment against said defendant, because no warrant or authority of law exists for the service of such process upon the Auditor; second, because the service of the process upon the Auditor of the state of Arkansas under the act under which the service was made is in violation of section 8, art. 2, of the Constitution of Arkansas, and of the fifth and fourteenth amendments to the Constitution of the United States. The provision of the Constitution of Arkansas referred to is the one which provides that no person shall be deprived of life, liberty, or property without due

¶ 1. Service of process on foreign corporations, see note to Eldred v. American Palace Car Co., 45 C. C. A. 3.

process of law; being, in substance, the same as article 5 of the federal Constitution.

It was conceded in the argument that, at the time the injury complained of occurred, the Kansas & Texas Coal Company was doing business in the state of Arkansas, and in the Ft. Smith division of the Western District thereof. It was also conceded that, at the time the suit was brought, the Kansas & Texas Coal Company had ceased to do business in the state, and had no agent in the state upon whom service could be made. It also appears from the record that up to the 28th of July, 1902, Thomas R. Tennant was the designated agent of the Kansas & Texas Coal Company for the service of summons and other process, and that his agency was revoked on the 28th day of July, 1902, and that prior to the 28th of July, 1902, the Kansas & Texas Coal Company had ceased to do business in the state of Arkansas, and was not engaged after that time in any business in the state, and that at the time of service of process in this case Thomas R. Tennant was not the agent of the Kansas & Texas Coal Company, or in any way connected with or employed by it. It also appears from the record that service had been had upon the said Tennant, and had been quashed by the state circuit court, before the removal of this case into this court, to which action the defendant the Kansas & Texas Coal Company at the time excepted. The service was had under the act approved February 26, 1901 (Acts 1901, p. 52), section 1 of which is as follows:

"In all cases where cause of action shall accrue to a resident or citizen of the state of Arkansas, by reason of any contract with a foreign corporation, or where any liability on the part of a foreign corporation shall accrue in favor of any citizen or resident of this state, whether in tort or otherwise, and such foreign corporation has not designated an agent in this state upon whom process may be served, or has not an officer continuously residing in this state upon whom summons and other process may be served so as to authorize a personal judgment, service or summons and other process may be had upon the Auditor of State, and such service shall be sufficient to give jurisdiction of the person to any court in this state having jurisdiction of the subject-matter, whether sitting in the township or county where the Auditor is served, or elsewhere in the state."

If this act stood alone, the court would be compelled to quash the service. Manifestly this statute, standing by itself does not authorize service upon the Auditor, which would be binding upon the defendant corporation, if it was not doing business in Arkansas at the time the cause of action accrued, or where the cause of action grew out of a transaction outside of the state. The act is broad enough, however, to cover that class of cases. It must be construed, if it can be upheld at all, to apply only to causes of action against corporations growing out of transactions while such corporations were doing business in the state; and, if this act stood alone, it could not be upheld at all, as against the Kansas & Texas Coal Company, but it does not stand alone. The act of the Legislature of Arkansas approved February 16, 1899 (Acts 1899, pp. 18–21), is as follows:

"Section 1. Every corporation formed in any other state, territory or country, before it shall be authorized or permitted to transact business in this state, or to continue business therein, if already established, shall by its certificate, under the hand of the president and seal of such company or corpo-

ration, filed in the office of the Secretary of State of this state, designate an agent, who shall be a citizen of this state, upon whom service of summons and other process may be made. Such certificate shall also state the principal place of business of such corporation in this state. Service upon such agent shall be sufficient to give jurisdiction over such corporation to any of the courts of this state. Any corporation so filing such certificate in the office of the Secretary of State shall pay therefor a fee of one dollar ($1.00) for such filing, and a like fee for each subsequent appointment of an agent so filed.

"Sec. 2. Every company or corporation incorporated under the laws of any other state, territory or country, now or hereafter doing business in this state, shall file in the office of the Secretary of State of this state, a copy of its charter, or articles of incorporation or association; or, in case such company or corporation is incorporated merely by a certificate of incorporation, duly authenticated and certified by the proper authority. The Secretary of State shall cause all such charters, articles of incorporation or association so filed to be duly recorded in a book kept for that purpose. And such corporation shall be required to pay into the treasury of the state, incorporating and other fees equal to those required of similar corporations formed with and under the laws of this state. Upon compliance with the above provisions by said corporation, a copy of such charter, or articles of incorporation, or certificate so filed, properly certified under the seal of his office, shall be taken by all the courts of this state as evidence that the said corporation is entitled to all the rights and benefits of this act. And such corporation shall be entitled to all the rights and privileges, and subject to all the penalties conferred and imposed by the laws of this state upon similar corporations formed and existing under the laws of this state: provided, that the provisions of this act requiring copy of original charter, and certificate naming an agent, and to pay certain fees therefor, shall not apply to railroad or telegraph companies which have heretofore built their lines of railroad or telegraph into or through this state: provided further, that the provisions of this act are not intended and shall not apply to 'drummers' or traveling salesmen soliciting business in this state for foreign corporations which are entirely nonresident.

"Sec. 3. On and after the going into effect of this act, any foreign corporation, as defined above, which shall refuse or fail to comply with this act, shall be subject to a fine of not less than one thousand dollars ($1,000.00), to be recovered before any court of competent jurisdiction; and it is hereby made the duty of the prosecuting attorneys of the different judicial districts of this state to see to the proper enforcement of this act. All such fines so recovered shall be paid into the general revenue fund of the county in which the cause shall accrue. In addition to which penalty, or after the going into effect of this act, no foreign corporation, as above defined, which shall fail to comply with this act, can maintain any suit or action, either legal or equitable, in any of the courts of this state, upon any demand, whether arising out of contract or tort.

"Sec. 4. Any foreign corporation that has heretofore engaged in business, or made contracts in this state, may within ninety days after the passage of this act, file such copy of articles of incorporation, together with certificate of appointment of an agent upon whom service of summons and other legal process may be had, in the office of the Secretary of State, and pay the requisite fees thereon, as provided by this act, then all their contracts made before this act goes into effect are hereby declared as valid as if said articles of incorporation and certificate, as herein defined, had been filed before they began business in this state.

"Sec. 5. That all laws and parts of laws in conflict herewith be and the same are hereby repealed, and that this act shall take effect and be in force from and after its approval."

By an act approved March 18, 1899 (Acts 1899, pp. 116, 117), it is provided:

"Section 1. That section 1323 be amended so as to read as follows: Before any foreign corporation shall begin to carry on business in this state, it shall, by its president and seal of said company filed in the office of the Secretary

of State, designate an agent who shall be a citizen of this state, upon whom service of summons and other process may be made. Such certificate shall state the principal place of business of said corporation in this state, and service upon such agent at any place in this state shall be sufficient service to give jurisdiction over such corporation to any of the courts of this state, whether the service was had upon said agent within the county where the suit is brought or is pending or not.

"Sec. 2. All acts and parts of acts inconsistent with this act are hereby repealed, and this act shall take effect and be in force from and after its passage."

By an act of the Legislature of Arkansas (Acts 1899, pp. 305–307), section 2 of the act of February 16, 1899, was amended so as to read as follows:

"Section 1. That section two (2) of said act be and the same is amended so as to read as follows: Every company or corporation incorporated under the laws of any other state, territory or country, now or hereafter doing business in this state, shall file in the office of the Secretary of State of this state, a copy of its charter, or articles of incorporation, or association, or in case such company or corporation is incorporated merely by a certificate, then a copy of its certificate of incorporation, duly authenticated, and certified by the proper authority. The Secretary of State shall cause all such charters, articles of incorporation, or association, so filed to be duly recorded in a book kept for that purpose. And such corporation shall be required to pay into the treasury of the state, incorporating and other fees equal to those required of similar corporations formed within and under the laws of this state. Upon compliance with the above provisions by said corporation the Secretary of State shall cause to be issued to said corporation, a copy of such charter, or articles of incorporation, or certificate so filed, properly certified under the seal of his office, and a copy of such charter, or articles of incorporation or certificate, certified to by the Secretary of State shall be taken by all the courts of this state as evidence that the said corporation has complied with the provisions of this act, and is entitled to all the rights and benefits therein conferred. And such corporation shall be entitled to all the rights and privileges, and subject to all the penalties conferred and imposed by the laws of this state upon similar corporations formed and existing under the laws of this state: provided, that the provisions of this act requiring copy of original articles of incorporation, or charter, and certificate naming an agent, and to pay certain fees therefor, shall not apply to railroad companies which have heretofore built their lines of railroad into or through this state: provided further, that the provisions of this act are not intended and shall not apply to 'drummers' or traveling salesmen soliciting business in this state for foreign corporations which are entirely non-resident."

All these acts must be construed together, so that the provisions of each of them may be permitted to stand, and from the whole the purpose and object of the Legislature is to be deduced. It may be noted in this connection that as early as the 25th of April, 1873 (Acts 1873, p. 258, § 13), the Legislature of Arkansas enacted the following statute:

"No insurance company, not of this state, nor its agents, shall do business in this state, until it has filed with the Auditor of this state a written stipulation, duly authenticated by the company, agreeing that any legal process affecting the company, served on the Auditor or the party designated by him, or the agent specified by said company to receive service of process for the company, shall have the same effect as if served personally on the company within this state. And if such company should cease to maintain such agent in this state, so designated, such process may thereafter be served on the Auditor; but so long as any liability of the stipulating company to any resident of this state continues, such stipulation can not be revoked, or modified, except that a new one may be substituted, so as to require or dispense with

service at the office of said company within this state, and that such service, according to this stipulation, shall be sufficient personal service on the company. The term 'process' includes any writ, summons, subpœna, or order, whereby any action, suit or proceedings shall be commenced, or which shall be issued in or upon any action, suit or proceedings."

It will be noted that this last statute differs in some important particulars from the statutes quoted above, which apply to other corporations than insurance companies. For instance, by the last statute, before an insurance company could legally do business in the state, it was required to file a written stipulation "agreeing that all legal process affecting the company, served on the Auditor or the party designated by him or the agent specified by said company to receive service of process for the company, shall have the same effect as if served personally on the company within this state." It is also provided that if such company should cease to maintain such agent in the state, so designated, such process may thereafter be served on the Auditor; and it prohibited the revoking by insurance companies of such stipulation, except by substituting a new agent for the one revoked. It is also provided specifically that service on the Auditor or such agent according to the stipulation shall be sufficient personal service on the company.

Reviewing these several statutes, it appears that by a provision of the original Code of this state, which provision is now found in section 5672 of Sandel & Hill's Digest of the Statutes of Arkansas, a foreign corporation having an agent in this state, could be brought into court by making service upon such agent. Service could not be had upon a foreign corporation in this state at that time in any other way. It was therefore within the power of a corporation, if it saw fit, at any time, to withdraw its agents from the state, and in that way avoid suit. Afterwards, by an act of the Legislature approved April 4, 1887 (Acts 1887, p. 234), incorporated in sections 1323–1325, inclusive, of Sandel & Hill's Digest, the Legislature sought to correct this evil, and provided that, before any foreign corporation shall begin to carry on business in the state, it shall, by its certificate under the hand of the president and seal of such company, filed in the office of the Secretary of State, designate an agent, who shall be a citizen of the state, upon whom service of summons and other process may be made. Such certificate shall also state the principal place of business of such corporation in the state. Service upon such agent shall be sufficient to give jurisdiction over such corporation in any of the courts of the state. And by such stipulation the failure by such corporation to comply with this provision rendered all its contracts with all the citizens of the state void, and the state courts were prohibited from enforcing the same in favor of such corporation. Corporations doing business in the state were also given 90 days within which to comply with the statute. The purpose of this act was manifest. It was to prohibit the corporation doing business in the state until it had first designated an agent upon whom process might be served in favor of any citizen of the state who might have a cause of action against it. The act of February 16th, quoted supra, was intended to carry out the same idea, and also to further regulate the doing busi-

ness in this state by foreign corporations. The act of March 18th, supra, which amends section 1323 of Sandel & Hill's Digest, referred to supra, was intended to authorize suit to be brought against foreign corporations by service on the designated agent, whether the service was had upon said agent within the county where the suit was brought or is pending, or not. The act of May 8th amending the second section of the act of February 16th, supra, in no wise affects the method previously provided for service upon corporations. It may be noted that the Legislature of the state, up to this date, made no provision for service upon a foreign corporation, except upon an agent found in the state, or a citizen of the state designated as an agent upon whom service might be had under the acts above referred to. But the act of February 26, 1901, which is now assailed, and under which the process in this case was had, went a step further, and provided that:

"In all cases where cause of action shall accrue to a resident or citizen of the state of Arkansas, by reason of any contract with a foreign corporation, or where any liability on the part of a foreign corporation shall accrue in favor of any citizen or resident of this state, whether in tort or otherwise, and such foreign corporation has not designated an agent in this state upon whom process may be served, or has not an officer continuously residing in this state upon whom summons and other process may be served so as to authorize a personal judgment, service of summons and other process may be had upon the Auditor of State, and such service shall be sufficient to give jurisdiction of the person to any court in this state having jurisdiction of the subject matter, whether sitting in the township or county where the Auditor is served, or elsewhere in the state."

Up to the passage of this act a foreign corporation doing business in the state might, at its pleasure, cease to do business in the state, recall its agents, and revoke the authority conferred under the acts above referred to upon a citizen of the state upon whom service could be made; and, this being done, no suit could be brought against it in the state. If the same is true under the provisions of the act of February 26th, to which I have just referred, what was the object and purpose of the provision authorizing service to be made upon the Auditor? The company could not withdraw the agency of the Auditor, because that was conferred by the terms of the statute, and when it did business in the state after the passage of the act of February 26, 1901, that section of the statute became in the nature of a contract between the company and the state, to the effect that service might be had upon the Auditor of State in all cases where suits accrued against the company while doing business within the state; and it is beyond the power of the defendant company to revoke that provision of the statute. If the object of the statute was not that the company might be sued after it had ceased to do business in the state, and had recalled its agents and revoked the agency of the person designated, then what could have been the purpose of the Legislature in designating the Auditor as a person upon whom service might be had? It may be said that the object of designating the Auditor as a person upon whom process might be served was to provide against the failure of foreign corporations to designate agents as previous statutes required; but it must be remembered that, by the provisions of the previous statutes, foreign corporations were absolutely forbidden

to do business in the state at all until they had designated agents, and their contracts had been rendered void, and they themselves subjected to criminal prosecution, for their failure to comply with the statutes. I think, therefore, it is fair to say that the Legislature intended that a foreign corporation doing business in the state should not escape suit in the state for contracts entered into by it or torts committed by it by simply ceasing to do business in the state, recalling its agents, and revoking the authority of the person designated by it under the law to receive process.

I am of the opinion that the principles laid down in the case of Collier v. Mutual Reserve Life Association (C. C.) 119 Fed. 617, are alike applicable to the case at bar, and that the motion to quash the process ought to be overruled. Of course, this opinion must be limited to the facts before the court, and has no application whatever to contracts entered into or torts committed by corporations not doing business within the state at the time the cause of action accrued, Because the act of February 26, 1901, is broad enough to cover the acts and doings of foreign corporations beyond the territorial limits of the state, which never at any time did business within the state, and therefore, as to such corporations, is unconstitutional, it does not follow that the act should be held to be void as to the class of cases which arise out of transactions of foreign corporations doing business in the state at the time such cause of action accrued.

The motion to quash the process in this case is overruled.

In re BREINER.

(District Court, N. D. Iowa. April 22, 1904.)

1. BANKRUPTCY—CONCEALMENT OF ASSETS—DISCHARGE.
Where, at the time of filing a voluntary petition in bankruptcy, the bankrupt knew that he had an interest in his grandfather's estate, and knowingly omitted to list the same in his schedules, for the purpose of concealing it from his creditors, and knowingly made a false oath to such schedules in expectation of receiving a discharge from his debts and afterwards enjoying the property, he was not entitled to discharge.

2. SAME—AMENDMENT OF SCHEDULES.
Where a bankrupt knowingly omitted certain assets from his schedules, the fact that he listed the property and amended his schedules after his attempt to conceal such assets, and after the fact that he had made a false oath had been discovered, was insufficient to relieve him of the consequences of such acts and entitle him to a discharge.

On Petition of the Bankrupt for Discharge, and Objections of Creditors Thereto.

Kelly & Kelly, for bankrupt.

E. A. Morling and Geo. B. McCarty, for opposing creditors.

REED, District Judge. On November 27, 1903, Dallas D. Breiner, of Emmetsburg, Palo Alto county, was adjudged a bankrupt upon his own petition, which was filed November 25th, but sworn to by him

¶ 1. See Bankruptcy, vol. 6, Cent. Dig. §§ 733, 735.

November 13, 1903. On December 28th following he filed his petition for discharge, and certain of his creditors, within the time allowed therefor, have filed specifications of grounds in opposition thereto, which are substantially (1) that the bankrupt has concealed, while a bankrupt, from his trustee, property belonging to his estate in bankruptcy; and (2) that he has made a false oath to his schedules attached to his petition. From the evidence adduced in support of these specifications it appears that Joseph Breiner, the father of the bankrupt, died December 26, 1902; that Francis J. Breiner, father of Joseph Breiner, and grandfather of the bankrupt, died testate in McDonough county, Ill., August 18, 1903. On March 9, 1900, the grandfather made his will, whereby he devised 80 acres of land and bequeathed certain personal property to one of his daughters, and the remainder of his estate, real and personal, in equal shares to six other children (of whom Joseph Breiner, the bankrupt's father, was one) and the children of a deceased son; thus leaving to the father of the bankrupt one-seventh of the remainder of his estate. After the death of the bankrupt's father, and on January 13, 1903, the grandfather made a codicil to his will, the material parts of which are as follows:

"1st. It is my will that my former will, executed March 9th, 1900, shall stand in all particulars except as hereinafter mentioned. Since my above will was executed, my son Joseph Breiner departed this life. It is my will, and I hereby bequeath said Joseph Breiner's share to the children of said Joseph Breiner, after the death of their mother Hester Breiner. During the natural life of said Hester Breiner my executors are directed to pay to said Hester Breiner, the income derived from said share, and my executors are directed to keep said share invested in some secure manner for that purpose. 2nd. After the death of said Hester Breiner, my executors are directed to pay to said children of said Joseph Breiner, their said shares in equal parts share and share alike."

On August 25, 1903, the executors named in the will of the grandfather filed the same in the probate court of McDonough county, Ill., together with a petition praying that probate thereof be granted. This petition recites that the deceased (the grandfather of the bankrupt) died seised of real estate valued at about $18,000, and possessed of certain personal property estimated to be worth about $20,000, and names the heirs of the deceased, with their places of residence; and among them is that of the bankrupt, Dallas D. Breiner, his place of residence being given as Emmetsburg, Iowa. About August 26th the clerk of the probate court of McDonough county, Ill., mailed to the bankrupt at Emmetsburg, Iowa, a certified copy of this petition, which recites that October 5, 1903, has been fixed as the time for the hearing proof of said petition. The bankrupt admits that he received this copy through the mails, at Emmetsburg, about September 1, 1903; and it appears that the will and codicil were duly proven and admitted to probate October 31, 1903, at a term of court which began October 5, 1903.

In Schedule B–4, attached to the bankrupt's petition (which we have seen was signed and sworn to by him November 13, 1903), under the head of "Rights & Powers, Legacies and Bequests," he answers, "None." The bankrupt testified on January 19, 1904, that he is one of nine children or heirs of the said Joseph Breiner, and entitled to

one-ninth of his estate; that his mother, Hester Breiner, was still living, and probably 67 or 68 years old; that he does not know her exact age. He was questioned closely in regard to the above-mentioned statement in his schedule, and testified that it was true so far as he knew. In answer to questions as to his knowledge of his grandfather's will, he says:

"I supposed he left a will. Don't know positive that he did. Supposed that, with the amount he had, probably he did. Q. Haven't you been informed by letter from McDonough county, Illinois, that he did leave a will? A. I had a letter from Illinois. I thought it was a letter. I don't know what you would call it. I guess it was a petition. Q. What information did this paper give you? A. Well, I couldn't tell you. There was a good deal on that paper. I couldn't give you a statement of what was on that paper. * * * I haven't received a copy of my grandfather's will. I sent for it, and waited quite a while, but didn't get it. Sent to my uncle, and he said he didn't know what a copy would cost. That is the last I heard of it. * * * Q. Did you not, through him or some other source, learn that you had an interest in your grandfather's estate? A. I don't know as I did. All I know about it would be that my grandfather died, and left what he had. I supposed it would be left to the family. Q. Haven't you said to parties in this county that you had an interest in that estate, but it was subject to your mother's life estate? A. I expect I have said that probably. I said that, if my mother was to die, I supposed, if there was anything left, I would get my share of it. Q. Didn't the paper sent you from Illinois inform you that you had an interest in your grandfather's estate? A. Well, I don't know for sure that it did or didn't. I told you before I don't know what was on that paper; that is, I don't know now. I think I read the paper I received from Illinois. * * * Q. This paper did inform you of the amount of your grandfather's estate? A. Yes, sir; I think it said what it was. I don't recollect what it was. Q. After you received that paper, didn't you know that you had an interest in your grandfather's estate? A. I have forgot how the paper read, but I don't see how I could know neither, because I didn't know, from the way that paper read, if I understood the paper. I don't say that I understood that paper. I don't understand the way it reads myself."

Further questions in regard to this paper were not freely nor frankly answered by the bankrupt, and when requested to produce the paper he declined to do so, or at least did not do so (claiming that he had left it at home, some six miles distant from where he was being examined) until he was ordered by the referee to produce it. In pursuance of such order, he later produced a duly certified copy of the petition of the executors for the probate of the grandfather's will. It gives the estimated value of the estate as hereinbefore stated, is in writing and print, and gives the bankrupt's name and address in typewriting as one of the heirs of the testator. The envelope in which it came to the bankrupt shows that it was received at Emmetsburg August 28, 1903, and he says that he got it within two or three days thereafter. The bankrupt was then shown a copy of the will and codicil of his grandfather, and asked:

"Are you now willing to amend your schedule in the bankruptcy proceedings, and add the legacy herein bequeathed to you, and list it as one of your assets? A. Surely, if I have a right to. I don't know anything about that paper myself, and don't know if I have a right to do such a thing."

After conferring with his counsel, he was again asked:

"After having consulted with your attorneys, I will now ask if you will proceed to amend your schedule, and file the legacy and expectancy described in

the codicil read to you as one of your assets in the bankruptcy proceedings? A. Yes, sir, I do. Listed it before if I had known it. Wrote for it, but didn't get it. That is what I wrote for, with that intention."

Cross-examined by his attorneys, he says:

"Q. State whether or not you endeavored to procure and secure any information concerning your grandfather's estate? A. Why, only just by sending for the will, or sending for a copy of it. I didn't receive the copy. Q. You may state why you sent for the will. A. I sent for it with the intention of this bankruptcy proceeding. Q. What did you intend to do in the bankruptcy proceeding with reference to that will, or your interest, if any you had? A. I intended to list it. Q. And how long did you wait from the time you received this notice until you commenced bankruptcy proceedings? A. The 27th of November, I believe, was the day the papers were acknowledged. Q. That is, from about the 1st of September until the 27th of November? A. Yes, sir. Q. Did you get any information, directly or indirectly, that you had any interest in the estate of your grandfather? A. Not anything more than what was on that petition. * * * Q. At the time you signed the petition for bankruptcy and all schedules thereto attached, did you have any intention or desire to secrete or hide or in any other manner cover up any property in which you had an interest? A. No, sir."

Afterwards, and on January 29, 1904, an amendment to the schedule was filed with the clerk as follows:

Amendment to Schedule B–4.

Rights & Powers Legacies and Bequests.	One of the eight or nine legatees who are to inherit their father's share of their grandfather's estate, now held and to be held for life by petitioner's mother, supposed valuation	$500.00.

This amendment was not verified, and no leave was asked or granted to file the same. No explanation is made or offered of the failure of the bankrupt to list this interest in his grandfather's estate in his original schedules, unless it be his equivocal statements that he did not know, when he made such schedules, that he had such interest.

It satisfactorily appears from this testimony that at the time the bankrupt made and filed his petition he had an interest, as legatee under his grandfather's will, in the latter's estate. That he knew at such time that he had such interest cannot, under his own testimony, be doubted. When his attention was first called to its omission from Schedule B–4, he says "that his schedule is true, so far as he knows." The copy of the petition for the probate of the will which he produced names him as one of the heirs, and he admits having received this copy about September 1st (six weeks before he signed and swore to the petition). Afterwards, in answer to questions by his attorney, he says that he sent for a copy of the will in order to list whatever interest he might have thereunder in this bankruptcy proceeding. This is inconsistent with the former part of his testimony, in which he endeavors to maintain that he did not know that he had an interest under that will. The value of this interest does not appear, except from the recital in the petition for the probate of the will. It is a fair inference, however, from the testimony of the bankrupt, that his grandfather's estate was of considerable value; and in the amendment to his schedules which he has filed he says the supposed value of his interest in that estate is about $500. The bankruptcy law is designed to afford relief to the unfortunate debtor; but to receive the benefits

of that law in a full discharge from his liabilities he must lay before his creditors all of his property except such as may be exempt to him under the laws of the state in which he lives, and make true oath that he has done so. If he knowingly fails to do this, a discharge from such debts will be denied him. The conclusion from the whole testimony is unavoidable that this bankrupt did know that he had an interest in his grandfather's estate at the time he made and filed his petition in bankruptcy; that he knowingly omitted listing such interest in his schedules of his property for the purpose of concealing it from his creditors; and that he knowingly made a false oath to such schedules in expectation of receiving a discharge from his debts, and afterwards enjoying the benefits of this property freed from liability for such debts. The fact that he listed the property after his attempt to conceal the same and after the making of the false oath by him had been discovered will not relieve him from the consequences of such acts; neither will his denial, then made, of any intent on his part to secrete, hide, or otherwise cover up such property. The right to a discharge is forfeited if the bankrupt knowingly conceals his property, or knowingly makes a false oath in the bankruptcy proceedings; and it is not restored when his wrongful acts are discovered, or attempts frustrated.

It follows that the petition for discharge must be denied, and it is so ordered.

UNITED STATES v. MOORE.

(District Court, W. D. Missouri, Central Division. March 22, 1904.)

No. 3,262.

1. POST OFFICE—NONMAILABLE MATTER—OBSCENE LETTER—STATUTES—CONSTRUCTION.

Rev. St. U. S. § 3893 [U. S. Comp. St. 1901, p. 2658], provides that every obscene, lewd, or lascivious book, pamphlet, writing, or other publication of an indecent character shall be nonmailable. *Held*, that where the necessary inference from the language used in a letter was obscene, and tended to offend the sense of decency, purity, and chastity of society, it was immaterial that the words used were not themselves obscene.

2. SAME.

A letter was written by a married man to a married woman, not his wife, whom he had never met, suggesting that he hoped the same would come to her as "a ray of sunshine on a cloudy day"; that his attention had been called to her "by a friend of ours," and asked her to meet him on an afternoon at the house of an old lady who kept rooms to rent "for such meetings"; that his proposition was "all straight goods," and that he would be "a good friend" to her, and, though he had never been at such proposed meeting place, he knew others who had been there, and had been informed by them that it was "all O. K." *Held*, that the purpose of such letter was an invitation and solicitation to the addressee to meet the writer for illicit intercourse, and was therefore obscene, within Rev. St. U. S. § 3893 [U. S. Comp. St. 1901, p. 2658], prohibiting the sending of any obscene writing through the mails.

¶ 1. Obscene matter as nonmailable, see note to Timmons v. United States, 30 C. C. A. 79.

See Post Office, vol. 40, Cent. Dig. § 50.

On Demurrer to Indictment.

William Warner, U. S. Dist. Atty.

C. D. Corum and J. G. Slate, for defendant.

PHILIPS, District Judge. The defendant stands indicted under section 3893, Rev. St. U. S., 1 Supp. Rev. St. p. 621 [U. S. Comp. St. 1901, p. 2658], for writing and placing, or causing to be placed, in the post office of the United States at Jefferson City, Mo., an obscene, lewd, and lascivious letter, of an indecent character. The letter is in words and figures as follows:

"October 7, 1903.

"Dear Mrs. Thomas: I know you will be surprised to get this letter but I hope it will be a glad surprise. I hope it will come to you as a ray of sunshine on a cloudy day. I do not know you personally, but I have heard you spoken of by a friend of ours. I have been wanting to meet you, but so far have failed. I have taken this method of trying to get acquainted with you. I don't know whether my suggestion will meet with your approval or not, are whether you will want to meet me or not. If you do and will do as I tell you, we can meet each other and no one will ever know it. And we can pass some pleasant afternoons together. There is an old lady by the name of Mrs. Willard that keeps rooms to rent for such meetings. She lives West of Elston House up stairs on the first floor over the book bindery. Go up the stairs between the book bindery and the Saloon. Tell her that you have a 'gentleman friend' that you want to meet there. Say twice a week and that he is alright, and will treat her right. I have never been at her place but I know some parties that go there and they tell me it is all o. k. I want to meet you there at about 3 o'clock Thursday afternoon. You go about 2:30 and talk to the old lady and get on the good side of her. I want you to be sitting at the front window with your hat on, so I will know that you are there and that you want to see me. I will come up on the opposite side of the street and will tip my hat so you will know it is me comming, and you can meet me at the top of the stairs. This is all straight goods. And I will be a good friend to you. If you cannot go on Thursday afternoon, go Friday. But I will look for you Thursday. Will not sign my name. Will tell you all about myself when I see you. A friend.

"Don't fail me."

The defendant has demurred to the indictment on the ground that, the letter being admitted, it does not come within the purview of the statute. Reliance for this contention is predicated of the ruling in United States v. Lamkin (C. C.) 73 Fed. 459. The correctness of the ruling in that case can be conceded without affecting the validity of this indictment. The character of the letters upon which that indictment was based is materially different from the letter in question. But the reasoning of the learned judge in his opinion in that case does not wholly accord with my view of the statute. The trend of the opinion, if I read it aright, is that unless the language employed in the letter is per se coarse, obscene, lewd, lascivious, or indecent, although it is discernible on the face of the letter that it was written for the immoral purpose of inviting and stimulating illicit intercourse with a woman, it is not within the denunciation of the statute. It may be conceded that the forbidden character of the book, pamphlet, picture, paper, letter, etc., is to be found on its face. If the terms employed do not, in and of themselves, reasonably convey the suggestion of obscenity, lewdness, or lasciviousness, they cannot be eked out by evidence aliunde; that is to say, the court cannot, with strained eyes, read into the letter a hidden

purpose its language does not naturally import. But it is as equally true that the obscene, lewd, lascivious, indecent character of the writing is not to be made to depend upon the fact that the language employed must be coarse, blunt, and bald. Language is a vehicle of thought. "Chaste words may be applied so as to be understood in an obscene sense by every one who hears them." Edgar v. McCutchen, 9 Mo. 768. Words, abstractly considered, may be free from vulgarism, yet they may, by reason of the context, manifest to the intelligent apprehension the most impure thoughts, and may arouse a libidinous passion more effectually in the mind of a modest woman than the coarse vernacular of the bawd and the pimp. The poison of the asp may lie beneath the honeyed tongue, just as a beautiful flower may contain a deadly odor. The statute does not say that every book, pamphlet, picture, paper, letter, writing, etc., containing obscene, lewd, or lascivious language, is prohibited to the use of the mails; but it is the "indecent character," obscene, lewd, or lascivious in its nature and import, against which the statute is leveled. In other words, it is the effect of the language employed, conveying obscene, lewd, or lascivious suggestions, tainted with immorality and impurity, which is struck at by the statute.

Judge Thayer, in United States v. Clarke (D. C.) 38 Fed. 732, in discussing this statute, when it was directed only against the admission to the United States mails of books, pamphlets, pictures, papers, writings, and prints, said:

"The word 'obscene,' * * * when used, as in the statute, to describe the character of a book, pamphlet, or paper, means containing immodest and indecent matter, the reading whereof would have a tendency to deprave and corrupt the minds of those into whose hands the publication might fall, whose minds are open to such immoral influences."

In United States v. Harmon (D. C.) 45 Fed. 414, 417, the word "obscene" was discussed, and, quoting from Chief Justice Cockburn in Rex v. Hicklin, L. R. 3 Q. B. 360, "where the tendency of the matter charged as obscene is to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall, and where it would suggest to the minds of the young of either sex, or even to persons of more advanced years, thoughts of the most impure and libidinous character," the court said:

"Rather is the test, what is the judgment of the aggregate sense of the community reached by it? What is its probable, reasonable effect on the sense of decency, purity, and chastity of society, extending to the family, made up of men and women, young boys and girls?"

In United States v. Martin (D. C.) 50 Fed. 918, the letter in question was written by a married man to an unmarried woman, the substance of which was a solicitation by him to her to take a trip with him to Lynchburg, Va., with a proposition to pay her expenses and $5 besides, with the suggestion that, "if you will go, I will promise you a nice time," and that she would contribute to his happiness, and would never regret it, etc. The court, after adverting to the foregoing cases of the United States v. Clarke and United States v. Harmon, said:

"Taking these definitions, and applying them to the letters on which this indictment was found, the court cannot see how any other construction can be put upon them, than that they are obscene, within the meaning of the

statute. The expressions used in the letters can leave no doubt as to their lewd and lascivious character. It is difficult to conceive what can be more shocking to the modesty of a chaste and pure-minded woman than the proposition contained in these letters. It is no less than a proposition from a married man to an unmarried woman, proposing a clandestine trip to the city of Lynchburg for a grossly immoral purpose."

In Dunlop v. United States, 165 U. S. 486, 500, 17 Sup. Ct. 375, 380, 41 L. Ed. 799, it appears that the trial court, in charging the jury, inter alia, said:

"Now, what are obscene, lascivious, lewd, or indecent publications, is largely a question of your own conscience and your own opinion. * * * it must come up to this point: that it must be calculated, with the ordinary reader, to deprave him, deprave his morals, or lead to impure purposes."

In passing upon this instruction, Mr. Justice Brown, speaking for the court, said:

"The alleged obscene and indecent matter consisted of advertisements by a woman, soliciting and offering inducements for the visits of men, usually 'refined gentlemen,' to their rooms, sometimes under the disguise of 'baths' and 'massage,' and oftener for the mere purpose of acquaintance. The court left it to the jury to say whether it was within the statute, and whether persons of ordinary intelligence would have any difficulty in divining the intention of the advertiser. We have no doubt that the finding of the jury was correct upon this point."

In United States v. Wroblenski (D. C.) 118 Fed. 496, the court said:

"In either case [that is, of publication or sealed private letter] the question of violation of the statute rests upon the import and presumed motive, and not upon the mere terms of the communication. Thus its tendency depends upon circumstances, and unexceptionable language may convey vicious information within the statute. In the case of a private letter there is no publication, and no presumption arises of intention to give publicity, or that it will be read by others than the addressee. The language or communication may be free from the condemnation of the statute in one instance, while it would clearly fall within it when addressed to other persons. So the inquiry as to the tendency of the letter must be narrowed to its liability to corrupt the addressee."

Turning to the letter in question here, what is its plain purport? It was written by the defendant, admitted to be a married man, to Mrs. T., with whom he had never met, with the suggestion that he had hoped his missive would come to her as "a ray of sunshine on a cloudy day"; that his attention had been called to her "by a friend of ours." He expressed some apprehension lest his advance might not meet with approval. He therefore essays to beguile her by suggesting that if she will meet him, and "do as I tell you, we can see each other and no one will ever know of it; and we can pass some pleasant afternoons together." Indeed, he suggests broadly in the letter an assignation house favorable "for such meetings," and enters into details for signals for such clandestine meeting; that, while he has never been on this "happy meeting ground," he knows parties who say it is O. K.; winding up with the suggestive assurance that "this is all straight goods, and I will be a good friend to you. I will not sign my name. Will tell you about myself when I see you." Can two intelligent minds reach any other conclusion on reading this letter than that its purpose was an invitation and solicitation to Mrs. T. to meet the writer for illicit inter-

course? The very secrecy and safety of the method of meeting was calculated to excite in the mind of the addressee libidinous thoughts and indulgence, if there was any such lurking tendency in her character. In short, it was a seductive letter—as much so as if the writer had employed broader and balder indecent expressions for bringing about adulterous intercourse with this woman. At all events, it certainly is a question for the jury to pass upon, under proper instructions from the court.

The demurrer is overruled.

ELLIOTT v. CANADIAN PACIFIC RY. CO.

(Circuit Court, D. Vermont. April 5, 1904.)

1. MASTER AND SERVANT—RAILROADS—CAR INSPECTORS—WRONGFUL DEATH—QUESTION FOR JURY.

   In an action for the wrongful killing of a car inspector by his being run over by a car started by other cars violently switched against the same, evidence as to defendant's negligence held to present a question for the jury.

2. FELLOW EMPLOYÉS—INCOMPETENCY.

   Where, in an action for wrongful death of a car inspector, it was claimed that his injuries resulted from the negligence of an incompetent brakeman, evidence tending to show that the person acting for defendant in employing such brakeman shortly before the accident was the brakeman's cousin, and that he had doubt as to the brakeman's proper command of himself when braking cars, he not having been so previously employed, was sufficient to justify a finding that defendant was negligent in employing such brakeman.

3. SAME—CONTRIBUTORY NEGLIGENCE.

   Where, before going in front of a car to test the knuckle of a coupling, a car inspector saw an engine and certain other cars a considerable distance away, and if they had been moved at the ordinary speed of cars in switching they could not have reached the car he was inspecting until long after he had accomplished his object, he was not guilty of contributory negligence as a matter of law in placing himself in front of the car, which might be run against and over him.

4. SAME—FEDERAL COURTS—DEFENSES.

   In an action for wrongful death in the federal courts, contributory negligence is a matter of defense, unless the proof shows an absolute act of negligence so plain that the minds of reasonable men would not differ concerning it.

5. SAME—PLEADING.

   In an action in the federal courts for wrongful death, the declaration need not allege absence of contributory negligence.

6. SAME—OBJECTIONS AFTER VERDICT.

   Where the gist of an action for the wrongful death of a car inspector was the running of several cars without control, by an incompetent brakeman, and the declaration alleged the running of such cars against other cars, without any proper control, at a high rate of speed, on a down grade, in charge of but one inexperienced and incompetent brakeman, so negligently, and without proper control, that plaintiff's intestate was suddenly thrown violently down under the car which he was so inspecting, dragged for a long distance, and then killed, it was sufficient as against a motion in arrest of judgment.

¶ 5. See Death, vol. 15, Cent. Dig. § 62.

7. SAME.

Rev. St. § 954 [U. S. Comp. St. 1901, p. 696], provides that no declaration shall be quashed for any defect or want of form, but the court shall give judgment according as the right shall appear, without regarding any such defect, except those specially set down as grounds of demurrer, and that the court shall amend every such defect other than those specially demurred to, and may at any time permit the pleadings to be amended. *Held*, that where no objection was made to the declaration until the close of the evidence, and everything that defendant claimed should have been alleged was proved, and the jury found the facts in favor of the plaintiff, a judgment on the verdict will not be set aside for defects in the declaration.

At Law. On motions to set aside a verdict in favor of plaintiff and in arrest of judgment. Motions denied.

Max L. Powell and Wilder L. Burnap, for plaintiff.
Frank E. Alfred and William B. C. Stickney, for defendant.

WHEELER, District Judge. The plaintiff's intestate was a car inspector employed in the defendant's yard at Richford, which was on an unusual grade for a railroad yard. He went to the lower end of one of two cars standing on one of the tracks, and held by a brake, for the purpose of testing the knuckle of the coupling, which would take but a few seconds. Five heavily loaded cars were sent down the same track toward these two at a rapid rate, struck them, pushed them along, and ran them over him and killed him. This suit is brought for that cause of his death; and since the verdict the defendant has moved to set it aside as against the evidence, and moved an arrest of judgment for the insufficiency of the declaration. The ground upon which the plaintiff recovered was the inefficiency of the brakeman on the five cars whereby the death was caused.

The intestate was entitled to a reasonably safe place in which to work, and to reasonably competent and safe fellow workmen. One principal ground for setting aside the verdict relied upon is the lack of sufficient evidence of the incompetency of the brakeman to the knowledge of the defendant. The grade of the yard made it a difficult place for switching cars in making up trains. Whatever lack of safety there was about that would be well known to the intestate, who had been employed there for some years; but the grade of the yard, according to the evidence, required a more experienced and efficient brakeman than an ordinary yard would. The proof tended to show that the brakeman had no proper control of the five cars; that they ran at two or three times the usual speed for cars being switched in that way, and drove against the two cars with great force, and thereby sent them along the track. This was contradicted, but the effect of it was for the jury.

An important requisite was the control of the cars, which would include the control by the brakeman of himself. The evidence tended to show that one who acted for the defendant in employing this brakeman then lately before, was a counsin of the brakeman who had not before been employed as such, was acquainted with him, and had some doubt as to his proper command of himself when braking on the cars. This was a very important matter for a brakeman who

was to do what this brakeman was doing at the time when the intestate was killed. Lack of control of himself would be a very serious defect in the ability of a brakeman to properly control cars in such connections. The evidence in regard to that seemed at the trial to be sufficient to lay before the jury as to the competency of the brakeman, and seems so now. The question is not as to how the court would find the fact, but as to whether there was enough from which the jury might find the fact, and there seems to have been enough. This brought the defect to the attention of those acting for the company in employing this brakeman, and tends to show that the company was aware of his actual capacity such as it was. This is a little different from what it would have been if a competent brakeman had grown incompetent. Here the question was as to hiring a suitable brakeman, which would involve proper inquiry as to his capacity. There the question would be as to notice of the failure of capacity.

Another question made is as to contributory negligence of the intestate. It is argued that he placed himself at the end of the car, which might be run against and pushed over him. Unless this was so plain that there could be no question about it in the minds of reasonable men, it would be a question for the jury, and the circumstances were such that there might well be such a question. The testing of the knuckle would involve so short a time that he could easily do it and move away before any cars which were in sight would reach the two cars at the ordinary rate of speed for switching cars. If these cars were sent at twice the usual speed, he would only have one-half the usual time; if at three times the usual speed, he would have only one-third the usual time. The coming so much quicker than he expected may have misled him into going there and remaining long enough for testing the knuckle. The switch engine and the five cars were away up the track. At the ordinary speed of cars in switching, according to some witnesses, they would move but a few feet—about seven or eight—in a second, which would give many more seconds before they would reach there than were necessary to accomplish his object. This is a matter of defense in this court, which could not be taken from the jury unless it was an absolute act of negligence, and could not apparently be properly disposed of without being submitted to the jury as it was. The motion to set aside the verdict as being against the evidence must, according to these views, be denied.

The principal fault found with the declaration is the lack of allegations of the incompetency of the brakeman to the knowledge of the defendant and without the knowledge of the intestate. As contributory negligence is in this court a defense, no allegation of want of knowledge or proper conduct on the part of the intestate was necessary. It would be sufficient to allege in the proper manner the defect in the brakeman, whereby the injury resulting in death was caused. The declaration alleges the running of the five cars against the two cars negligently, "without any or proper control, at a high rate of speed, on said down grade, alone and free from any locomotive or engine, and in charge of an insufficient and of

but one inexperienced and incompetent brakeman, * * * and so negligently, improperly, imprudently, and without control that the plaintiff's intestate was suddenly, helplessly, and without fault on his part thereby struck, thrown violently down, and thrown under said car, which he was so inspecting, and dragged for a long distance, to wit, ninety feet, by means whereof he was then and there killed." This is not a technical, artificial, and apt statement of the insufficiency of the brakeman, whereby the intestate was struck. The question is not as to the correctness, accuracy, and fullness of the averments, but whether in any, even defective, manner, the substance of what is necessary to a right of recovery is set out. The running of the five cars was, of course, the act of the defendant. The running them in charge of an insufficient, inexperienced, and incompetent brakeman would involve knowledge of the incompetency such as would make the defendant responsible for the act of the incompetent man. The gist of the action was the running of the five cars without control of any but an incompetent brakeman. Whatever charged that was a sufficient charge of that negligent act, and in that view the declaration seems, upon this motion in arrest of judgment, to be sufficient to found a judgment upon.

The statute of jeofailes applicable (section 954, Rev. St. [U. S. Comp. St. 1901, p. 696]) provides that no summons, writ, declaration, return, etc., shall be abated, arrested, or quashed for any defect or want of form, but the court shall give judgment according as the right of the cause and matter in law shall appear, without regarding any such defect or want of form except those which in cases of demurrer the party especially sets down, and the court shall amend every such defect and want of form other than those the party demurring so expresses, and may at any time permit either of the parties to amend any defect in the process or pleadings upon such conditions as it may prescribe.

This saves everything to the party that can be saved. This declaration was not challenged by any demurrer, special or otherwise, and no point was made upon it until the close of the evidence in the case. It seems to, although in a somewhat defective manner, have stated sufficient of the grounds of the cause of action to warrant the taking of a verdict. Upon the submission of the case to the jury everything that defendant now claims should have been alleged was laid before the jury, who have found the facts for the plaintiff, and judgment on the verdict now would conform to the requirements of that statute.

Motions overruled. Judgment on verdict.

UNITED STATES v. ONE BLACK HORSE et al.

(District Court, D. Maine. April 8, 1904.)

No. 96.

1. SMUGGLING—HORSES AND VEHICLES—FORFEITURES—INTENT OF OWNER.

Rev. St. § 3061 [U. S. Comp. St. 1901, p. 2006], makes it the duty of a revenue officer to search any vehicle on which he suspects there is merchandise subject to duty, or which has been introduced into the United States contrary to law, whether by the person in possession or upon such vehicle; and, if such merchandise is found on the vehicle, the officer is required to seize and secure the same. Section 3062 [U. S. Comp. St. 1901, p. 2007] provides that such vehicle shall be liable to seizure and forfeiture; and section 3063 [U. S. Comp. St. 1901, p. 2007] declares that vehicles used by common carriers shall not be subject to forfeiture unless it shall appear that the agent of the carrier in charge of the vehicle at the time of the unlawful importation or transportation was a consenting party thereto. *Held*, that section 3063 should be construed as excluding vehicles other than those used by common carriers from its application, and hence a vehicle owned and let by a liveryman, and used wholly within the United States for the purposes of transporting liquor illegally brought across the Canadian border, was subject to seizure and forfeiture, though the liveryman had no knowledge of the purpose for which the team was to be used.

Isaac W. Dyer, U. S. Dist. Atty.
Foster & Hersey, for claimant, Wm. E. Foss.

HALE, District Judge. This case comes before the court on a libel by information of the United States of America against one black horse, one harness, and one wagon, alleged to have been used by one William Elliott in conveying four bottles of liquor from the Province of New Brunswick into the Judicial and Collection District of Houlton, in the District of Maine, and to have been so used at the time of the illegal importation aforesaid.

William E. Foss, of Houlton, appears as claimant for said horse, harness, and wagon. The case is presented on an agreed statement, as follows:

"The following facts are agreed upon by counsel, and are found as facts in the case:

"First. The first fact found is that the said William Elliott did smuggle the four bottles of liquor on the 8th day of August, 1903, and that said Elliott has since been convicted and sentenced for said act of smuggling.

"Second. That on the said 8th day of August said Elliott hired the horse, carriage, and harness, described in the information, of William E. Foss, the claimant, who was then and there engaged in the business of a livery stable keeper at said Houlton, and in letting horses for hire.

"Third. That said Foss at the time of letting the team to said Elliott had no knowledge or information that said team was to be used for any violation, or to aid in any violation, of the customs revenue laws of the said United States by said Elliott.

"Fourth. That said Elliott, having hired the team as aforesaid, did drive to a point very near the line, but on the United States side of it, and left the team in a shed within the United States, and within the town of Houlton. That said Elliott immediately went over the line, purchased the four bottles of liquor, returned, placed them in the carriage, and started to drive towards Houlton village. Before he had completed his return journey the said four bottles of liquor and the said team were seized, as stated in the information."

The statutes of the United States (sections 3061–3063, Rev. St. [U. S. Comp. St. 1901, pp. 2006, 2007]) are as follows:

"Sec. 3061. Search of Vehicles and Persons. Any of the officers or persons authorized to board or search vessels may stop, search, and examine, as well without as within their respective districts, any vehicle, beast, or person, on which or whom he or they shall suspect there is merchandise which is subject to duty, or shall have been introduced into the United States in any manner contrary to law, whether by the person in possession or charge, or by, in, or upon such vehicle or beast, or otherwise, and to search any trunk or envelope, wherever found, in which he may have a reasonable cause to suspect there is merchandise which was imported contrary to law; and if any such officer or other person so authorized shall find any merchandise on or about any such vehicle, beast, or person, or in any such trunk or envelope, which he shall have reasonable cause to believe is subject to duty, or to have been unlawfully introduced into the United States, whether by the person in possession or charge, or by, in, or upon such vehicle, beast, or, otherwise, he shall seize and secure the same for trial.

"Sec. 3062. Forfeitures. Every such vehicle and beast, or either, together with teams or other motive-power used in conveying, drawing, or propelling such vehicle or merchandise, and all other appurtenances, including trunks, envelopes, covers, and all means of concealment, and all the equipage, trappings, and other appurtenances of such beast, team, or vehicle, shall be subject to seizure and forfeiture. If any person who may be driving or conducting, or in charge of any such carriage or vehicle or beast, or any person travelling, shall willfully refuse to stop and allow search and examination to be made as herein provided, when required so to do by any authorized person, he shall be punishable by a fine of not more than one thousand dollars, nor less than fifty dollars.

"Sec. 3063. Privity of Owner. No railway car or engine or other vehicle, or team, used by any person or corporation, as common carriers, in the transaction of their business as such common carriers, shall be subject to forfeiture by force of the provisions of this title unless it shall appear that the owner, superintendent, or agent of the owner in charge thereof at the time of such unlawful importation or transportation thereon or thereby was a consenting party, or privy to such illegal importation or transportation."

Under the decisions of our courts, this and all other statutes relating to forfeitures in revenue cases must be construed fairly and reasonably, to arrive at the intention of the lawmaking body. In coming to this construction the court must remember that the construction is made in a civil case in a matter relating to forfeiture of property, and not relating to the punishment of an offender. It is the duty of the court to discover what was the intention of the lawmakers in framing this law. This belongs to a class of cases where the Legislature might undoubtedly declare an act criminal without respect to the motive of the doer of the act. The courts have repeatedly decided that in respect to statutory offenses an evil intent is not necessarily an ingredient. It is then necessary for us to inquire, not what was the intention of the claimant in this case, but what was the intention of the lawmaking power. Where the intention is left in any way obscure, the courts have repeatedly said that the forfeiture of goods for violation of revenue laws would not be imposed, unless the owner of the goods or his agent has been guilty of an infraction of the law. Peisch v. Ware, 4 Cranch, 347–362, 2 L. Ed. 643; United States v. Bags of Kainit (D. C.) 37 Fed. 326; United States v. Certain Celluloid, 82 Fed. 627, 27 C. C. A. 231; United States v. Two Barrels of Whiskey, 96 Fed. 479, 37 C. C. A. 518; The Lady Essex (D. C.) 39 Fed. 767; Six Hundred and

Fifty-One Chests of Tea v. United States, Fed. Cas. No. 12,916; United States v. Two Horses, Fed. Cas. No. 16,578. In the case of United States v. Two Barrels of Whiskey, 96 Fed. 479, 37 C. C. A. 518, a full examination of authorities is given, and much light is thrown upon the general subject of forfeitures in revenue cases. That case deals with a statute different from the statutes in the case at bar. In the statutes which were before the court in that case, the court found that there was no intention of the Legislature to forfeit property, except the property of owners, on account of the misconduct of strangers over whom the owners could have no control. Such has been the general construction of revenue statutes. In Boyd v. United States, 116 U. S. 616, 6 Sup. Ct. 524, 29 L. Ed. 746, the court, Mr. Justice Bradley, says:

"We are clearly of the opinion that proceedings instituted for the purpose of declaring forfeiture of a man's property by reason of an offense committed by him, though they may be civil in form, are by their nature criminal. * * * The information, though technically a civil proceeding, is in substance and effect a criminal one. It is his breach of the law which has to be proved to establish the forfeiture, and it is his property which is sought to be forfeited. * * * Goods, as goods, cannot offend, forfeit, unlade, pay duties, or the like; but men whose goods they are."

In this case, and in the cases which we have cited, the court was able to find some language in the statute which enabled it to construe such statute as implying that the Legislature did not intend to forfeit the goods, unless knowledge was shown on the part of the owners. It is claimed that in the case at bar the court should find that these statutes above quoted should be so construed as to mean that the claimant of goods must be charged with knowledge that his property is to be used in a manner offensive to the statutes, and, further, that it is not enough for the court to find that the property has been used in transporting smuggled property, but that, in order to create a forfeiture, the horse, wagon, and harness must be found to have assisted in the importation itself of the property. By the agreed statement it appears clearly that the horse, wagon, and harness were used in the transportation of the liquors within the United States, and not in bringing them over the line; and, further that they were used without the knowledge or consent of the owner.

Now, let us examine the statutes. Section 3061 makes it the duty of the revenue officer to search any vehicle on which he suspects there is merchandise subject to duty, or which has been introduced into the United States contrary to law, whether by the person in possession or upon such vehicle; and if the officer shall find merchandise on such vehicle which he shall have reasonable cause to believe is subject to duty, or to have been unlawfully introduced into the United States, whether by the person in charge of the vehicle or upon the vehicle, or otherwise, then he, the said officer, shall seize and secure the same. The clear intention of Congress in making this law was to provide for the seizure of property which had been smuggled into the United States, either by the person in charge of it or upon the vehicle. Upon any reasonable and fair construction of the statute, it was clearly the intention of the Legislature to seize a vehicle which has been used either in the importation or the

transportation of smuggled property. Indeed, this clear intention of the Congress is gathered without recourse to "construction," but by a reading of the unambiguous language of the law. Where "there is no ambiguity, there is no room for construction." U. S. v. Morris, 14 Pet. 464, 10 L. Ed. 543. The above case is cited with approval in the opinion in the Northern Securities Case (just published, by the Supreme Court) 24 Sup. Ct. 436, 48 L. Ed. ——.

Section 3062 provides that "such vehicle," namely, a vehicle which has been found by an officer to be in use in transporting or conveying smuggled property, shall be liable to seizure and forfeiture. This statute should be construed, as all such statutes should be, with a view of giving the full force to all the language of the statute, under the principle that words are to be taken in a statute or in a contract under the rule of noscitur a sociis. The meaning of words is undoubtedly to be derived from the company in which they are found; but when this rule is applied in the interpretation of these statutes, no construction can be arrived at which is favorable to the claimant's contention. The duty of the officer in seizing is to seize property which is subject to duty, or has been introduced into the United States in any manner contrary to law. This statute is not one of the laws where doubt can be found as to the intention of holding offending property which has been used in smuggling without the knowledge of the owner. In such cases of doubt the courts have properly given the construction favorable to the claimant, and have imported the claimant's knowledge into the statute. In the statutes which are now before us in the case at bar, the court cannot find that there is any room left, after an intelligent reading of the law, to import such knowledge of the claimant into it.

Section 3063 provides that, in case of vehicles used by common carriers in the transaction of their business, such vehicles shall not be subject to forfeiture, unless it shall appear that such agent of the common carrier in charge of the vehicle at the time of such unlawful importation or transportation was a consenting party to the illegal importation or transportation. This section is very important in arriving at the intention of Congress in reference to the whole law before us. It provides distinctly that common carriers should be charged with knowledge before their property can be forfeited. The Legislature has clearly shown that it did not have such intention with reference to the vehicles of others besides common carriers. The rule "Expressio unius, exclusio alterius," is very important in the construction of statutes of this nature. The Congress has shown clearly in these statutes before us that it regards property as offending when used not only in the importation, but in the transportation, of smuggled goods. The case at bar is like the case of United States v. Two Bay Mules (D. C.) 36 Fed. 84, although the statute in this case makes the contention of the government much more reasonable than in the Case of the Two Bay Mules.

The court has well said, in such case, that "Congress has been induced to enact very comprehensive, specific, and stringent measures for the prevention and punishment of frauds" in revenue matters. The law which we are construing in the case at bar is much more comprehensive

and stringent than the law which was being enforced in the Case of the Two Bay Mules. In this case, as in that, the redress of the innocent claimant must be from the wrongdoer himself, or by application to the officers of the government invested with the authority to remit forfeitures. It is the clear duty of the court, although it may seem a harsh one, to construe the law reasonably and fairly, giving clear effect to the ordinary use of the English language.

Let a decree of condemnation be drawn in conformity with this opinion.

THE SOUTHWARK.

(District Court, E. D. Pennsylvania. March 10, 1904.)

No. 16.

1. ADMIRALTY—SUIT IN REM—RECOVERY OF INTEREST AND COSTS FROM CLAIMANT.

   The claimant of a ship who contests a suit in rem against it to recover damages, whether for a maritime tort or for breach of a contract of carriage, is liable for interest and costs, although the damages awarded to the libelant, together with the interest, may exceed the amount of the stipulation given for the vessel's release; the decree in such case to be entered against the stipulators to the extent of their contract liability, and against the claimant for the remainder of the interest and the costs.

2. SAME.

   A libelant is not precluded from asserting his right to recover interest and costs from the claimant in a suit in rem, in excess of the stipulation given, by the fact that his application for leave to amend his libel by inserting a claim in personam for the damages sued for was denied on the ground of laches.

In Admiralty. On motion for entry of decree.

See 128 Fed. 149.

Horace L. Cheyney and John F. Lewis, for libelant.

Biddle & Ward, J. Rodman Paul, and Howard H. Yocum, for respondent.

J. B. McPHERSON, District Judge. Unless the present case can be distinguished from The Wanata, 95 U. S. 600, 24 L. Ed. 461, I think the libelants are entitled to a decree against the claimants for the damages agreed upon, and for interest and costs, even although the amount of such decree exceeds the sum named in the stipulation. The decree against the surety, however—the City Trust, Safe Deposit & Surety Company—is to be limited to the principal sum for which it agreed to be bound. An effort is made to distinguish the cases, first, on the ground that The Wanata was an action for collision, in which the claimant was taking advantage of the statute permitting a limitation of liability; and, second, on the ground that permission to amend so as to prosecute the present action against the claimants in personam has been refused on the ground of undue delay, and therefore that the libelant should not be permitted to accomplish, by this form of motion, what the court has denied him permission to accomplish by another.

As it seems to me, neither ground is well taken. The reasoning

of the court in The Wanata was intended, I think, to cover other actions than those of collision, for there is no effort to confine it to torts of that class, where the claimant is seeking to limit his liability. In that case the damages awarded, $16,000, were precisely the amount of the stipulation for value, but the District Court added interest and costs thereto in the decree that was entered against the offending schooner. No decree was entered in the District Court against the stipulators for costs or the stipulators for value, the signers of each stipulation being the same persons, and these uniting also in an appeal bond for the sum of $2,000. In the Circuit Court, on appeal, a decree was entered against the schooner, and at the same time the court (page 608, 95 U. S., 24 L. Ed. 461) "entered a decree against the stipulators for value in the sum of $16,000, and against the stipulators in the other stipulation and the sureties in the appeal bond in the sum of $1,407.47, the two sums being exactly equal to the amount of the decree entered against the schooner, which includes the $16,000 recovered as damages in the District Court, together with the costs taxed in the District Court, and interest on the sums recovered in that court to the date of the decree entered in the Circuit Court, and the costs taxed in the Circuit Court, amounting in all to the sum of $17,407.47." Thereupon the claimants, who were also among the stipulators, appealed to the Supreme Court, and one of the positions taken by the libelants—appellees—was (page 612, 95 U. S., 24 L. Ed. 461) "that the owners defending the suit are liable for costs, even where the damages are equal to the stipulated value of the property, and the costs taxed exceed the amount of the stipulation for costs filed when the owners appeared in the District Court." The Supreme Court approved this position, saying: "Doubtless the rule was so prior to the passage of the act of Congress limiting the liability of shipowners. 9 Stat. 635. Since the passage of that act the question arises whether costs can be allowed in such a case, where it appears that the decree for damages exhausts the whole amount of the stipulation for value." Reference is then made to the British statute upon the subject of limiting liability, and to the cases, such as The Volant, 1 Rob. A. 383, which have held that, where the proceeds of the ship were insufficient to make good the loss, "the court cannot decree against the owner for the excess of damage beyond the proceeds of the ship." And it is then said that, although this may be true, "it is settled law that the defending owners in such a case are liable for costs, even though the damages recovered exhaust the whole amount of the stipulation for value." The John Dunn, 1 Rob. 160.

Turning to the subject of interest, the court proceed to say (page 613, 95 U. S., 24 L. Ed. 461): "Interest in such a case is allowed, as well as costs; and in case of an appeal, the interest is cast upon the whole amount of the decree in the court below, including costs, as well as the amount of the damage. The Dundee, 2 Hagg. 137." Referring further to The Dundee, the court approve the rules there laid down by Lord Stowell:

"Due objection to a decree settled in that form was made in that case; but Lord Stowell held that the allowances were correct, that the cost to which

the party is put to recover his just damages is a part of his loss, and that the costs in such a case are properly added to the damages in the computation of interest. Objection was also made in that case to the allowance of interest, as the damages were equal to the value of the ship; but the same learned judge answered that the sufferer is entitled to such costs as he shall incur in recovering the value of the ship, and to interest if payment is delayed—meaning, of course, that the party causing the delay is liable in such a case; and he added that the suffering party is entitled to remuneration for the costs to which he is driven for recovering his loss, as the costs constitute a part of the same; that the act of Parliament is not guilty of the injustice which would ensue if it excluded the costs, which are necessary for replacing the sufferer in a just state of compensation. Such a party, if he is reinstated in the value of the property without litigation, is not entitled to costs; but if he cannot obtain the benefit of the regulation in respect to compensation without being driven to the necessity of a suit, the statute would be chargeable with great injustice if it did not allow him to recover costs; and these remarks apply with equal force to the charge of intervening interest arising from delay occasioned by such litigation.

"Common-law authorities support the same construction of the act of Parliament referred to, and show to a demonstration that the rule is firmly established in all the courts of the parent country. Ex parte Rayne, 1 Gal. & Dav. 377; Gall v. Laurie, 5 B. & C. 163."

From this outline of the relevant portions of the opinion in The Wanata, I think it will be seen that the court's discussion proceeded along general lines, and was not intended to apply solely to the class of maritime torts. No principle is perceived that requires the rule announced by the court to be so limited. If the libelant has been injured, what difference does it make whether the harm has been done by sinking his ship, or by breaking a contract to carry safely? In either event he has suffered a money loss, and whatever rule may exist that seeks to make him whole, so far as possible, in the one case, ought also to be applied in the other.

The second ground of objection, as it seems to me, is also not tenable. I refused the motion to amend the libel, because the great weight of authority seemed to be in favor of refusal, and I was unwilling to depart from a well-established rule. But the present application seems to be supported by the highest authority in the land, and, while it is true that I have a discretion on this motion also (The Maggie J. Smith, 123 U. S. 349, 8 Sup. Ct. 159, 31 L. Ed. 175), I am disposed to exercise it in favor of the libelants. The same reason that influenced my decision on the petition to amend, namely, that decisive authority is on the side of the appellant, influences me now, and supports the position that the libelants should be compensated in full, so far as the power of the court may go, for the loss they have sustained, and for the cost of carrying the litigation to an end. The fact that the libelants will thus obtain by one method what they were unable to obtain by another does not seem to me to be important. Both remedies were available if the court permitted; the remedy by amendment and suit in personam, and the remedy by such a decree as is now asked for. These remedies were not dependent upon each other, and the considerations that are pertinent upon the subject of their allowance are not the same. It is not accurate, I think, to say that the libelants ask the court to do indirectly what the court has just refused to do directly. Doubtless the same result will be reached, but it will be reached directly, although by another

road than the road of amendment. I can see no reason why these two remedies may not be successively invoked.

The following decree will be entered:

And now, the mandate of the Supreme Court of the United States having been filed, directing a reversal of the decree of this court dismissing the libel, and directing a decree to be entered in favor of the libelants for the amount of damages sustained with costs; and it further appearing, by agreement of the proctors for the parties filed of record, that the damage sustained by the libelants for the cause of action set forth in said libel amounts to the sum of $6,036, with interest thereon from August 1, 1894, and that the libelants' costs amount to the sum of $711.16; and it further appearing to the court that the interest upon the said sum of $6,036 to date amounts to the sum of $3,473.72, making the total claim of the libelants $9,509.72; and it further appearing that the claim was made for said steamship Southwark by H. C. Bye, agent of the International Navigation Company, owner of said steamship, and that answer to the libel was filed by the said International Navigation Company, owner of said steamship, and that the payment of the libelants' claim has been contested and resisted by the said International Navigation Company up to this time:

Now, upon motion of Horace L. Cheyney and John F. Lewis, proctors for the libelants, the damages of the said libelants are hereby assessed at the sum of $9,509.72, being the amount of said claim, as set forth in the libel, together with interest thereon from August 1, 1894, to this date; and it is ordered and decreed that Joseph J. Martin, Alfred M. Fuller, and Thomas B. Shriver, copartners trading as Martin, Fuller & Co., libelants, shall have and recover from the City Trust, Safe Deposit & Surety Company and H. C. Bye, agent of the International Navigation Company, stipulators, the sum of $7,500, being the said sum of $6,036 damages, with the sum of $1,464, a portion of the interest thereon; and that the libelants shall further have and recover of the International Navigation Company, owner and claimant of said steamship Southwark, the sum of $2,009.72, being the balance of said interest; and shall further have and recover of said International Navigation Company their costs, amounting to the sum of $711.16. And it is further ordered and decreed that this decree shall bear interest from its date at the rate of 6 per cent. per annum.

SAMUEL H. COTTRELL & SON v. SMOKELESS FUEL CO.

(Circuit Court, E. D. Virginia. January 16, 1904.)

1. SALES—CONTRACTS—EXCUSES FOR FAILURE TO DELIVER.

Where a contract for the sale of such coal as the buyer might need, approximating 3,000 tons, during the year from April 17, 1902, to April 17, 1903, contained a provision that deliveries should be subject to strikes, accidents, interruptions to transportation, and other causes beyond the seller's control, the existence of a miners' strike did not avoid the contract, but only suspended its operation during such strike.

2. SAME—DAMAGES.

Where defendants agreed to deliver such coal as plaintiff should need between April 17, 1902, and April 17, 1903, approximating 3,000 tons, in such quantities and at such times as plaintiff should direct, except that deliveries should be subject to strikes, and by reason of a strike deliveries were prevented from June 7, 1902, to March 1, 1903, and plaintiff only demanded two car loads after that date, plaintiff could only recover damages on such amount.

In Assumpsit for Breach of Contract.

On the 17th day of April, 1902, the Smokeless Fuel Company entered into a contract with S. H. Cottrell & Son, by which the fuel company agreed to furnish and deliver to Cottrell & Son, at Richmond, Va., all of the New River R. O. M. steam coal from Collins Colliery Company, they might need from the 17th of April, 1902, to April 17, 1903, approximating 3,000 tons, more or less, and to ship the same in such quantities and at such times as Cottrell & Son might from time to time direct during the continuance of said contract, at prices therein mentioned, but subject to the following provision: "Deliveries of coal under this contract are subject to strikes, accidents, interruptions to transportation, and other causes beyond the control of the party of the first part [the fuel company], which may delay or prevent shipment." Cottrell & Son called for and received under said contract up to the 10th day of June, 1902, a total of 563 tons, at the price of $2.57 per ton, the contract price. On the 7th day of June, 1902, there was a general strike throughout the mining district, including the mines from which the coal under this contract was to be shipped. From that time on no coal was shipped to Cottrell & Son during the continuance of the contract, though during the pendency of the strike they frequently called for the same; and after it ended, and during the running of the contract, made one request of two car loads of coal, none of which was furnished. This action was brought to recover damages for breach of the contract for failure to furnish the undelivered 2,437 tons of coal thereunder, said damage being estimated on the average of ruling prices for such coal from November, 1902, to April, 1903, which showed a loss to Cottrell & Son of $1.74½ per ton, as they claim, and for which the verdict of the jury was rendered in their favor.

Henry R. Pollard, for plaintiffs.
Sands & Sands, for defendant.

WADDILL, District Judge. This case is now before the court upon a motion to set aside the verdict of the jury rendered herein on the 2d day of December, 1903, because, among other things, it is contrary to the law and the evidence, and unsupported by the evidence. After mature consideration of said motion, having carefully reviewed the evidence and heard the arguments of counsel thereon, the conclusion reached by the court is that the verdict rendered in favor of the plaintiffs should be set aside, because the same is unsupported by and contrary to the evidence. The crucial point involved is whether or not the conditions at the mines of the defendant during the continuance of the contract were such as to relieve it from the obligationof the same under the clause in the agreement known as the "strike clause." In other respects the facts may be said to support the finding of the jury. That abnormal conditions prevailed during the fall of 1902 and the winter of 1902–3 is a matter of common knowledge, and forms a part of the history of the times; but reliance need not be had upon this, as the evidence conclusively establishes that from the 7th of June, 1902, certainly for a period of four months, conditions at the mines were such that the ordinary and usual operation of them was out of the question.

Indeed, out of 60 mines in the coal district, comparatively few were operated at all, and those few under the protection of a military force. Normal conditions were not resumed until about the 1st of March, 1903. This is established by the evidence of the plaintiffs' own witness Mr. Morris O. Brooks, a gentleman of intelligence, who had ample opportunity of knowing the conditions existing, and who testified with such frankness, fairness, and clearness, and showed such familiarity with the entire situation, that none could fail to be impressed by his evidence; and as to the conditions mentioned he is fully sustained by the evidence of the defendant company. At an early stage of the strike little or no coal was mined, but the defendant never discontinued work entirely, though conducting its business by means of an armed force, employed as well at the mines as in the effort to transport coal therefrom. The output was comparatively small, and produced at greatly increased expense; so much so that the coal more than doubled in value. Even after the return to normal conditions, the cost of mining and the price of coal were never anything approximating those existing at the time of entering into the contract. The strike clause in the contract was manifestly inserted for the purpose that when conditions existed which placed it beyond the control of the party of the first part to the contract, the defendant here, to carry out the same, it should operate to relieve it from the provisions thereof. That such conditions did exist during the life of this contract which placed the mining and transportation of coal in the usual course of business beyond the defendant's power, is too apparent to admit of serious doubt. Indeed, it is the one thing in which the evidence of the plaintiffs and the defendant concur; and to allow the verdict of the jury to stand based upon the failure of the defendant to furnish coal during the strike would, in effect, be to annul that important qualification and condition in the contract, and to give to it no effect whatever. The language in reference to strikes is: "Deliveries * * * are subject to strikes, accidents, interruptions to transportation, and other causes beyond the control of the party of the first part, which may delay or prevent shipments." The existence of the conditions do not avoid the contract, but only suspend the operation of the same during their pendency, which in this case was from the 7th of June, 1902, to the 1st of March, 1903. For the failure to deliver coal during that period, no recovery should be had, and the plaintiffs can only recover for such coal as they called for under their contract, after the restoration of normal conditions at the mines—that is, after the 1st of March, 1903, to the 17th of April, 1903—which, according to the evidence, consisted of two car loads ordered by the plaintiffs on the 2d of March, 1903.

The court's attention has been called to the case of Hull Coal & Coke Co. v. Empire Coal & Coke Co., 113 Fed. 256, 51 C. C. A. 213, which bears upon the general subject under consideration, but otherwise throws no special light on this case, as the same turns entirely upon the sufficiency of the evidence adduced to support the finding of the jury.

The verdict, as rendered, will therefore be set aside, and a new trial awarded herein.

CARY BROS. & HANNON v. MORRISON.

(Circuit Court of Appeals, Eighth Circuit. March 18, 1904.)

No. 1,928.

1. EXPLOSIVES—BLASTING—RIGHT TO USE TO GRADE RAILROAD.
Blasting by the use of gunpowder or dynamite is an appropriate and justifiable mode of removing rock from the right of way of a railroad in order to bring it to grade, and a railroad company or its grading contractors may lawfully employ it, with reasonable care.

2. SAME—THROWING ROCKS UPON NEIGHBORING PROPERTY—WARNING.
While a contractor may lawfully use blasting with gunpowder or dynamite to remove rock in the right of way of a railroad company, he has no right by its use to throw rocks upon persons rightfully occupying or using neighboring property. Such an act is a trespass, and it is his duty to give such persons reasonable warning of coming explosions.

3. SAME—UNHEEDED WARNING—CONTRIBUTORY NEGLIGENCE.
It is the duty of one who is lawfully using property near to that upon which another is legally engaged in blasting, and who is warned of a coming explosion, to use reasonable diligence to escape from danger on account of it; and a failure to exercise such care, which concurs in producing his injury, waives his right of action for the trespass, and constitutes contributory negligence, which is fatal to his action for damages for the injury.

4. CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY—EXCEPTION.
The question whether or not one is guilty of contributory negligence is ordinarily for the jury. It is only when the facts which condition the question are stipulated, or are established by testimony which is free from substantial conflict, and the inference from the facts is so certain that all reasonable men, in the exercise of a fair and impartial judgment, must agree upon it, that the question of contributory negligence may be lawfully withdrawn from the jury.

5. EXPLOSIVES—BLASTING—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.
The defendants were lawfully engaged in blasting rock out of the right of way of a railroad company at a point about 150 feet from a river. The decedent was rightfully walking along the bank of the river a short distance below a point opposite the place of blasting, holding the prow of a ferryboat away from the bank with a pole, while the ferryman was walking ahead of him, pulling the boat up the stream, in the customary way, preparatory to poling it across. The decedent had engaged his passage across the river upon the boat. The custom of the defendants was to send men out, shouting "Fire," at short intervals for a period of 12 or 15 minutes before exploding a charge of gunpowder or dynamite, and the charges had been so heavy that rocks had fallen all around the place where the decedent and the ferryboat were, and had broken limbs and stripped foliage from the trees of the forest which intervened between the right of way and the river, and concealed the boatmen from those engaged in blasting, who were not aware of their presence before the explosion. The decedent had worked for the defendants, and knew these facts and this custom. Seven witnesses heard the cry of fire 12 to 15 minutes before the explosion. Three heard it from 2 to 5 minutes before. When the ferryman heard it, he shouted "Don't shoot," and he and the decedent continued to ascend the stream within 200 or 300 feet of the place of blasting. The ferryman heard it again, and answered it again, and they continued up the river. The ferryman heard it a third time, answered again, the signal to explode the blast was given, the charge was fired,

¶ 2. See Explosives, vol. 23, Cent. Dig. §§ 9, 10.

and a rock fell upon the decedent and killed him. The defendant's witnesses testified that they did not hear the cry "Don't shoot."

Held, the question whether or not the decedent was guilty of contributory negligence was for the jury.

Thayer, Circuit Judge, dissenting.

(Syllabus by the Court.)

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

G. B. Rose (U. M. Rose and W. E. Hemingway, on the brief), for plaintiffs in error.

Ira D. Oglesby (W. E. Atkinson and Geo. O. Patterson, on the brief), for defendant in error.

Before SANBORN, THAYER, and HOOK, Circuit Judges.

SANBORN, Circuit Judge. This writ of error questions the proceedings at the trial of an action for negligence brought by Mrs. T. Jane Morrison, the administratrix of the estate of W. L. Morrison, against Cary Bros. & Hannon, a partnership composed of the defendants below, which resulted in a judgment against the defendants for $6,000. In her complaint the plaintiff alleged that her husband, W. L. Morrison, was killed by a blow from a rock which was carelessly thrown from a blast by the defendants, who were then engaged in grading the Little Rock & Ft. Smith Railroad. The defendants denied that they were guilty of negligence, and alleged that the injury and death of Morrison were caused by his own carelessness, in that he disregarded warnings that the explosion was about to occur, and refused or neglected to seek a less dangerous place. At the close of the trial the court, in effect, charged the jury that Morrison was free from negligence, and that, if they believed that the defendants were guilty of carelessness which caused his injuries and death, the plaintiff was entitled to a verdict. This instruction is challenged, and its consideration necessitates a review of the facts disclosed by the evidence at the trial, which were these: Cary Bros. & Hannon had been engaged at the place where the accident occurred in blasting heavy rocks out of the right of way of the Little Rock & Ft. Smith Railroad Company for about two weeks. At the place where they were at work the right of way ran east and west parallel to, and about 150 feet distant from, a river 1,200 feet wide. The surface of the ground along the right of way was higher than that of the river, and between them was a forest, which, with its foliage, made it impossible to see the river from the surface of the ground along the right of way, although there was testimony that it was visible from a pile of timber and brush some 20 to 90 feet distant from the explosion. On the bank of the river, and about 700 feet below and east of a point upon the river directly south of the place of the blasting, was a landing place for a ferry; and between these two points, and about 350 feet from the landing, was a mill. The country was sparsely populated, and there was but one house, aside from the mill, within 700 feet of the place of the fatal blast. The contractors had been using heavy charges of powder, and had thrown rocks in every direction, some of them 700 feet from the place of the explosion, but

naturally many more had fallen nearer to the place of the blasting than at a greater distance. Between the place of the explosion and the river much foliage had been stripped from the trees, and their limbs had been broken by falling rocks. The custom of the defendants had been and was to send their employés out 12 or 15 minutes before a charge of powder was to be fired, shouting the word "Fire" at short intervals, for the purpose of warning all persons in the vicinity of the coming explosion, so that they might retire out of danger. Morrison was a laborer, a farmer, and a minister, who earned annually about $100 by the first, about $300 by the second, and about $75 by the third occupation. He had been an employé of the defendants at the place of the explosion within two weeks before the accident occurred, had seen heavy charges of powder exploded, was aware of their effect, and knew how the warning of a coming blast was given, and all the facts which have been recited. The customary method of operating the ferryboat at this time was to tow it up the stream, so that the current would not carry it below the opposite landing, and then to pole it across the river. But the defendants' witnesses testified that they were not aware that the ferryboat ever came up along the bank in that way. At a time when the defendants had a charge of powder nearly ready for explosion, about 2 or 3 o'clock in the afternoon of October 5, 1902, Morrison came from the north to the landing place of the boat for the purpose of crossing the river upon it. When the boat was ready to cross the river, it was loaded with a team of mules, a wagon, and one Davis, the owner of the mules. Thereupon the ferryman walked up along the north bank of the river, and dragged the boat after him by means of a rope attached to it, while Morrison walked along the bank behind him, and pushed the prow of the boat away from the bank with a pole. When they had arrived at a point above the mill, but below a point opposite the place of the blasting, Davis heard the cry of fire, the ferryman shouted "Don't shoot," and they proceeded on their way up the river. After a short interval Davis again heard the shout "Fire," and the ferryman again cried "Don't shoot," while they continued on their way. And after another interval Davis heard the cry of fire again, the ferryman again cried "Don't shoot," Davis heard the words "All right," the explosion occurred "right then," and a rock from the blast fell upon Morrison and killed him. The defendants' witnesses testified that they did not hear the cry "Don't shoot," did not know that Morrison and his companions were near their place of work, and that the words "All right" were addressed to the operator of the battery, and constituted the signal for the explosion. The course of proceeding of the defendants and their employés up to this time had been this: About 12 or 15 minutes before the explosion, men had been sent out, crying "Fire," and they continued to repeat the cry at short intervals until the explosion occurred. One of the employés of the defendants stepped on some logs about 100 feet from the river, faced it, and shouted "Fire." After he had done this he walked 500 feet to the battery before the explosion. Seven witnesses testified that they heard the cry of fire 12 or 15 minutes before the explosion. Three witnesses only, and they were on the opposite side of the river, testified that they first heard the cry from 2 to 5 minutes before the explosion. The

witness Hines testified that he was sitting on the north bank of the river, opposite the mill, when he first heard the warning; that this was 12 or 15 minutes before the explosion; that the ferryboat was then no more than 200 feet above him (and that would have been about 150 feet below a point opposite the place of the blasting); that he heard the cry of fire five times, and that after he first heard it he went north and east 1,000 feet, in order to get out of danger before the explosion occurred. Yandell, another witness, who was on the opposite side of the river, and who did not hear the cry until from 2 to 5 minutes of the explosion, walked 120 feet away from the river after he heard it, and before the explosion, in order to place himself without the range of danger. And Prendergast, who was also on the other side of the river, testified that he heard the cry 15 minutes before the explosion, and went under a shed for shelter. Davis was the only one of the men who were with the boat at the time of the accident who appeared at the trial, and he testified that when he first heard the cry of fire the boat was a little below a point opposite the place of explosion, and that the ferryman dragged it up the river two boat lengths, or 90 feet, and commenced to roll up his lines to start to cross the river before the blast came.

In this state of the evidence the court below instructed the jury, in effect, that there was no question of contributory negligence for their consideration, and that, if the defendants were guilty of negligence, the plaintiff was entitled to their verdict. It refused to charge, at the request of the defendants, that if Morrison was a passenger on the ferryboat, but was walking along the bank of the river, pushing the boat from the bank, and if he heard the warning, and made no effort to get out of danger, but continued to walk along the bank, he was guilty of contributory negligence. It also refused the request of the defendants to instruct the jury that it was the duty of Morrision, when he was made aware of the fact that a blast was about to be fired, to use reasonable diligence to get out of danger. It charged them that it was not the duty of Morrison to abandon the boat in the event that he was crossing the river and was a passenger when the warning was given. These rulings present the question to be considered in this case.

The railroad company and its contractors, the defendants, had the right to grade its road along its right of way. The right to accomplish a result includes the right to use the appropriate means to produce it. In a sparsely settled country, blasting by means of gunpowder or dynamite is a reasonable and justifiable way of removing ledges and rocks for the purpose of bringing a railroad to a proper grade, and a corporation and its contractors have the right to use this method, provided they exercise reasonable care to protect others from injury. Dodge v. County Commissioners of Essex, 3 Metc. (Mass.) 380, 383; Whitehouse v. Androscoggin R. Co., 52 Me. 208; Brown v. Providence, etc., R. Co., 5 Gray, 35, 40; Blackwell v. Lynchburg, etc., R. Co., 111 N. C. 151, 153, 154, 16 S. E. 12, 17 L. R. A. 729, 32 Am. St. Rep. 786; Watts v. Norfolk & W. R. Co., 39 W. Va. 196, 205, 19 S. E. 521, 23 L. R. A. 674, 45 Am. St. Rep. 894; Gates v. Latta, 117 N. C. 189, 190, 23 S. E. 173, 53 Am. St. Rep. 584; Mitchell v. Prange, 110 Mich. 78, 67 N. W. 1096, 34 L. R. A. 182, 64 Am. St. Rep. 329.

While a railroad company has the right to blast rock from its right

of way by means of gunpowder or dynamite, it has no right, without warning, to throw rocks upon persons who are lawfully occupying or using neighboring property, and such an act is a trespass. Sullivan v. Dunham, 161 N. Y. 290, 55 N. E. 923, 47 L. R. A. 715, 76 Am. St. Rep. 274; Hay v. Cohoes Co., 2 N. Y. 159, 51 Am. Dec. 279; Wright v. Compton, 53 Ind. 337; St. Peter v. Denison, 58 N. Y. 416, 423, 17 Am. Rep. 258; Colton v. Onderdonk, 69 Cal. 155, 159, 10 Pac. 395, 58 Am. Rep. 556.

It is, however, the duty of one who is lawfully using neighboring property, and who is warned of a coming explosion by another, who is rightfully engaged in blasting, to use reasonable diligence to escape from danger from the approaching explosion; and a failure to exercise such care, which concurs in producing his injury, waives the right of action for the trespass, constitutes contributory negligence, and is fatal to an action for the recovery of damages on account of the injury. Sullivan v. Dunham, 10 App. Div. 438, 440, 41 N. Y. Supp. 1083; Wright v. Compton, 53 Ind. 340, 341; Graetz v. McKenzie (Wash.) 35 Pac. 377, 378; Mills v. Wilmington City Ry. Co. (Del. Super.) 40 Atl. 1115; 2 Shearman & Redfield on Law of Negligence, § 688a.

In the case at bar, therefore, the defendants had the right to remove the ledges and rocks from the right of way of the railroad company by explosions of gunpowder or dynamite. The decedent, Morrison, had the right to walk along the bank of the river for the purpose of accompanying the boat to its starting point, and crossing upon it to the opposite side. It was the duty of the defendants to warn Morrison and every other person within the circle of danger of the coming explosion they were about to cause. It was the duty of Morrison and of every one thus warned to exercise reasonable diligence to escape from the danger from the explosion and from the threatened injury, and if they failed to exercise this diligence, and their failure contributed to their injury, it was fatal to an action for damages on account of it. The evidence is conclusive that Morrison was warned of the danger, and the conclusion is inevitable that the court below fell into an error when it refused to instruct the jury that it was his duty, after he was thus warned, to exercise reasonable diligence to escape from the threatened injury, unless the necessary deduction from the undisputed evidence was such that all reasonable men, in the exercise of an impartial judgment, would be compelled to conclude that he exercised reasonable care or diligence to escape from the impending danger. The question of contributory negligence, like every question of negligence, is ordinarily for the jury; and it is only when there is no substantial conflict in the evidence which conditions it, and when, from the undisputed facts, all reasonable men, in the exercise of a fair judgment, would be compelled to reach the same conclusion, that the court may lawfully withdraw it from them. St. Louis, I. M. & S. R. Co. v. Leftwich, 54 C. C. A. 1, 2, 117 Fed. 127, 128; Railroad Co. v. Jarvi, 3 C. C. A. 433, 53 Fed. 65; Pyle v. Clark, 25 C. C. A. 190, 192, 79 Fed. 744, 746; Railroad Co. v. Ives, 144 U. S. 408, 417, 12 Sup. Ct. 679, 36 L. Ed. 485; Railroad Co. v. Converse, 139 U. S. 469, 11 Sup. Ct. 569, 35 L. Ed. 213.

In the case at bar neither of these conditions existed. The evidence which conditions the question of contributory negligence is not free

from substantial conflict, and, if the view of it most favorable to the defendants is taken, as it must be in this case, where the instruction which took the question from the jury was for the plaintiff, reasonable men might well conclude that the decedent was not free from negligence which contributed to his injury. The crucial fact in the case is the time when Morrison first heard the cry of fire. That time is not fixed by the testimony of any witness, but it must be found from the evidence of the witnesses who heard the cries. No one testifies when Morrison first heard them. The great preponderance of the testimony is that the shouts of fire were made at short intervals for a period of from 12 to 15 minutes before the explosion. Seven witnesses heard them at least 12 minutes before the blast was fired. One of these witnesses was about 200 feet below Morrison, on the same bank of the river, and another was on the opposite side of the river, 2,200 feet from the place of the explosion. Three witnesses who were on the other side of the river testified that they first heard the cry of fire, and the ferryman's answer, "Don't shoot," from 2 to 5 minutes before the explosion. The natural and rational inference from all this testimony is that the shouts of fire were given for at least 12 minutes before the blast, but that the three witnesses on the other side of the river did not hear the earlier shouts. Did Morrison first hear the warnings when the seven witnesses, many of them farther from the place of blasting than he was, first heard them, or when the three witnesses on the other side of the river first perceived them? The evidence is certainly ample to sustain a finding that Morrison first heard them when the majority of the witnesses first perceived them, 12 or 15 minutes before the explosion. The preponderance of the evidence points to that conclusion. If he heard this warning 12 or 15 minutes before the explosion, all reasonable men would not be compelled, in the exercise of a sound judgment, to conclude that remaining within the circle of danger, or advancing into greater danger, when he was on the bank of the river and free to escape from all danger, was the exercise of reasonable care or diligence.

Again, there is sufficient evidence in this record to warrant a finding by the jury that the ferryboat was at least 150 feet below a point opposite the place where the explosion occurred when the ferryman first cried "Don't shoot." Three witnesses testify that this cry was first heard by them from 2 to 5 minutes before the explosion. Davis says that the ferryman was walking fast, drawing the boat up the river, and then rolling up his lines to start across the river, during this time. A man walking slowly—walking only 3 miles an hour—travels 528 feet in 2 minutes; and the boat sank only 800 feet above the landing, and not more than 100 feet above a point opposite the place of blasting. Davis testifies that the boat was a little below a point opposite the place of the explosion when he first heard the cry of fire. Hines says that it was at least 150 feet below that point when he first heard the cry, and that he was within 200 feet of it. Davis says that the boat went about 90 feet after he first heard the warning, and the testimony of two witnesses on the other side of the river is that the boat seemed to be about opposite the place of the blasting when they first heard the cry "Don't shoot." But Davis' estimates of distance were demonstrated by the measurements to be erroneous. He thought the dis-

tance from the place of the explosion to the point where the boat sank was 450 feet. It was 198 feet. He said he heard the first cry of fire about 900 feet above the landing. But the distance from the landing to the place where the boat sank was only 800 feet. Thus it appears that the evidence was substantial and sufficient to sustain a finding that the boat was 150 feet below the place of blasting when the ferryman first cried "Don't shoot," and when Morrison must have been aware of the danger.

Moreover, wherever the boat may have been, there were at least 2 minutes—time enough for one to go on a slow walk 528 feet, and on a brisk walk 700 feet, after the ferryman first cried "Don't shoot," and before the explosion occurred. It was only about 700 feet from the point on the river opposite the place of blasting to the landing. Every step down the river, away from the place of explosion, diminished the danger of injury. Every step towards it increased the danger. Would a person of ordinary prudence and diligence under such circumstances remain in the imminent danger or advance into increasing danger? Or would he flee from the point of greatest danger, when every step down the river would diminish the chance of his injury? Some reasonable men might well conclude that a person of ordinary prudence and diligence would, under such circumstances, move away, instead of advancing toward or remaining near the point of greatest danger. That was the course pursued by every person within hearing of the warning, except the men about the ferryboat. Five of those who thus retired upon hearing the warning were much farther away from the place of the explosion than Morrison was, and four of them were on the opposite side of the river. Hines, on the same bank, 200 feet below Morrison, traveled 1,000 feet north and east after he heard the cry, and before the explosion occurred. Prendergast, 2,200 feet away, on the other side, took shelter under a shed. Yandell, Pointer, and Travers, on the opposite side of the river, and at least a quarter of a mile distant, turned and walked farther away. The ferryman had the care of his boat. Davis had the care of his mules. Morrison had the care of nothing but himself. He was walking on the bank of the stream, with no responsibility, care, or duty, save the duty to heed the warning and use ordinary care to retire from the impending danger. This was not a case where the facts which conditioned the question of contributory negligence were stipulated, or where they were established by undisputed testimony. It was not a case where, from the facts which the evidence tended to establish, no reasonable men could have rightfully drawn the conclusion that Morrison failed to exercise ordinary care and diligence to escape from the impending danger after he received the warning of it, and the question of his contributory negligence should have been submitted to the jury. It was a debatable question—one upon which the minds of reasonable men might honestly reach opposite conclusions—and hence one peculiarly appropriate for the determination of a jury of men of the vicinage, who are necessarily familiar with the methods of life and action in the country where the accident occurred, and of the course of action which men of ordinary sagacity usually pursue when they are notified that a heavy charge of powder to blast out

rock, which has been falling from such blasts all about the place they are occupying, is about to be exploded. The facts were not so clearly established, nor the inference from them so conclusive, that the court below should have instructed the jury either that if Morrison was a passenger, and was walking along the bank, pushing the boat away from the land with a pole, when he heard the warning, and made no effort to escape, but continued to walk up the river until the explosion, he was guilty of contributory negligence, or that it was not his duty to abandon the boat in the event that he was crossing the river and was a passenger when the warning was given. The court gave the latter instruction. It was erroneous, because the evidence was undisputed that Morrison was not crossing the river when he heard the warning, but was walking on its bank, and because, when he heard the warning, he owed no duty to the boat, nor to the men about him, which was not subordinate to his positive duty to immediately use reasonable diligence to decrease, and if possible to entirely avoid, the impending danger.

There are other specifications of error, but the discussion of those which have been already considered sufficiently indicates the law applicable to the case, and determines the disposition which must be made of it in this court.

The judgment below is accordingly reversed, and the case is remanded to the Circuit Court, with instructions to grant a new trial.

THAYER, Circuit Judge (dissenting). The defendants below, who are the plaintiffs in error in this court, requested the trial court to give four instructions on the subject of contributory negligence, all of which were refused, and the sole question before this court is whether a reversible error was committed in refusing these instructions, or any of them. The first of the four instructions was as follows:

"The evidence shows that at the time of hearing the warning, and until he was killed, Morrison was not in the boat, but was walking on the bank; that he was a passenger, and under no obligation to look out for the safety of the boat or its contents; and you are instructed that when he heard the alarm it was his duty to proceed down the bank in search for a place of safety, and that, if he did not do so, he was guilty of contributory negligence which precludes of recovery in this case."

The second and third instructions embodied the same idea, namely, that if Morrison heard the alarm of fire while walking along the bank and poling the ferryboat offshore, and made no effort to get out of danger after he heard the alarm, he was guilty of contributory negligence.

The fourth instruction was a mere abstract proposition of law, to the following effect:

"The court, in this connection, instructs you that it was the duty of the decedent, Morrison, when he was made aware of the fact that a blast was to be fired, to use reasonable diligence to get out of danger."

I have not been able to conclude that the refusal of either of these instructions constitutes a reversible error. The first three of these instructions were palpably wrong and misleading, in that they ignored material facts which the testimony for the plaintiff below strongly tend-

ed to establish. This testimony was to the effect that no warning of the blast which was about to be fired was given until the ferryboat had started on its voyage across the river, and had proceeded upstream from 150 to 300 yards above the landing; that, when the alarm of fire was given, the captain of the ferryboat immediately hallooed back as loud as he could, two or three times, not to fire until the boat got away, or "Don't shoot until we get away," and that the reply immediately came back from some person in the vicinity of the blast, "All right." In other words, the testimony for the plaintiff below showed that the persons on the ferryboat and alongside of it, including the deceased, were led to believe, by the reply "All right," which was made to the captain's exclamation "Don't shoot," that the firing of the blast would be deferred until the boat had got out of danger. Obviously, then, if such was the fact, and the jury had so found, as they might well have done, under the testimony, it could not be said that the deceased was guilty of contributory negligence, as these instructions declared, because he did not drop his pole and search for a place of safety immediately after the alarm of fire was given. The first three instructions that were asked on the subject of contributory negligence wholly ignored this phase of the testimony, and the trial court properly refused these requests for that reason.

The fourth instruction, above quoted, stated merely an abstract proposition of law, giving the jury no precise direction as to what the deceased's conduct should have been on the occasion in question. If the deceased heard the alarm of fire, and also heard the captain's exclamation "Don't shoot," and the response "All right," and understood from such response, as he probably did, that the blast would not be fired until the boat was out of danger, no one can say that he did not exercise reasonable diligence in acting as he did. On the other hand, if he did not hear such response, and was not given to understand that the blast would not be fired, the exercise of reasonable diligence might, in the estimation of the jury, have required him to act differently than he did. The fault with this instruction, in my judgment, was that it was too general in its terms, not adapted to the different phases of the testimony, and was not calculated to give the jury any information concerning their duty in the premises. Instructions ought always to be adapted to the various hypotheses of fact which may be found by a jury, and a judgment ought not to be reversed because the trial court fails to give an instruction, as respects some abstract rule of law, however accurate it may be, which is not calculated to aid the jury in reaching a correct conclusion. There is abundant evidence in the record to support the conclusion that the plaintiffs in error were guilty of negligence. Indeed, I do not understand that fact to be challenged by the majority opinion. The testimony shows that the blasts which they were in the habit of firing from this cut were very heavy. When fired they showered the surrounding country with rock, and put the lives of every one who was within the vicinity in peril. It was shown that only a day or two previous to the accident in question a blast had been fired which threw a rock weighing 20 tons entirely across the river. Under these circumstances, it was the duty of the defendants below to have taken greater care than they appear to

have taken to ascertain, before firing a blast, whether all persons within the danger line had been duly notified of the expected explosion, and were in a place of safety, or had been given time to reach a place of safety. Certainly such blasts as the one in question ought not to be fired in proximity to a ferry landing, and near a public highway, without taking such precautions as are fully adequate to protect human life. In the present instance the area of danger was so large that if the decedent, when he first heard the warning cry, "Fire," had dropped his pole and run in any direction, he might not have reached a place where he would have been any safer than by remaining where he was; but, conceding it to be true that it was his duty to have made some effort to reach a place of safety after he heard the warning cry of fire, yet the plaintiffs' evidence, if credited by the jury, was of such a character as excused him from making any such effort. I think that no instruction on the subject of contributory negligence, such as was requested, ought to have been given, and that the record discloses no reversible error.

HARGROVE et al. v. CHEROKEE NATION.

(Circuit Court of Appeals, Eighth Circuit. February 27, 1904.)

No. 1,866.

1. JUDGMENT—PERSONS BOUND—PURCHASER PENDING SUIT.

In a suit under section 3 of Act June 28, 1898 (30 Stat. 495, c. 517), which authorizes a suit by a tribe in the Indian Territory to recover lands held by those claiming membership in the tribe, but whose membership or right has been disallowed by the commission or the United States court, and the judgment has become final, the general rule applies that a stranger cannot, by a conveyance or transfer of possession from the defendant pendente lite, acquire any rights which are not subject to the judgment subsequently rendered in the suit, whether or not he is made a party thereto; and where such a purchaser or transferee is brought in by an amended complaint it is not necessary to allege that his membership in the tribe has been disallowed.

2. INDIANS—ACTION TO DISPOSSESS INTRUDER ON LANDS OF TRIBE—NOTICE BEFORE SUIT.

Act June 28, 1898 (30 Stat. 495, c. 517), provides for the bringing of suits by any tribe in the Indian Territory to dispossess intruders on lands of the tribe, and authorizes such suit by any member of the tribe where the chief or governor fails or refuses to bring it. Section 5 requires the party bringing such suit to serve notice on the adverse party to leave the premises at least 30 days before the suit is commenced; and by section 2 it is provided that when, in the progress of any civil suit in a court of the territory, it shall appear that the property of any tribe is affected by the issues, it shall be the duty of the court to make such tribe a party by service on the chief or governor. *Held* that, where a suit to dispossess an intruder was originally brought by a member of a tribe who had served the required notice, such notice was sufficient, although the Cherokee Nation afterward joined, and became the plaintiff in the suit.

3. SAME—DAMAGES FOR DETENTION OF PROPERTY.

Where, in such a suit, it appeared that a defendant brought in by an amended complaint, by an agreement with the original defendants, obtained possession of the premises and improvements after the bringing of the suit, and wrongfully withheld possession from the tribe, a judgment may properly be rendered against him for the damages caused by his wrongful detention, as well as for possession of the property.

In Error to the United States Court of Appeals in the Indian Territory.

For opinion below, see 69 S. W. 823.

An act of Congress approved on June 28, 1898, entitled "An act for the protection of people of the Indian Territory, and for other purposes" (30 Stat. 495, c. 517), contains, among others, the following provisions:

"Sec. 2. That when in the progress of any civil suit, either in law or equity, pending in the United States court in any district in said territory, it shall appear to the court that the property of any tribe is in any way affected by the issues being heard, said court is hereby authorized and required to make said tribe a party to said suit by service upon the chief or governor of the tribe, and the suit shall thereafter be conducted and determined as if said tribe had been an original party to said action.

"Sec. 3. That said courts are hereby given jurisdiction in their respective districts to try cases against those who may claim to hold as members of a tribe and whose membership is denied by the tribe, but who continue to hold said lands and tenements notwithstanding the objection of the tribe; and if it be found upon trial that the same are held unlawfully against the tribe by those claiming to be members thereof, and the membership and right are disallowed by the commission to the Five Tribes, or the United States court, and the judgment has become final, then said court shall cause the parties charged with unlawfully holding said possessions to be removed from the same and cause the lands and tenements to be restored to the person or persons or nation or tribe of Indians entitled to the possession of the same: provided always, that any person being a non-citizen in possession of lands, holding the possession thereof under an agreement, lease, or improvement contract with either of said nations or tribes, or any citizen thereof, executed prior to January first, eighteen hundred and ninety-eight, may, as to lands not exceeding in amount one hundred and sixty acres, in defense of any action for the possession of said lands show that he is and has been in peaceable possession of such lands, and that he has, while in such possession made lasting and valuable improvements thereon, and that he has not enjoyed the possession thereof a sufficient length of time to compensate him for such improvements. Thereupon the court or jury trying said cause shall determine the fair and reasonable value of such improvements and the fair and reasonable rental value of such lands for the time the same shall have been occupied by such person, and if the improvements exceed in value the amount of rents with which such persons should be charged the court, in its judgment, shall specify such time as will, in the opinion of the court, compensate such person for the balance due, and award him possession for such time unless the amount be paid by claimant within such reasonable time as the court shall specify. If the finding be that the amount of rents exceed the value of the improvements, judgment shall be rendered against the defendant for such sum, for which execution may issue.

"Sec. 4. That all persons who have heretofore made improvements on land belonging to any one of the said tribes of Indians, claiming rights of citizenship, whose claims have been decided adversely under the Act of Congress approved June tenth, eighteen hundred and ninety-six, shall have possession thereof until and including December thirty-first, eighteen hundred and ninety-eight; and may, prior to that time, sell or dispose of the same to any member of the tribe owning the land who desires to take the same in his allotment: provided, that this section shall not apply to improvements which have been appraised and paid for or payment tendered by the Cherokee Nation under the agreement with the United States approved by Congress March third, eighteen hundred and ninety-three.

"Sec. 5. That before any action by any tribe or person shall be commenced under section three of this act it shall be the duty of the party bringing the same to notify the adverse party to leave the premises for the possession of which the action is about to be brought, which notice shall be served at least thirty days before commencing the action by leaving a written copy with the defendant, or, if he cannot be found, by leaving the same at his last known place of residence or business with any person occupying the premises over

the age of twelve years, or, if his residence or business address can not be ascertained, by leaving the same with any person over the age of twelve years upon the premises sought to be recovered and described in said notice; and if there be no person with whom said notice can be left, then by posting same on the premises.

"Sec. 6. That the summons shall not issue in such action until the chief or governor of the tribe, or person or persons bringing suit in his own behalf, shall have filed a sworn complaint, on behalf of the tribe or himself, with the court, which shall, as near as practicable, describe the premises so detained, and shall set forth a detention without the consent of the person bringing said suit or the tribe, by one whose membership is denied by it: provided, that if the chief or governor refuse or fail to bring suit in behalf of the tribe then any member of the tribe may make complaint and bring said suit."

Pursuant to the provisions of the foregoing act of Congress, one Claude S. Shelton, who was an Indian, and a member of the Cherokee tribe of Indians, appears to have brought an action against J. S. Hargrove et al., the plaintiffs in error, in which action the Cherokee Nation subsequently joined as a party plaintiff. The original complaint, which was filed by Shelton, is not found in the present record, but the action so brought was tried, resulting in a judgment in favor of the plaintiffs, whereupon the defendants prosecuted an appeal to the United States Court of Appeals in the Indian Territory. The latter court reversed the judgment of the lower court for reasons fully disclosed in its opinion. Vide Hargrove v. Cherokee Nation (Ind. T.) 58 S. W. 667. On the return of the record to the lower court, the defendants filed a motion to dismiss the action, which motion was overruled. The plaintiffs thereupon asked leave to amend the complaint by making one Samuel H. Conklin a party defendant, and leave to that effect was granted. An amended complaint was thereupon filed, and afterwards a second amended complaint, on which the judgment now before this court for review was subsequently rendered. By the second amended complaint Conklin was made a party defendant, and with leave of court Shelton's name was stricken out as a party plaintiff, so that the action was thereafter prosecuted to final judgment by the Cherokee Nation as the sole plaintiff. To this second amended complaint the defendants below, who are the plaintiffs in error here, interposed a demurrer on the following grounds: First, that the court had no jurisdiction of the person of the defendant Conklin, or of the subject of the action as to said defendant Conklin; second, that the plaintiff had no legal capacity to sue the defendant Conklin; third, that there was a defect of parties defendant; and, fourth, that the amended complaint did not state facts sufficient to constitute a cause of action. The trial court overruled the demurrer. The defendants declined to plead further, whereupon a judgment was rendered against them, which was subsequently affirmed on a second appeal to the United States Court of Appeals in the Indian Territory (69 S. W. 823), and the judgment which was so affirmed is before this court for review on a writ of error.

M. M. Edmiston, for plaintiffs in error.

James S. Davenport, for defendant in error.

Before SANBORN, THAYER, and HOOK, Circuit Judges.

THAYER, Circuit Judge, after stating the case as above, delivered the opinion of the court.

As there was no trial below except on demurrer, and as the record contains no bill of exceptions, the questions for consideration by this court are those which arise on the face of the record, and are in the main those which are presented by the demurrer to the second amended complaint.

The reason assigned in support of the first ground of demurrer, namely, that the court had no jurisdiction of the case as respects the defendant Conklin, and no right to render a judgment against him,

appears to be this: that the amended complaint contains no allegation that Conklin's right to the improvements in controversy had been disallowed by the decision of the commission to the Five Tribes, or a judgment of the United States court in the Indian Territory, which had become final at the time he was made a party defendant. It is urged, in substance, that under the provisions of the third section of the act of Congress above quoted, under which the action is brought, the court before whom the case was tried had no power to cause Conklin to be removed, and the premises in controversy to be restored to the Cherokee Nation, until his membership in the tribe "and right" had been (as the act says) "disallowed by the commission to the Five Tribes or the United States court, and the judgment had become final"; and that, as the complaint showed no such disallowance of his membership and rights by the commission or the United States court, the lower court had no jurisdiction over him in this statutory proceeding. This contention is founded, apparently, upon a misconception of the reasons which caused the Cherokee Nation to make Conklin a party defendant. Its second amended complaint alleged that the defendants other than Conklin were claimants to citizenship in the Cherokee Nation, whose claim had been decided adversely to them by the United States courts and the Dawes commission, and that the judgment had become final; that said defendants were, at the time of the institution of this action, holding the improvements in controversy as claimants to citizenship in the Cherokee Nation; that the defendant Conklin, on or about and since the institution of the suit, had taken possession of the improvements in controversy jointly with the other defendants—that is, with the Hargroves; that he so took possession under an arrangement with the other defendants for the purpose of defeating the Cherokee Nation of its right to the improvements; that at the time of the institution of the present action Conklin had a suit pending against the other defendants to obtain possession of the identical improvements now in controversy; that the Cherokee Nation had filed its interplea in said case for the protection of its rights; and that subsequent to the filing of such interplea Conklin, through his attorney, had dismissed his action to recover the improvements from the other defendants, doing so in pursuance of a combination or agreement with the other defendants for the purpose of holding the improvements in controversy contrary to and against the will of the Cherokee Nation. The complaint contained another allegation to the effect that the defendants were at the time in unlawful possession of the lands and improvements in controversy, that they were not the owners thereof or entitled to the possession, and that the Cherokee Nation was the absolute owner, and as such entitled to the immediate possession of the same.

Fairly construed, these allegations of the complaint must be understood to mean that Conklin acquired such possession as he had subsequent to the commencement of the present action against the other defendants, who were in possession of the improvement in controversy when the suit was instituted, and whose claim and right thereto had been disallowed by the commission, and that such possession as he had gained was obtained by collusion with the other defendants to prevent the Cherokee Nation from recovering the possession of the im-

provement in this action, which was then pending. In view of the foregoing averments, it is manifest, we think, that Conklin was named as a party defendant to the second amended complaint upon the theory that he could not, by collusion with the Hargroves, take possession of the land and improvements in controversy subsequent to the institution of the action, and by so doing defeat the purpose of the suit, although such claim to the improvement as he may have had had not been disallowed by the commission or the United States courts. This view of the case appears to us to be well founded. It is a general rule of law, and one which is absolutely essential to the effective prosecution of an action for the recovery of the possession of real property or to enforce a lien against the same, that one who acquires possession of property from a person against whom a suit is at the time pending for the possession thereof or to enforce a lien against the same takes it subject to the outcome of the pending action, and may be dispossessed precisely as the person from whom he acquired the possession might have been dispossessed had he retained the possession, whether such intruder is made a party to the suit and has his day in court or not. Any other rule would render suits for the recovery of real property ineffectual, as they might be defeated by repeated transfers of possession during the pendency of the action. Tilton et al. v. Cofield, 93 U. S. 163, 168, 23 L. Ed. 858; Whiteside v. Haselton, 110 U. S. 296, 301, 4 Sup. Ct. 1, 28 L. Ed. 152; Burleson v. McDermott, 57 Ark. 229, 21 S. W. 222; Bailey v. Winn, 113 Mo. 155, 165, 20 S. W. 21. See, also, Am. & Eng. Ency. of Law, vol. 21 (2d Ed.), p. 595, and cases there cited. We perceive no reason why this doctrine should not be held applicable to a case like the one at bar, which is an action by the Cherokee Nation to recover an intruder's improvement on land belonging to the nation, although it is a statutory proceeding authorized by an act of Congress. The same reasons exist in such a case as in ordinary cases why an action which is brought by the nation in pursuance of the statute to recover an improvement, provided it is brought against the parties who are in actual possession at the time the suit is instituted, should not be affected, or in any manner interrupted, by a subsequent transfer of the possession to a third party. The facts alleged in the complaint as against Conklin are fully admitted by the demurrer, and inasmuch as it appeared that he acquired possession of the improvement subsequent to the institution of the suit against the Hargroves, he could have been ousted by the nation under a judgment against them, even if he had not been made a party. We are of opinion, therefore, that he has no right to complain because he was made a party and given an opportunity to assert his rights if he had any; and we entertain no doubt of the jurisdiction of the court as respects Conklin, or of its power to enter a judgment against him for the restoration of the land and the improvements thereon to the Cherokee Nation.

The other objections to the amended complaint, which are specified in the demurrer, are that there "is a defect of parties defendant," and that "said amended complaint does not state facts sufficient to constitute a cause of action." The first of these objections only challenges the right of the plaintiff to make Conklin a party defendant, as it saw fit to do. It therefore presents the same question which has

already been considered and decided. As Conklin acquired possession from the other defendants after the suit was brought, we are of opinion that the Cherokee Nation had the right to make him a party defendant if it thought proper to do so, and that he has no cause for complaint on that ground.

The next objection—to the sufficiency of the amended complaint—raises but one question, and that is whether such a notice was given to the defendants as is required by the fifth section of the act of June 28, 1898, supra. The complaint shows that the original defendants were served with the statutory notice by the original plaintiff, C. S. Shelton, but it does not aver that the nation itself served or caused such a notice to be served on the defendants prior to its becoming a party plaintiff; and the question to be determined is whether the notice which was given by Shelton is sufficient to sustain the action. The act of Congress above quoted clearly contemplates that actions for the recovery of intruder's improvements in the Indian Territory shall be brought by the tribe to whom the lands belong, but the proviso to the sixth section of the act declares "that, if the chief or governor refuse or fail to bring suit in behalf of the tribe, then any member of the tribe may make complaint and bring said suit." The fifth section of the act in terms permits the party who institutes the suit, whether it be the tribe or a member of the tribe, to serve the prescribed notice, and the second section of the act makes it the duty of the court, when it appears that the property of the tribe is "in any way affected by the issues being heard" in a suit pending before it, "to make said tribe a party to said suit." It further declares that "the suit shall thereafter be conducted and determined as if said tribe had been an original party to said action." Now, if the original action which was brought by Shelton had come to trial before the Cherokee Nation had elected to join in the proceeding, it would have been the duty of the court before whom the case was tried, under the second section of the act, to have made the nation a party, and in that event it could hardly be claimed that the nation would have been under an obligation to serve a second notice before it could have been made a party and allowed to take part in the prosecution of the suit. Moreover, the notice which the fifth section of the act requires to be served is merely intended to advise the intruder that his claim is contested, and to give him a fair opportunity to abandon his holding before any costs are incurred. One notice to this effect, by a person entitled to give it, is certainly as effective as many. In view of these considerations and the various provisions of the act, we feel constrained to hold that, when a member of a tribe gives the requisite notice to an intruder, and subsequently brings a suit on the strength thereof, and thereafter the nation elects to join in the suit, it may do so without giving another notice in its own behalf; in other words, we are of opinion that it may properly adopt or ratify the action of one of the members of the tribe, who, in bringing a suit to dispossess an intruder in the Indian country, really acts in behalf of his tribe and for its benefit. We conclude, therefore, that the second amended complaint was not fatally defective because it failed to show that a notice had been given by the nation itself, and, as the complaint contains all the other allegations necessary to the establishment

of a cause of action in behalf of the Cherokee Nation, the demurrer to the complaint was properly overruled.

While the point is not argued in the brief of counsel for the plaintiffs in error, yet we have considered the question whether the lower court acted properly in rendering a judgment against the defendant Conklin for the damages occasioned by the unlawful detention of the improvement as well as for the possession of the property. It may be assumed, we think, that this question is fairly raised by the demurrer to the second amended complaint, which challenges the jurisdiction of the court to render a judgment against Conklin of any kind. After due consideration of this question, we have concluded that the judgment against Conklin for damages can be upheld as well as the judgment for possession. It stands admitted by the demurrer to the complaint that he joined with the other defendants in withholding possession of the improvement from the Cherokee Nation, in consequence of which the damages were incurred; and, while the complaint alleges that he entered into possession of the improvement subsequent to the institution of this suit, yet it further avers that his entry was on or about the time the action was commenced, from which we must infer that the wrongful and collusive entry was almost coincident with the institution of the suit. We are aware of no sufficient reason why one who wrongfully intrudes upon the possession of property after a suit to recover it has been brought by the true owner should not be held responsible for the rents and profits of the property from and after the date of his entry. A judgment against such a person for the damages incident to a detention of the property, in which he participated, would seem to be as proper as a judgment against him for the possession. In the present instance the record discloses that the damages which were awarded were assessed by a jury which was called to assess the damages after the demurrer to the amended complaint had been overruled, and, as there is no bill of exceptions bringing the testimony upon the record, we must presume that the assessment rests upon adequate evidence, and is in all respects correct.

Finding no error in the proceedings which, in our judgment, would warrant a reversal of the judgments below, they are each hereby affirmed.

BROUGHT et al. v. CHEROKEE NATION.

(Circuit Court of Appeals, Eighth Circuit. February 27, 1904.)

No. 1,867.

1. INDIANS—SUIT TO DISPOSSESS INTRUDER ON LANDS OF TRIBE—PARTIES.
A suit under Act June 28, 1898 (30 Stat. 495, c. 517), to dispossess an intruder on lands owned by an Indian tribe or nation, although brought by a member of the tribe, as permitted by such act, when the tribe fails or refuses to bring it, is based primarily on the right of the tribe, and the court may properly permit it to be substituted as plaintiff, and to allow the name of the original plaintiff to be stricken out, with his consent.

2. SAME—PLEADING—VERIFICATION OF COMPLAINT.
It is sufficient compliance with the requirement of such act that a "sworn complaint" shall be filed if the complaint is verified by the authorized

attorney of the tribe or nation which is plaintiff, who states that the facts alleged are within his knowledge.

3. JUDGMENT—CONFORMITY TO PLEADINGS—EXCESSIVE DAMAGES.
A judgment for damages in a sum greater than is alleged or prayed for in the complaint cannot be sustained, although it may be supported by the evidence.

4. INDIANS—SUIT TO DISPOSSESS INTRUDER ON LANDS—PLEADING.
Where the defendants in a suit by an Indian tribe to dispossess an intruder on its lands and recover damages for wrongful detention do not plead the value of their improvements, or ask to recover for the same, the court is without authority to set off such value against the damages awarded plaintiff.

In Error to the United States Court of Appeals in the Indian Territory.

For opinion below, see 69 S. W. 937.

M. M. Edmiston (W. S. Stanfield, on the brief), for plaintiffs in error.

James S. Davenport, for defendant in error.

Before SANBORN, THAYER, and HOOK, Circuit Judges.

THAYER, Circuit Judge. This is an action which was originally brought in the United States Court in the Indian Territory on May 30, 1899, by Andrew McAffrey against C. G. Brought, Mrs. C. G. Brought, J. H. Balfour, and J. Reamer, three of whom are the present plaintiffs in error, to recover an intruder's improvement, as authorized by the third section of the act of Congress of June 28, 1898 (30 Stat. 495, c. 517). The case is very similar to the case of Hargrove et al. v. The Cherokee Nation, 129 Fed. 186, which has just been decided, and reference is here made to the various provisions of the act of Congress of June 28, 1898, which are set forth in that opinion. After the suit at bar was instituted, leave was obtained to file an amended complaint making the Cherokee Nation a party plaintiff, and such a complaint, making the nation a party, was thereafter filed in the month of November, 1899. The complaint was again amended on February 1, 1901, this latter complaint being the one on which the case was eventually tried. When the complaint was last amended, the name of Andrew McAffrey, the original plaintiff, was stricken out by leave of court, and the case was thereafter prosecuted by the Cherokee Nation as the sole plaintiff. The complaint showed, by proper averments, that the defendants proceeded against were intruders in the Indian Territory, and were holding and occupying land belonging to the Cherokee Nation, on which they had made improvements, which lands were described with sufficient certainty to identify them; that the commission to the Five Tribes had previously reported and decided that the improvements in question were intruder improvements; that the persons who made the same, to wit, C. G. Brought and Mrs. C. G. Brought, had been tendered the money for the value of the improvements, but that they had declined to accept the tender, and had continued to hold and occupy the premises, contrary to the laws of the Cherokee Nation and of the United States; that in conformity with the act of Congress of June 28, 1898, a notice had been served upon the defendants to vacate

the premises, and that more than 30 days had elapsed prior to the bringing of this action since the notice was served; that, notwithstanding such notice, the defendants refused to vacate the premises; that the Cherokee Nation was the owner of the land and the improvements thereon, and had been since the tender of their value to the defendants and their refusal to accept the same; that the plaintiff, the Cherokee Nation, had been made a party to the action by leave of court; and that the annual rental value of the place was $400 per year, and that the Cherokee Nation had been entitled to the rents and profits of the place since the institution of the action. The Cherokee Nation accordingly prayed judgment for the possession of the lands and the improvements thereon, and for the annual rental value of the same at the rate of $400 per year until the termination of the action. To the complaint thus filed the defendants interposed a demurrer, but the demurrer was overruled, and, as the defendants elected to stand upon their demurrer, and as both parties waived a jury, the case was submitted to the court, which rendered a judgment in favor of the Cherokee Nation, which judgment is before this court for review on a writ of error. As no bill of exceptions was filed bringing such testimony as may have been heard upon the record in an authentic form, the questions presented to this court for review are those which arise and are presented by the demurrer to the complaint. While the complaint on which the case was tried was demurred to for several reasons, yet we understand that the grounds relied upon to obtain a reversal of the judgment—that is to say, the grounds specified in the brief with which we have been favored —are these: That the Cherokee Nation was erroneously substituted as plaintiff in place of McAffrey; that the name of McAffrey was erroneously stricken out as a party plaintiff; that the amended complaint was not sworn to by the chief or governor of the Cherokee Nation; and that the notice to leave was not served by the nation, but by McAffrey. For all of these reasons, as we understand, the plaintiffs in error insist that the demurrer to the amended complaint should have been sustained, and the action dismissed.

We have already held, however, in Hargrove et al. v. The Cherokee Nation, 129 Fed. 186, that when a member of the tribe serves a notice upon an intruder to leave the premises which he wrongfully occupies, and the improvements thereon, and subsequently sues for the recovery of the same, as he is permitted to do by the proviso to section 6 of the act of June 28, 1898 (30 Stat. 497, c. 517), and the nation thereafter elects to join in the action by making itself a party plaintiff, it need not serve a second notice, but may adopt the notice already given by the member of the tribe who originally sued. If the nation does not join of its own volition in an action by one of its citizens to recover an intruder's improvement, it would be the duty of the court, under the second section of the act of June 28, 1898, to issue process against it, and make it a party, as we pointed out in the case of Hargrove et al. v. The Cherokee Nation, supra. We perceive no sufficient reason, therefore, why its voluntary appearance without process and making itself a party, should not place the nation in the same position which it would have occupied had the court caused it to be made a party; and in the latter event the act expressly declares that "the suit shall thereafter be conducted and

determined as if said tribe had been an original party to said action." The truth is that suits to recover intruder's improvements are based primarily upon the right of the nation to have and recover such improvements as have been wrongfully erected by an intruder upon its land, and authority is conferred on individual members of a tribe to bring such actions and give the requisite notice because the nation may at times be dilatory in the assertion of its rights. We perceive no error, therefore, in the action of the trial court in permitting the Cherokee Nation to become a party and to proceed with the suit, or in striking out the name of the original plaintiff. At all events, if any one is entitled to complain because the original plaintiff was dropped when the nation became a party, it would seem to be McAffrey himself, and he is not complaining, and has not appealed.

Relative to the contention that the amended complaint was not sworn to by the chief or governor of the Cherokee Nation, this may be said: That the sixth section of the act of June 28, 1898, does not, in terms, provide that the complaint filed in such cases shall be sworn to by the chief or governor of the tribe in person. The provision of the act is that "a sworn complaint" shall be filed; not that the complaint shall be verified by the chief or governor of the tribe in person. The amended complaint on which the case was tried was sworn to in due form by "one of the attorneys for the Cherokee Nation in this action." The affidavit made contains the further statement that the affiant "knows the facts contained in the within and foregoing amended complaint, and the same are true." We are of opinion that this was a sufficient verification, it having been made by an agent and authorized attorney of the Cherokee Nation to satisfy the requirements of the statute.

Another point was made by counsel for the plaintiffs in error on the oral argument of the case, although it is not mentioned in the brief; the point being that the trial court erred in entering its judgment in awarding damages against the defendants for a greater sum than was prayed for in the complaint. This point seems to be well taken, and it appears upon the face of the record. The amended complaint alleged that the rental value of the premises in controversy was $400 per annum, and that the nation was entitled to the rents and profits "since the institution of this suit." The suit was brought on May 30, 1899, and the judgment was rendered on February 8, 1901, so that in no event was the plaintiff entitled to recover in this action a greater sum than the value of the rents and profits for one year eight months and nine days, or, in the aggregate, the sum of $677.77. The trial court in fact allowed the plaintiff, as damages, a sum sufficient to cancel the nation's indebtedness to the defendants for the appraised value of their improvements, to wit, the sum of $1,344, which sum had been tendered to them before the suit was brought, but was not accepted; and it also rendered a judgment against the defendants for the sum of $337.50. In other words, the trial court appears to have awarded damages amounting in the aggregate to $1,681.50, and to have entered the judgment in such a form as to cancel and extinguish the defendant's claim against the nation for the appraised value of their improvements. A judgment to this extent, and having such an effect, was not authorized by the pleadings, since a judgment in a legal proceeding for an amount

greater than is claimed by the plaintiff in his complaint is erroneous, and will be reversed on appeal, although the judgment may be sustained by the evidence. Cauthorn v. Berry, 69 Mo. App. 404, 412; Moore v. Dixon, 50 Mo. 424; Wright v. Jacobs, 61 Mo. 19; Armstrong v. City of St. Louis, 3 Mo. App. 100, 106; Corning v. Corning, 6 N. Y. 97, 105. Moreover, as the defendants did not plead the value of the improvements that had been tendered to them by the nation as a counterclaim or set-off against the demand for the rents and profits of the land, we fail to perceive that the trial court, in the absence of such a plea, had any power to allow such a set-off in this proceeding, thereby extinguishing the claim of the defendants against the nation for the appraised value of their improvements. Because of this error we think the existing judgments should be reversed and annulled, and that the case should be remanded to the trial court, with directions to that court to enter a judgment in favor of the Cherokee Nation for the possession of the land and improvements in controversy; also a judgment in its favor against the defendants for the rental value of the property from May 30, 1899, to February 8, 1901, in the sum of $677.77; leaving the parties at liberty to adjust the claim for the assessed value of the improvements as they may be advised.

It will be so ordered, and that the costs in this case on appeal be taxed against the Cherokee Nation.

CALLISON v. BRAKE.

(Circuit Court of Appeals, Fifth Circuit. April 8, 1904.)

No. 1,319.

1. WRONGFUL DEATH—ACTION FOR DAMAGES—INSTRUCTIONS.
Instructions in an action by an administrator to recover damages for wrongful death under the statute of Florida considered and approved, as in conformity with a prior decision of the court.

2. STATUTES—MANNER OF ENACTMENT—CONSTITUTIONAL REQUIREMENTS.
Where a bill introduced into the Florida Senate was regularly passed by a call of the yeas and nays and referred to the House, where on its second reading a substitute was introduced by the judiciary committee, regularly passed, and forwarded to the Senate, the fact that the Senate treated the substitute as an amendment of the original bill, and concurred in it without the formality of a roll call, did not invalidate the act on the ground that it was not passed in conformity with the state Constitution, which requires the yeas and nays to be taken on the final passage of a bill.

3. WRONGFUL DEATH—ACTION FOR DAMAGES—JOINDER OF CAUSES OF ACTION UNDER DIFFERENT STATUTES.
Rev. St. Fla. 1892, §§ 2342, 2343, authorize actions for wrongful death to be brought, among others named, by the executor or administrator of the deceased; the measure of damages in such case being the loss to the estate. Such sections were supplemented by Laws 1899, p. 114, c. 4722, which authorizes an action for the wrongful death of a minor child by the father or mother of such child, in which the plaintiff "may recover, not only for the loss of services of such minor child, but, in addition thereto, such sum for the mental pain and suffering of the parent or parents as

¶ 3. See Death, vol. 15, Cent. Dig. § 22.

the jury may assess." *Held* that, where the father of a minor who was killed was also the administrator, he might sue for the death in both capacities in the same action, joining counts under each statute in the same declaration.

In Error to the Circuit Court of the United States for the Southern District of Florida.

For opinion below, see 122 Fed. 722.

This is an action by the plaintiff, as administrator of the estate of Gerard H. Brake, deceased, to recover damages from the defendant for alleged wrongful act or acts, or negligence, or default on the part of the defendant, alleged to have been the cause of death of Gerard H. Brake. The statement of the plaintiff's case is set forth in his declaration in four separate and distinct counts; that is, each of these four separate counts is a statement of a claim contended for by plaintiff against defendant, Callison. In the first count, plaintiff alleges in substance that the defendant, as the lessee of county convicts for the county of Alachua and state of Florida, had, in the month of November, 1901, Gerard H. Brake, son of the plaintiff, aged at that time about 16 years, in his custody as lessee, said Brake having been committed as a prisoner of said county, and that the defendant, as such lessee of the county convicts, became obligated to furnish support, care, and maintenance to the said Brake, and that the said Brake was during such time sick and ailing, and in feeble and infirm health, all of which is alleged to have been well known to the defendant, and that the defendant failed and neglected and refused to permit decedent proper opportunity for rest, and compelled him to toil immoderately, and failed and neglected to furnish said Brake with necessary medicine and medical attendance and personal care, in consequence whereof said Brake languished and died, whereby the plaintiff has lost and been deprived of the services of the said Brake to the value of $5,000, and that the plaintiff and the plaintiff's wife, mother of the said Brake, have been submitted to great mental pain and suffering, to their damage in the sum of $20,000. This count of the declaration in brief claims that, by reason of the neglect of the defendant to furnish proper clothing, medical attention, and comfortable quarters, and by reason of having compelled said Brake to work immoderately the said Brake died, to the damage of the plaintiff as alleged. The third count in substance sets forth substantially the same facts as were set forth in the first count as to the decedent, Gerard H. Brake, being in the custody of the defendant as lessee of the county convicts of the county of Alachua, Fla., and then alleges that the said Brake, at the time of such imprisonment by the defendant, was sick and ailing, and in feeble and failing health, and unfit for work, and that the defendant, knowing said Brake was sick and ailing, urged and insisted that the said Brake engage in labor disproportionate to his strength, and by way of coercing the said Brake to labor the defendant caused and procured said Brake to be immoderately beaten and bruised upon and about the body and limbs, in consequence whereof the said Brake languished and died, to the damage of the plaintiff for loss of services of the said Brake of $5,000, and for mental pain and suffering of the plaintiff and plaintiff's wife to the sum of $50,000. The second count of the declaration, after setting up the same facts as to the imprisonment of Gerard H. Brake in the county convict prison of Alachua county, and his custody by the defendant as lessee of the said convicts, and after alleging it to be the duty of the defendant to furnish support, care, and maintenance to the said Brake, and stating that during such imprisonment the said Brake was sick, ailing, and in feeble and infirm health, to the knowledge of the defendant, alleges that the said defendant failed and neglected to provide the said Brake with comfortable quarters, good bedding and blankets, and wholesome food, and also refused to permit Brake to have proper rest, and compelled him to toil immoderately, and also failed to furnish decedent with necessary medicine and medical and personal attendance, in consequence of which the said Brake languished and died, to the damage of the plaintiff, as administrator, by the loss of earnings which the decedent in his lifetime would have made, to the extent of $25,000. The fourth count of the declaration, after setting up the

facts of the imprisonment of Brake and his custody as such prisoner by the defendant, then alleges that the said Brake, while thus imprisoned, was sick, ailing, and in feeble and infirm health, and unfit for work, that the defendant urged and insisted that the decedent engage in labor disproportionate to his strength, and by way of coercing the said Brake so to labor defendant caused and procured Brake to be immoderately beaten and bruised upon and about the body and limbs, in consequence whereof Brake languished and died, and by said wrongful acts of the defendant the plaintiff, as administrator, suffered great damages by loss of earnings which the said Brake in his lifetime would have made, to wit, $25,000. The plaintiff claims as total damages for the causes of action set forth in all counts of the declaration $75,000.

The defendant is charged, therefore, with two classes of torts: First, offenses of omission, or rather a failure to provide suitable and satisfactory subsistence, quarters, bedding, and blankets, proper opportunities for rest, necessary medicine and medical attendance and personal care. The testimony is conclusive of the relations existing between the deceased and the defendant. The deceased was a convict, and the defendant was, in accordance with the law, the keeper and custodian of the deceased, and as such custodian of the deceased, and as such custodian and keeper, it was his duty to furnish the deceased with all reasonable means and opportunity for health and welfare, as far as the circumstances would justify. The defendant cannot be held responsible for the position of the deceased as a convict, in which he was found; but it was his duty to provide him suitable quarters, bedding, and blankets, necessary medicine, and attendance, such as might be required by the physical condition of the convict. The foregoing statement of the case we have adopted from the opening paragraphs of the charge given to the jury by the trial judge.

Bisdee & Bedell, for plaintiff in error.

Evans Haile, S. Y. Finley, E. P. Axtell, C. D. Rinehart, and Horatio Davis, for defendant in error.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

McCORMICK, Circuit Judge (after stating the facts as above). In the opinion of the majority of this court, the judgment of the Circuit Court in this case should be affirmed. We do not deem it necessary to notice in detail, and in the order in which they have been presented by the respective counsel, the questions which were raised on the trial and have been submitted to us on the hearing of this writ of error. We notice only a few of the points, which we deem require some attention.

The trial judge, amongst other things, in the charge which he gave the jury on his own motion, instructed them substantially that the liability of the defendant, under the declaration, is based upon two statutes, under one of which this suit is brought by the plaintiff as administrator, and under which the defendant may be liable for any act of a servant, agent, or employé, acting by the authority of the defendant; but in such case the damages are limited to the actual injury suffered by the plaintiff in such character of administrator—that is, the value of the estate. Later on, he instructed further to the effect, substantially, that under the second and fourth counts of the declaration the defendant would be liable for any act or negligence of any agent or employé of his, acting in the line of duty to which he had been appointed, or for which he had been employed; but for such act or negligence nothing could be recovered for mental suffering or for the services of the deceased before he reached the age of 21. So, if you

find the defendant liable under these counts, the only damages that can be given would be such as would be coming to the plaintiff as administrator; that is, the present worth of what you find the deceased would have accumulated during his natural life, considering his probable earnings, expenses, and savings, and the probable length of his life. Of these matters you are the sole judges according to your best judgment. The jury should take into consideration the age, occupation, habits, character, and ability, mental and physical, of defendant, and the probable continuance of his life, in arriving at this estimate.

In reference to the other counts under the declaration, the trial judge instructed the jury to the effect that, if you find for the plaintiff upon the issues of either of these counts, it will be necessary for you to determine the damage that plaintiff has suffered. Under these counts the defendant can only be held liable for his own personal acts or negligence. If you find the death of the deceased was caused by such personal act or negligence, damage may be allowed the plaintiff, as parent, for the net services of deceased until he reached the age of 21 years, making allowance for all expenses of his education and support, and for the mental pain and suffering of his parents. There is no rule by which these can be determined, except by your own judgment under the light of all the circumstances and the evidence in the case. You are to take into consideration all the facts and circumstances, and upon the testimony, tested by your own general knowledge of human nature, determine in your own mind what was the distress and anguish of mind, the mental pain and suffering, of these parents, caused by the death of their son under these circumstances; and upon your deliberate judgment and individual conscience make such an award as you deem just.

The statutes of Florida, to which the trial judge referred, and under which the action was brought, are sections 2342 and 2343 of the Revised Statutes of the State of Florida of 1892, and chapter 4722, p. 114, of the Laws of Florida, approved June 3, 1899. The provisions of these statutes, so far as they affect this case, are as follows:

"Sec. 2342. Whenever the death of any person in this state shall be caused by the wrongful act, negligence, carelessness or default of any individual, * * * and the act, negligence, carelessness or default is such as would, if death had not ensued, have entitled the party injured thereby to maintain an action for damages in respect thereof, then, and in every such case, the person who would have been liable in damages, if death had not ensued, shall be liable to an action for damages, notwithstanding that the death shall have been caused under circumstances as would make it in law amount to a felony.

"Sec. 2343. Every such action shall be brought by, and in the name of, the widow or husband, as the case may be, and where there is neither widow nor husband surviving the deceased, then the minor child or children may maintain an action; and where there is neither widow, nor husband, nor minor child or children, then the action may be maintained by any person or persons dependent upon such person killed for a support; and where [there] is neither of the above classes of persons to sue, then the action may be maintained by the executor or administrator, as the case may be, of the person so killed, and in every such case the jury shall give such damages as the party or parties entitled to sue may have sustained by reason of the death of the party killed."

Chapter 4722, § 1. "Whenever the death of any minor child shall be caused by the wrongful act, negligence, carelessness, or default of any individual, * * * the father of such minor child, or if the father be not living, the mother, as the legal representative of such deceased minor child, may maintain

an action against such individual, * * * and may recover, not only for the loss of services of such minor child, but in addition thereto such sum for the mental pain and suffering of the parent or parents as the jury may assess."

In this case the issues which were presented and decided by the Circuit Court, affecting so much of the action as looks to sections 2342 and 2343 of the Revised Statutes of Florida of 1892, are substantially the same as those which were presented in the case of Sullivan, by administrator, v. The Florida Central P. R. Co., which was heretofore tried in the same Circuit Court, and brought by writ of error to this court under the style of "Florida Central & P. R. Co. v. Sullivan," and here affirmed, as appears from the report of our action thereon in 120 Fed. 799, 57 C. C. A. 167, 61 L. R. A. 410. In the case we are now considering the learned judge of the Circuit Court, who had formerly tried the Sullivan Case, followed substantially herein the rulings that he made therein, and which we had affirmed, as to the right of the administrator to sue, the right to recover under these statutes, and the measure of damages; and, as we have seen no occasion to change the views then expressed, we must, on the authority of that case, hold that, as to so much of this case as rests on those sections of the Revised Statutes, the Circuit Court did not err in its rulings and action.

The effort herein to recover under the act of June 3, 1899, occasioned the presentation of two questions which we ought to notice:

First, whether that act was constitutionally passed by the Legislature of Florida? The counsel for the plaintiff in error, assuming, on the authority of State v. Hocker, 36 Fla. 358, 18 South. 767, and Ottawa v. Perkins, 94 U. S. 260, 24 L. Ed. 154, that this court takes judicial notice of the journals of the Legislature of Florida to ascertain whether or not a bill has been constitutionally passed into a law, prints in his brief "extracts from the journals of the Legislature of Florida for its session of 1899, showing all the entries relating to the supposed passage of chapter 4722, p. 114, of the Laws of Florida, the act on which the first and third counts of the declaration are based." We have examined these journal entries with minute care, and, in connection therewith, the decisions of the Supreme Court of Florida in the case of State v. Hocker, supra, and State v. Dillon, 42 Fla. 95, 28 South. 781, and we conclude that the record of the action of the Legislature, read in the light of the decisions of the Supreme Court of Florida, does not support the objection made by the plaintiff in error to the validity of the act in question.

The other question is whether recovery under both statutes may be sought and had by the administrator in his character as legal representative in one action? The later statute is recent, and no decision under it is reported. Its language appears to authorize recovery under both, when the administrator is the father or the mother of the deceased. The damages in each case grow out of the same transaction. The proof, in the very nature of the case, must be substantially the same in each as to the wrong done and as to the liability of the defendant. The action is by one natural person as the legal representative of one intestate decedent, and against one natural person, to recover damages for wrongfully causing the death of the deceased. The later statute seems to supplement the earlier one, and to carry the remedy, in the

same direction, farther towards completion. The time, place, and circumstances of the wrong alleged to have been done are the same. The nature of the relief sought is the same. It seems to us that to conclude and hold that in such suit there is a misjoinder of parties plaintiff, or a misjoinder of causes of action, would involve the surrender of our faculties to the duress of distinctions which, in the olden time, learned experts in the science of pleading treated as substantial, but which in their essence are shadowy and highly technical.

The judgment of the Circuit Court is affirmed.

BRAKE v. CALLISON.

(Circuit Court of Appeals, Fifth Circuit. April 8, 1904.)

No. 1,332.

1. BANKRUPTCY—ACT OF BANKRUPTCY.
   A conveyance of property by a debtor to creditors cannot be charged as an act of bankruptcy, where he had at the time no other creditors.
2. SAME—INVOLUNTARY PROCEEDINGS—WHO MAY MAINTAIN.
   A judgment creditor cannot maintain a petition in bankruptcy against his debtor on an allegation that the latter made a conveyance of property to creditors which constituted an act of bankruptcy before the rendition of the judgment, where it does not appear that the demand on which it was rendered was one provable in bankruptcy, so as to make him a creditor at the time the conveyance was made.

Petition for Revision of Proceedings of the District Court of the United States for the Southern District of Florida, in Bankruptcy.

Bisbee & Bedell, for petitioner.

E. P. Axtell, C. D. Rinehart, and Jno. E. Hartridge, for respondent.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

McCORMICK, Circuit Judge, delivered the opinion of the court.

On May 16, 1903, the respondent, N. A. Callison, for a recited consideration of $12,000 to him in hand paid, conveyed to H. F. Dutton, J. G. Nichols, and W. G. Robinson, as partners, a large amount of real and personal property. The deed was filed for record on the day of its date, and recorded May 18, 1903. On May 29, 1903, the petitioner, William J. Brake, as administrator of the estate of Gerard H. Brake, deceased, recovered a judgment at law against the respondent in the Circuit Court of the United States for the Southern District of Florida, for the sum of $6,000 damages and $189.25 cost, whereupon execution issued out of that court, and the judgment remains in full force and effect, unsatisfied, and in no wise reversed or made void. On September 9, 1903, the petitioner presented to the District Court, as a court of bankruptcy, his petition against the respondent, making the formal allegations necessary to show the jurisdiction of the court, including the averments as to the nature and amount of his claim, as substantially recited above, and charging that the respondent is insolvent, and within four months had by his certain deed (above referred to) conveyed, transferred, concealed, removed, and permitted to

be concealed and removed, a part of his property, with the intent to hinder, delay, or defraud his creditors, or some of them; that the respondent was, on the day of the date of the deed, indebted to the grantees therein, and made the conveyance with the intent to prefer such creditors over his other creditors; and that the deed was, in effect, a general assignment for the benefit of creditors. To this petition the respondent, by counsel, submitted a demurrer, and for grounds thereof alleged: First, it does not appear from the petition that the respondent, on the 16th day of May, 1903, had any creditors, within the meaning of the bankrupt act, who are entitled to complain of the transaction complained of in the petition; second, because it appears from the statements contained in the petition that the petitioner was not a creditor of the respondent at the time of the transfer complained of, and is not entitled to file a petition in bankruptcy, within the meaning of the bankrupt act (Act July 1, 1898, c. 541, § 1, 30 Stat. 544, 545 [U. S. Comp. St. 1901, p. 3419]). Three other grounds are assigned, but it is not necessary that they should be specially considered. The District Court sustained the demurrer on each of the grounds above stated, with leave to the petitioner to amend as advised. No amendment was tendered, and this petition for review was allowed.

The counsel for the petitioner submits that the case presents the question whether a creditor, having a provable claim, may file a petition, irrespective of whether he had such claim at the time of the commission of the act of bankruptcy complained of. Redacting this proposition, and dispensing with its abstract features, the case presents to us the question whether, under the conditions shown by the petitioner at the date of the conveyance by the respondent, his conveyance of his property constituted an act of bankruptcy. So far as shown by the petition, the grantees in his deed were his only creditors at that time. It could not be an act of bankruptcy as to them. As to the parties to that deed, it was manifestly a valid conveyance. It is said in Horbach v. Hill, 112 U. S. 144, 5 Sup. Ct. 81, 28 L. Ed. 670 (we quote the syllabus):

"A creditor of a grantor of real estate, attacking the conveyance as made to defraud creditors, should show affirmatively that he was a creditor of the grantor when the alleged fraudulent conveyance was made."

Referring to the grantor in that case, the concluding sentences of the opinion are in these words:

"He had a right to dispose of his property in the ordinary course of business for a valuable consideration, and the defendant (the grantee) had a right to purchase it. The complainant, not showing that he was at the time a creditor, cannot complain. Even a voluntary conveyance is good as against subsequent creditors, unless executed as a cover for future schemes of fraud."

The petition to the bankrupt court alleges no facts, other than those already stated, showing or tending to show that the conveyance in question was executed as a cover for future schemes of fraud. There is no allegation that the petitioner had any claim of any kind against the respondent prior to the date of the rendering of the judgment which he obtained. The allegation is simply that it was a judgment for damages, without indicating whether they grew out of a breach of contract, express or implied, or were recovered on account of a tort. As de-

fined by the bankrupt act, the term "creditor" includes any one who owns a demand or claim provable in bankruptcy, and the term "debt" includes any debt, demand, or claim provable in bankruptcy. It not appearing that at the time of the respondent's conveyance there were any other creditors than those to whom he conveyed, and it appearing expressly that the petitioner was not a creditor of respondent at that time, we conclude that the demurrer to the petition was well taken on the first and second grounds. Beers v. Hanlin (D. C.) 99 Fed. 695; In re Brinckmann (D. C.) 103 Fed. 65. As this disposes of the case, it is unnecessary to notice the other grounds.

The petition for revision is dismissed.

CAREY v. BILBY et al. (two cases).

(Circuit Court of Appeals, Eighth Circuit. March 7, 1904.)

Nos. 1,929, 1,930.

1. TORTS—JOINT TORT FEASOR—RELEASE OF ONE—CONSTRUCTION—EFFECT.

Plaintiff, claiming a right of action for damages against C. and H. jointly for alleged fraudulent misrepresentations in the sale of cattle, accepted a certain amount of money from H., and executed a release discharging him from any and all liability by reason of such misrepresentations, and agreeing to indemnify him from being compelled to pay any further sum by reason thereof. The release, however, expressly provided that plaintiff did not relinquish or release any action or cause of action against C. by reason of the premises, but reserved his right to sue C. or the firm of C. Bros. on such cause of action. *Held*, that such instrument should not be treated as a technical release terminating plaintiff's cause of action against all the joint tort feasors, but as a covenant not to sue H., and was therefore no defense to an action against C.

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

John S. Bilby and Russell I. Bilby, the defendants in error in case No. 1,929, brought an action against John L. Carey, the plaintiff in error, to recover certain damages for injuries which they claimed to have sustained in consequence of their being induced by the defendant, Carey, to purchase from him certain Texas cattle through false representations. John S. Bilby and John E. Bilby, the defendants in error in case No. 1,930, brought a similar action against John L. Carey, plaintiff in error. The complaints in the two cases were substantially alike, except that in case No. 1,929 the damages claimed by the plaintiffs below were $13,611, whereas the damages claimed in case No. 1,930 was the sum of $3,809. The complaints stated, in substance, that in the month of May, 1897, the defendant, Carey, and one C. J. Hysham were the owners of 755 head of cattle, which had been shipped by them from the state of Texas to the city of St. Joseph, Mo.; that said Carey and Hysham offered to sell to the plaintiffs below certain of said cattle, and, to induce them to buy, represented that the cattle had been kept during all of the preceding winter and spring in a part of the state of Texas, which was entirely free from, and not infected with, a certain contagious disease commonly known as "Spanish Fever," and that they had not been driven over or in the vicinity of any territory in the state of Texas which was infected by said disease, and had not been exposed thereto, but were in a sound and healthy condition; that, relying on this representation, and believing the same to be true, they purchased a certain number of the cattle from Carey

¶ 1. See Release, vol. 42, Cent. Dig. §§ 68, 71.

and Hysham, and paid them therefor; that the representations aforesaid, at the time they were made, were known to the vendors of the cattle to be untrue; that they also knew that the purchasers of the cattle would pasture them on lands in the state of Missouri with a large number of Missouri and other native-born northern cattle; that they were so pastured by the vendees, after they were purchased, with other northern-bred cattle; that, in consequence of their being affected with the contagious disease aforesaid, they communicated the disease to other cattle with whom they were herded, which belonged to the plaintiffs below, and that in consequence thereof the plaintiffs lost a large number of cattle of great value, and that they were damaged in the one case to the amount of $15,840 and in the other case to the extent of $4,580, in consequence of the disease in question being communicated to their respective herds. The plaintiffs below further alleged that they had been paid by C. J. Hysham, on account of the damages claimed in case No. 1,929, the sum of $2,229, and that they had been paid by C. J. Hysham, on account of the damages claimed in case No. 1,930, the sum of $771, leaving a balance of damages due to them in the one case in the sum of $13,611 and a balance due to them in the other case in the sum of $3,809.

Among other allegations contained in the defendant's answer it was admitted that the plaintiffs had received from C. J. Hysham the sums of money alleged in the complaints, and it was alleged that the sums so paid to the plaintiffs by Hysham were received and accepted by said plaintiffs in full release, satisfaction, and discharge of the pretended causes of action sued upon in said actions, and in full release of said Hysham from all liability thereon. On the trial of the cases the receipt which was signed by the plaintiffs when the sums of money were paid to them by C. J. Hysham was introduced in evidence, and was of the following purport:

"Whereas, on or about the ——— day of May, 1897, T. J. Hysham acting for C. J. Hysham or C. J. Hysham & J. L. Carey, as partners or either of them, purchased for said C. J. Hysham or C. J. Hysham & J. L. Carey as partners, or either of them, certain cattle of Comer Bros., in the State of Texas, and

"Whereas, said cattle were shipped from the State of Texas and were sold and delivered by said C. J. Hysham or C. J. Hysham and J. L. Carey as partners, or either of them, to J. S. Bilby in St. Joseph, Missouri, on or about the ——— day of May, 1897, and

"Whereas, said J. S. Bilby did on the day last above named receive from said C. J. Hysham, or C. J. Hysham & J. L. Carey as partners, or either of them, at St. Joseph, Missouri, about 756 of said cattle, and did at said time execute and deliver to the said C. J. Hysham his certain promissory note for the purchase price of said cattle, together with a chattel mortgage on said cattle thus bought by him securing said note, and

"Whereas, the said J. S. Bilby has since paid off and discharged said note and mortgage, and

"Whereas, after buying said cattle said Bilby took the same to his farms described in said chattel mortgage, and

"Whereas, after taking said cattle to his farm, the said Bilby claims that many cattle owned by him or others have died, and that many other cattle became sickened and impoverished, and

"Whereas, the said Bilby claims that the said cattle thus dying and the others thus becoming sickened and impoverished was caused by reason of what is commonly called the Spanish or Texas fever, and

"Whereas, the said Bilby claims the said Spanish or Texas fever was imparted or conveyed by the cattle that he thus bought at St. Joseph, Missouri, as aforesaid recited.

"Now, therefore, in consideration of the sum of $3,000.00 to me in hand paid by T. J. Hysham and C. J. Hysham, and the further consideration of the said T. J. Hysham and C. J. Hysham having assigned to me all claims and causes of action that they, or either of them have against the said Comer Bros., growing out of or in any way connected with the said purchase of said cattle from said Comer Bros., I, J. S. Bilby, fully release and discharge him, the said T. J. Hysham, and the said C. J. Hysham from any and all liability by reason of each, all and every of the foregoing matters and things, and re-

lease him, the said T. J. Hysham and the said C. J. Hysham from any and all liability in any way connected with or growing out of the aforesaid matters. And I will indemnify, protect and save harmless the said T. J. Hysham and the said C. J. Hysham from paying any further sum to any person or persons whatsoever, on account of any or all the matters set forth in this contract.

"But it is expressly and specifically understood in the execution and delivery of this paper that I do not relinquish or release any action or causes of action that I may now or hereafter have against him, the said J. L. Carey, or them, the said Comer Bros., or either of them by reason of any of the matters or things hereinbefore recited, expressly and specifically reserve to myself the right to maintain in said action or actions against him, the said J. L. Carey, or them, the said Comer Bros., or either or all of them by reason of said matters and things or any of them that I now have or may hereafter have.

"Signed this second day of August 1898. John S. Bilby."

The trial below resulted in a verdict in favor of the plaintiffs in case No. 1,929 for the sum of $2,229 and in a verdict in favor of the plaintiffs in case No. 1,930 for the sum of $771, on which verdicts judgments were subsequently entered. The defendant below has brought the cases to this court on writs of error.

John C. Cowin, for plaintiff in error.

James W. Hamilton (H. E. Maxwell, on the brief), for defendants in error.

Before SANBORN, THAYER, and HOOK, Circuit Judges.

THAYER, Circuit Judge, after stating the case as above, delivered the opinion of the court.

At the conclusion of the evidence on the trial below, counsel for the defendant requested a peremptory instruction to find a verdict in favor of his client. This instruction was asked, as it seems, on the sole ground that the release which had been executed by the plaintiff Bilby in favor of T. J. Hysham and C. J. Hysham operated as a release of the defendant, Carey, although it was not so intended, and that no action could be maintained against him in consequence of the execution of this instrument. The trial court denied the request, holding that the release in question did not have the effect claimed for it. It is conceded by counsel for the plaintiff in error that the only question for determination by this court is whether the trial judge was right in his view that the release did not operate as a discharge of the cause of action against Carey.

It is an old and well-established rule of law that the release of a cause of action as against one of two or more joint tort feasors or joint obligors operates as a release of all. This is upon the theory that when one has received full compensation for a wrong, no matter from which wrongdoer or from what source, the law will not permit him to recover further damages. Lovejoy v. Murray, 3 Wall. 1, 17, 18 L. Ed. 129. When a release of a cause of action for a tort is given by the injured party to one of two or more persons who committed the wrong, the release is construed most strongly against the party executing it. The law indulges in the presumption that the release was given in full satisfaction for the injury, and upon a sufficient consideration, and will not permit the presumption to be overcome by oral proof to the contrary. Ellis v. Esson, 50 Wis. 138, 6 N. W. 518,

520, 36 Am. Rep. 830; Bronson v. Fitzhugh, 1 Hill, 185, 186. Sometimes, however, as in the case in hand, a release executed in favor of one wrongdoer is accompanied with the reservation of the right to sue others who were jointly concerned in the wrong, and in such cases the question has frequently arisen, how shall such an instrument be interpreted? Shall the reservation of the right to sue others be ignored, and the instrument treated as raising a conclusive presumption that full compensation for the wrong has been made, as though it were a technical release under seal, or shall the reservation of the right to sue others be taken to mean that full compensation has not been received by the injured party, and that he merely intended to agree with the released party not to pursue him further, but without releasing his cause of action against the other wrongdoers, or admitting that he has received full compensation for the injury? With reference to this question the authorities are not in accord. Some courts are disposed to hold, and have held, that when such an instrument contains apt words releasing one of the joint wrongdoers, it operates to release all, and that any clause inserted therein reserving a right to sue others after one has been released is repugnant to the release, in that it defeats or attempts to defeat, the natural legal effect of the instrument; and that it should therefore be ignored. McBride v. Scott et al. (Mich.) 93 N. W. 243, 61 L. R. A. 445; Abb v. Northern Pacific Ry. Co. (Wash.) 68 Pac. 954, 58 L. R. A. 293, and cases there cited. Other courts hold, however, that such an instrument should be given effect according to the obvious intent of the person executing it, and that it should not be treated as a technical release operating to destroy his cause of action as against all of the joint tort feasors, but rather as a covenant not to sue the party in whose favor the instrument runs. Gilbert v. Finch (N. Y.) 66 N. E. 133, 61 L. R. A. 807; Matthews v. Chicopee Mfg. Co., 3 Rob. 712; Ellis v. Esson, 50 Wis. 138, 6 N. W. 518, 36 Am. Rep. 830; Hood v. Hayward, 124 N. Y. 1, 16, 26 N. E. 331; Sloan v. Herrick, 49 Vt. 327; McCrillis v. Hawes, 38 Me. 566; Miller v. Beck (Iowa) 79 N. W. 344, 345; Price v. Barker, 4 El. & Bl. 760, 776, 777.

We are of opinion that the doctrine enunciated in the cases last cited is supported by the greater weight of authority, and is founded upon the better reasons. It has the merit of giving effect to the intention of the party who executes such an instrument, which should always be done when the intention is manifest and it can be given effect without violating any rule of law, morals, or public policy. Besides, we are not aware of any sufficient reason which should preclude a person who has sustained an injury through the wrongful act of several persons from agreeing with one of the wrongdoers, who desires to avoid litigation, to accept such sum by way of partial compensation for the injury as he may be willing to pay, and to discharge him from further liability without releasing his cause of action as against the other wrongdoers. The law favors compromises generally, and it is not perceived that an arrangement of the kind last mentioned should be regarded with disfavor. The release which was read in evidence in the case at bar plainly shows that the sum paid by Hysham was not accepted by the plaintiffs as full compensation for the injury which

they had sustained; that it was not in fact full compensation for the injury; and that they had no intention of releasing their cause of action as against Carey. Why, then, should it be given an effect contrary to the intent of the one who executed it? We perceive no adequate reason for giving it such effect, and accordingly agree with the lower court that it did not release Carey.

The judgments below are therefore affirmed.

RIGGS et al. v. UNION LIFE INS. CO. OF INDIANA. SAME v. AMERICAN CENT. LIFE INS. CO. SAME v. FIDELITY MUT. LIFE INS. CO. SAME v. NORTHWESTERN NAT. LIFE INS. CO. SAME v. HARTFORD LIFE INS. CO.

(Circuit Court of Appeals, Eighth Circuit. March 23, 1904.)

Nos. 1,947-1,951.

1. INSURANCE POLICY—FRAUD—REMEDY AT LAW BEFORE LOSS—JURISDICTION IN EQUITY.
   Before a loss under a policy of insurance, the company which issued it has no adequate remedy at law for fraud, false representations, or concealments which procured its issue, and a federal court has jurisdiction in equity of a suit for the surrender and cancellation of the policy.

2. SAME—REMEDY AT LAW AFTER LOSS.
   After a loss under a policy of insurance, the company which issued it ordinarily has an adequate remedy at law for fraud, false representations, or false concealments which procured its issue by presenting them as a defense to any action that may be brought upon the policy, so that a suit in equity for its surrender and cancellation, commenced after the loss, cannot be maintained in the federal courts in the absence of special facts or circumstances invoking jurisdiction in equity.

3. SAME.
   The fact that the action at law on the policy will be brought in a state court does not render the remedy of the company at law in the federal court so inadequate that a suit in equity to avoid the policy, commenced after the loss, may be maintained, where the company has the right to remove the action at law from the state to the federal court.

4. SAME.
   Nor does the fact that the license of the company to do business in the state in which the action at law is to be commenced will be revoked if the company removes that action to a federal court render its remedy at law in the federal court so inadequate as to give that court jurisdiction in equity of a suit to cancel the policy.

(Syllabus by the Judge.)

Appeals from the Circuit Court of the United States for the Western District of Missouri.

For opinion below, see 123 Fed. 312.

Kendall B. Randolph and R. A. Hewitt, Jr. (W. H. Haynes, James T. Blair, and William M. Fitch, on the brief), for appellants.

W. A. Kerr, Augustin Boice, and Stephen S. Brown (John E. Dolman, on the brief), for appellees.

Before SANBORN, THAYER, and HOOK, Circuit Judges.

¶ 1. See Cancellation of Instruments, vol. 8, Cent. Dig. § 13.

SANBORN, Circuit Judge. These are appeals from orders of the Circuit Court, which granted to the insurance companies interlocutory injunctions against the executors of the last will of Eber B. Roloson and others, who were defendants in these suits in the court below. The injunctions forbid the executors or their codefendants to bring actions at law upon or assign their claims against the insurance companies which are based upon policies of insurance issued by the latter upon the life of Eber B. Roloson, who died on February 28, 1903. The bills in these cases were first exhibited after the death of Roloson. In them the complainants, the insurance companies, allege that they are corporations organized under laws of states other than the state of Missouri, that the defendants are citizens of the latter state, that the amount in controversy in each of the suits is more than $2,000, that the defendants in each case conspired together to procure and did procure the complainant in that case to issue a policy or policies of insurance which constitute the subject of that suit by fraudulent representations and concealments, that the complainants have procured their licenses to do business in many of the states upon the condition that they will not remove actions or suits brought against them in the courts of the states to the courts of the nation, and that the executors will, if not enjoined by the court, assign their claims under the policies, and cause actions to be brought upon them in the courts of some state, so that the insurance companies cannot remove these actions to the federal courts without incurring the penalty of a revocation of their licenses to do business in that state. No demurrers or answers were interposed in these suits, and the cases stand upon the bills and upon the orders for the injunctions. These orders are challenged by the defendants on the ground that the complainants had an adequate remedy at law, so that the court below was without jurisdiction of the suits in equity, because, if the insurance companies are sued upon the policies, they may remove the actions to the federal courts, and the fraudulent representations and concealments which induced the issue of the policies will constitute perfect defenses to those actions.

Whatever doubt there may have been of the jurisdiction in equity of the court below over these suits when the learned District Judge considered that question and issued the injunctions has been dispelled by the later decision of the Supreme Court in Cable v. U. S. Life Ins. Co., 191 U. S. 288, 24 Sup. Ct. 74, 48 L. Ed. 188. Before the loss under an insurance policy occurs, a company has no adequate remedy at law for the fraudulent representations or concealments which induce its issue, because an estoppel from denying its validity may arise in favor of third persons who advance their money in reliance upon it, and because the time when an opportunity will be offered to establish the fraud as a defense to an action upon the policy is so remote and uncertain that indispensable witnesses and evidence may, and probably will, disappear before the opportunity will be offered. Hence a federal court sitting in equity has jurisdiction of a suit instituted before the loss under a policy occurs to compel its cancellation and surrender on account of fraud or misrepresentation in its procurement, and after the court has thus acquired jurisdiction by the commencement of the suit before loss it may proceed to a final decree, although the

loss occurs during the pendency of the suit, and before the final hearing. Bacon on Benefit Societies and Life Insurance, § 285; Hamilton v. Cummings, 1 Johns. Ch. 517; Home Ins. Co. v. Stanchfield, 12 Fed. Cas. 449, No. 6,660; Benefit Ass'n v. Parks, 81 Me. 79, 16 Atl. 339, 10 Am. St. Rep. 240.

But the decision of the Supreme Court in Cable v. U. S. Life Ins. Co. has placed this proposition beyond doubt or debate: After a loss under a policy the remedy of the insurance company at law for fraud, false representations, or concealments which induced its issue by presenting them as a defense to the action that may be brought upon the policy is not inadequate because that action may be brought in a state court, where the defendant will have the right to remove it to a federal court, although its removal to the latter court may result in a revocation of the license of the insurance company to do business in that state, nor because a defendant has no choice of the time or place of the commencement of such an action, and less control of its conduct than the plaintiff, and a suit in equity to cancel the policy and to prevent an action at law upon it cannot be maintained in the federal courts upon these grounds. The jurisdiction of the court below in equity is invoked for no other reason that is worthy of consideration or discussion, and the orders which granted the injunctions must be reversed, and the cases must be remanded to the Circuit Court for further proceedings not inconsistent with the views expressed in this opinion, upon the authority of Cable v. U. S. Life Ins. Co., 191 U. S. 288, 24 Sup. Ct. 74, 48 L. Ed. 188; and it is so ordered.

THE EDITH L. ALLEN.

(Circuit Court of Appeals, Second Circuit. March 11, 1904.)

No. 132.

1. SALVAGE—RESCUE OF STRANDED SCHOONER—REDUCTION OF AWARD.

A salvage award of $6,500 for the rescue of a schooner valued, as saved, with her cargo and freight, at $32,800, which was stranded on the coast of New Jersey, reduced on appeal to $4,500; it appearing to have been increased to some extent by a misapprehension by the trial judge of the facts shown by the evidence as to the peril of the stranded vessel.

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

For opinion below, see 122 Fed. 729.

This cause comes here upon appeal from a decree of the district court, Southern District of New York, awarding to Neal, as owner of the tug Somers N. Smith, and to the American Salvage Company, which had a crew on board said tug, the sum of $6,500 salvage for pulling the schooner Edith L. Allen off the eastern edge of Brigantine Shoal, on the coast of New Jersey, and towing her to the port of New York. The decree further awarded to Neal the sum of $1,700 for damages alleged to have been sustained by the tug during the salvage operation. The appellant contends that the court erred in awarding anything for damages to the tug, and that the amount of salvage awarded is excessive. It is not disputed that salvage service was rendered. The value of the schooner, as saved, her cargo and freight, was $32,800. The

¶ 1. Salvage awards in federal courts, see note to The Lamington, 30 C. C. A. 280.

value of the tug, specially equipped with the best appliances for wrecking, was $50,000.

Edward G. Benedict, for appellant.
Henry G. Ward, for appellees.

Before WALLACE, LACOMBE, and COXE, Circuit Judges.

LACOMBE, Circuit Judge. The opinion of the District Court will be found reported in 122 Fed. 729. It sets forth the facts so fully that it is not necessary to undertake to restate them here. It will be understood that the conclusions of this court are based thereon, with such modifications only as are hereinafter set forth.

While hauling on the schooner, February 3, 1902, the tug struck bottom, certainly twice, possibly three times. These blows were very severe ones. The engineer testified that he was at the throttle, handling the engines, at the time, and that the blow came very near throwing him down off his feet, and made the tools rattle in the fireroom, and also shook the coal bunkers, boilers, and pipes in the engine room. There were big swells running at the time, and she struck twice, at least, between swells. So they paid out the hawser, and got into deeper water. The day before, while near another stranded vessel, and before the salvage service of the Allen was undertaken, the tug also touched bottom, but that was a very slight contact—she "just nudged the bottom"—whereas, when she struck while hauling on the Allen, "it was a harder strike. She came down on something, and it jarred her all over." The tug is a steel boat, with a double bottom; the spaces between the floors being filled up with cement and pig iron, making a very solid structure. No leak developed after the blows testified to, and no survey of her bottom was made till she was put on dry dock, two months later, for her usual spring overhauling. It was then discovered that her port side was damaged about amidships under the boilers. some of the garboard streak plates were bent, and had to be taken off and renewed, and the vertical floor under the forward fireroom bulkhead was bent, buckled, and distorted so that several frames had to be straightened. No holes were punched through the plates, but they were fractured on the inside and at the rivet holes. The mechanic who made the repairs had attended to the tug at her overhauling the spring before, and testified that these injuries did not then exist. Her master testified that he had been by the tug the whole of the time since the prior overhauling—"every day, never been off her two hours"—and that she never struck bottom during that period, except on the occasions above set forth. Upon this uncontradicted evidence, the district judge was warranted in finding that the injuries to the tug's bottom were sustained during the salvage service, and his award therefor was proper.

The amount awarded for salvage rests usually in the discretion of the court awarding it. Nevertheless, in The Bay of Naples, 48 Fed. 739, 1 C. C. A. 81, we held that:

"Appellate courts will look to see if that discretion has been exercised by the court of first instance in the spirit of those decisions which higher tribunals have recognized and enforced, and will readjust the amount if the decree below does not follow in the path of authorty, even though no principle has been violated or mistake made."

And a readjustment will more readily be made if the award below appears to have been enlarged through some misapprehension of the facts.

It is apparent that the salvors have been awarded a very high percentage of the amount salved. The appellant has submitted a list of all salvage cases found in the Federal Reporter down to date (say volume 124), where wooden vessels have been rescued from a stranded situation on the Atlantic Coast. They are given in a note, as a convenient supplement to the list given in the note to The Lamington, 86 Fed. 675, 30 C. C. A. 271. In the case at bar an important circumstance is the condition of the tide at stranding and until rescue. The schooner stranded on the eastern edge of the shoal during a strong squall from the northwest (offshore), which blew her headsails to pieces, so that she came up to the wind; and, before they could get her off, she was ashore. This was on Sunday, February 2d, at about 5:30 p. m. The wind had been easterly, but by 11 a. m. it had shifted to the west, and blew from the west and northwest until the stranding, increasing in violence. It had been blowing hard offshore for certainly four hours before the "living gale" in which the master of the schooner says she went ashore, with the natural result of somewhat flattening the sea and holding back the water. There is conflict between the weather records at Atlantic City, six miles distant, and the witnesses from the life-saving stations near Brigantine Shoal; but it may fairly be assumed, as libelants contend, that during the night of Sunday, and during Monday and Monday night until near midnight, there was a heavy offshore blow. The heaviness of the blow was not an especial peril to the schooner, since she was was not far enough offshore for the wind to make much of a sea; and, had she been blown off, she would not have sunk, because her leaks, as the event showed, were not beyond the control of the pumps. This strong offshore wind, however, prevented the natural rise of the tide. In consequence the tug strove in vain to haul her off—for two hours at high tide Monday afternoon, and again for a like time at the next high tide, early Tuesday morning. Thereafter, however, there came a change in the wind, which ceased to operate to hold back the water, and in consequence the next tide came in with an unusual rush; and on the third pull, which began about 1 p. m. Tuesday, February 4th, the schooner came off the shoal about 2:30 p. m., without any difficulty, and when the tide was only half high. If this change in the wind had been one from offshore to onshore, the schooner's position would have been serious, because, being without headsails and heavily iced, as the water lifted her the wind would have driven her aground higher up on the shoal. A change, however, only from a heavy to a light breeze, would not tend to produce such result, and might allow her to get afloat by the use of her own anchor and capstan. The evidence is uncontradicted that this was the only change. The wind fell to less than six miles an hour, and, although for a brief space it backed around to northeast, it remained westerly not only until the schooner was pulled off, but during all the rest of the week. It would seem, however, that the district judge was under the impression that the wind changed in direction as well as in velocity. He says:

"There can be little doubt that * * * the schooner was in great danger of becoming a total loss, from a change of the wind to the eastward, which

was impending, and in fact occurred before the schooner was floated." And again: "The change in the wind, which brought a normal state of the tide, was, of course, an extremely important feature in the proceeding. * * * It appears here that, in all probability, without the opportune intervention of the salvors, the change of wind, with the consequent increase of depth of water, though it might have caused the schooner to float temporarily, would eventually have driven her higher up on the beach, and led to her total loss."

Manifestly this understanding of situation operated to increase the award beyond what would otherwise have been made, and we think the salvage should be reduced from $6,500 to $4,500.

The decree is reversed, with costs of this court to appellant, and cause remanded to the District Court, with instructions to decree in accordance with this opinion; costs of district court to libelants.

NOTE. Salvage cases cited on argument, being all those in the first 124 volumes of Federal Reporter where a wooden vessel has been rescued from a stranded situation on the Atlantic Coast:

Mary E. Long (D. C.) 7 Fed. 364	4 %
Maggie Ellen (D. C.) 19 Fed. 221	5 %
Andrew Adams (D. C.) 36 Fed. 205	33⅓ %
Nellie Floyd (D. C.) 36 Fed. 221	6½ %
The Eleanor (D. C.) 42 Fed. 543	5 %
Thos. B. Garland (D. C.) 83 Fed. 1018	6¼ %
Agnes I. Grace (D. C.) 49 Fed. 662	42 %
The Penobscot (D. C.) 103 Fed. 205	9 %
Thos. L. James (D. C.) 115 Fed. 566	25 %

In re GOLDMAN.

In re GILBERT.

(Circuit Court of Appeals, Second Circuit. March 10, 1904.)

No. 188.

1. BANKRUPTCY—REOPENING ESTATE—DISCRETION OF COURT.

While a court of bankruptcy has power to reopen the estate of a bankrupt to permit the trustee to maintain an action to recover concealed assets, the granting of an application therefor rests in its discretion, and its action will not be reversed except for an abuse of discretion.

Petition to Review Order of the District Court of the United States for the Southern District of New York.

J. C. Bushby, for petitioner.

Nathan D. Stern, for respondent.

Before WALLACE, LACOMBE, and COXE, Circuit Judges.

PER CURIAM. We have no doubt of the power of the court to reopen the estate of the bankrupt or of the right of the trustee to maintain action necessary to recover concealed assets. But the motion was addressed to the sound discretion of the District Judge, and we are not satisfied that it was not properly exercised, in the interests of preventing litigation of insignificant importance. Had the application been made by the original creditors it would be regarded with more favor.

WESTINGHOUSE ELECTRIC & MFG. CO. v. MUTUAL LIFE INS. CO. OF NEW YORK et al.

(Circuit Court, W. D. New York. February 9, 1904.)

No. 188.

1. PATENTS—ANTICIPATION—INFRINGEMENT—ELECTRIC MOTORS.
The Tesla patents, Nos. 511,559 and 511,560, the former covering a method, and the latter certain apparatus or means of operating electric motors by means of alternating currents from a single original source known as the "split-phase" system, *held* not anticipated by the publication in Milan of a lecture by Prof. Galileo Farraris April 22, 1888, on evidence which clearly and satisfactorily carries the invention back to September, 1887. Such patents also *held* valid, and both claims of the former and claims 1 and 2 of the latter infringed by the Gutmann recording watt meter.

2. SAME—SUIT FOR INFRINGEMENT—PARTIES.
An agent is not properly joined with his principal as a defendant in a suit for infringement because of acts done in his capacity as such agent, in the absence of special circumstances.

3. SAME—DEFENSES.
It is not a defense to a suit for infringement against a user that a decree has previously been obtained against the maker, from whom the defendant bought the infringing article.

In Equity. Suit for infringement of letters patent Nos. 511,559 and 511,560, relating to electric motors, granted to Nikola Tesla December 26, 1893. On final hearing.

Kerr, Page & Cooper, for complainant.

Martin Carey and Seward Davis (Charles A. Brown, of counsel), for defendants.

HAZEL, District Judge. This suit in equity is brought to establish infringement by the defendants of two United States letters patent granted to Nikola Tesla, of which complainant is the owner by assignment. The applications for both patents were filed December 8, 1888, but, on account of interference proceedings in the Patent Office, they were not granted until December 26, 1893. Their numbers are 511,559 and 511,560, respectively. The infringements consist in the use by the defendants of an alternating split-phase motor in an instrument for measuring the amount of electric energy supplied to a consumer. The instrument containing the motor is technically known as a "recording watt meter." The infringing apparatus used by the defendants in a building at Elmira, N. Y., is the Gutmann meter. The defense is want of patentability, noninfringement, and anticipation. Patent No. 511,559 has two claims, both of which are said to be infringed. They read as follows:

"(1) The method of operating motors having independent energizing circuits, as herein set forth, which consists in passing alternating currents through both

¶ 2. See Patents, vol. 38, Cent. Dig. §§ 459, 471.

of the said circuits, and retarding the phases of the current in one circuit to a greater or less extent than in the other.

"(2) The method of operating motors having independent energizing circuits, as herein set forth, which consists in directing an alternating current from a single source through both circuits of the motor, and varying or modifying the relative resistance or self-induction of the motor circuits, and thereby producing in the currents differences of phase, as set forth."

The first claim relates broadly to the method and extent of retardation of the phase of the current. The second claim refers specifically to the method of accomplishing in the electric currents a difference of phase. Infringement is also charged of claims 1 and 2 of the patent No. 511,560, which read as follows:

"(1) The combination, with a source of alternating currents and a circuit from the same, of a motor having independent energizing circuits connected with the said circuit, and means for rendering the magnetic effects due to said energizing circuits of different phase, and an armature within the influence of said energizing circuits.

"(2) The combination, with a source of alternating currents and a circuit from the same of a motor having independent energizing circuits connected in derivation or multiple arc with the said circuit, the motor or energizing circuits being of different electrical character, whereby the alternating currents therein will have a difference of phase, as set forth."

These claims with particularity refer to an apparatus for effecting the object of process patent No. 511,559, and specifying the devices constituting the split-phase motor with a single line or circuit. It is practically conceded that infringement of either of the claims involves the complete use of the entire system described in the specifications. The patents in suit are improvements on a series of five earlier patents which are the basic inventions for a class of motors called the polyphase motors for power transmission, or rotating field alternating motors. They are operated by alternating currents of electricity. The improvement patents here considered relate to the split-phase motor. It is not intended to discuss the scope of these patents in detail, for the reason that the claims involved have been uniformly construed in one form or another in a variety of litigations which have followed the Tesla polyphase and the split-phase patents from the time of their issuance. The patents in suit especially have been attacked with well-directed, vigorous, and resolute pertinacity. The fundamental principles upon which a difference of phase in circuits is based have been set forth with elaborate detail in prior opinions by Circuit Courts and Circuit Courts of Appeals, notably by Judge Townsend in the case of Westinghouse v. New England Granite Co. et al. (C. C.) 103 Fed. 951, which was a suit upon the broad Tesla patents of May 1, 1888, Nos. 381,968, 382,279, and 382,280; by Judge Shipman in the same case for the Circuit Court of Appeals, 110 Fed. 753, 49 C. C. A. 151; by Judge Brown in Westinghouse Co. v. Royal Weaving Co. (C. C.) 115 Fed. 733; by Judge McPherson in Tesla Electric Co. v. Scott & Janney et al. (C. C.) 97 Fed. 558; by Judge Thompson in Westinghouse Co. v. Dayton Fan & Motor Co. (C. C.) 106 Fed. 724, and in the same case by Judge Severens, who wrote the opinion for the Circuit Court of Appeals for the Sixth Circuit, 118 Fed. 562, 55 C. C. A.

390; by Judge Lacombe in Westinghouse Co. v. The Catskill Illuminating Co. (C. C.) 110 Fed. 377, and in the same case by Judge Townsend for the Circuit Court of Appeals, reversing the decision of the Circuit Court, 121 Fed. 831, 58 C. C. A. 167; and recently by Judge Colt in Westinghouse Co. v. Stanley Electric Co., and by Judge Archbald in Westinghouse Co. v. Hiram C. Roberts (C. C.) 125 Fed. 6. It would, indeed, be a work of supererogation to here attempt an analysis of the involved claims and their scope, specially in view of the extremely technical character of the abstruse questions involved, and their previous exhaustive and comprehensive consideration by the courts. In the Catskill case the Circuit Court, considering the Tesla patents in suit and the defenses there raised, sustained their validity, and unqualifiedly concurred in the decisions of Tesla Electric Co. v. Scott & Janney et al. and Westinghouse Co. v. Dayton Fan & Motor Co., supra. The Circuit Court of Appeals, however, reversed the decision upon the ground that the publication of a magazine article on April 22, 1888, by Prof. Galileo Ferraris, fully described and disclosed the system covered by the patents in suit. This publication upon the evidence in that case was found to be prior to the date of the inventions in suit, and constituted an anticipation. It is quite apparent that the Circuit Court of Appeals did not intend to disaffirm or disapprove the conclusion of the Circuit Court upon any other ground, although no other issues were expressly discussed. By implication, at least, the novelty and validity of the patents Nos. 511,559 and 511,560, as found by the Circuit Court, were concurred in and sustained. Upon that point the opinion of the Circuit Court of Appeals states:

"By the method and means therein described, Tesla dispensed with one of the line circuits, and was able to run the motor by means of alternating currents from a single original source. This was accomplished, as appears from the foregoing claims, by means which retarded the phases of the current in all circuits, or so varied the relative resistance of the motor circuits as to maintain the necessary difference in phase in the currents. Such utilization of a single original source by thus splitting a single current into two currents was an improvement of great practical value."

This construction will be adopted by this court. The conclusions in patent cases by courts of concurrent jurisdiction, though the parties are different, are in themselves strongly persuasive of their soundness; but, when these questions have been reviewed on appeal and sustained, the doctrine of res adjudicata, provided no new evidence upon the subject is shown, has undoubted application.

I am now brought to the question of anticipation. Are patents Nos. 511,559 and 511,560 invalid because anticipated by the admitted publication of Prof. Galileo Ferraris on April 22, 1888, in Turin, Italy? It is not controverted that this publication completely described the process and method of operating motors, as set out in the specifications and claims in suit. The Tesla split-phase patents, as has been stated, were granted December 23, 1893, upon applications filed December 8, 1888, eight months after the Ferraris publication. Upon careful consideration of the proofs, I have arrived at the conclusion that the actual date of the Tesla inventions is prior to this publication, and that

the patents were not void for anticipation. According to the evidence, Tesla conceived his invention in his laboratory, No. 89 Liberty street, New York City, and completed the same in the month of September, 1887. He made disclosure thereof to others during the fall of 1887, especially to Mr. Brown and Mr. Nellis, witnesses for complainant, and subsequently in the month of April, prior to the Ferraris publication, to his solicitor, Mr. Page. The defense of anticipation raises a question of much importance. Evidence in support of the claim of earlier conception than the date of the application, disclosure of the invention, and its actual reduction to practice must be received with great caution. Unless such inventions were actually made and perfected before the date of the Ferraris publication, the patents cannot be sustained. The burden is upon the complainant, under the circumstances, to establish by clear, unequivocal, and convincing proof that the anticipation has been anticipated. Westinghouse Co. v. Saranac Lake Electric Light Co. (C. C.) 108 Fed. 221; Thayer v. Hart (C. C.) 20 Fed. 693; St. Paul Plow Works v. Starling, 140 U. S. 184, 11 Sup. Ct. 803, 35 L. Ed. 404. Has the complainant complied with the rule? Tesla, to sustain an earlier date of invention than the date of the application, and as a part of the complainant's prima facie case, gives testimony tending to establish the following facts: In the autumn of 1887, assisted by Mr. Szigeti, he was engaged in his laboratory at No. 89 Liberty street, New York, in perfecting different types and sizes of alternating current motors. Complainant has been unable to locate Szigeti, which tends to explain his failure to corroborate Tesla upon this point. In July, 1888, Tesla sold his polyphase and split-phase patents to the complainant corporation, and, entering its employ, took up a temporary residence in Pittsburg, where complainant's factory was located. During his absence of one year from New York, the laboratory was moved by his assistant from Liberty street, and later, after his return to New York, again moved to South Fifth avenue, where in 1895 it was consumed by a fire which destroyed all his motors, except the "Exhibit Tesla Motor." This apparatus had been reduced to practical form, according to the evidence, in September, 1887, and was in the Patent Office at Washington at the time of the fire. It had been used as an exhibit in proceedings in interference with Ferraris, and was produced as new evidence upon the hearing of this case. It is shown to be capable of successful operation by two wires, as indicated in the specifications of patent No. 511,560. The transaction to which Tesla's narrative relates occurred fully 15 years ago. Examination and consideration of all the testimony disclosed by the record satisfies me, even after this lapse of time, of its truthfulness and its accuracy. The conclusion is not reached without some degree of hesitation, solely due, however, to the views expressed by the Circuit Court of Appeals of this Circuit, in the Catskill Case, regarding the proof there submitted upon this question. This proof constitutes a portion of the evidence here, and will be treated hereafter. The standard of proof required, where anticipation has been clearly shown, to carry the invention back to a date earlier than the application, has been abundantly supplied in the present record. Here the testimony

of Tesla, emphatically and unequivocally narrated, sufficiently supported by other witnesses, as to the specific construction of the exhibit motor and its operativeness as a split-phase derivative motor in the month of September, 1887, impels me to the conclusion that its actual invention is prior to the date of the Ferraris publication. In the case at bar, the circumstances surrounding the earlier date of invention and the subsequent facts indubitably lead to the conclusion that an earlier date of invention has been definitely fixed and established. According to Tesla, the experimental motor in evidence was one of the earliest constructed, and was operated by him almost daily in September, 1887, upon the split-phase derivation system. His description of the way in which the two circuits were connected preparatory to securing the necessary difference of phase for the operation of the motor is entitled to weight, and is fairly corroborated by the testimony of Mr. Brown, to whom, with others, the single-wire system of motor operation was disclosed and explained. Tesla testifies further that subsequently, and early in April, 1888, he disclosed the invention to his solicitor, Mr. Page, who was then engaged in preparing an application for an improvement patent upon one of Tesla's earlier inventions. This communication is corroborated by Mr. Page, who testifies that the subject of such application was thereafter fully and frequently discussed. The two-wire induction motor was regarded by them as being the most important type of motors, and accordingly was fully described in the application filed May 15, 1888, without mentioning the derivation feature. Nellis, witness for complainant, testifies to the practicability and operativeness of the Tesla exhibit motor in the years 1887 and 1888. His testimony is to be received with caution, as he was not an electrician. It appears from the proofs that the experimental motor admittedly was capable of use in various ways, either as a transformer or polyphase motor, and therefore the testimony of Nellis, aside from his observations, which would be entitled to no probative effect, ought not to be entirely disregarded. So far as such testimony shows an independent recollection of facts and details, it is entitled to weight. I am unable to perceive any sufficient reason why his narrative of what he saw at particular times should not be given credence. Certainly his opportunity for observation was enticing; the laboratory was guardedly closed to the public and open to few, and the experiments of a trained expert in the intricate subject of electricity, fascinating to a mechanic, may well have made an impression. He testifies that he furnished power at night whenever Tesla tested his apparatus. It appears that Tesla showed him the method of operating with two wires the exhibit motor, which the witness says was thus revolved and reversed. The testimony leaves an undoubted impression upon the mind that, however unskilled this witness may have been shown, he had a clear recollection that the armature was revolved and reversed by the manipulation of two wires. Such operation of the apparatus, crudely and superficially stated, was substantially the discovery described in the Tesla patents in suit. It is argued that little stress ought to be placed upon this evidence in the absence of facts showing that the experimental motor was capable of operation with-

out the use of auxiliary devices. As already observed, standing alone it would not be entitled to consideration, but, when considered with the testimony of Tesla and Brown, it cannot be denied some degree of weight. The complainant's witness Brown, by his admission, was financially interested in the patents of Tesla, and this fact undoubtedly tends to detract from the force of his testimony, but no sufficient reason is apparent to disregard it. He testifies substantially that the motors of the derivative split-phase type were first made by Tesla in his laboratory in the summer or fall of 1887, and that the exhibit "Tesla Motor" was successfully operated many times in his presence. He says:

"It was operated by means of an alternating current, from which were taken two derived currents, one passing through one winding and the other through the other. It was operated as an induction motor, or by means of putting external resistance in one of the derived circuits."

The witness had some skill in the practical application of electricity, and his description of the apparatus conforms to the appearance of the exhibit motor. It was prior to or during September, 1887, that Tesla communicated to him the method of effecting a retardation to produce a difference in phase by putting an inductive resistance on one of the two derived circuits from the main circuit. Tesla also communicated to his solicitor that the rotary field motor was capable of direct operation from a single circuit, as well as from two or more independent circuits from the current source. To one who had thus recently drawn specifications covering the polyphase system of motors, the communication that such motors were capable of successful operation from a single circuit by a method of "splitting" or "derivation," thereby dispensing with one of the circuits, must have been not only interesting but surprising. I quite agree that it was astonishing that the disclosure by Tesla to his solicitor was not made earlier; but the reason assigned by Mr. Tesla himself deserves more than passing attention. Upon this point he testifies that he did not wish to apply for a patent for the later invention until the patents for his polyphase system were granted, being apprehensive that the later would minimize the importance of the earlier. It appears from the evidence of Mr. Page that, upon receiving the disclosure early in April, he became apprehensive that the applications then filed, and for which patents were soon to be granted, were not sufficiently specific to include the later method. Accordingly, he advised with his associates at home, and later in Washington, in relation to modifying or amending the pending claims, and in devising a future course to protect the later invention. The conclusion reached was that an earlier patent covered the invention, and hence the delay in not at once filing application. Attention is called to a written charge for services rendered by Mr. Page, under date of April 27th, upon which stress is laid by complainant, and to which Judge Archbald, in his opinion in the Roberts Case, attached much significance. I do not attach like emphasis to this point. In my mind, it is quite probable that the said charge, as well as the trip to Washington, may have related to the application of May 15th, which, as I understand the evidence, had reference to the inductive

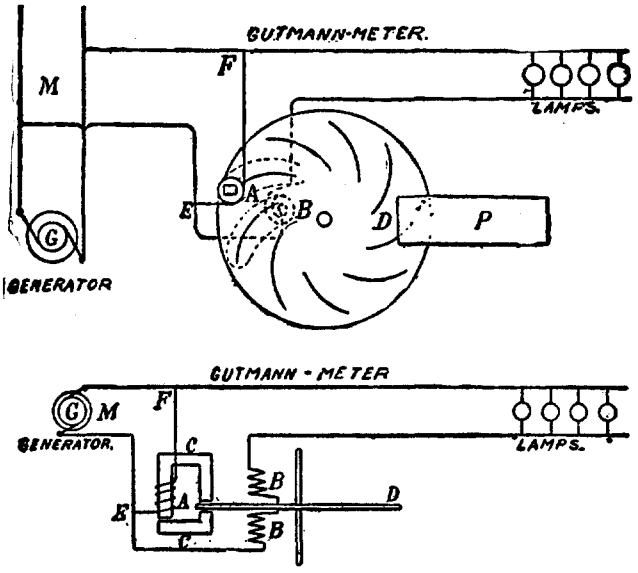
split-phase feature, and not to a motor "connected in derivation or multiple arc with the circuit." Irrespective, therefore, of the entry in Mr. Page's lost diary of a charge for services rendered, the result of all the evidence establishes the disclosure by Tesla, in the manner and at the time stated by him, clearly, directly, and persuasively. This conclusion is strengthened by many other facts and circumstances, disclosed by the record, tending to corroborate an earlier date for the invention. The testimony of Mr. Stanley, witness for defendant, deserves to be noted. On his direct examination he testifies that between May 15 and June 15, 1888, he had an interview with Mr. Tesla in his laboratory; that nothing was said on the subject of a two-wire motor, nor were any experiments made by Tesla in his presence. Later, when confronted with a letter addressed to George Westinghouse, written by him under date of June 24, 1888, he admitted the truth of its contents. The letter states that Tesla spoke of having run the motors by one circuit with a retarding coil in one set of circuits, and mention is made of the manner in which the result is achieved, namely, by "changing the lag in one set of circuits, and using the difference in phase between direct and indirect magnetization." True, this letter was written and the interview took place two months after the Ferraris publication, but it is a circumstance which has weight in support of complainant's contention. It certainly dissipates the argument, based upon the witness Darlington's testimony, that when Tesla was in Pittsburg he was ignorant of the derivation method. Furthermore, Tesla has satisfactorily explained his failure to disclose his invention to Prof. Anthony, while at the factory of the Mather Electric Company, whereby two currents of different phase could be derived from a single source. It appears that he was admonished by Mr. Brown and Mr. Peck, both financially associated with him, to remain silent, and later, upon the advice of counsel, he again declined to furnish information sought regarding his invention. These are all significant facts, which in my judgment supply the definiteness and certainty on the question of priority of invention which the court found absent in the Catskill Case. For these reasons, the date of the inventions in suit is carried back to September, 1887.

As to infringement. It was held by Judge Lacombe in the Catskill Case, and by Judge Archbald in the Roberts Case, cases in which the infringing devices were equivalent, that, inasmuch as the meter armature of the defendant's apparatus "rotates against the action of a permanent magnet, and turns the spindle which operates the registering device," the production of some power is necessarily involved, and accordingly it was held to be immaterial that the structures of the patent involved power transmission systems, while that of the defendant involved a meter. The defendant's apparatus in the Roberts Case being practically identical with the defendant's device in this case, the conclusion and reasoning of the court in that case upon the question of infringement will be followed here. It is contended by the defendant that the disk or armature of its apparatus is rotated as a result of the energizing out of phase currents acting in unison upon it; that the position of the disk in the defendant's apparatus is horizontal,

having two electro-magnets placed in relation thereto in such a way that the magnetism intersects the same on the same radius; that one of the magnets located near the disk's edge receives a "shunt" current—that is, a current derived from the main circuit—and the other is energized by the "series" or main current. It is further contended that the said electro-magnets are so arranged in the meter as to produce electric currents of differing phase, namely, that the construction of the shunt magnet and the coils which surround it produces a certain amount of self-induction, while, on the other hand, the function of the series magnet, which has little or none of the retarding effect mentioned, is to create a magnetic force in the plane of the disk, and by their joint action cause it to rotate. The rapidity of its rotation, according to defendant's view, is "arranged to be proportional to the flow of the current employed by the consumer, passing through the series coil, and also proportional to the electrical pressure between the mains or the flow of current through the shunt coil." This description, and the manner of operating defendant's meter, in my opinion does not differentiate the same from Tesla's primary patents, to which references are made in the patents in suit, and which describe a mode of operation depending entirely upon a rotation or "whirling field of force," in which the magnetic pole shifts from point to point about the periphery of the armature, resulting in its rotation. No evidential value is attached to the defendant's theory upon this point in view of the indisputable proof that the effect of the achievement by the defendant's meter practically consists in the utilization of the Tesla method of producing a difference of phase in the energizing circuits. In the Roberts Case the armature consisted of a hollow vertical cylinder having slanting slots, while in the case at bar the armature in the form of a horizontal disk has spiral slots, and the poles of different phase are so constructed in relation thereto, as has already been pointed out, as to deflect through the radial slots of the disk the magnetic effect produced by the poles. I concur in the analysis of this feature of the defendant's apparatus, as stated by Judge Archbald. In referring to the eddy curents formed in the armature under the field poles, he says:

"The field poles, AA, at one end, are deflected by the slots in the cylinder, so as to come under the influence of the field poles, BB, of differing phase at the other end, and that it is the resultant magnetic effect of the two that causes the rotation of the armature. That it is this resultant effect that is sought and obtained is manifest, else why the deflecting slots, the only function of which is to extend the eddy currents from one to the other? Cut this off, or dispense with one set of poles, and you have no rotation, or only a most feeble one, explainable on other principles."

The record discloses that the Tesla patents describe armatures as disks wherein field poles are presented radially to their periphery, while in the defendant's motor the poles are perpendicular to the disk. These structural differences are immaterial. Other differences have been pointed out, but it is thought that they are merely a difference in form, and not such as affect the merits of the patents in suit. The Gutmann meter without the registering attachment, is appropriately described by the following diagram prepared by complainant's expert witness Waterman:



"D represents a disk of aluminum, which serves as the armature. BB are two coils of coarse wire with short iron cores which are placed on opposite faces of the disk near its center, and C is a magnetic core carrying a fine wire coil, A, and having its poles presented to opposite faces of the disk at a point near the edge of the latter. The coarse-wire coils, B, constitute one energizing circuit, while the fine-wire coil, A, is the other energizing circuit. These two circuits form paths through which the current proceeding from an alternating current generator, G, divides, and as the path or branch including the coils, B, has but a few turns of coarse wire surrounding a small amount of iron, while the path including the coil, A, has very many turns of fine wire surrounding a large iron core, the latter path will have a very high self-induction as compared with the first, and hence the current which passes through it will be greatly delayed in phase with respect to that in the other or coarse-wire path."

It is wholly unnecessary to comment upon the inventions of Cabanellas, Dumesnil, and others relied on in anticipation, or to again construe with greater particularity the claims in suit. This has been exhaustively and comprehensively done in the later adjudications in the Circuit Courts, to which attention has been called. Furthermore, the distinguishing features described in the alleged anticipatory patents have often with great particularity been explained by the courts. It is enough that it is satisfactorily shown by the proofs that the apparatus of the defendant is constructed by a method of applying the energizing circuits in different phases, and that the effective results of the armature or disk are achieved in the defendant's motor by the mode of operation described by both claims of patent No. 511,559 and claims 1 and 2 of patent No. 511,560. Those claims, therefore, are held to be infringed.

Two other points pressed at the argument, viz., that the defendant Mandeville is not a proper party defendant, and that the meters which are the subject of this suit were sold to the defendant insurance com-

pany by the Western Electric Company, against which this complainant has already had a decree, need to be decided. The first point is sustained. The defendant Mandeville, in the absence of special cause, is not chargeable with infringement in his capacity as agent, especially as the real substantial infringer is before the court, and hence the bill as to him is dismissed with costs. The second point is overruled on the authority of Birdsell v. Shaliol, 112 U. S. 485, 5 Sup. Ct. 244, 28 L. Ed. 768; Kelley v. Ypsilanti Mfg. Co. (C. C.) 44 Fed. 19, 10 L. R. A. 686; Electric Gas-Lighting Co. v. Wollensak (C. C.) 70 Fed. 790.

It follows that the patents in suit are valid. The defendant has failed to establish any of the grounds upon which complainant's right to sue for infringement depends, and complainant is therefore entitled to a decree in the usual form, with costs and disbursements.

WATTS et al. v. UNITED STATES.

(District Court, S. D. New York. April 8, 1904.)

1. COLLISION—DAMAGES—FINDINGS OF COMMISSIONER.
   The finding of a commissioner as to the value of a vessel sunk in collision, made on conflicting evidence, will not be disturbed unless error or mistake is clearly apparent.

2. SAME—SUIT AGAINST UNITED STATES—INTEREST.
   A court of admiralty, in a suit brought against the United States, under a special act of Congress, to recover damages for the loss of a British vessel through collision with a naval vessel, has no authority to allow interest as a part of such damages, where the special act is silent on the subject; the general rule being that interest is not recoverable against the government, and such being the statutory rule governing suits in the court of claims.

In Admiralty. On exceptions to commissioner's report.

See 123 Fed. 105.

Wing, Putnam & Burlingham, for the exceptions.

Henry L. Burnett, U. S. Dist. Atty., and Arthur M. King, Asst. U. S. Dist. Atty.

ADAMS, District Judge. The first three exceptions relate to the value of the steamship Foscolia. They are:

"First. For that the Commissioner found the value of the Foscolia at the time of the collision at only $60,000 instead of £17,000 ($82,730) or £15,000 ($72,997) as testified to by the London witnesses, Burgess and Gordon respectively; also that the Commissioner by said valuation rejected in effect the estimates of the three New York witnesses called for the libellants, namely, Saunders, who proved a value at £14,538 ($70,654.68), Clark, who showed a valuation of £14,500 ($70,542.50), and Garmey, who appraised the ship at $63,611.94.

Second. For that the Commissioner did not regard, or did not give due and sufficient weight to, the high rates of freight proved to be prevailing in May 1898, which enhanced the earning power of cargo steamers like the Foscolia, and necessarily increased the market value thereof.

¶ 1. See Collision, vol. 10, Cent. Dig. § 306.

Third. For that in his valuation the Commissioner assumed that the Foscolia could as readily be sold here as in England, whereas the value of such a vessel in her home port, to wit, in London, is the correct measure of the owners' loss."

The finding of the Commissioner is not in accordance with the estimate of any one witness but his report shows that he reached his result through a consideration of all of the testimony. His conclusion was arrived at from conflicting evidence and should not be disturbed unless error or mistake is clearly apparent—Panama R. Co. v. Napier Shipping Co., Ltd., 61 Fed. 408, 9 C. C. A. 553; The Elton, 83 Fed. 519, 31 C. C. A. 496—which is not the case here. On the contrary, the award is a conservative one, taking into account the testimony adduced both here and in England and is consistent with the weight of the evidence.

The following is his report upon this subject, which I adopt:

"There is testimony on the part of her owners to the effect that the Foscolia had been a very profitable vessel, and some of the testimony taken by them in England on the question of value appears to have been largely influenced by this fact. Libellants' counsel argues that the value of the vessel to the owners is a better measure of damages than the estimates of experts, and quotes from the opinion of Mr. Justice Barnes in the Harmonides, 9 Asp. Mar. Cases, 354, in which this view is apparently taken. But the decisions of our courts are to the effect that this is not the proper test, and that in the absence of special circumstances the amount for which the vessel would have sold in the open market is the true test of value. Nor do I think that because of our navigation laws greater weight should be given to the London testimony than to that taken in New York, since one of the witnesses examined here stated that the value given by him was that of London, and the other New York witnesses did not take the navigation laws into consideration as affecting the value, it being assumed that, for the purposes of the enquiry, the Foscolia could be as readily sold here as in England.

The Foscolia was an iron steamship built at Newcastle, England, in 1879, at a contract price of £23,074. Some of the Government witnesses considered this a large sum to pay for her at that time, and it appears that bids were not asked for when she was built; but Mr. Burgess, one of the owners, testified that he knew what values were at that time and believed he got the lowest rates. Witnesses for the owners testified that iron vessels have more endurance than steel vessels, and this has not been disputed by the Government. The Foscolia was of the double-deck type, with three tiers of deck beams, had one iron deck and one deck partly iron and partly wood, high forecastle solid, bridge and high poop. She had compound engines, and her average speed was 9 knots when loaded, on a coal consumption of 12 tons per day. She was classed 100 A 1 with a star, in the British Lloyds, which is the highest class and indicates that she was built under a special survey. She had retained that class from the beginning, passing the periodical surveys, and she was entitled to be continued in it as long as her owners complied with the Lloyds requirements. Her last survey was in September, 1897, about seven months before her loss, and under it the vessel would have retained her class for four years, barring accidents. The engines and boilers were the same that were originally placed in her, but they had been subject to annual inspection, and in September, 1897, were certified for 12 months. From the time she was built her owners had spent £12,136/9/6 on her in repairs and renewals, and the testimony shows that she had been thoroughly kept up.

To prove value, two witnesses were examined in London on behalf of the owners, and one on behalf of the Government, besides the witnesses who testified here. Their values were given as of May, 1898, when the vessel was lost.

Mr. Burgess, one of the English owners, whose business and experience qualified him to testify on the subject, placed the value at £17,000. This is the highest estimate given by any witness, and his interest in the matter may

have led him to place too great a value on the vessel. Moreover, this appears to be his estimate of her commercial value to his firm, since he says: 'To us, a going concern, the steamer was worth at least £17,000.'

Mr. Gordon, the other London witness for the owners, was an officer of a company owning a large number of steamships, and had a long experience in the purchase, ownership and management of steamships. He valued the Foscolia at £15,000. He states that there was a demand for ships of her class at that time, not in England, but from foreigners, who were buying largely; such vessels were well adapted for the Baltic and Black Sea trades, but were not then being built in England. Mr. Gordon had never been aboard the vessel, although he had seen her some years before her loss. In explaining his method of fixing the value, he said that he took into consideration his own steamers of similar build and age, their insured values for that year, and their earning capacity. He also states that for this particular year, 'the earning quality of the boat is an absolute test of value.' Elsewhere, however, he disclaimed taking the insured value into consideration as an element, and said that his estimate was based upon his knowledge of ships of similar type and size. He seems to have been in error as to the age of the vessel, since he refers to her as 'practically new' in 1892, when in fact she was 13 years old. When asked what, under normal conditions, would be the percentage of deterioration for a vessel costing £23,074 in 1879, he said that he could not answer the question with reference to the Foscolia, since she was probably worth nearer £30,000 than £23,000 in 1881, and in the neighborhood of £29,000 when she was 5 years old, because vessel values increased enormously during that period.

Mr. Thompson, the London witness examined on behalf of the Government, was not a vessel owner, but was a surveyor and appraiser of vessels, and a naval architect and engineer; his experience, extending over some 40 years, included superintending the construction of ships and frequently testifying as to ship values in the admiralty courts. He valued the Foscolia at £11,000. He says, however, that if the owners had gone into the market in May, 1898, to contract for the building of a similar steamer, the cost would, in his judgment, have been about £23,000. He has no knowledge of the vessel beyond the records in Lloyds' Register. He said that in fixing the value, he assumed that she was a good dead weight carrier, that she was in a condition for sea, that her original boilers were still in her, and that no large structural repairs had been recently made; he had kept informed as to actual sales, and such sales had entered into his computation; the fact that the vessel's boilers had never been renewed materially affected his valuation.

Five witnesses were examined in New York on the question of value. These were Herbert B. Saunders, John Garmey and Arthur H. Clark on behalf of the owners, and Horace See and Thomas Congdon on behalf of the Government. Their estimates ranged from $70,654.68 to $52,500.

Mr. Saunders is a marine appraiser and surveyor for underwriters, and has acted in this port about 4 years. His knowledge of the Foscolia was derived from Lloyds' Register, although he said that he had seen the vessel and 'went across her' on one occasion. There is some confusion in his figures, since he changed his result once or twice because of inaccurate data on which he had made his calculations, and errors in computing, but after making his corrections he testified that the value was £14,538, or $70,654.68. He worked out this result by applying a system of deductions for depreciation at various stages in the life of the ship.

Mr. Garmey is superintendent of the Prince Line, which has a large number of cargo steamships plying in various parts of the world, he has bought and sold vessels and had occasion to value and appraise them. His knowledge of the Foscolia was confined to shipping records and other information brought out in the testimony. He valued her at $63,611.94. His method was to make a deduction of a certain percentage from her original cost at the date of each of the periodical surveys which she underwent, so that when she passed her last survey, in 1897, these deductions amounted to 40% of her original cost; and finally, on ascertaining that the vessel had run in the iron ore trade in the last years of her existence, he took off 10% more, for the wear and tear which he considered incidental to this rough trade. He said that he ap-

proached the subject in the attitude of an intending purchaser, and valued the vessel at what he would have been willing to pay for her; his estimate had not been influenced in any way because of the fact that the United States was at war and was procuring vessels.

Mr. Clark was at one time a master mariner, but has been Lloyds' agent in New York for the past 8 years; he was in London from 1877 to 1890 as agent for New York and Boston Underwriters, and has also been chief surveyor to the Record of America and Foreign Shipping; he has had to do with the valuation of vessels in London and keeps posted about vessels in New York. He valued the vessel at £14,500 or $70,542.50. He had never seen her, but based his estimate on the surveys and data furnished him. He took the original cost of £23,000, which, with the repairs, renewals and other expenses amounting to £12,000, made a total of £35,000, which the owners had spent on the ship; but in the £12,000 there were a good many items which, although necessary, did not increase the intrinsic value of the ship, such as surveyors' fees and dry docking; for this reason he rejected 50% of the £12,000, reducing it to £6,000, which, deducted from £35,000, left £29,000; bearing in mind the high class of the vessel, and the fact that her earning capacity was not impaired (since she could earn as much money for her owners as a new ship of her size and type could) but considering that she was 19 years old, he thought it would be fair to strike off half of the amount expended on her, or £14,500; he was also mindful of the fact that in 1898 ship property was anywhere from 25 to 30% more valuable than at present; he also took into account the fact that she had her original boilers, but he found that they did not carry a very high pressure of steam, and for that reason they would probably outlast boilers carrying a higher pressure; they had evidently been kept in good repair, because they were surveyed every year by Lloyds' Register and still held their highest class as they had originally.

Mr. See has been a marine engineer and naval constructor for 40 years and has been connected with well known ship-building and steamship firms as superintending and constructing engineer, and from this, and other experience which he set forth, has become familiar with steamship construction and values, although he said he never had to do with the actual purchase or sale in the market of vessels like the Foscolia. He placed the market value at £10,500, 'or $52,500.' This was based on the surveys, her original cost and the amount spent on her upkeep. He did not figure on an annual depreciation, but a general depreciation, taking all the elements into consideration; the boilers showed a depreciation which reduced the working pressure from 60 to 80 lbs., and that should be considered in relation to the hull, also; the efficiency of the boilers would be impaired, and with the reduced pressure and a greater coal consumption she would go slower and it would take longer to make the voyage.

Mr. Congdon has had an experience as a marine surveyor, extending over a period of 45 years. Early in life he went through such training as was necessary to become certified as a shipwright and ship builder, afterwards was a Lloyds' surveyor at various ports in England for many years, and for 21 years was principal surveyor for Lloyds' Register in the United States. He has seen the Foscolia many times, and passed her on one of the surveys, which he thought was in 1895. He placed the market value at $52,500. He says that he worked out the percentage of depreciation up to the vessel's 13th year, at which time he considered her worth from $60,000 to $65,000, and added: 'Beyond that I think it is unsafe to go, because I don't think there is any scale, or any man's experience, that will place a percentage of depreciation, year by year, for any series of years over that time on comparatively old vessels. You have to fall back then on what is termed the market value, what a vessel would fetch if sold, by comparison with other vessels that have been sold.' He received circulars containing records of sales of vessels abroad, and it was by comparison with these and with vessels which he himself had valued that he determined the market value; he had also considered the condition of the freight market at the time and given the vessel the benefit of it; she was a fairly good cargo steamer but there was nothing special about her; in fixing the value, he had given her the advantage wherever he could, because she was old and not very marketable.

Where there is such a wide difference among experienced appraisers, it is not unreasonable to assume that some of them were biased to a certain extent in favor of the parties calling them, and that their estimates were unconsciously influenced more or less by a desire to present a favorable case for their clients. But it will be seen that the lowest estimate of any witness for the owners is that of Mr. Garmey, $63,600, and that the highest given by a witness for the Government is that of Mr. Thompson, £11,000, or $53,531.50; a difference of some $10,000. I am satisfied that the fair market value lies somewhere between these two estimates. In the three years immediately preceding the loss of the Foscolia, Mr. Garmey had an experience in the actual purchase and sale of vessels, which I think gives his testimony a practical value beyond that of the other experts examined before me. He testified on cross-examinaton as follows:

'Q. Mr. Garmey, have you bought and sold iron vessels? A. Yes, sir.
'Q. Could you say, roughly, how many? A. Well, between 1895 and 1898, for one firm I bought 7, sold 9 and built 3, ranging from 3,000 tons to 6,000 tons dead-weight.'

Under all the circumstances, I think that $60,000 is a fair value for the Foscolia, and I accordingly allow that sum."

The exception upon which most stress was laid in the argument was the one relating to interest, as follows:

"Fourth. For that the Commissioner did not allow interest upon all the items of the libellants' damages at the rate of six per cent. from the 28th day of May, 1898."

It is contended that the disallowance of interest is unjust and excludes the libellants from a full recovery of the damages sustained. Such appears to be the fact. Without interest, the recovery is only partial but it is too well established to admit of argument that the Government is not liable for interest on damage claims in the absence of an express statutory provision or stipulation covering it. Bunton v. U. S. (C. C.) 62 Fed. 171; U. S. v. Sherman, 98 U. S. 565, 25 L. Ed. 235; Tillson v. U. S., 100 U. S. 43, 25 L. Ed. 543; Harvey v. U. S., 113 U. S. 243, 5 Sup. Ct. 465, 28 L. Ed. 987; Angarica v. Bayard, 127 U. S. 256, 8 Sup. Ct. 1156, 32 L. Ed. 159; U. S. v. North Carolina, 136 U. S. 211, 10 Sup. Ct. 920, 34 L. Ed. 336.

Formerly, Congress adjudicated upon private claims against the Government, through its Committees, but the great and increasing volume of claims necessitated some other method of providing for their investigation and the Court of Claims was established for such purpose—Act of February 24, 1855, c. 122 (10 Stat. 612)—but general authority was never granted to pass upon collision cases, as they sounded in tort, and special legislation remained necessary in each case of such character. St. Louis & Miss. Valley Transp. Co. v. U. S., 33 Ct. Cl. 251, 265. When Congress acted upon such claims, the Court of Claims was usually selected as its instrument to ascertain the facts and, in case of liability upon the part of the Government, to assess the damages. Interest, however, was expressly excluded. Rev. St. p. 200 [U. S. Comp. St. 1901, p. 747]:

"Sec. 1091. No interest shall be allowed on any claim up to the time of the rendition of judgment thereon by the Court of Claims, unless upon a contract expressly stipulating for the payment of interest."

The claimants here, while conceding that if the matter had been referred by Congress to the Court of Claims, interest would not be recoverable, urge that as it has been sent to an admiralty court, which ordinarily allows interest as part of the damages, interest should be granted. The question turns upon the intention of Congress. It would seem that under the authorities cited, interest is not allowable, unless expressly provided for, and there being a complete absence of any allusion to interest in the Act, under which the action has been tried here, it should not be granted. The Commissioner says in this connection:

"Libellants claim interest on the various sums allowed. The District Attorney insists that interest cannot be allowed, since the act under which the suit was brought did not expressly award interest in the event of recovery by libellants.

It is undoubtedly true that the sovereign cannot be sued without his consent, and that interest cannot be allowed against the United States where it has not manifested its consent that it should be awarded. The act by which Congress authorized this suit to be brought does not in express terms authorize the Court to award interest, but libellants' counsel contends that it does so by implication, inasmuch as it provides that the claim of the owners of the Foscolia be submitted to this Court 'under and in compliance with the rules of said court sitting as a court of admiralty,' and that if it should appear that the fault was with the Columbia, the court should determine the amounts to be paid to the owners of the ship and cargo 'in order to reimburse them for the losses so sustained.'

It is argued that the reference to the rules of admiralty may be either to the practice on the instance side of the court or to the procedure in prize causes, and that in either view interest should be allowed.

Were this a collision suit against an individual, there is little doubt that libellants would be entitled to interest under the settled practice in this court; and perhaps it would also be so if the procedure in prize causes were followed, although the only instance cited in which interest was allowed against the United States in a prize cause was the Paquete Habana, 189 U. S. 453 [23 Sup. Ct. 593, 47 L. Ed. 900], and there, as counsel states, the admission of the court that interest was allowable against the Government was only implied. In the other cases cited, the Government was not a party, and two out of the three captures were by privateers.

In regard to that portion of the Act which provides that the libellants shall be reimbursed for their losses, I agree with libellants' counsel that for losses which occurred six years ago, it cannot fairly be said that the libellants are reimbursed when they receive the bare principal without the least compensation for the loss of the use of their property or its value during that period; and I should allow interest for that reason, if I thought interest could be allowed against the United States under an Act which does not expressly award it.

Besides a number of decisions of the Supreme Court, the District Attorney quotes many expressions from opinions of the Attorney Generals and Comptrollers of the Treasury which he contends support his position. Some of the opinions of those officials undoubtedly go so far as to say that the award of interest must be express, that it is never given by construction under an Act of Congress, and it seems clear that the practice has long prevailed in the departments, of disallowing interest on claims presented for payment. I think that the Supreme Court has also gone to this extent. It is true that some of these cases (as in Tillson v. U. S., 100 U. S. 43 [25 L. Ed. 543]), are appeals from the Court of Claims, and that the subject of interest on claims prosecuted in that court has been regulated by an Act of Congress to the effect that no interest shall be allowed on any claim up to the time of the rendition of the judgment thereon by the Court of Claims, unless upon a contract expressly stipulating for the payment of interest. Act March 3, 1863, c. 92, § 7, 12 Stat. 706 [U. S. Comp. St. 1901, p. 747]. But I am referred to no case in which the federal courts

have allowed interest against the United States by construction under an act of Congress, and I have been unable to find any and the Supreme Court has expressed its views in language so positive that in my opinion an allowance of interest under the act which permitted this suit would be unauthorized. In Angarica v. Bayard, 127 U. S. 251 [8 Sup. Ct. 1156, 32 L. Ed. 159], which was not an appeal from the Court of Claims, the court referred with approval to the long line of opinions rendered by the Attorney Generals against the allowance of interest, including those in which it was stated that interest cannot be allowed unless expressly granted by Act of Congress. The Court also said:

"The case, therefore, falls within the well settled principle, that the United States are not liable to pay interest on claims against them, in the absence of express statutory provision to that effect. It has been established, as a general rule, in the practice of the government, that interest is not allowed on claims against it, whether such claims originate in contract or in tort, and whether they arise in the ordinary business of administration or under private acts of relief, passed by Congress on special application. The only recognized exceptions are where the government stipulates to pay interest and where interest is given expressly by an act of Congress, either by the name of interest or by that of damages.'

I therefore disallow interest."

I consider that these views are sound and should not be disturbed. Moreover, there is persuasive evidence that Congress intended to exclude the recovery of interest. While this matter was pending, another claim for the recovery of damages caused by collision with a Government vessel was introduced simultaneously in the Senate and House of Representatives. The Senate bill which especially provided for the recovery of interest and costs, was first passed. When the matter was taken up for consideration by the House Committee on Claims, a report was made as follows:

"56th Congress, 1st Session. House of Representatives. Report No. 723

The Brooklyn Ferry Company of New York.

March 20, 1900.—Committed to the Committee of the Whole House and ordered to be printed.

Mr. Otey, from the Committee on Claims, submitted the following

Report.

(To accompany H. R. 9499.)

The Committee on Claims, to whom was referred the bill (H. R. 9499) for the relief of the Brooklyn Ferry Company, of New York, report the same favorably, and recommend that the same do pass, with an amendment striking out the words 'with costs and interest', on page 2, line 5.

The claim, amounting to $12,188.04, arises out of a collision which occurred in the East River, New York, on the 1st day of August, 1899, between the ferryboat *New York* and the U. S. S. *Dolphin*, a little after 6 o'clock in the morning. The *Dolphin* was bound through the East River to Newport, R. I., and the ferryboat was proceeding from the foot of East Twenty-third street, Manhattan, to her Brooklyn slip, at the foot of Broadway. A serious collision between the vessels happened off about South Third street, Brooklyn. The ferry company alleges that faults on the part of the *Dolphin* caused the disaster in violating a New York law, which is recognized and enforced by the United States courts, requiring steam vessels navigating the East River, when not bound to any of the docks or landing places therein, to keep as near as possible in the center of the river, and not to be propelled in excess of a rate of speed of 8 miles an hour; also, in violating the United States laws for the prevention of collisions in not keeping a proper lookout on the forward part of the vessel, in not stopping and backing her engines when danger of collision became apparent, in not giving the proper signals with her steam whistle, and in not navigating in conformity with those she did give.

The action of the committee in reporting the bill favorably is regarded as consistent with the policy of Congress, heretofore manifested in extending relief to citizens suffering loss from alleged negligence of Government's agents in this class of cases by giving them an opportunity to establish their claims, if found to exist, in the United States courts, and as this collision happened within the limits of the jurisdiction conferred by law upon the United States district court for the eastern district of New York, and as that court has had a very large experience in dealing with cases of collision upon the water, it is deemed the proper forum for the determination of the questions of law and fact involved in this case. A further reason for conferring jurisdiction upon that court in this case is found in the legal residence of the claimant within the district. The policy of Congress to permit citizens having claims against the Government to sue in their own districts finds expression in section 2 of the act of March 3, 1887, entitled 'An act to provide for the bringing of suits against the Government of the United States.'"

After this report, the Senate bill was amended to conform to it, by striking out the provision for interest and costs, and a bill was passed by both houses, of which the following is a copy:

"56th Congress,
1st Session. H. R. 9499.

(Report No. 723.)

In the House of Representatives

March 12, 1900.

Mr. Fitzgerald, of New York, introduced the following bill; which was referred to the Committee on Claims and ordered to be printed.

March 20, 1900.

Reported with an amendment, committed to the Committee of the Whole House, and ordered to be printed.

(Omit the part struck through.)

A Bill

For the relief of the Brooklyn Ferry Company, of New York, owner of the steam ferryboat New York.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

That a claim against the United States of the Brooklyn Ferry Company, of New York, a corporation organized and existing under the laws of the State of New York, with its principal place of business in the borough of Brooklyn, city of New York, owner of the ferryboat New York, for damages caused by collision between the said ferryboat and the United States steamer Dolphin, in the East River, near Brooklyn, on the first day of August, eighteen hundred and ninety-nine, may be sued for by the said ferry company, in the United States district court for the eastern district of New York, sitting as a court of admiralty and acting under the rules governing such court, and said court shall have jurisdiction to hear and determine such a suit and to enter a judgment or decree for the amount of such damages, if any shall be found to be due, against the United States in favor of the said ferry company, upon the same principles and measure of liability, ~~with costs and interest~~ as in like cases in admiralty between private parties, and with the same rights of appeal.

Sec. 2. That such notice of the suit shall be given to the Attorney-General of the United States as may be provided by order of the said court, and it shall be the duty of the Attorney-General to cause the United States attorney in such district to appear for and defend the United States.

Sec. 3. That should damages be found to be due the said ferry company, the amount of a final decree therefor shall be paid out of any money in the United States Treasury not otherwise appropriated."

The matter under consideration covering the Columbia-Foscolia collision, was introduced in the Senate and House of Representatives before the one covering the Dolphin-New York collision but

was enacted into a law subsequently. The report of the Senate Committee on Claims was as follows:

"Calendar No. 112.

56th Congress, 1st Session. Senate. Report No. 100.

British Ship Foscolia.

January 17, 1900.—Ordered to be printed.

Mr. Warren, from the Committee on Claims, submitted the following Report.

(To accompany S. 189.)

The Committee on Claims, to whom was referred the bill (S. 189) for the relief of the owners of the British ship *Foscolia* and cargo, having carefully considered the same, submit the following report:

A similar bill to the one now under consideration was favorably reported by this committee last session and passed the Senate. The Senate bill was also favorably reported by the House Committee on Claims.

As the committee's report (Senate report No. 1625) made last session fully sets forth the facts in the case, your committee adopt said report as their report and recommend the passage of the bill.

The report is as follows:

The Committee on Claims, to whom was referred the bill (S. 5000) for the relief of the owners of the British ship *Foscolia* and cargo, beg leave to recommend the passage of the bill for the reasons set forth in the letter of the Secretary of the Navy and accompanying papers.

Navy Department, *Washington, January 11, 1899.*

Sir: In response to the committee's request, contained in its letter of the 9th instant, for the views and recommendation of the Department in regard to the Senate bill 5000, for the relief of the owners of the British ship *Foscolia* and cargo, I have the honor to state that on the 28th of May last, at 7.30 p. m., the U. S. S. *Columbia*, while engaged in patrol duty just outside the harbor of New York and about 12 miles southerly and easterly from the Fire Island light-ship, came into collision with the British merchant steamer *Foscolia*. The *Columbia* was not seriously injured, but the *Foscolia* suffered much damage and sunk nine hours after the collision. There was no loss of life, the officers and crew of the *Foscolia* being taken on board the *Columbia* and cared for and brought into port, but the *Foscolia* and her cargo were a total loss.

It appears from the finding of a naval board of inquiry, convened to investigate and report upon the circumstances attending the collision, that at the time it occurred and for an hour and a half previously a thick fog had prevailed; that the vessels were both running at reduced speed on account of the fog; that a proper lookout was kept on both vessels; that the *Foscolia* was exhibiting the usual lights and sounding the fog signal, but that the *Columbia* had all her lights screened and was sounding no fog signal. It also appears from the finding of the court that no fault is imputed to any of the officers or men on board the *Columbia*, and that, aside from the screening of lights and discontinuance of the sounding of fog signals, everything that could have been done by them to avoid the catastrophe and to minimize its consequences, when it became inevitable, was done.

The testimony adduced shows that the lookouts on each vessel sighted the other at about the same time, the two vessels being about 100 yards apart, and that the *Columbia* was so manœuvred that a glancing blow only was received from the *Foscolia*, and doubtless little injury would have been caused either vessel but for the fact that the bow of the merchant steamer was caught upon one of the projecting after sponsons of the cruiser.

Upon careful consideration of the facts reported by the naval court of inquiry, above mentioned, the Department is satisfied that there is at least reasonable ground for the contention advanced by the owners of the *Foscolia* that the collision might have been avoided had the *Columbia* shown the lights and sounded the fog signals usual under such conditions. The lights and

signals were, however, dispensed with by the *Columbia* on this occasion for the reason that the Spanish fleet under the command of Admiral Cervera had not at that time been located and the cruiser was then engaged in patrol duty in the vicinity of the most important ports of the country, New York and Philadelphia, the points between which she was cruising being Fire Island lightship and Delaware Breakwater, and that it was deemed essential to take extraordinary precautions, even to the extent of incurring some hazard, in guarding against possibilities which might have developed at any moment.

A collision with one of our war ships having occurred under such circumstances when, for public reasons deemed sufficient to justify such action, our vessel was disregarding the rules of the road at sea, and a valuable merchant steamer and cargo belonging to a friendly power being destroyed, apparently without contributory negligence on the part of her officers and crew, it would seem proper that the losses incident thereto should not be allowed to rest upon the owners of a private vessel, but that such losses should, on the contrary, be borne by the United States, provided, of course, that it shall be judicially determined in the courts of the United States that the facts are as hereinbefore outlined.

Entertaining these views, and inasmuch as it appears that the bill (S. 5000) provides simply for the submission of all matters of fact in the case to the United States district court for the southern district of New York, sitting as a court of admiralty, and for the payment of such amount only as may be adjudged to the claimants by decree of such court, the Department recommends the bill to the favorable consideration of the committee, section 2 of the bill, making provision for the prompt payment of the amount which the court may find to be due, being deemed proper in view of the fact of the foreign ownership of the vessel lost and the desirability of avoiding in such a case the delay which would result from a resubmission of the matter to Congress for the necessary appropriation.

In this connection I desire to state that, under date of the 21st of June last, this Department addressed letters to the Committees on Naval Affairs of the Senate and House of Representatives, respectively, recommending favorable action in the matter of the claim of the owners of the *Foscolia* and cargo.

The inclosures of your communication are herewith returned.

Very respectfully, John D. Long, *Secretary.*

Hon. H. M. Teller,
Chairman Senate Committee on Claims, United States Senate.

Navy Department, *Washington, June 20, 1898.*

Gentlemen: Complying with the request contained in your communication of the 14th instant, I transmit herewith a press copy of the findings of the court of inquiry which recently investigated the collision between the U. S. S. *Columbia* and the steamer *Foscolia.* The Department's action of this date upon the case is as follows:

'The findings of the foregoing court of inquiry are approved.

'With respect to the claim of the owners of the *Foscolia* for damages, the Department will request Congress to authorize the submission of such claim to the United States district court for the southern district of New York for determination.'

Very respectfully, John D. Long, *Secretary.*

Messrs. Cowen, Wing, Putnam & Burlingham,
45 William Street, New York City.

Finding.

On the evening of May 28, 1898, the U. S. S. *Columbia,* on patrol duty, was in latitude 40° 20′ north, longitude 73° (?)′ west, and about 12 miles southerly and easterly from Fire Island light-ship. At 7.30 p. m. the course was S. W. ¼ S., and her speed 6 knots per hour. A thick fog had prevailed since 7 p. m. and the *Columbia* had all her lights screened and was sounding no fog signal. The British merchant steamer *Foscolia* was at the same time approaching on a course E. ½ S., at a speed which had been reduced to 7½ knots on account of the fog. At 7.38 p. m. the lookout on the *Columbia* and the man in the forward chains sighted the *Foscolia* on the starboard bow.

The officer of the deck of the *Columbia* sounded the steam whistle twice, put the helm to starboard, and signaled the engine room for full speed ahead. The commanding officer of the *Columbia*, coming quickly from the emergency cabin, repeated the order for full speed ahead and sounded the siren, the collision occurring at the same moment. When the *Foscolia* was sighted the two vessels were about 100 yards apart. She had her starboard, port, and masthead lights set, yet none of these were visible to the Columbia until after the *Foscolia's* hull was seen. This is accounted for by the fact that the fog was very dense and daylight had not yet entirely disappeared. The *Foscolia* sighted the *Columbia* at about the same time that she herself was seen. The *Foscolia's* engines were at once reversed and given full speed astern. Her helm was put hard aport for starboard, but the distance was so short that her headway was probably not stopped until the collision occurred. The *Foscolia* struck the *Columbia* at the aft sponson on the starboard side, her stem cutting into five compartments above the protective deck. A considerable portion of her stem was left in the *Columbia's* side.

Measures were promptly taken for the temporary repair of the damages to the *Columbia*, and two of the *Columbia's* boats were sent to the assistance of the *Foscolia*. The *Columbia* remained in the locality nine hours, until the *Foscolia* sank. There was no loss of life, the crew of the *Foscolia* being taken on board the *Columbia* and cared for and brought to port. The damages to the *Foscolia*, occurring through the collision, caused her to sink. The court finds that the fog whistle of the *Foscolia* had been sounded for upward of half an hour previous to the collision, and that the whistles were not heard on board the *Columbia* until after the vessel was sighted. The evidence shows conclusively that the captain, officers, and men of the *Columbia* were attentive to their duties previous to and at the time of the collision. The same is true of the master, officers, and men of the *Foscolia*.

Opinion.

The court is of the opinion that when the two vessels sighted each other the distance between them was so small and their speed and relative positions were such that a collision was unavoidable. If the lights of the *Columbia* had been displayed it is impossible to state positively whether they would have been visible to the lookouts on the *Foscolia* before the *Columbia's* hull was in sight, but the court is of the opinion that the hull would have been first discovered. The opinion of the court is, therefore, that the absence of the *Columbia's* lights is not an element in the causes which produced the collision. Notwithstanding that the fog whistle on board the *Foscolia* was not heard on board the *Columbia*, the court is of the opinion that the *Columbia's* fog whistle might have been heard on board the *Foscolia* had it been sounded. The court cannot, however, express a positive opinion on the subject, owing to well-known instances of sound being diverted under certain atmospheric conditions.

The court having taken into consideration the instructions in the case of the loss or grounding of a ship of the Navy, as directed by the precept, did not consider it necessary to call all the officers and crew before it, because of the fact that there had been no loss or grounding of a navy vessel. Capt. James H. Sands, of the *Columbia*, had received positive orders from his superior officer in command of the northern patrol fleet to cruise without lights. The object of this order was to conceal the presence of his ship from the vessels of a nation with which the United States was at war. [See article 445 of the United States Navy Regulations.] Captain Sands directed fog signals to be suspended for the same purpose. The court is of the opinion that he was justified in so doing. The court is of the opinion that the collision between the *Columbia* and the *Foscolia* was, under the circumstances of war, in no respect due to the fault or negligence of any of the officers or members of the crew of the U. S. S. *Columbia*, and therefore it is of the opinion that no further proceedings should be had in the matter.

William P. McCann,
Commodore, United States Navy, Retired, President.
Douglas Roben,
United States Navy, Retired, Judge-Advocate."

The following is a copy of the bill which was subsequently adopted by both houses:

"56th Congress, *1st Session.*

S. 189.

(Report No. 739.)

In the House of Representatives.

February 22, 1900.

Referred to the Committee on Claims.

March 21, 1900.

Committed to the Committee of the Whole House and ordered to be printed.

An Act

For the relief of the owners of the British ship Foscolia and cargo.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

That the claim of the owners of the British steamship Foscolia, sunk by collision with the United States steamship Columbia on the evening of May twenty-eighth, eighteen hundred and ninety-eight, near Fire Island light-ship, for and on account of the loss of said vessel and cargo, may be submitted to the United States district court for the southern district of New York, under and in compliance with the rules of said court sitting as a court of admiralty; and said court shall have jurisdiction to hear and determine and to render judgment thereupon: Provided, however, That the investigation of said claim shall be made upon the following basis: First, the said court shall find the facts attending the loss of the said steamship Foscolia and her cargo; and second, if it shall appear that the responsibility therefor rests with the United States steamship Columbia, the court shall then ascertain and determine the amounts which should be paid to the owners respectively, of the Foscolia and her cargo, in order to reimburse them for the losses so sustained, and shall render a decree accordingly: *Provided further*, That the amounts of the losses sustained by the master, officers, and crew of the Foscolia may be included in such decree.

Sec. 2. That should such decree be rendered in favor of the owners of the Foscolia and her cargo, the amount thereof may be paid out of any money in the Treasury and not otherwise appropriated."

It will be seen that when the provision for interest and costs is stricken out of the Dolphin-New York bill, there is no material difference between the two bills with respect to interest. Under such circumstances, it is not perceivable how interest can be allowed on the Foscolia losses, even though it is apparent to the court that strict justice can not be achieved in any other way. It certainly was not the intention of Congress to allow interest to foreign owners, when refused to citizens of this country under somewhat similar circumstances.

The exceptions are overruled.

[The decision on the merits in this action will be found in 123 Fed. 105.]

MORSE et al. v. ST. PAUL FIRE & MARINE INS. CO.

(Circuit Court, D. Maine. April 25, 1904.)

No. 27.

1. MARINE INSURANCE—UNSEAWORTHINESS—NEW TRIAL.

Where, in an action on a marine policy, a new trial was granted after verdict in favor of plaintiff on the uncontradicted testimony of two witnesses who testified that after the loss they made an examination by boring through the vessel's waterways into the ends of the beams between

the main and fore masts, and found no solid wood, but only mud and dirty wood, and on the second trial such evidence was again introduced, and there was no other evidence offered tending to obviate its effect, a second verdict in favor of plaintiff should be set aside, and a new trial ordered.

A. Nathan Williams, for plaintiffs.
Charles E. Littlefield and Arthur S. Littlefield, for defendant.

HALE, District Judge. This suit has already been twice before the court. It first came before the court on a question raised at a trial before the jury. Judge Putnam rendered an oral decision, which appears in 122 Fed. 748. The case proceeded, and the plaintiffs recovered a verdict. The defendant moved to have that verdict set aside on the ground that it was against the weight of evidence. Judge Putnam, speaking for the Circuit Court, rendered his decision upon that question in 124 Fed. 451, granting a new trial. The case then went to trial a second time before a jury, and the plaintiffs again recovered a verdict. The defendant now moves to have this second verdict set aside, on the ground that it, also, was against the weight of evidence.

The suit is upon an open policy of marine insurance, upon a cargo, on a voyage from Calais, Me., to Philadelphia. The only defense submitted to the jury was that the vessel was unseaworthy at the time the risk was to commence. At the second trial of the case, more testimony was submitted; but the language of Judge Putnam, in relation to the issues before the jury, and as to the general character of the defense, is true, also, with reference to the case at its second trial. The court granted a new trial for reasons stated at page 454. After referring to the testimony of two men who examined the vessel, the court says:

"What we rest on is the evidence furnished by them of particular facts of a fundamental and serious character, which the plaintiffs made no attempt to contradict by proofs, the force of which, also, they have not undertaken to obviate at bar, or in the brief which has been submitted to us. One of these witnesses testified as follows: 'We bored down through the waterways, striking into the ends of the lower deck beams, and, if I remember aright, into some of the timbers, too; and we couldn't find any sound wood at all—nothing but mud and rotten wood.' The other one testified as follows: 'And we bored down in the waterway till we struck the end of the beams, and we couldn't get any sound wood whatever. It was a kind of mud and dirty wood, that came right up into the barrel of the auger, and stayed there. They bored from the mainmast to the foremast.' We lay aside the characterization of what came up out of the borings, but we are compelled to accept the uncontradicted statements that the vessel was bored through her waterways, through the ends of the beams, and at some points into the timbers from the mainmast to the foremast, and that no sound wood was found. We also observe on the fact that the record is absolutely lacking in evidence of any other borings made either by the plaintiffs or by the defendant, and we cannot reject the well-known consideration that this is the ordinary and most efficient way of determining whether or not a vessel is sound. Notwithstanding the observations we made with reference to the jury, it will be borne in mind that this evidence, as the result of boring the vessel, stands uncontradicted and unexplained; and, whatever may be the condition of her planking, a vessel with a frame such as was exhibited by these borings cannot be regarded as seaworthy. Consequently either the jury failed to properly note this evidence, or to connect it with the definition of 'seaworthiness' as given by us. Public policy

requires that courts shall not encourage the navigation of the ocean by craft in such a condition as this evidence shows this vessel to have been in. Therefore, on the strength of the testimony of these two witnesses, disclosing a fact which speaks for itself, and overlaps all the other facts in the record, and which stands absolutely uncontradicted, either directly, indirectly, or by inference, we are compelled to grant the defendant's motion. Of course, it is to be understood that our decision is based strictly on the case as it now stands, so that on a new trial the proofs which now control us may be directly met or avoided in such manner as to put this particular portion of it beyond the reach of the court on another motion for a new trial, if one is made, precisely as all the rest of it is beyond such control of the present record."

The testimony on which the new trial was granted by Judge Putnam was that of John W. Cann, a surveyor and inspector, and Alexander Fisher, a repairer and builder, of towboats, scows, and yachts. The testimony of these witnesses consisted of depositions, and was the same at the second trial as at the first. As will be seen from the quotation which we have made from the former decision of the court, it consisted of testimony of Cann and Fisher that they bored through the waterways into the ends of the lower deck beams, and into some of the timbers from the mainmast to the foremast, and that no sound wood was found. They also testified to further examinations at the "bottom part of the vessel"; but, confining ourselves only to the testimony commented upon by the court at the former trial, it is sufficient to say that no proofs were submitted at the second trial to contradict or explain that testimony, or in relation to the distinct subject-matter upon which the new trial was granted. Testimony was offered tending to show that the vessel had been new sealed and other repairs had been made below her under deck in 1897, and that there had been repairs from time to time upon her, and that she had been kept in repair. But all this testimony appears to relate to her condition before the examination made by Cann and Fisher; and no proofs are presented of any boring into her timbers below her lower deck or near the places testified to by these gentlemen; so that it still remains true that the testimony which is commented on by the court in the first application for a new trial is the only testimony relating distinctly and expressly to the condition of the vessel's lower beams and to the lower part of her frame. The decision of the court in the former trial is the decision of a judge not only of great learning in the law, but of great experience in all matters relating to vessels and maritime affairs. He found distinctly that "a vessel with a frame such as exhibited by these borings cannot be regarded as seaworthy." He laid great stress upon the condition of the lower part of the vessel, as shown by the testimony upon which he based his decision.

After a careful examination of all the testimony presented to the jury at the second trial, we are compelled to decide that the record does not show anything relating to the subject-matter on which the new trial was granted to materially change the facts which were before the court at the former hearing, and which led the court to grant a new trial. We must come to the same conclusion to which the court then came. Judge Putnam in his opinion gives a summary of the rulings of the court in this circuit with reference to new trials. From that summary, and from the current of decisions in the federal

courts, it is clear that a court, in order to set aside a verdict—especially a second verdict—should be without any doubt as to what it ought to do in the premises.

In Wright v. Southern Express Co., 80 Fed., at page 91, Judge Hammond, speaking for the Circuit Court, said:

"Notwithstanding there have been two verdicts in this case in favor of the plaintiff, the court is constrainedly of the opinion that the jury may be entirely wrong in its finding. * * * Unquestionably this case is not one for the direction of a verdict, but, on the contrary, is distinctly a case which ought to be submitted to a jury. But it does not follow, because it ought to be submitted to a jury, that the court should let the verdict stand, nor even two verdicts, possibly not three or more, if at each succeeding trial the proof should be precisely the same, and no stronger for the plaintiff at the last than the first trial."

In Felton v. Spiro, 78 Fed., at page 582, 24 C. C. A. 327, Judge Taft, speaking for the Circuit Court of Appeals, said:

"We come, then, to the question whether a federal court in which a jury has rendered a verdict has the power to set aside a verdict, when, in its opinion, it is contrary to the decided or overwhelming weight of the evidence, and, in the exercise of a legal discretion, may properly do so. Upon this point we have not the slightest doubt. In an elaborate and most carefully considered opinion, Judge Lurton, speaking for the court, points out the distinction between that insufficiency in law of evidence to support an issue which will justify a peremptory instruction by the court, and that insufficiency in fact of evidence, when weighed with opposing evidence, which, while not permitting a peremptory instruction, will justify a court in setting aside a verdict based on it, and sending the parties to another trial before another jury."

He then quotes the opinion of Judge Lurton found in Mt. Adams Co. v. Lowery, 74 Fed. 477, 20 C. C. A. 609:

"We do not think, therefore, that it is a proper test of whether the court should direct a verdict that the court, on weighing the evidence, would, upon motion, grant a new trial. A judge might, under some circumstances, grant one new trial and refuse a second, or grant a second and refuse a third. In passing on such motions, he is necessarily required to weigh the evidence, that he may determine whether the verdict was one which might reasonably have been reached. But in passing upon a motion to direct a verdict, his functions are altogether different. In the latter case we think he cannot properly undertake to weigh the evidence. His duty is to take that view of the evidence most favorable to the party against whom it is moved to direct a verdict, and from that evidence, and the inferences reasonably and justifiably to be drawn therefrom, determine whether or not, under the law, a verdict might be found for the party having the onus."

In the case before us there was much more evidence submitted at the second trial than at the first. There was much testimony of examinations of the ship and of borings, but at different parts of the ship from that covered by the testimony of Cann and Fisher, upon which the new trial was ordered. The new testimony related to examinations and borings, but not to the condition of the ship below the lower deck, in her lower beams and lower framework. The proofs which seemed vital to Judge Putnam have not been met by any testimony offered at the second trial.

The verdict is set aside. A new trial is ordered.

In re GEISER.

In re McGRATH.

(District Court, D. Montana. April 1, 1904.)

1. BANKRUPTCY—CONSTABLES—LEVY—SURPLUS—PAYMENT.

A constable, after having sold a debtor's property on execution, returned the execution as satisfied, and alleged that he had returned the surplus to the purchaser at the sale. The debtor having become bankrupt, his trustee demanded such surplus. The constable, on being cited to show cause why he should not pay the money, testified that he had never received the same. *Held*, that if he sold the property on credit, or failed to collect the amount bid, he was prima facie liable for the surplus to the execution debtor, and was therefore properly adjudged to pay the same to the trustee.

In Bankruptcy.

Sanders & Sanders, for Drake, trustee.
Davies & Haskins, for McGrath.

KNOWLES, District Judge. In this case it appears that there was a suit brought in the justice's court of Silver Bow township, Silver Bow county, Mont., before John Doran, a justice of the peace, by W. M. Montgomery & Co., against said George F. Geiser. The complaint and an affidavit and undertaking in attachment were filed August 27, 1903, and the summons and writ were duly issued and placed in the hands of John McGrath, constable, for service, and he executed the writ of attachment by levying the same, and taking into his possession certain personal property belonging to the said defendant, George F. Geiser, consisting of fixtures, tools, and appliances used by said defendant in connection with a butcher shop and business, and also upon some perishable goods, consisting of fresh and salt meats, fish, etc. During the pendency of this suit and before a judgment was entered therein, said McGrath, as constable, sold certain of the property as perishable, and realized $67.50 from the sale thereof. Out of the sum realized, he paid $8 as compensation to a keeper of the property, and the balance, $59.50, he paid over to Justice Doran, to await the final disposition of the suit. On September 2, 1903, a judgment was made, given, and entered in favor of said W. M. Montgomery & Co., plaintiffs in said suit, and against said George F. Geiser, defendant, for the sum of $197.49 damages and costs, and on September 2, 1903, an execution was duly issued upon said judgment and delivered to the said John McGrath, constable, and under it said McGrath sold the remaining personal property of the defendant at public sale on September 8, 1903, to one A. P. Henningsen, for $400, who was the highest and best bidder therefor, and said McGrath delivered said property to said Henningsen. Pending the suit one Charles Hartneck filed his labor or wage claim under the statute, which claim was allowed in the sum of $62.50. Out of the moneys realized from said sale under said execution, the said McGrath paid in the sum of $209.19, the amount of said judgment, costs, and interest, and retained $19.64 for his expenses and costs, and paid the labor claim of said Hartneck,

in the sum of $62.50, and returned said execution as satisfied. The total amount of the judgment, costs, interest, accruing costs, and of said labor claim was $291.33. This would leave a balance in his hands of $176.17, and this amount, in his return made by said McGrath, he alleges, was paid back to said A. P. Henningsen. In the meantime, and on the 23d day of September, 1903, upon a petition in involuntary bankruptcy proceedings filed in this court by certain of his creditors, said George F. Geiser was duly adjudged a bankrupt, and Frederick H. Drake was on the 12th day of October, 1903, duly appointed as the trustee of the estate of said bankrupt, Geiser; and, upon qualifying as such trustee, said Drake made demand upon said McGrath for the payment to him of the said sum of $176.17, as a part of the estate of said bankrupt. Said McGrath failed, neglected, or refused to pay said sum, or any part thereof, to said Drake, who made complaint to Thompson Campbell, one of the referees in bankruptcy of this court, to whom the said bankruptcy matter had been referred; and thereupon said Campbell issued an order to show cause, requiring said McGrath to appear before him and show cause why he should not pay over and surrender to said Drake the balance of $176.17 in his hands as the proceeds of his execution sales. This order was duly served upon said McGrath, and he appeared in person and by attorney before the referee and answered, and asked to have the proceedings on said order continued, in order that he might make amendment of his return on said execution. As to what matters he expected to amend, said return does not appear. He seems to have had plenty of time in which to amend his return, but no amended return was presented to the court. Upon the hearing had before the referee, said McGrath was ordered to pay said balance to the trustee. He again failed to pay over this balance, and thereupon he was adjudged to be in contempt, and the matter was certified to this court by said referee. The evidence of the defendant shows that he received the sum of $67.50 specified above, and that he sold the remainder of the bankrupt's property for $400. He denies, however, that he received this $400, or any part thereof. It also appears that he delivered the said property so sold by him to said Henningsen.

A sheriff who fails to collect the amount of a bid made at an execution sale is prima facie liable to the execution debtor as for a neglect of duty. Murfree on Sheriffs, § 999a. If an officer sells the property on credit, without authority, he and his sureties are liable for all loss. Murfree, supra, § 993a. To the same effect is Maddox v. Rader, 9 Mont. 126, 22 Pac. 386. It appears from these authorities that if the defendant in this case sold the property to Henningsen on credit, or in any other way than for cash, he made himself liable personally for the amount of the bid made by said Henningsen. In fact, he would be estopped, under such circumstances, to claim that he never received any money for the property. The effect of this would be to place the defendant in the same position in which he is found by his return upon the execution, and I am not called upon to determine whether or not defendant, as between himself and the trustee of the bankrupt's estate, was not absolutely bound by his return. In law, the defendant would be found

to have $176.17 of money in his possession, which, under the statute law, he is required to account for. He did not pay the same over to the bankrupt, Geiser, nor to the justice's court in which the aforesaid action was pending, and he has not paid the same over to the trustee of the bankrupt's estate. Having been ordered to pay said sum to the trustee by Thompson Campbell, Esq., one of the referees in bankruptcy of this court, and, having failed to do so, adjudged in contempt, and the matter certified up to this court. The defendant now urges that he should not be punished for contempt, because he is a poor man, with a large family, and unable to comply with the orders of the court. The defendant's affidavit upon this point is unsatisfactory. In his return to the execution he stated that he had paid the money over to Henningsen. In his evidence before the referee he swears that he never received the money. If he paid this $176.17 over to Henningsen without any order of court, or if he failed to collect this sum from Henningsen at the sale made to him, he has voluntarily placed himself in a position where he cannot comply with the orders of the court, and thus becomes liable to its command to perform his duty. See Rapalje on Contempts, § 17; Galland v. Galland, 44 Cal. 475, 13 Am. Rep. 167; People v. Salomon, 54 Ill. 39. It does not appear that the defendant cannot collect this money from Henningsen, and there is no reason why he should not make some endeavor to do so. Henningsen has no right to this money, according to his statement. I think, therefore, the judgment and order of the referee that the defendant be found guilty of contempt must be affirmed. If at any time it should satisfactorily appear that the defendant is absolutely unable to pay over this money, the court will consider it.

It is therefore ordered that the defendant, John McGrath, be, and he is hereby, required to pay the said balance of $176.17 to Frederick H. Drake, the trustee of the estate of George F. Geiser, bankrupt, within five days, or if he shall fail within said time to make such payment, that said John McGrath be committed to the custody of the United States marshal for the District of Montana, and be imprisoned until he shall fully comply with this order; and that said McGrath pay the costs of this proceeding.

Ex parte HOUGHTON.

(Circuit Court, D. Maine. April 9, 1904.)

No. 162.

1. ARMY AND NAVY—ENLISTMENT OF MINORS—NECESSITY OF PARENTS' CONSENT.

   Under the laws of the United States a minor cannot lawfully be enlisted in any branch of the military or naval service without the consent of his parents, and one who has so enlisted by misrepresenting his age will be discharged by writ of habeas corpus at suit of his parents.

2. SAME—DISCHARGE ON HABEAS CORPUS—JURISDICTION OF CIVIL COURT FIRST ATTACHING.

   Where a petition for habeas corpus for the discharge of a minor from the military service on the ground that he enlisted without the con-

sent of his parents has been served, the court is not deprived of jurisdiction to discharge the minor by his subsequent arrest by the military authorities on the charge of fraudulent enlistment.

Habeas Corpus.

Frank D. Marshall, John C. Stewart, and J. M. Maloney, for petitioner.

Isaac W. Dwyer, U. S. Dist. Atty.

HALE, District Judge. This is a petition of Patrick Houghton for habeas corpus. It is heard on an agreed statement of facts, as follows:

"It is agreed on behalf of the petitioner and of the United States that William Houghton was enlisted at Kittery, Maine, June 6, 1903, by Captain R. N. Lane, for four years; that at the date of said enlistment he represented his age to be twenty-one years and six months; that he has been in the service of the United States from said 6th day of June, and is now in said service; that he is the son of Patrick Houghton and Mary T. Houghton, citizens of Massachusetts; that said William Houghton was born in Boston, August 10, 1884; that he enlisted without the consent of his parents or guardian; that said William Houghton is now under arrest pending charges of fraudulent enlistment, and that said arrest was made and charges preferred since the service of the petition for habeas corpus in these proceedings."

The statutes of the United States make it clear that it is the will of Congress that minors shall not be enlisted in any branch of the service without the consent of their parents. In the case of McNulty and Clement, 2 Low. 270, Fed. Cas. No. 8,917, Judge Lowell, in this circuit, held that under the laws of the United States a minor cannot be lawfully enlisted in the marine corps without the consent of his parents. Under section 1117, Rev. St. U. S. [U. S. Comp. St. 1901, p. 813], Congress requires the written consent of parents for the enlistment of minors in the military service. Under the statutes referred to in Judge Lowell's decision, just cited, Congress has made clear its intention that the consent of the parents is necessary for the enlistment of minors in any branch of the United States military or naval service. The decision of Judge Lowell, which we have quoted, applies distinctly to the enlistment of minors in the marine corps. It appears by the agreed statement in the case at bar that the minor, William Houghton, is now under arrest pending charges of fraudulent enlistment, and that said arrest was made and charges preferred since the service of the petition for habeas corpus in these proceedings. This arrest refers clearly to an arrest by the military authorities, but it appears affirmatively that such arrest was made and the charge preferred since the jurisdiction of the United States attached in these proceedings. The rule of the federal courts in this circuit touching this matter of jurisdiction is settled by Judge Putnam in Re Carver (C. C.) 103 Fed. 624, where, at page 626, Judge Putnam says:

"True it is that it seems to be well settled by the decisions, and it is also consonant with the rules of law framed to prevent unseemly conflicts between different judicial tribunals, that, ordinarily, where charges have been preferred, and the court-martial having jurisdiction has been ordered, and the person charged has been held to answer, the jurisdiction which attaches in

favor of the court-martial will exclude that of a civil tribunal in which proceedings for a writ of habeas corpus may afterwards be commenced. Under such circumstances the civil tribunal must wait until the court-martial has concluded its proceedings, and even until the sentence, if any, imposed by the court-martial, has been worked out."

But in the case at bar the military authorities did not take any action until the jurisdiction of this court under these proceedings had attached. In the case of George F. Harris, petitioner for writ of habeas corpus, recently decided in the Supreme Court of the District of Columbia, the court found that when Harris, the minor, enlisted in the marine corps of the United States, he was a minor 19 years old, and was living at home with his father; that the arrest by the military authorities did not occur until after the service of the writ of habeas corpus had been made. The court discharged the minor. In the case before us it is clearly the duty of this court to exercise its jurisdiction and to grant the prayer of the petitioner.

The decree must be: Prayer of petitioner granted; writ of habeas corpus to issue, returnable forthwith.

UNITED STATES v. CLARK et al.

(Circuit Court, D. Montana. April 1, 1904.)

No. 209.

1. LANDS—ENTRY—FRAUD—PLEADING.
   A bill by the United States alleged that public land in controversy had been entered by certain persons, acting in collusion with defendant C., for the purpose of obtaining title to the land and conveying the same to defendants; that the entries were made by fraud and misrepresentation, to which C. was a party; that C. acted for himself and the other defendant, who well knew, at the time the land was conveyed to him by C., all the facts constituting the fraud, and that the land had been entered in violation of the laws of Congress, and that the entrymen had entered the same for hire, on speculation, for the purpose of enabling defendants to obtain title in violation of the laws of Congress. *Held*, that such bill stated a sufficient cause of action against both defendants.

2. SAME—PARTIES.
   The entrymen by whom the land had been conveyed to defendants before patents issued were not necessary parties to the bill.

3. SAME—MULTIFARIOUSNESS.
   Where several entrymen on public land conspired with defendant C. to make their entries for the benefit of C. and his codefendant, to whom the land was subsequently conveyed, a bill to set aside such entries as fraudulent was not multifarious in that each of such entries was a separate transaction.

See 125 Fed. 774.

P. C. Knox, Atty. Gen., M. C. Burch and F. A. Maynard, Special Asst. U. S. Attys., and Carl Rasch, U. S. Atty.

W. M. Bickford and W. A. Clark, Jr., for defendants.

KNOWLES, District Judge. The United States, as complainant, sues the defendants, William A. Clark and Robert M. Cobban, in

this action, to declare void, and to declare canceled and held for naught, certain patents for certain lands situated in the District of Montana, and purchased by some 50 persons from the United States under the so-called "Timber and Stone Acts"; and also to compel the said Clark to release and convey his purchased title, and all interest claimed by him in and to said lands, to the United States.

To the bill of complaint filed herein the said defendants have interposed separate demurrers, the grounds thereof being substantially the same, and are: (1) That said bill of complaint does not state facts sufficient to constitute a cause of action, either at law or in equity in favor of the complainant and against the defendants. (2) That there is a want of proper parties defendant to said bill, in this: That the said bill charges a joint conspiracy between several different parties, and alleges an agreement and contract with certain parties who made entry or entries under a law of the United States approved June 3, 1878, 20 Stat. 88, whereby the said parties agreed to sell and transfer their lands before making entries of said lands under said law. That Susan Alford and 49 others are named as parties who entered said lands under said law, and that each committed a fraud against the United States in the making of their said entries. (3) That the bill is multifarious and improperly confounds distinct demands, in that each of the entry men and women mentioned in said bill of complaint made a separate and distinct entry of a particular tract of land, which is set forth and described in said bill, and that each of the said entries is based upon a separate and distinct set of facts, and has no relation to any other entry mentioned in said bill.

Sufficient facts are set forth in the bill to show that the several parcels of land entered by the entry men and women named in the bill were procured from the United States by fraud and misrepresentation, and that the said Cobban was a party to these frauds; and it is also stated that the said Cobban acted for himself, and for the use and benefit of Clark. It is also charged that the defendant Clark well knew, in a general way, if not in detail, at the time the said conveyances to all of said lands were made to him by the said Cobban, the facts constituting the frauds alleged to have been committed by the said entry men and women and said Cobban, and well knew, and had good cause to know, that the said lands had been entered in violation of the laws of Congress under which the said entries were made, and that the said several parties had entered the same for hire and upon speculation, and for the purpose of enabling him, the said defendant Clark, through the said Cobban, to procure title from the United States to the same by evasion and violation of said laws of Congress. Under these allegations it would appear that there is a good cause of action against both Clark and Cobban. Cobban, it appears from the bill, obtained a conveyance of the said lands from the entry men and women, and conveyed the same to Clark, and it is claimed they were acting together in the procuring of title to these lands. Considering these allegations, I hold that the bill does state facts sufficient to constitute a cause of action.

Under the second ground, that there is a want of proper parties defendant to the bill, the claim is made that all the persons who made the entries named in the bill should have been joined with Clark and Cobban as defendants. The bill shows that patents were issued to these parties, that before patents issued they conveyed the lands to Cobban, and that Cobban subsequently conveyed the same to Clark. Under and by virtue of the statute law of Montana, the title subsequently obtained by these parties inured to the benefit of Clark. A fraudulent grantor of land, as he has no further interest therein, is not deemed a necessary party to a suit brought to set aside the conveyance. 1 Beach, Mod. Eq. Pr. § 72; Dunn v. Wolf et al. (Iowa) 47 N. W. 887. In the case of Northern Pacific R. R. Co. v. Kindred (C. C.) 14 Fed. 77, an action was brought to set aside certain deeds fraudulently obtained for certain lands of the Northern Pacific Railroad Company. In that case it was insisted that the parties who first received a conveyance of these lands, and afterwards conveyed them to Kindred, should have been made parties. In considering this matter, Judge McCrary said:

"* * * The only necessary parties are the persons who have some present interest in the controversy, and against whom the complainant has a right to decree for relief. The persons who are alleged to have been used as the instruments of the frauds, and who have, in pursuance of the conspiracy, conveyed to others the title which was once vested in them, are not necessary parties."

See, also, Cherokee Nation v. Hitchcock, 187 U. S. 294, 23 Sup. Ct. 115, 47 L. Ed. 183.

The next point presented is that the bill is multifarious. The claim is made that each one of the entries made by each one of the parties making the same is a separate and distinct act, based upon a separate and distinct set of facts, and has no relation to the other entry mentioned in said bill. In the case of Hayden v. Thompson, 71 Fed. 60, 17 C. C. A. 592, it was held that, where a bill charged that separate stockholders of an insolvent national bank had received separate dividends, they could be charged in a bill in equity by its receiver with holding the money each had received in trust for the creditors of the bank. In that case each stockholder had received a separate dividend upon a separate amount of stock. That, upon the facts, would seem to be a stronger case in support of the contention of the defendants than the one at bar. The Circuit Court, on the argument on the demurrers, held, in favor of the defendants, to the effect that the bill was multifarious (67 Fed. 273); on appeal, the decision of the court below was reversed. In N. P. R. R. Co. v. Kindred, supra, it was held that, where the bill charged a conspiracy entered into for the purpose of obtaining the complainant's lands for less than their value, through the fraud of its agents, a bill was not multifarious because each particular transaction charged is several in character and distinct from all the others. In the case at bar a conspiracy is also charged. In 1 Beach, Mod. Eq. Pr. § 134, the author says:

"There is no such general principle that distinct matters between the same parties, and who sue or are sued, cannot properly be united in the same bill.

On the contrary, there are several cases in which it has been held that matters of the same nature and between the same parties, although arising out of distinct transactions, may be joined in the same suit."

See, also, Id. § 129.

The suit in this case is against two defendants, while the transactions by which title was obtained from the United States were separate; still the cases are all much alike; the grounds for relief in each case are the same, and the uniting of all of them in one action prevents a multiplicity of suits, and I can see no good reason for requiring 50 separate suits when one will accomplish the same purpose fully. As to multifariousness it is said: "It is almost universally declared that every case must be governed by its own circumstances, and the question is left to the discretion of the court." Section 115, Beach, supra.

For the foregoing reasons, the defendants' demurrers must be, and the same are hereby, overruled.

McFARLAND v. STATE SAVINGS BANK et al.

(Circuit Court, D. Montana. April 1, 1904.)

No. 225.

1. DECREE PRO CONFESSO—VACATION.

Where a bill was taken pro confesso on demurrers being treated as insufficient for failure of the parties to make the affidavit required by equity rule 31, but no final decree could have been entered in favor of the complainants until one of the defendants who had not been served had been brought in, and defendants' failure to have the demurrer verified was the result of a mistake caused by lack of knowledge as to the proper mode of procedure in equity, defendants, on presenting answers on the merits, should be entitled to have the decree pro confesso vacated on payment of the costs of the suit to the date of their application.

Alex Mackel, for plaintiff.

McBride & McBride, for defendants.

KNOWLES, District Judge. The complainant, G. O. McFarland, filed his bill of complaint in this court on October 12, 1903. All of the defendants named in the bill, except Lulu F. Largey, were duly served with process, and appeared in the case, and filed demurrers to the bill, alleging several grounds of objection to the same. The solicitors for the appearing defendants certified that, in their opinion, their demurrers so interposed were well founded in point of law; but no affidavit was made by any of the defendants that said demurrers were not interposed for delay, as required under the provisions of equity rule 31 of the Supreme Court.

Complainant caused these demurrers to be set down for a hearing. Subsequently, however, but during the present term of court, he entered an order for taking the bill pro confesso. This action on the part of complainant treated the demurrers as of no force, on account of the failure of the parties to make the affidavit required by equity rule 31, supra. The appearing defendants now ask to be let in to file answers to the merits of the suit.

It is evident from an inspection of the bill that no decree fully determining all the rights of all the parties to this controversy can be had until Lulu F. Largey, one of the defendants herein, has been served with process. Under these circumstances, the complainant, at present, can have no final decree as against these appearing defendants.

As to the 1,000 shares of stock which it is charged should be held in trust for complainant, it does not appear as to who holds the same, be it Lulu F. Largey, Thomas M. Hodgens, or the State Savings Bank. It appears that this stock was assigned to Lulu F. Largey, and that she was to use the same as collateral security in obtaining a loan of money from the State Savings Bank. Whether it was so used is not disclosed by any allegations contained in the bill. Whether the State Savings Bank now holds said stock as a pledgee is also not disclosed by the bill.

There are certain interrogatories propounded in the bill to be answered by the defendants, but, in the matter of presenting these interrogatories, complainant fails to conform to the requirements of equity rule 41. No memorandum is found at the foot of the bill, requiring each of the defendants to answer any specific interrogatories. There are a good many other defects in the bill that might be noticed, which might cause some confusion in making answer to the same.

The defendants claim to have been surprised and to have made a mistake on account of rule 11 of this court, which requires a demurrer to be certified to by counsel, as in equity rule 31, but does not require an affidavit of good faith by one of the parties interposing the demurrer. This rule is placed under the head of common-law rules, and should not have been confounded by counsel with the rules governing equity proceedings. On account of the confusion made by this rule, it has been abrogated by the Circuit Court several years ago. Still it has been quite a common mistake on the part of attorneys who have been educated under the code system of pleading to fall into this error. In 5 Ency. Pl. & Pr. 1014, it is said: "Mere orders pro confesso are opened, much as a matter of course, upon a showing of surprise and a meritorious defense." Again, Id. p. 1015: "A decree pro confesso may be opened, and the defendant let in to answer, where his failure to appear or answer was due to the negligence of his solicitor." Whilst I cannot say in this case that there was any negligence on the part of the solicitors for these defendants, still there was a mistake, by reason of a lack of knowledge as to the proper mode of procedure on the equity side of this court, occasioned, perhaps, by the aforesaid common-law rule 11 of this court. The defendants have presented separate answers on the merits, and I think the case ought to be heard on the merits. It is a case involving a very considerable amount, and, under the circumstances presented, calls for some leniency and liberality on the part of the court. Leave is therefore given to the defendants to file their answers, upon the condition, however, that they pay the full amount of the costs thus far incurred in this suit.

MIDVALE STEEL CO. v. CAMDEN IRONWORKS.

(Circuit Court, E. D. Pennsylvania. March 30, 1904.)

No. 53.

1. PLEADING—SUFFICIENCY OF DECLARATION—MOTION FOR JUDGMENT.
A plaintiff is not entitled to judgment on the pleadings for the price of articles which plaintiff was to manufacture and deliver to defendant, where it appears from the face of the letters alleged to constitute the contract, which are set out, that the price was not to be due until a certain time after the articles were delivered, and it does not appear that they ever were so delivered.

On Rule for Judgment for Want of a Sufficient Affidavit of Defense.

Thomas Leaming, for plaintiff.
H. Gordon McCouch and R. C. Dale, for defendant.

J. B. McPHERSON, District Judge. Upon this motion I cannot take into account the correspondence that passed between the parties a year and a half after the contract was made. It may be competent evidence on the trial for some purpose, but it certainly does not form part of the contract itself, and is not properly on the record. Confining myself, therefore, to the other writings that are attached to the plaintiff's statement, I find an apparently unqualified agreement that the price of the forgings was not to be due until 90 days after they were delivered f. o. b. at Cincinnati, Ohio. As it is undisputed that no such delivery has been made, the plaintiff's suit seems, therefore, to be premature. Of course, a different situation may develop on the trial of the case. I am speaking now only of the effect of the two letters dated January 27 and February 20, 1902, and of the specifications dated January 25, 1902. The letters are as follows:

"Philadelphia, January 27, 1902.

"The Camden Ironworks, Camden, N. J.—Gentlemen: Referring to your valued favor of the 3rd instant, in which you enclose blue prints of shafts and connecting rods, your Nos. 8314, 8320 and 8301, which are duplicates of drawings furnished us some time ago, also a duplicate copy of the specifications for shafts and rods, all as requested by us of your Mr. Lewis. We have gone carefully over the verbal quotation made by our Mr. Bowen, and we now submit the following prices: 4 Crank shafts, finished complete, as per B/P C–8301, 13¾c. per lb. 4 1. P., 4 H. P. and 4 L. P. connecting rods; finished complete as per B/Ps # 8320 and # 8314, 23⅞c. per lb.

4	Connecting rods,	finished	complete,	as	per	B/P	C–8297	10c. per lb.
24	Piston rods,	"	"	"	"	"	8334	
48	Distance rods,	"	"	"	"	"	8334	
12	Couplings,	"	"	"	"	"	8334	
4	Shafts 'A',	"	"	"	"	"	44/80	
4	" 'B',	"	"	"	"	"	44/80	
12	Main crosshead pins,	"	"	"	"	"	44/81	
4	Air pump crosshead pins,	"	"	"	"	"	44/81	

"The above prices are for forgings delivered Cincinnati, O.
"Hoping they will warrant you placing your order with us, we are,
"Very truly yours,
The Midvale Steel Co.
by Henry D. Booth.
"Terms: Cash 90 days.
"Camden Iron Works,
H. G. H. Jarr."
"Accepted subject to specifications accompanying this proposal."

"Order No. 3764. Camden, N. J. 2/20 1902

"Midvale Steel Co., Nicetown, Pa.: Please send the following with a Bill, numbered as above: 4-Crank shafts finished and fitted up complete as per our print C24-8301 herewith, price $.13¾ per lb. F. O. B. Cincinnati, Ohio. Terms cash 90 days after delivery. As per your quotation of January 27th, 1902. Patterns when used to be the property of C. I. W. and delivered Camden Ironworks, Camden, N. J.

"All the above to be strictly in accordance to specifications. For delivery see specifications. For Camden Ironworks

"Hamlin."

The relevant parts of the specifications are as follows:

"The whole of the above to be of first-class material and workmanship, and must be to the complete satisfaction of the Camden Ironworks and the engineer of the City of Cincinnati or his representatives. * * * All the above to be delivered f. o. b. cars at California Pumping Station, City of Cincinnati, Ohio."

"Accepted accompanying proposal to the Camden Ironworks dated January 27th, 1902, and accepted by Camden Ironworks.

"Accepted for the Midvale Steel Company,

"by Henry D. Booth

"Camden Ironworks,

"H. G. H. Jarr."

The rule for judgment for want of a sufficient affidavit of defense is discharged.

In re LINCOLN.

(District Court, N. D. California. February 8, 1904.)

No. 13,216.

1. INDIANS—ALLOTTED LANDS—CRIMES—STATE COURT—JURISDICTION.

Where land was allotted to an Indian under Act Cong. Oct. 1, 1890 (26 Stat. 658), providing for the reduction of the Round Valley Indian Reservation, and authorizing the agricultural lands therein to be surveyed and allotted to Indians residing thereon in severalty, such allotment did not operate to exclude the land from the reservation so as to confer jurisdiction on the courts of the state in which it was located to prosecute the allottee for a violation of the state's game laws committed on the land allotted to him.

Marshall B. Woodworth, U. S. Atty., for petitioner.

Pillsbury, Madison & Sutro, for respondent.

DE HAVEN, District Judge. The petitioner is an Indian ward of the government residing upon the Round Valley Indian Reservation, situate in the county of Mendocino, in this state. On January 9, 1904, in the justice's court of Round Valley township, county of Mendocino, state of California, he was convicted of the alleged offense of having deer meat in his possession on the 14th day of November, 1903, in said Round Valley township, contrary to the Penal Code of this state. It is conceded that the alleged offense, if any, was committed at the home of the petitioner, on land which has been allotted to him by the government, under the provisions of the act of Congress approved October 1, 1890, entitled "An act to provide for the reduction of the Round Valley Indian Reservation, in the state of California, and for other purposes" (26 Stat. 658), and that such land was within the boundaries of the

Round Valley Indian Reservation as they existed at the date of the passage of said act.

The petitioner is a ward of the government, and the legal title to the land which has been allotted to him is still in the United States, and the act of allotment did not have the effect of excluding such land from the limits of the Round Valley Indian Reservation. Such being the facts, there can be no doubt that the justice's court was without jurisdiction to enter the judgment under which the imprisonment of the prisoner is sought to be justified. In re Blackbird (D. C.) 109 Fed. 139; State v. Campbell et al., 53 Minn. 354, 55 N. W. 553, 21 L. R. A. 169; United States v. Kagama, 118 U. S. 375, 6 Sup. Ct. 1109, 30 L. Ed. 228.

Petitioner discharged.

HORAN v. HUGHES.

(District Court, S. D. New York. May 15, 1903.)

1. CONTRACTS—DEFENSE OF AGENCY.

Defendant, to sustain the defense against his contract with plaintiff that he was acting as agent, must prove that he disclosed the name of his principal. It is not enough that plaintiff supposed he was acting for some one not disclosed.

In Admiralty.

Peter S. Carter, for libelant.

James J. Macklin, for respondent.

HOLT, District Judge. Hughes made the contract with Horan. He is therefore presumably responsible on it. His defense is, in substance, that he was acting as agent for a principal. To maintain such a defense, he must prove that he disclosed the name of his principal. It is not sufficient that he was acting as agent, or that the other party to the contract supposed he was acting as agent, if he did not know who the principal was. De Remer v. Brown, 165 N. Y. 419, 59 N. E. 129; Tew v. Wolfsohn (Court of Appeals) 66 N. E. 934. The evidence in this case, in my opinion, preponderates that Hughes either chartered Horan's boat himself, or that, if Horan supposed Hughes was acting as agent, he did not know who Hughes' principal was.

There should be a decree for the libelant for the amount demanded in the libel, with costs.

¶ 1. See Principal and Agent, vol. 40, Cent. Dig. §§ 501, 522.

UNITED STATES v. ORIENTAL AMERICAN CO.

(Circuit Court, D. Oregon. March 5, 1904.)

No. 2,784.

1. CUSTOMS DUTIES—CLASSIFICATION—REFINED COCOANUT OIL—COCOA-BUTTERINE.

As to certain cocoanut oil of the melting point of 70° to 75° F., which has been purified and rendered suitable for culinary purposes and the manufacture of high-grade soaps, and which is not susceptible of the same uses as cocoa-butter, *held*, that the article is not subject to duty as "cocoa-butterine," under paragraph 282, Tariff Act July 24, 1897, c. 11, § 1, Schedule G, 30 Stat. 172 [U. S. Comp. St. 1901, p. 1652], but is free of duty under paragraph 626 of said act (section 2, Free List, 30 Stat. 199 [U. S. Comp. St. 1901, p. 1685]) as cocoanut oil.

2. SAME—COCOA-BUTTERINE.

Cocoa-butterine, as provided for in paragraph 282, Tariff Act July 24, 1897, c. 11, § 1, Schedule G, 30 Stat. 172 [U. S. Comp. St. 1901, p. 1652], consists of products made in imitation of cocoa-butter, and adapted for use as a substitute therefor.

Edwin Mays, for the Government.
P. L. Willis and Guy G. Willis, for defendant.

BELLINGER, District Judge. The tariff act provides that cocoanut oil, with other enumerated commodities, "when imported shall be exempt from duty." Act July 24, 1897, c. 11, § 2, Free List, par. 626, 30 Stat. 199 [U. S. Comp. St. 1901, p. 1685]. The defendant imported 46,912 pounds of refined cocoanut oil, which was so classified by the customs officers at this port, but which, after analysis by the United States chemist at New York, was reclassified by them, under instructions from the Secretary of the Treasury to the Board of General Appraisers, as "cocoa-butter or cocoa-butterine." Paragraph 282, Tariff Act July 24, 1897, c. 11, § 1, Schedule G, 30 Stat. 172 [U. S. Comp. St. 1901, p. 1652]. When so reclassified, the merchandise imported became liable to a duty aggregating $1,641.92, for the recovery of which this action is brought.

Cocoa-butter is produced from the beans of the cacao or chocolate tree; the word "cocoa," used in this connection, being a corruption of the word "cacao." The importation in question is made from the fleshy part of the cocoanut, a product of the cocoa palm. All products made in imitation of cacao or cocoa-butter, and adapted to its use, are classified as cocoa-butterine, and are dutiable.

It is conceded by the government that the importation in question is refined cocoanut oil. The reason given for classifying it otherwise is that it is in fact cocoanut oil deodorized and prepared for edible purposes, that the refining process has rendered it agreeable to the taste and edible, and that it is not placed on the market under the name of "cocoanut oil," but under various names indicating a different product and use from cocoanut oil, such as "Mannheim butter," "vegetable butter," etc. Such is the effect of the report of the United States chemist at New York, which has been admitted in evidence on behalf of the government. Two cases are cited in this report in support of the con-

clusion reached. In one of these cases the merchandise in question was invoiced as "nucoa butter," an article used chiefly by confectioners as a substitute for cocoa-butter. It is described as a hard butter, manufactured from cocoanut oil by subjecting the oil to hydraulic pressure until the soft oils are expressed from it, when the hard oil remaining is refined by careful washing with steam, according to a patent process. The extra-refined oil resulting is then colored with yellow coloring matter, presumably to give it a resemblance to cocoa-butter. The melting point of this product is 87° F. It is represented that it is "as good and genuine an article for chocolate thinning as cocoa-butter itself"; that it is successfully used instead of cream in the manufacture of caramels, and renders wax and wrappers unnecessary. The Board of United States General Appraisers found that this manufacture was not the cocoanut oil of commerce, but a product of that oil, and dutiable, and this decision was affirmed in the Circuit Court of Appeals for the Seventh Circuit. Apgar v. United States, 78 Fed. 332, 24 C. C. A. 113. In the other case the article imported was a product of cocoanut oil obtained by "eliminating the softer oils and the free fatty acids, thus raising the melting point and removing the rancidity found in the cocoanut oil of commerce." The Board of General Appraisers held that this product had been advanced beyond the condition of an oil, and was a substitute for cocoa-butter. Decision of General Appraisers, In re Wood, G. A. 5,353 (T. D. 24,495). A sample of the merchandise which was the subject of this decision (No. 5,353) was procured by the attorney for the United States, and is made an exhibit in this case, together with a sample of unrefined cocoanut oil, and one of the merchandise which is the subject of this action. These three samples are marked as Exhibits 1, 2, and 3, respectively. They were marked by the examining chemist as 2,661, 2,662, and 2,663, respectively, and the references to them in the testimony are by these numbers. Prof. Knisely, chemist at the State Agricultural College in this state, at the instance of the attorney for the United States, made an analysis of these three products in order to determine by comparison whether Exhibit No. 3 (Chemist's No. 2,663), the merchandise imported, has been by process of manufacture advanced beyond the condition of an oil, so as to constitute it a cocoa-butterine, under the decisions of the Board of General Appraisers in the cases referred to. Tried by all of these tests, some 12 in number, no appreciable deviation was found in the imported merchandise from the unrefined oil. The two articles differed equally in character from Exhibit No. 1 (Chemist's No. 2,661), the article held to be a cocoa-butterine in the later of the two cases upon which the report of the chemist at New York is based.

Mr. Loebell, chemist and manager for the oil mills at Singapore, where the importation was refined, testifies as a witness in defendant's behalf that his company manufactures three classes of cocoanut oil, designated as No. 1, No. 2, and No. 3. The last is an inferior grade of oil, and is chiefly used in the country where manufactured for lighting purposes. None of it is exported. No. 1 is white, free from rancidity, smell, and taste, and is used for culinary purposes and for making high-grade soap. No. 2 is used for culinary purposes by the Chinese and for soap-making. There is only slight variation in the melting

point of these three oils, such as will be found in all cocoanut oils—the melting point being from 70° to 75° F., while the melting point of cocoa-butter is 85° to 95°. This witness testifies that the No. 1 oil—the oil involved in this action—is not produced by the elimination of the softer oils, as was the case with the manufacture involved in the cases cited; that this oil is "the entire cocoanut oil in the same state as it is contained in the fresh cocoanut, without any of the lower or higher melting parts having been removed"; that cocoa-butter is made from the bean of the cacao or chocolate tree, by heating it up between 60 and 80 degrees centigrade, and pressing it under hydraulic pressure, thus separating the fat, which comprises 40 to 45 per cent. of the whole, from the nonfatty part. The remaining dry substance is ground up and sold as cocoa. This witness further testifies that he has made experiments to determine whether the imported product could be adapted to the purposes for which cocoa-butter is used, by trying to raise its melting point far enough (some 15° F.) to make it a suitable substitute for such butter; that this can only be done by adding certain higher melting substances to it, or removing some of the lower melting parts from it; that neither of these methods is practicable in Singapore, since, owing to the high temperature of that climate, the employment of a refrigerating plant would be necessary, while it can be done in other countries at ordinary temperature at a considerably less expense. The witness explained the process of separating the high and low melting parts of the fats included in the cocoanut oil. He exhibited a sample of Cochin oil, a kind of cocoanut oil that comes from Cochin, and that comes in free of duty. He testifies that this is exactly the same thing as the merchandise imported by the defendant, with the exception of having a little more free fatty acids.

The elimination of free fatty acids and the softer oils from the cocoanut oil of commerce adapts it for use as a substitute for cocoa-butter. This has been decided. No board or court, so far as I am advised, has gone the length of holding that removal of the free fatty acids without raising the melting point of the oil adapts it for use as such substitute. It renders it edible and adapts it to general culinary use. But edible oils are not necessarily butter, or imitations of it; nor is rancidity, which is a manifestation of free fatty acids, a characteristic of cocoanut oil. The oil made from the fresh nut is free from it, sweet and edible. The so-called cocoanut oil of commerce contains it in varying degrees, depending on the condition as to cleanness and freshness of the copra, or dried kernel of the nut, from which it is made. The refining process, which constitutes what is called the "manufacture" of the oil, merely removes from it the impurities due to the manner in which the kernel is handled and dried, and to its partial decay. There is no standard of purity by which the cocoanut oil of commerce is known. That oil, for anything that appears to the contrary, may be a pure and edible oil. An edible cocoanut oil is not a butter because it is edible. Other vegetable oils, like olive oil and cotton seed oil, are edible, and, with butter, are used in cooking as substitutes for the fat of swine. The unrefined cocoanut oil is used for culinary purposes by Chinamen in the Straits Settlements. It must be assumed that whether an oil is an oil or a butterine does not depend upon the degree of rancidity

it has, by which its general culinary use is affected. A product, to be dutiable as cocoa-butterine, must be useful as a substitute for cocoa-butter. It must be an artificial substitute for cocoa-butter. Such is the holding of the Board of General Appraisers.

As already appears, cocoa-butter is a product of the bean of the cacao or chocolate tree. The oil from cocoanuts, to be classed as cocoa-butterine, must be an imitation of this cacao or cocoa butter. It must, in other words, be an artificial cocoa-butter. The testimony in the case shows a wide difference between the two articles. One of the witnesses, a dealer who has sold cocoanut oil of the manufacture in controversy for a year and a half, testifies that he never offered it for sale, or knew of any one else offering it, as cocoa-butterine; that it differs in appearance from cocoa-butterine; that there are, of the imported butterines and those manufactured here, some 12 or 15 different cocoa-butterines; that they are all solids, with a melting point of about 90° F., and are usually sold in cakes, wrapped in paper, and packed in cases, while the oil in question melts at about 80° completely and becomes a liquid, and is sold in hermetically sealed packages; that the two products differ in color, in texture, and in the uses to which they are applied; that cocoa-butterine is sold to confectioners and pharmacists as a substitute for cocoa-butter; that in the pharmaceutical trade the cocoa butter and butterines are largely used for suppositories; that they are similar in color, in texture, in the nature of the fracture when broken, and in the degree of melting; that in many cases the odor of the cocoa-butter is attempted to be introduced in the butterines, not always successfully, but that they are put up in the same manner, packed in the same weight of packages, and bear, as nearly as an imitation may bear, all the characteristics of cocoa-butter; that they are readily recognized by every one in the trade; that confectioners refuse to buy the oil in question because its low melting point makes it entirely unsuitable as a substitute for cocoa-butter. The testimony of the confectioners is that the importation in question is not used as a substitute for cocoa-butter; that any sweet, clean fat can be used, to a limited extent, in thinning chocolate; that most fats dissolve at a very low degree, while cocoa-butter, because it melts at a higher degree, is more suitable for thinning chocolate, "so the chocolate won't dissolve and spread"; and that, in the confectioner's business, cocoa-butter is chiefly used for this purpose. Some of these witnesses testified that they had used the cocoanut oil in question, but it was not successful; that it was no more suitable for their use than lard or cotton seed oil. From the testimony in the case it appears that this cocoanut oil is used chiefly for soap-making, and that more than three-fourths of the importation on account of which this action is brought was purchased by one manufacturer for such use.

From these facts, I conclude that the merchandise in question is not an imitation of, nor a substitute for, cocoa-butter, and that it is not dutiable under the tariff act.

GRAHAM v. PLANTERS' COMPRESS CO.

(District Court, S. D. New York. April 14, 1904.)

1. SHIPPING—DEMURRAGE—LIABILITY OF CONSIGNEE.
   Where a consignee is interested in the cargo, and accepts it under a charter party made between the vessel and the consignor which provides for demurrage, he is liable therefor in case of his default.

2. SAME—BILLS OF LADING.
   Where a part of the freight had been paid by the consignor, and the consignee was required by the charter party to pay the balance, a provision in the bill of lading requiring the consignee to pay freight at the rate agreed on, in accordance with the terms of the charter party, referred to freight alone, and did not obligate the consignee to pay demurrage.

3. SAME—FAILURE TO ACCEPT CARGO.
   Where, though a consignee was not liable for demurrage under the bill of lading or charter party, he improperly refused to take part of the cargo within a reasonable time after arrival, he thereby became liable for damages arising from the delay.

Martin A. Ryan, for libellant.
Simpson, Thacher, Barnum & Bartlett and Graham Sumner, for respondent.

ADAMS, District Judge. This action was brought by Stephen Graham, as owner of the boat Six Brothers, against the Planters' Compress Company, to recover a claim for freight, with demurrage and other charges, on a quantity of hay transported from Montreal to New York in August, 1903. The freight, amounting to $185, was admittedly due and an offer was made to pay it, with custom house charges, but refused and the action was instituted to recover $318.60, which included the custom house charges mentioned, amounting to $4.70, towing charges in New York Harbor, amounting to $4, demurrage for 32 days at $4 each, amounting to $128, and wharfage charges in New York for 31 days, amounting to $8.90. An offer was made on the 22nd of January, 1904, to allow judgment for $150 and costs to date.

The dispute arises out of the condition of 51 bales of damaged hay and the responsibility therefor, the contention of the libellant being that it was the duty of the shipper to furnish proper covering for the cargo to protect it from the weather while en route and the damage occurred because it did not do so. The respondent claims that the damage arose through a leaky condition of the boat and that the libellant should be held responsible for it, which would require a dismissal of the libel, in view of the offer to pay.

The testimony is to the effect that the damage was principally away from the side of the boat, where some slight leaks existed. My im-

¶ 1. Demurrage, see notes to Harrison v. Smith, 14 C. C. A. 657; Randall v. Sprague, 21 C. C. A. 337; Hagerman v. Norton, 46 C. C. A. 4.
See Shipping, vol. 44, Cent. Dig. § 571.

pression formed on the trial, that in all probability the damage was caused through defective coverings, has not been disturbed but rather confirmed by a perusal of the testimony, in connection with a consideration of the improbability of leaks, located as these were, damaging the cargo. The libellant's claim should, therefore, be sustained, but the respondent insists that if such conclusion is reached, the respondent being merely a consignee is not liable, and in any event is entitled to $25 for the detention of 4 Canadian tarpaulins, which the libellant received in Montreal and failed to deliver promptly in New York.

The question of when and how far a consignee is liable for demurrage depends upon the particular facts in each case. A mere consignee, who is not interested in the goods carried, is not liable for demurrage—Merritt & Chapman Derrick & Wrecking Company v. Vogeman (D. C.) 127 Fed. 770—But where the consignee is interested in the cargo and accepts it under a charter party made between the vessel and the consignor, which provides for demurrage, he becomes liable in case of his default. Sutton v. Housatonic R. Co. (D. C.) 45 Fed. 507.

In this case a shipment of 5000 half bales of hay was ordered from the respondent by Thebaud Bros. of New York. The respondent obtained the hay at Montreal from the Canadian Baling Company, Ltd. and it was forwarded under a charter, of which the following is a copy:

"Charter Party.

Concluded at Montreal this 30th day of July 1903

Between

The Canadian Baling Co. Ltd Merchant of Montreal

and

Stephen Graham Captain of boat Six Brothers

It Is This Day Mutually Agreed:

1. That said boat Six Brothers being tight, staunch, and in every way fitted to carry hay, shall be at the port of Montreal Quebec on the St. Lawrence River, on the day of July 31st 1903, ready to receive a cargo of pressed hay, not to exceed what can pass under all bridges safely, and when loaded shall proceed with all reasonable speed for New York, and there deliver said cargo as ordered by Planters Compress Co. at the port of New York.

2. Boat to give, free of charge, eight full working days to load & unload said cargo, Sundays and Holidays excepted, after which demurrage shall be paid by shipper at the rate of $4.00 per day. ~~It is understood that this demurrage is payable at point of shipment and cannot be collected from consignee.~~

3. Cargo to be loaded at the expense of The Canadian Baling Co. Ltd Merchant.

4. Boat to pay all canal tolls and towages to New York and one towage in New York Harbor within lighterage limits.

5. Freight to be paid at the rate of Three hundred and ten dollars for the full cargo.

6. Captain to receive, as an advance, when the cargo is loaded, the sum of One hundred & twenty five dollars.

Balance of freight to be paid by consignee, free of commission, on right delivery of cargo at New York.

7. The Company to unload said cargo at New York.

8. The boat to allow eight full days for discharging & loading, Sundays and Holidays excepted, after which demurrage shall be paid at the rate of $4.00 per day; lay days commencing immediately after Captain enters his boat at the Custom-house, New York City, and reports to the consignee.

9. The Merchant agree to furnish sufficient tarpaulins to cover the hay on deck.
10. Captain to deliver tarpaulins at point of discharging to the consignee.

Canadian Baling Company Ltd.
per Wm J S Burns,
Merchant.

Witness:
E. Brisebois.

Stephen Graham
Captain."

(Endorsed)
"Captain to report to
Planters Compress Co
675 West 33rd St.
New York.

Pier 15
Prentice Stores
Brooklyn."

The bill of lading was as follows:

"Shipped in good order and condition by Canadian Baling Co Ltd on board the boat Six Brothers Whereof Stephen Graham is master, now lying at the port of Montreal

No. of Bales.		Weight in Pounds
2686	Hay	259630
	For Export to Yucatan	lbs.

to be delivered in like good order and condition at the port of New York (the act of God, fire and every danger and accident of the seas, rivers, canals and navigation, of whatsoever kind excepted), Consigned to Planters Compress Co he or they paying freight at the rate of as agreed, in accordance with the terms of the charter party.

In Witness Whereof the master of said boat hath signed 3 Bills of Lading, all of this tenor and date, one of which being accomplished, the other to stand void.

Dated at Montreal, this 1st day of August 1903

Stephen Graham, Master."

(On margin)
"Notify Planters Compress Co
675 West 33rd St
New York
Planters Compress Co
New York
2686 Bales hay
259630 lbs
4 Canadian
Tarpaulins
to be retd
Captain paid $4 70/00
Customs Charges on Cargo
F. W. Myers & Co.
Freight advanced
$125 00/00
Captains copy"

(Endorsed)
"Captain to report to
Planters Compress Co
675 West 33rd St
New York."

When the boat reached New York, the cargo was taken charge of by the respondent, which proceeded to unload it. As above appears, some of the cargo was damaged, without fault on the part of the boat, and the testimony of the libellant shows that he was ordered back to piers 4 and 5, where he had been lying before going to Staten Island to discharge, under a promise from the respondent that the balance of the hay and the covers would be taken off. But the hay was not removed and the boat was detained with the covers until the 21st of September, when they were taken possession of by the respondent and the libellant was informed that the hay was his. On the 23rd of September, he sold it for $15, and gives the respondent credit for that amount. During the period he was detained, the wharfage mentioned accrued.

Bills of lading requiring the consignee to pay the freight, only hold him liable for such provision alone. Burrill v. Crossman (D. C.) 65 Fed. 104; Id., 69 Fed. 747, 750, 16 C. C. A. 318; Crossman v. Burrill, 179 U. S. 100, 109, 21 Sup. Ct. 38, 45 L. Ed. 106. Here, $125 of the freight were paid by the consignor and the consignee was by the charter required to pay the balance. The provision in the bill of lading: "in accordance with the terms of the charter party" evidently referred to the freight alone. I must hold, therefore, that there was no liability on the part of the consignee as such, under the charter party.

If the consignee had been entitled to reject the damaged hay, there would be no liability on its part, but as it improperly refused to take part of the cargo, the case seems in this respect, to fall under the principle that where a consignee fails to take the cargo within a reasonable time after arrival, he remains liable for the damages arising from undue delay, according to the ordinary rules of law, which govern in the absence of a specific agreement. Crossman v. Burrill, supra.

I conclude that the consignee should be held for the delay incident to the refusal, including the wharfage necessarily incurred during such period, less $15, and unless the parties can agree upon the amount of damages, there will have to be a reference to ascertain them.

Decree for the libellant, with an order of reference.

SIMPSON v. FIRST NAT. BANK OF DENVER.

FIRST NAT. BANK OF DENVER v. SIMPSON.

(Circuit Court of Appeals, Eighth Circuit. March 22, 1904.)

Nos. 1,828, 1,829.

1. APPEAL—ASSIGNMENT OF ERRORS—FILING BEFORE ALLOWANCE OF APPEAL INDISPENSABLE.
   The filing of an assignment of errors before or at the time of the allowance of an appeal is indispensable, under the eleventh rule of the Circuit Courts of Appeals (91 Fed. vi, 32 C. C. A. lxxxviii), and the appeal will be dismissed if the assignment is not thus filed.

2. SAME—CONDITIONAL ALLOWANCE.
   An allowance of an appeal on condition that the petitioner give a bond in a fixed amount does not become an allowance of the appeal until the bond is given and accepted, and the filing of an assignment of errors before or at the time of the giving and acceptance of the bond is a filing within the time prescribed by the rule.

3. APPEAL MATTER OF RIGHT—ALLOWANCE OF WRIT OF ERROR MATTER FOR JUDICIAL DETERMINATION.
   An appeal is a matter of right, secured by act of Congress upon compliance with the statutes relative to security and with the rules of the courts.
   The allowance of a writ of error is a matter for judicial determination upon a consideration of the sufficiency of the grounds for the writ stated in the petition and assignment of errors.
   The reason for the rule requiring the filing of an assignment of errors before the allowance of an appeal is to give notice to opposing counsel and the appellate court of the questions of law to be discussed. In an action at law there is the additional reason that the presentation of an assignment of errors to the judge who allows or issues a writ of error is essential to his decision of the question whether or not it should be issued.

4. EVIDENCE—ACCOUNT—EACH SIDE PRIMA FACIE EVIDENCE OF ITS CONTENTS.
   The introduction in evidence without qualification of an account containing debit and credit items makes each side evidence of its contents.
   In the absence of all other evidence, the debits and credits of such an account offset each other, and the account proves its balance only. An admission must be taken with its qualifications as an entirety.
   But where there is other evidence the court or jury is not required to give equal credit to each side of the account, to the admissions against interest, and to the self-serving statements contained in it. They may, and they should, determine the fact for or against the evidence contained in the account as the preponderance of all the evidence in the case and the rules of law require.

(Syllabus by the Court.)

Appeals from the Circuit Court of the United States for the District of Colorado.

See 93 Fed. 309, 35 C. C. A. 306; 115 Fed. 1019, 52 C. C. A. 683.

Simon M. Simpson exhibited his bill against the First National Bank of Denver to procure an accounting from it of the proceeds of certain personal property, which he averred that he had pledged to the bank to secure his indebtedness to it. The bank denied that a portion of the goods were pledged, and alleged that its cashier had bought and paid for them. A decree to that effect was rendered in the court below, and this suit was dismissed. Upon an appeal to this court that decree was reversed, and the case was remanded to the court below, with directions to take an account of the proceeds of all the personal property which the complainant claimed to be pledged. That account

has been taken, and a decree has been rendered upon the accounting. Each of the parties to the suit has appealed from this decree.

T. J. O'Donnell, for plaintiff.

Charles J. Hughes, Jr. (Barnwell S. Stuart, on the brief), for defendant.

Before SANBORN, THAYER, and HOOK, Circuit Judges.

SANBORN, Circuit Judge (after stating the facts as above). The first question which the record in this case presents is whether or not the assignments of error were filed in such time that the merits of the case may be reviewed in this court. On June 23, 1902, each of the parties to this suit prayed in open court for an appeal from the decree, and orders were made that the appeal of the defendant was allowed, "but upon the condition, nevertheless, that the respondent give bond on such an appeal in the sum of fifty thousand dollars ($50,000)," and that the appeal of the complainant was allowed, "but upon condition, nevertheless, that he give bond on said appeal in the sum of five hundred dollars ($500)." On August 15, 1902, the defendant filed an assignment of errors, an approved bond in the sum of $50,000, and a citation dated on that day. On August 20, 1902, the complainant filed an assignment of errors, an approved bond for $500, and a citation dated on that day. The bonds were approved and the citations were signed by the judge who heard the case and made the conditional orders of allowance of the appeals. In this way the question is presented whether or not an assignment of errors is filed at or before the allowance of the appeal, within the meaning of rule 11 of this court (91 Fed. vi, 32 C. C. A. lxxxviii), when it is filed at the time when the judge signs the citation and approves the bond which he has made a condition of the allowance of the appeal.

The acts of Congress provide that "there shall be annexed to, and returned with any writ of error for the removal of a cause at the day and place therein mentioned an authenticated transcript of the record, an assignment of errors and a prayer for reversal with a citation to the adverse party," and that "appeals * * * shall be subject to the same rules, regulations and restrictions as are or may be prescribed in law in cases of writs of error." Rev. St. §§ 997, 1012; 1 U. S. Comp. St. 1901, pp. 712, 716. Rule 11, so far as it is relevant to the question now under consideration, reads:

"The plaintiff in error or appellant shall file with the clerk of the court below, with his petition for the writ of error or appeal, an assignment of errors which shall specify separately and particularly each error asserted and intended to be urged. No writ of error or appeal shall be allowed until such assignment of errors shall have been filed."

The acts of Congress did not require the filing of an assignment of errors before the allowance of a writ of error or of an appeal. This requirement rests upon rule 11 of this court, which is the same in terms and in effect as rule 34 of the Supreme Court of the United States. There are two reasons for this rule: One is that the judge to whom the application for the allowance or issue of a writ of error is presented may be informed what the alleged errors are upon which the petitioner

relies, so that he may intelligently decide the question whether or not the writ should be issued. The other is that opposing counsel and the appellate court may be informed by a statement which becomes a part of the record what questions of law are presented for their consideration and determination.

The first reason applies to the allowance of a writ of error only. It is inapplicable to the allowance of an appeal. The filing of the petition for a writ of error, with its accompanying assignment of errors, is the institution of a suit in the appellate court. The petition and the assignment set forth the grounds for the issue of the writ, and the duty of deciding whether or not these grounds are sufficient to warrant its issue, and of issuing or refusing to issue it in accordance with his decision of this question, is imposed upon the judge to whom they are presented.

It is not so in the case of an appeal. The right to appeal is an absolute right granted to the defeated party by the acts of Congress. No court or judge has any jurisdiction or power to condition the allowance of an appeal upon his consideration or determination of the question whether or not the applicant presents alleged errors which form reasonable grounds for the review of the decision below. That question is reserved for the consideration of the appellate court exclusively. The petitioner has the same right to the allowance of his appeal, in the absence of error or of the appearance of it, as when he presents the most conclusive reason for the belief that the decision against him was erroneous. The only question for the consideration of the court or of the judge to whom an application for an appeal is made is the sufficiency of the security offered for the costs and damages, or for the costs alone; and if the petitioner presents satisfactory security, and prays an appeal in accordance with the statute and the rules of the courts, the duty of the court or judge to whom he presents his application is imperative to allow it. Brown v. McConnell, 124 U. S. 489, 490, 8 Sup. Ct. 559, 31 L. Ed. 495; Pullman's Palace Car Co. v. Central Transp. Co. (C. C.) 71 Fed. 809. The result is that the assignment of errors is not required to be filed before an allowance of appeal for the benefit or information of the court to whom the application for its allowance is made. The only reason for its filing at that time is that the alleged errors upon which the petitioner relies may be made a part of the record for the information of opposing counsel and of the appellate court; and that object is as well attained by filing it at any time before the security is approved and accepted as by filing it before the order is made which allows the appeal only upon the giving of the security.

Again, no formal order of allowance of an appeal is requisite to its perfection. The acceptance of security in open court at the same time at which the decree challenged is rendered, or the acceptance of security and the issue of a citation by the proper court or judge at any proper time or place within the period limited for an appeal, in themselves constitute its allowance, without any other or further order regarding the matter. Sage v. Railroad Co., 96 U. S. 712, 715, 24 L. Ed. 641; Draper v. Davis, 102 U. S. 370, 371, 26 L. Ed. 121; Brandies v. Cochrane, 105 U. S. 262, 26 L. Ed. 989; National Bank v. Omaha, 96 U. S. 737, 24 L. Ed. 881.

What, then, in the light of these principles and rules, was the legal effect of the orders of the court below, made on June 23, 1902, to the effect that the appeals of these parties should be allowed upon condition that they give bonds in the amounts there specified? That court had no jurisdiction or power to determine whether or not the appeals of these parties should be allowed if the applicants complied with the rules of the court and gave the security required by the acts of Congress. If they effected this compliance and the court accepted their security, its further order allowing or disallowing their appeals would be utterly futile. Their appeals would be as effective, upon their compliance with the rules and upon the acceptance of their security, if the court made an order that they were disallowed, as they would be if it made an order that they were allowed. The only judicial discretion and the only function of the court upon the application for the appeals was to determine the amount and sufficiency of the security which the parties were to present when they took them. This discretion it exercised. It fixed the amounts of the bonds, and it ordered that the appeals should be allowed upon the express condition that these bonds were given. If the bonds had not been given, that court would not have lost, and this court would not have gained, jurisdiction of this case. The appeals would not have been perfected, and the case would have remained in the Circuit Court. Draper v. Davis, 102 U. S. 370, 371, 26 L. Ed. 121; Aspen Mining & Smelting Co. v. Billings, 150 U. S. 31, 35, 14 Sup. Ct. 4, 37 L. Ed. 986.

The legal effect of the conditional orders of allowance, therefore, was exactly the same that the effect of an order that the amounts of the bonds for appeals were fixed at $50,000 for the defendant and $500 for the plaintiff would have been. Under such an order the acceptance of the bonds and the issue of the citations would have allowed the appeals, without any order of allowance whatever. Under the conditional order actually made the acceptance of the bonds and the issue of the citations could have no other effect. These acts allowed the appeals, and our conclusion is that the appeals were not allowed until the bonds were accepted. The orders of allowance were expressly conditioned upon the giving of the bonds, and until they were given and accepted the appeals were not allowed, because, until then, the conditions of their allowance were not fulfilled. As the assignments of error were filed before or at the time of the acceptance of the security and the issue of the citations, they were filed within the time fixed by rule 11 of this court and the merits of the cases presented by the appeals are open for our consideration.

The cases of Radford v. Folsom, 123 U. S. 725, 727, 8 Sup. Ct. 334, 31 L. Ed. 292, Brown v. McConnell, 124 U. S. 489, 490, 8 Sup. Ct. 559, 31 L. Ed. 495, and Hewitt v. Filbert, 116 U. S. 142, 6 Sup. Ct. 319, 29 L. Ed. 581, have been read and considered; but they do not appear to us to be inconsistent with the conclusion at which we have arrived. Neither of them presents a conditional order of allowance. It may be, as the Supreme Court held in Radford v. Folsom, that, where a bond is given and accepted under an order which absolutely allows an appeal and fixes the amount of the bond, that the appeal relates back to the date of the order of allowance, for the purpose of deter-

mining the term of the appellate court at which the case should be docketed. That question is not before us, and its decision either way does not determine the issue whether or not a conditional allowance becomes an absolute allowance before the condition is fulfilled. In Brown v. McConnell and Hewitt v. Filbert the Supreme Court in effect held that where an appeal is absolutely allowed and the case is docketed in that court, without the taking of security or without the issue and service of a requisite citation, that court has the power in its discretion to allow security to be given, or to issue a citation and permit it to be served, and then to proceed to hear the case upon the merits. But it is not perceived that these decisions answer the question whether or not an appeal, permitted only upon an express condition, is allowed before the condition is complied with. The opinions of this court have declared, and it is our purpose to adhere strictly to the rule which they announce, that rule 11 of this court is just and reasonable, that it will be enforced, and that under it we cannot consider or decide issues of law which are not raised by assignments of error filed before or when the writ of error or appeal is allowed. In actions at law the assignment of errors must be filed and presented to the judge before the writ of error is issued or allowed, because he must determine, from an examination of it and of the petition for the writ, whether or not they set forth any substantial grounds for the issue of the writ. Frame v. Portland Gold Min. Co., 108 Fed. 750, 47 C. C. A. 664; U. S. v. Goodrich, 54 Fed. 21, 22, 4 C. C. A. 160; Union Pac. R. Co. v. Colorado Eastern R. Co., 54 Fed. 22, 4 C. C. A. 161; City of Lincoln v. Sun Vapor Street Light Co., 59 Fed. 756, 759, 8 C. C. A. 253, 256; Flahrity v. Railroad Co., 56 Fed. 908, 6 C. C. A. 167; Crabtree v. McCurtain, 61 Fed. 808, 10 C. C. A. 86.

The rule applies with equal force to cases brought to this court by appeal. In Webber et al. v. Mihills, 124 Fed. 64, 59 C. C. A. 578, an appeal had been taken in a case in which the allowance was made on November 19, 1902, was absolute, and there was no claim or suggestion that it was not perfected on that day, so far as it could be completed without the filing of an assignment of errors. But the assignment was not filed until November 26, 1902. The appeal was dismissed because the assignment of errors was not filed before the appeal was allowed. The conclusion in the case at bar that the appeals here were not allowed until the conditions on which the court permitted them were fulfilled, and that the assignments of error were filed within that time, is consistent with the decision in the Webber Case. The opinion in Lockman, Adm'r, v. Lang et al. (filed November 30, 1903) 128 Fed. 279, was rendered upon what was then supposed to be a state of facts similar to those presented in Webber v. Mihills, and the decision followed the conclusion in that case. A re-examination of the record in the Lockman Case, however, discloses the fact that the order of allowance of the appeal in that case contained a condition similar to those in the orders in the case at bar. The order of allowance was conditioned upon the giving of the bond for $100, and when this bond was presented and accepted by the court a petition for a writ of error to which an assignment of errors was attached was filed with the trial court. A motion for a rehearing has been made in this court in that case, and the final decision of it

will be made to conform to the views which have been expressed in this opinion. We turn to the consideration of the merits of the case.

These are appeals from the decree of the Circuit Court upon the accounting directed by this court in Simpson v. First National Bank, 93 Fed. 309, 35 C. C. A. 306. In that case we found, from the evidence which had then been produced, that on March 2, 1887, Simpson owed the bank $33,685.31, and that for the purpose of securing the payment of this indebtedness he conveyed and delivered to S. N. Wood, the cashier of the bank, and to H. Z. Salomon, its agent, his house and three lots in the city of Denver, which were worth about $12,500, his stock of cigars, which was worth about $21,000 and was called the "cigar store," and his bonded goods, which were worth about $25,000, under an agreement with them that they should convert this property into money, pay the debt he owed to the bank, and return the surplus to him. The bank had admitted by its answer and testimony that Wood received the bonded goods for the purpose of securing the payment of $23,000 of the debt of Simpson to the bank, but it had alleged and claimed that Wood bought the house and lots for $7,500, which he applied in payment of Simpson's debt, and that he also purchased the cigar store for a like amount, which he also applied to the payment of the same debt and to the purchase of a certificate of deposit in the name of the president of the bank. The claims of the defendant that the transactions with Wood constituted a sale to him of the real estate and of the cigar store were not sustained by the proof; but as the complainant, Simpson, had not alleged that the real estate had been conveyed to secure his debt, and had not asked for an accounting of its proceeds, the conveyance of the house and lots to Wood and the reduction of the debt of Simpson by the application of the $7,500, which the bank alleged that Wood had paid for this real estate, was allowed to stand as a sale, and the Circuit Court was directed to take and state an account of the proceeds received and of the expenditures made by the bank and by its agents, Wood and Salomon, in the management and disposition of the store and of the bonded goods. This account has been taken, and the court below has found, and rendered a decree to the effect, that the bank has received from these goods $22,061.93 more than the sum of its expenditures and of the indebtedness of Simpson to it, and that the latter is entitled to recover this amount from the bank, with interest from January 19, 1893. Both parties have appealed from this decree. The alleged errors presented for our consideration by the bank will first be considered.

The cigar store was operated by Salomon from March 7 to March 25, 1887, when he sold it for cash and notes from which the bank realized $19,541.66. Salomon then proceeded to sell many of the bonded goods, which had been at first delivered to Wood by Simpson, and he concluded his relations with this transaction during the last days of January, 1888. During this time the bank kept an account with him, styled "H. Z. Salomon Cigar Store Account," in which Salomon deposited the proceeds of the sale of the store and of the bonded goods which he handled, and out of which he drew various amounts by checks or orders upon the bank. During the same time Wood, the cashier of the bank, was expending money to pay duties and freight

upon the bonded goods, and was selling to others and was himself collecting the proceeds of some of these goods. The proceeds which he obtained from these sales to others than Salomon he deposited in his individual account with the bank. Out of this account he checked the amounts which he paid for duties, freight, and other expenses incurred in disposing of the bonded goods. These two accounts, and much testimony concerning many of the items which appear in them and concerning the amount and character of the goods in the store and in bond, were introduced in evidence at the first hearing for the purpose of proving that the cigar store was pledged, but was not sold. In this state of the case, and after the decision of this court, the Circuit Court on June 8, 1899, ordered the accounting. The seventy-ninth rule in equity requires parties accounting to bring in their respective accounts in the form of debtor and creditor, and provides that any of the other parties to the proceeding who are not satisfied with the account shall be at liberty to examine the accounting party in the master's office. The burden and duty was therefore upon the bank to bring in an account in the form of debtor and creditor, which would show upon its face the items which the bank claimed it had received and those which it claimed to have rightfully expended on account of the store and of the bonded goods, together with the respective dates at which it received and paid them out. On October 22, 1900, more than a year after the accounting had been ordered by the Circuit Court, the bank had presented no account whatever to the master. Thereupon counsel for Simpson submitted to the master the evidence that had been taken at the first hearing, and asked that the accounting might be had upon that record. On March 21, 1901, counsel for the bank submitted an account upon which two of the items credited to Simpson were: "Balance ret'd by S. N. Wood from cigar store, $12,366.40. Collateral in hands of S. N. Wood sold, $26,273.82."

The items from which these balances were derived were not specified in the account, but witnesses for the bank by their subsequent testimony identified them. This account disclosed a balance due from Simpson to the bank of $9,813.17, and its witnesses testified that it was a correct statement compiled from its account books of all the moneys received and expended by it or by its agents on account of the store and the bonded goods. It had, however, stated in its original answer that Simpson owed the bank only $2,742.98, upon the theory which it then maintained that the store was not pledged, but sold, and that he was entitled to a credit of only $7,500 on account of the store, from which the bank actually received $19,541.66. At a later period during the hearing before the master the bank filed another account, verified by the testimony of one of its witnesses, which shows Simpson in debt to the bank in the sum of $42,466.67. This account contains an item of $10,500 for goods placed in the cigar store and of $22,230.86 interest, which appear here for the first time. Testimony was introduced which identified the items of receipts and expenditures on account of the pledged goods which passed through the individual account of Mr. Wood, and they stand in the master's report free from exceptions.

The first specification of error questions the action of the master and of the court below relative to the cigar store account. That account

practically balances. Some of the items which appear in it to the credit of the cigar store were explained and verified by testimony, and some were not. This is also true of the items charged against the cigar store in that account. The master, in making the statement of account upon which the decree below rests, charged the bank with the unexplained items on the credit side of that account, which amount to about $23,000, on the ground that they were admissions of the bank against its interest; and he refused to credit it with the unexplained items on the debit side, which amount to about $20,000. Upon this subject he said:

"By the decision of the Court of Appeals Mr. Salomon is held to be in this transaction the agent of the defendant, and this account must therefore be considered as the account of the bank; and the defendant must be charged with the entire amount of receipts as shown by the account, and can take credit only for such items of disbursement as are shown to be proper and necessary to the execution of the trust. There can be no reasonable doubt but a portion of the disbursements appearing on the account were expenses necessarily incurred in the transaction of the business, but they are not identified, nor the purpose of the expenditure shown."

This decision and action of the master was affirmed by the court below, and it is the subject of bitter complaint. The cigar store account was offered in evidence by the complainant upon the accounting as a part of all the evidence taken at the first hearing. It was a single account, composed of debit and credit items. There was testimony to the effect that Salomon deposited the proceeds of the pledged goods in the bank to the credit of the cigar store in this account, that he checked out of this account many thousand dollars to Wood, which the latter applied to pay the debt of Simpson, and that he used the moneys deposited in this account to run the business of the cigar store. This testimony was uncontradicted. This was an account between the bank and its agent, Salomon, and it was undoubtedly evidence that the bank received from Salomon, on account of the cigar store and on account of the bonded goods, the amounts which were credited to the store in that account, and that it paid out upon the orders or checks of its agent the amounts which are debited to the store therein. Where one introduces in evidence an admission, it must be taken in its entirety, with the qualifications which limit or destroy its effect. The whole admission, together with the limitations and qualifications it contains, must be taken together, because, unless these are all received, the true import and meaning of the admission may not be discovered, and the truth, which is the great object of the inquiry, may not be ascertained. But although the entire admission, including the parts favorable as well as the parts unfavorable to the party who makes it, must be received in evidence, they are not all necessarily equally conclusive or worthy of credit, and it is the province and the duty of the trior of the fact, in the light of all the evidence in the case, to determine how much of the entire statement he will believe and how much he will discredit. Greenleaf, Ev. § 201; Bristol v. Warner, 19 Conn. 7, 18; Kallman v. His Creditors, 39 La. Ann. 1089, 1090, 3 South. 382. This rule applies to statements of account which are introduced in evidence without qualification to secure the benefit of the admissions against interest which they contain. In the absence of all other evidence, each

side of such an account qualifies and limits the other. Both sides must be taken, weighed, and considered together. The items upon one side offset the items upon the other, and the account proves its balance only. Morris v. Hurst, Fed. Cas. No. 9,832; Bell v. Davis, Fed. Cas. No. 1,249.

But, where other evidence relative to the matters referred to in the account is presented for the consideration of the court or jury, they are not required to give equal effect to all parts of the account—to the admissions against interest and to the self-serving statements; but it is their province and their duty to consider each side of the account, together with all the other evidence germane to it, and to give to each part of it such credit as they believe it to be fairly entitled to receive. Neither side of the account in such a case is conclusive evidence of the facts which it discloses. The evidence presented by either side may be rebutted and overcome by testimony aliunde, and the triors of the fact may and should determine the question at issue for or against the evidence contained in the account as in their opinion the preponderance of all the evidence in the case and the rules of law require. 1 Jones on Law of Evidence, § 295; Walden v. Sherburne, 15 Johns. 409, 424; Veiths v. Hagge, 8 Iowa, 163, 174; Gildersleeve v. Landon, 73 N. Y. 609. The cigar store account, therefore, was prima facie evidence of the receipt by the bank, on account of the bonded goods and on account of the cigar store, of the items upon its credit side, and prima facie evidence of the payment by the bank, upon the same account, of the items on its debit side. But, as there was much other evidence upon this subject, it was not conclusive proof of either fact, and neither the master nor the court was required to give the same credence and effect to the self-serving statements on the debit side that they gave to the admissions against interest upon the credit side of the account. The effect of the application of this rule of law to the evidence in this case will be considered later in this opinion, after the effect of the other specifications of error which affect the master's statement has been determined.

The second specification of alleged error made by the bank is that the master and the court below found that the cigar store was sold for $21,000, when the fact was that the selling price was only $19,900. This specification is without foundation in fact, because the account of the master shows that the amount charged against the bank on account of this sale was only $19,541.66. There was, however, an error in the charge, which the master made against the bank, of $817.10 under date of March 25, 1887. This item was a check of S. N. Wood to Salomon, given to reimburse the latter for the payment of duties upon the bonded goods which he had made. This $817.10 is credited to the bank by the master in the item of $1,035.83 under the same date. The charge of the $817.10 offsets the credit to that amount, and the effect of it is to deprive the bank of any credit for this amount of $817.10, which it paid for duties on the goods. The debit side of the master's account should accordingly be reduced by the sum of $817.10.

The next complaint is that the master and the court below refused to credit the bank with $10,500 on account of imported cigars of that value, which the counsel for the bank insisted were placed in the cigar

store after it had been delivered to Salomon and just before he sold it. The bank also complains that the master refused, after the testimony was closed, to permit it to prove that these cigars were thus introduced into the store. The fact, if it be a fact, that these cigars were placed in the store, and the evidence offered to establish that fact, are alike immaterial, in the absence of any proof, and of any offer to prove, that these cigars were bought by, or were the property of, the bank. The decision of this court at the former hearing was that the cigar store and the bonded goods were the property of Simpson, and that the bank must account for their proceeds. If the bank, or its agent, Salomon, bought, paid for, and put into the cigar store, while it was in the hands of the latter, more cigars, the bank would undoubtedly be entitled to a credit for the amount which was realized from the sale of those cigars to Hyman, when it produced fair proof of the proportion of $19,541.66 which was obtained at the sale that was realized from the cigars which it bought and placed in the store. The burden, however, would in any event be upon the bank to establish these facts, and in the absence of proof of them the complainant would be entitled to all the proceeds of the stock. If the bank had purchased and mingled its own cigars with Simpson's, it would have done so at its peril. In the case as it stands, the proof utterly fails to show that the cigars in question were ever the property of the bank or of Salomon, or that either of them ever bought or paid for them. There is neither proof nor offer of proof of these essential facts. The probability is that, if any cigars were ever added to the stock in the cigar store during the incumbency of Salomon, they were the cigars of Simpson which have not been otherwise accounted for by the bank, and there was no error in the refusal of the master to credit it with their supposed value, nor in his refusal to permit it to prove that such cigars were placed in the store, in the absence of evidence that they were the property of the bank, or the property of any other person than Simpson.

On November 6, 1888, Simpson indorsed and delivered to the bank the promissory note of the Only Chance Mining Company for $5,000. At a later date such entries were made in the books of the bank as strongly indicate that the bank treated this note as paid by the surplus above $7,500 which it received from the sale of the real estate it had obtained from Simpson. It is assigned as error that no credit was given to the bank for the amount of this note. As the complainant did not attack the sale of the real estate to Wood for the sum of $7,500, and that transaction stands unimpeached, nothing was ever in fact paid upon this note, and credit for it should be given to the bank. The second note for $5,000 made by the Only Chance Mining Company was not indorsed by Simpson, and for that reason it was properly omitted from the charges against him.

Other specifications of error are that the master and the court below refused to receive in evidence the bill of sale and other documents and testimony which tended to show that the transfer of the cigar store to Salomon was a sale, and not a pledge, and that they did not hold that inasmuch as the cigar store account appeared to balance, and Wood testified that in 1889 he delivered up to Salomon the Only Chance Mining Company's notes, a complete and conclusive settlement of the

transactions between Simpson and the bank was thereby effected. But there was neither error of law nor mistake of fact in these rulings. The second hearing below was not a new trial of the issues which were presented at the first hearing. It was not a rehearing of the questions whether the transaction between Simpson, the bank and Salomon was a sale or a pledge, and whether or not the accounts between them had been conclusively settled in 1888 or 1889. Those issues were tried and adjudicated by this court upon the appeal from the first decree. That adjudication was the law of the case, and the only questions open at the second hearing were those involving the state of the account between Simpson and the bank and its agents, Wood and Salomon, who took and held the cigar store and the bonded goods in trust to pay Simpson's debt to the bank and to return the surplus to him. The former adjudication determined the issue whether the accounts between these parties had ever been finally rendered and settled. No correct account had ever been rendered, because the bank had never given to Simpson credit for more than $7,500, when he was entitled to credit for $19,541.66 on account of the cigar store; and, even if the question were open for consideration, the evidence does not satisfactorily sustain the claim that any settlement was ever made between these parties, even upon the erroneous theory upon which the bank originally insisted.

We turn to the complaints of Simpson. He insists that the charge against him of $2,000 for the services of Salomon in handling and selling the pledged goods is excessive, and that it ought not to be allowed to the credit of the bank. But Salomon took possession of, and with the aid of Simpson sold and collected the proceeds of, property of the value of more than $50,000. He did this with the consent and pursuant to the agreement made by Simpson with the bank. For these services the bank has paid him $2,000. The only question here is whether or not the services of Salomon were worth that amount. The master and the court below were competent, upon the disclosure of the facts that Salomon had rendered these services and that the bank had paid him for them, to determine their reasonable value, and their decision of this question should not be disturbed, in the absence of error of law or of mistake of fact. There is no evidence of either, and their finding upon this subject is affirmed.

The next complaint is that the bank was credited with the payment of $2,000 for the services of its attorney in defending the title to the bonded goods against an action brought by one Muro, who claimed to be the owner of them. The evidence is conclusive that the action was brought, that the bank retained the attorney to defend it, that he did defend it, and that his services were worth $2,000. The bank insists that on May 17, 1895, it paid the attorney this amount, and Simpson denies it. The evidence upon the question of payment is not very satisfactory. It is such that a finding either way could not be said to be without substantial support in the record. The master and the court below agree that the fee was paid, and that finding ought not to be disturbed, in view of the state of the evidence upon this issue, and of the fact that the issue involves nothing but interest upon the $2,000. It involves interest upon the $2,000 only, because, if the bank did not pay that amount to its attorney, the evidence conclusively shows that it

incurred the liability to pay it, and Simpson, who appeals to this court of equity for the proceeds of his property, ought, as a condition of the relief he seeks, to pay the liability of his pledgee necessarily incurred in defending the title to it. He who seeks equity should do equity.

The action brought by Muro was settled on January 19, 1893. But, according to the report of the master, there was in the coffers of the bank a surplus of the proceeds of the pledged property, after the payment of the debt of Simpson, at all times subsequent to the year 1887. It is assigned as error that in the statement of the account the bank is not charged with any interest upon this surplus from 1887 until the settlement of the Muro action on January 19, 1893. This balance, however, was derived from the sale of the goods to a large part of which Muro claimed the title. If he had succeeded in his action, the bank would have been required to pay to him the value of these pledged goods. It would have been relieved from paying their proceeds to Simpson. It would have been entitled to apply those proceeds to satisfy the claim of Muro. It was the surplus which the bank should receive after properly administering the trust, after defending the title to the pledged goods, and after paying the debt of Simpson, and that surplus only, which the latter was entitled to receive from the bank. It was impossible to determine whether or not there would be any surplus, and, if there should be, how much that surplus would amount to, until the action which Muro had brought was determined. Until that time nothing became due from the bank to Simpson, no action to recover the surplus could be maintained, and consequently no liability to pay interest upon the amount which the bank held in trust and had the right to retain, at least for a reasonable time, in order to dispose of the litigation against it, arose. The specifications of error regarding the interest cannot be sustained.

Reference has been made to all the specifications of error, and the result is that if the unexplained items on the debit side of the cigar store account should be disallowed, as they were by the master and the court below, the $22,061.93 which was found by them to be due from the bank to Simpson should be reduced by the deduction of $5,817.10 to $16,243.83 and interest from January 19, 1893. If, on the other hand, those unexplained items should be allowed and credited to the bank, a decree should be rendered in favor of the bank and against Simpson, because the aggregate of these items exceeds $16,243.83 by several thousand dollars. We return to the consideration of this, the most important question in this case.

The cigar store account was introduced before the master as a part of the evidence at the first hearing, from all of which this court deduced the finding that on March 2, 1887, Simpson owed the bank $33,685.31, that he paid it $7,500 by the conveyance of his residence, and pledged to it to secure the remainder of his indebtedness bonded goods of the value of about $25,000 and a cigar store of the value of about $21,000, leaving the bank indebted to him on the face of this finding in the sum of about $19,814.69. 93 Fed. 310. The evidence at the former hearing, in other words, so strongly indicated that there was some amount of money due to Simpson on account of the pledged goods that in the opinion of this court it overcame the evidence of the

debit side of the cigar store account, and induced a finding to the effect which has been stated. It necessarily follows that when the counsel for the appellee, Simpson, introduced before the master all the evidence at the former hearing, he made a prima facie case to the effect that his client was entitled to recover about $19,000 from the bank, and the burden was placed upon the appellant bank to overcome this conclusion by means of the accounting. Does all the evidence, when fairly considered, establish the fact that the bank was not justly liable to pay to the complainant an amount approximating this sum? The case imposes upon the court the duty of answering this question, and it has been a difficult task to do so satisfactorily. The evidence is not so clear that it is possible to state an account with the certainty that every item in it is correct. If, however, when all the evidence is taken together, it indicates with reasonable certainty what the general balance of the account between these parties must have been on January 19, 1893, the court is not relieved of the duty of finding this amount and rendering a decree accordingly by minor doubts and uncertainties which the record leaves undetermined. If there was any probability that more or better evidence could be produced, the case might be returned to the master for farther testimony; but the witnesses have generally testified that they have now presented all the evidence under their control. Salomon, the chief actor in the drama, is dead. His books and vouchers have been destroyed, and there is no hope of a more satisfactory record from a prolongation of this litigation. This suit has been pending for more than a decade. Its continuance would serve only to deprive the ultimate victor of the benefit of the decree, and to inflict unnecessary loss upon the defeated. In view of these facts, all the testimony, including especially both sides of the cigar store account, has been carefully read and thoughtfully considered. Much of the evidence has been read many times, and an earnest effort has been made to justly determine the main issue remaining in this case—the issue whether the bank is justly indebted to Simpson for an amount approximating $16,000, or Simpson is indebted to the bank, as claimed by counsel for the latter, for tens of thousands of dollars. The established facts which persuade to the conclusion that has finally been reached upon this question will be briefly stated. No attempt will be made, however, to itemize the amounts to be mentioned, or to make them exact, because the significance of the facts is not in the specific amounts with which they deal, but in their general character and effect.

Conceding to the debit side of the cigar store account its effect as prima facie evidence, the case before the master opened, as we have seen, with that evidence rebutted and a prima facie case against the bank established for the recovery of about $19,000, based upon all of the evidence at the first hearing and the finding of this court thereon. When the subsequent evidence upon the accounting had been introduced, the fact was established, by the cigar store account and by the testimony of Simpson and Wood, that Salomon received from the pledged goods and deposited with the bank in that account about $55,000, and that out of this account he paid to Wood amounts which aggregated $24,766.40 to pay the debt of Simpson, $7,543 to pay a note which Salomon gave to the bank when he took the cigar store, and $2,000 to Salomon

for his services in handling the pledged goods, leaving a balance of about $20,000, which the debit side of that account shows that Salomon had checked out for other purposes which are not established or indicated by the record. Now, the only other purpose to which this $20,000 could have been legitimately applied was to pay the necessary expenses of operating the store, which had a stock of about $20,000, for 23 days, and the reasonable expenses of selling the bonded goods, which were worth about $35,000. The fact that Salomon checked this amount of about $20,000 out of the bank through his cigar store account, and that it was charged to him in that account, does not seem to us to be convincing evidence that it was either reasonable, just, or necessary to expend so large an amount to dispose of property which realized only about $55,000. It is true that in the foregoing statement of the account, which finds the amount realized by Salomon from the goods he sold to be $55,000, the cigar store account and the testimony of Simpson that Salomon deposited the proceeds of his goods in that account, and that as the money accumulated he gave checks to Wood to apply on Simpson's debt and to run the business, has been esteemed sufficient proof, in the light of the other evidence in the case, that the unexplained items on the credit side of this account, which amount to about $23,000, represent proceeds of the pledged goods received by the bank from Salomon, while the debit side of that account is not given sufficient probative force to establish the proper expenditure of the unexplained items on that side of the account, which amount to about $20,000. But there are substantial reasons for this conclusion, derived from the relations of the parties and the other evidence in the record. The bank held these goods in trust as pledgee. It had the control of the goods, of its agent, Salomon, of the account of the sales, and of the expenditure of the moneys derived from them. Simpson had none of these things. He participated in, perhaps conducted, the negotiations for the sale of the goods under the supervision of Salomon; but he had no control of the account or of the moneys deposited in the bank. It was the duty of the bank to keep a correct account of the receipts from the proceeds of the trust estate, of the necessary expenses of selling it, to render this account to Simpson, and to pay to him the surplus remaining after his debt and the necessary expenses of turning the pledged goods into money had been paid. It kept an account with its agent, Salomon, but none with Simpson or with the trust estate. The credit side of this account is an admission against interest, while the debit side is a self-serving statement, and in the presence of other persuasive evidence upon this subject the former naturally induces more credence than the latter.

Again, this was not an account between a creditor and his debtor. In such an account the debtor himself generally orders the payment of, or receives, the items charged to him, and, if they are erroneous, he has the knowledge and the testimony to disprove them. It is not so in this cigar store account. This was an account between the bank, a trustee, and its agent, Salomon. So far as this record discloses Simpson had no knowledge, nor means of knowledge, of the purposes for which the $20,000 here in question was expended, or of the items through which it was drawn from the bank, while the latter, after the

money was deposited with it, had the power and was charged with the duty to see and to know how this fund was used.

Again, this account was written by the bank, if the testimony of its officers was true, at a time when they were acting upon the theory that Salomon owned the cigar store, and had the right to use its proceeds for his own benefit, or otherwise, as he saw fit. It may, therefore, well be convincing evidence that the unexplained items on its credit side were derived from the pledged goods and were deposited with the bank. But how can it be very persuasive evidence of the just application of $20,000 of these trust funds which are included in the unexplained items on its debit side?

There is another class of evidence in this case which strongly confirms the conclusion that the unexplained items on the credit side of the cigar store account represent the proceeds of the pledged goods, while those on the debit side do not represent a proper application of those proceeds to the discharge of the trust. It is the evidence of the action of the bank before this controversy had arisen. Neither the account of Wood nor the cigar store account shows any surplus or balance due to Simpson. The action of the bank demonstrates the fact that there was such a surplus. While in 1887 it was treating the transfer of the cigar store to Salomon as a sale, and was giving Simpson credit for only $7,500 on account of it, instead of allowing him a credit for its proceeds, $19,541.66, it nevertheless acknowledged full payment of Simpson's debt from the proceeds of the pledged goods on October 5, 1887. If upon that theory the debt was paid on that day, Simpson is now entitled to recover of the bank at least—

The amount of the certificate of deposit to Moffat, which he had bought with his property, and which the bank was holding for him		$ 4,314 69
The difference between the $7,500 the bank had credited him for the cigar store and $19,541.66, its proceeds		12,041 66
The amount deposited in the cigar store account after October 5, 1887		5,683 99
		$22,040 34
Less the amount paid Salomon for his services	$2,000 00	
The amount paid for the settlement of the Muro action and for the attorney's fees therein	4,230 00	
And the amount of the Only Chance note	5,000 00	
Making in all		$11,230 00
And leaving a surplus due him of		$10,810 34

These considerations have forced our minds to the conclusion that the evidence clearly establishes the fact that the bank received about $55,000 from the proceeds of the pledged goods which were handled by Salomon. The receipt of this money by the bank charged it with a trust in favor of Simpson, and made the bank liable to him for every dollar of it which it did not lawfully expend in discharging its trust. Concede that the cigar store account is evidence that the bank paid out the $20,000 evidenced by the unexplained items on the debit side of the account upon the checks of Salomon. That fact is not enough to exonerate it. It must go farther and establish the fact that it paid this sum out either in satisfaction of the debt of Simpson to it or in dis-

charge of the necessary expenses of converting the pledged goods into money. The proof is plenary that Simpson's debt and Salomon's note and Salomon's services were paid with about $35,000 of this fund. But there is no evidence to show what was done with the other $20,000. The duties upon the goods, the freight, the insurance, the taxes upon them were paid by Wood and are credited to the bank in the master's account. If other duties, other freight, other taxes, other insurance, had been paid, the proof of it would doubtless have been forthcoming; for it would not have been difficult to obtain, and the witnesses for the bank have testified that they have produced all the evidence they could secure. There is nothing left to which this $20,000 could have been lawfully applied but the expenses of conducting this business, and it is too tense a strain on our credulity to believe that it was necessary to expend $20,000 to pay the expenses of converting cigars and tobacco worth only about $55,000 into money. The facts to which reference has now been made converge with compelling force to show that there was a substantial surplus of many thousand dollars remaining in the hands of the bank and of its agents after the debts of Simpson and all the legitimate charges against the proceeds of the pledged goods had been satisfied. While they do not disclose the exact amount of this balance, they indicate that it could not have been very far from the $16,243.83 to which the award of the master has been reduced by the specific exceptions which have been considered, and they leave little doubt that a reversal of that award and a finding of an indebtedness of Simpson to the bank would work substantial injustice.

In reaching this conclusion the books and accounts of the bank and the testimony of its officers and witnesses have not been disregarded, but they fail to convince that the bank has fairly accounted for the proceeds of this trust estate which the proof, in our opinion, shows that it received. In the first place, the account books of the bank were not written to show, but to conceal, the truth of this transaction. They did not disclose the fact that the deposit certificate to the president of the bank for $4,314.69 was the property of Simpson. They were not written to indicate, but to conceal, the fact that the cigar store was pledged to secure the debt of Simpson. The bank never made or kept any separate account of the receipts and expenditures on account of the pledged goods, as it was its legal duty to do. It mingled the amounts which Wood obtained from them with his individual funds, and permitted him to make his expenditures on account of them by means of checks on his own account, paid indiscriminately with those he drew to discharge his individual business obligations, so that there was no way to trace his receipts and expenditures on account of the trust estate, except by means of a tedious search for the items through his individual account, with the aid of his recollection and his vouchers. Even this account with Wood was not regularly kept, by entering all the items in it at the respective times at which the transactions to which they relate occurred. It contains a single credit on October 4, 1887, of three items; one of $5,117.30, March 25; one of $10,000, May 13; and one of $5,000 August 4, making in the aggregate $20,117.30. There were other errors in the books of the bank—one of $10,000 in Wood's account, one of $100.92, under date of December 15, 1887, in

the cigar store account, and one of seven items which made a difference of $4,604.95 in the profit and loss account. The entries in the latter account regarding the transaction in question in this suit, and the entries of certain notes on the discount ledger relating to Simpson's account, were written over erasures of entries that it was impossible to read. The officers and witnesses of the bank were unable themselves to make a true statement of the account between it and Simpson from their books and vouchers. Their knowledge and testimony concerning this subject have been neither uniform nor consistent. When they examined their books and made their answer, they stated an account on the theory that the cigar store was sold by Simpson to Wood for $7,500. They gave Simpson credit on account of it for that amount only, and then showed a balance due to the bank of only $2,742.98. They had not then discovered apparently that they held a deposit certificate in the name of their president for $4,314.69, which, upon the theory of that account, had been purchased with the money of Simpson, and that he was entitled to additional credits of this $4,314.69 and of $12,041.66, the difference between the $7,500 which they had credited him for the cigar store and the $19,541.66 which that store produced. After the decision of this court and the order for the accounting they stated another account, which disclosed a balance of $9,813.17 against Simpson, and before the testimony in the presence of the master was closed they presented a third account, in which the balance against Simpson appears to be $42,466.67. The last account includes items of $10,500 for cigars taken from the warehouse and put into the cigar store, and $22,230 for interest, which there first appear. One or more of the officers or witnesses for the bank testified that each of these three accounts was correct according to the books of the bank and according to the knowledge which the officers or witnesses had of the transactions. But the three accounts and the testimony in support of them demonstrate the fact that some of them must have been erroneous. There is nothing in all this evidence for the bank, including the debit side of the cigar store account, of sufficient weight and cogency to overcome the broad, controlling fact which the evidence establishes and which conditions the entire case—the fact that the bank has received from the pledged goods many thousand dollars for which it has not in any way accounted, save by the entries in the debit side of the cigar store account of unexplained items to the amount of about $20,000. There is no legitimate cause to which the expenditure of these items can be attributed under the evidence, except the expenses of operating the store for 23 days, such as rent and clerk hire, and the expenses of selling the bonded goods. The debit side of this account may be evidence of a reasonable expenditure for this purpose. Such a reasonable expenditure may have amounted to $1,000. An expenditure of this character of some amount must have been made. The probative force of the unexplained items in the debit side of the cigar store account cannot and ought not to be extended beyond this reasonable expenditure, in the absence of evidence of the exact amount paid out on this account, and this item of expenditure is accordingly fixed and allowed to the bank at the sum of $1,000. The record as it stands contains no evidence that will sustain a finding that it was either necessary, just, or right for the bank or its agents to ex-

pend more than this amount in the execution of its trust, in addition to the amounts heretofore credited to it, while it is convincing to the effect that the bank held all the amounts which it received from the pledged goods, above the sums it expended to administer the trust and to pay the debts of Simpson, charged with an express trust for the benefit of the complainant. The amount thus received by the bank above the expenses of the administration of the trust and the debts of Simpson is, therefore, found to be $15,243.83.

The decree below is accordingly reversed, and the case is remanded to the Circuit Court, with instructions to enter a decree in favor of the complainant, Simpson, and against the bank, for the sum of $15,243.83, with interest thereon at 8 per cent. per annum from January 19, 1893, and his costs to the time of these appeals. The bank may recover the costs of these appeals in this court.

HEINZE et al. v. BUTTE & B. CONSOL. MIN. CO.

(Circuit Court of Appeals, Ninth Circuit. March 4, 1904.)

No. 1,033.

1. CONTEMPT—NATURE OF PROCEEDING—REVIEW.

   A bill in equity, filed in aid of an action at law to recover for trespasses on a mining claim, alleged that defendants had extended their underground workings from adjoining claims owned by them into the claim of complainant, and prayed for an injunction restraining them from extracting and removing ore therefrom. The answer justified the trespasses on the ground that the veins or lodes into which defendants' workings were extended had their apexes in defendants' claims, and were their property. A preliminary injunction was granted, and, on petition of complainant, an order was entered requiring defendants to permit agents of complainant to enter their workings, and examine, inspect, and survey the same so far as necessary to obtain evidence on the issue joined. Defendants having refused to permit such inspection and survey, an order was entered finding them in contempt of court, and adjudging a fine against them; such order, however, to be discharged, as to both fine and commitment, on their compliance with the previous order. *Held*, that such order of contempt was not a judgment in a criminal, but in a civil, proceeding; that it was remedial and coercive in character, and entered for the purpose of enforcing private rights of complainant, judicially determined, and was not reviewable by writ of error.

2. SAME—PERSONS BOUND BY ORDERS OF COURT—OFFICERS OF CORPORATION DEFENDANT.

   Officers of a mining corporation which is a party to a suit in equity in which it has been ordered to permit an inspection and survey of its mine are bound by such order, although not personally parties to the suit, and may be subjected to punishment for contempt, where, having the power to require compliance with it by the company, they refuse to do so.

3. INTERLOCUTORY ORDERS—PERSONS BOUND—PURCHASER PENDENTE LITE.

   A purchaser of mining property, including the shafts, machinery, and workings thereon, pending a suit against the grantor involving the alleged extension of such workings into adjoining property, is bound by an order subsequently made by the court in such suit permitting the adverse party to inspect and survey the mine.

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

This is a writ of error, directed to the Circuit Court for the District of Montana, to review an order of that court adjudging F. Augustus Heinze,

Josiah H. Trerise, and Alfred Frank guilty of contempt of court, in violating an order of the court permitting the inspection and survey of certain premises mentioned and described in the order.

On May 17, 1898, the defendant in error filed a bill in equity in the Circuit Court for the District of Montana against the Montana Ore Purchasing Company, Chili Gold Mining Company, John MacGinnis, Edward L. Whitmore, and Carlos Warfield, as defendants, to enjoin and restrain the defendants from extracting and removing certain ores and minerals from out of the Michael Devitt claim, of which complainant claimed to be the owner. The suit was ancillary to an action at law brought by the same complainant, as plaintiff, against the same parties, as defendants, to recover damages for the same trespasses. Upon the bill, process was issued, and the defendants appeared and answered. The Montana Ore Purchasing Company, in its answer, justified the trespasses charged in the bill of complaint by virtue of its claim of ownership of the Rarus and Johnstown lode claims, lying northerly of and adjacent to the Michael Devitt claim. It was alleged that these claims were patented by the United States; that they had parallel end lines; that certain veins or lodes which had their tops or apexes within the said Rarus and Johnstown lode claims extended on their strike through said lode claims nearly parallel to the side lines of said claims, and departed through the end lines thereof; that these veins or lodes on their downward course or dip so far departed from a perpendicular as to pass beyond the vertical side lines of said lodes or claims, and to enter the ground described in the complaint as the Michael Devitt lode claim; that the Montana Ore Purchasing Company was the owner of said veins or lodes which had their tops or apexes within the Rarus and Johnstown claims, and all ores, minerals, and metals therein contained, throughout their entire depth; that any entry which had been made by the defendant or its lessee, the Chili Gold Mining Company, within the vertical side lines of the Michael Devitt claim mentioned in the complaint, had been upon such veins or lodes, and that any ores, minerals, or metals which had been extracted from within said vertical side lines had been taken and extracted from said vein or lode; and that the same was the property of the defendant or its lessee. The answer of the defendant the Chili Gold Mining Company pleaded substantially the same justification, under the lease from the Montana Ore Purchasing Company. The answer of the defendants MacGinnis, Whitmore, and Warfield justified as officers or agents of the Chili Gold Mining Company.

Upon the bill an injunction pendente lite was issued in accordance with the prayer of the bill, and served upon F. Augustus Heinze, as president of the Montana Ore Purchasing Company, Edward L. Whitmore, a trustee and general manager of the Chili Gold Mining Company, and upon each of the other defendants named in the bill of complaint. This injunction is still in force.

On October 1, 1903, the complainant in the action presented a petition to the Circuit Court, showing that the defendants had constructed certain shafts upon the Rarus and Johnstown claims, and from said shafts had made a large number of underground workings, extending through the said Johnstown and Rarus claims into and beneath the surface of the Michael Devitt claim, and also had extended and made a large number of workings from the said shafts south into the claim called the "Pennsylvania Claim," which joins the said Michael Devitt claim on the west, and from the said Pennsylvania claim into and beneath the surface of the Michael Devitt claim; that, in order that the complainant might be prepared to prove its contention in the case, and prove that it was the owner of the ore bodies in controversy, and also prove a violation of the injunction by the defendants, it was necessary that the complainant, by its representative, should make a survey, inspection, and examination of certain portions of the Rarus and Johnstown claims, and underground workings therein, and underground workings made from the shaft and working of said claims, and from and through the Pennsylvania claim into and beneath the surface of the Michael Devitt claim, and all workings made from any of said claims under the surface of the Michael Devitt claim. To this petition the Montana Ore Purchasing Company filed its answer on October 13, 1903, in which it denied the several allegations contained in the petition; denied that it had possession and control of any of the shafts or portions of the Johnstown and Rarus claims lying north of the Michael Devitt claim,

or extending into the Michael Devitt claim; and denied that it was necessary for the complainant to have the survey, examination, or inspection of the workings in the Rarus, Johnstown, or Pennsylvania claims for the purpose of the trial, or for any matter connected therewith.

On October 14, 1903, upon the petition and upon the motion of the complainant, an order of inspection, examination, and survey was entered in the Circuit Court, appointing certain persons as agents and representatives of the complainant during a period of 15 days, to survey, examine, and inspect the Michael Devitt, Rarus, Johnstown, and Pennsylvania lode claims, and all the underground workings and openings in said claims, so far as was necessary to enable complainant to ascertain whether the said underground workings and openings in the Rarus, Johnstown, or Pennsylvania connected with the underground workings in the Michael Devitt lode claim. It was further ordered that for the purpose of such inspection, examination, and survey, the agents and representatives of the complainant were authorized to temporarily remove or open all doors, bulkheads, or other obstructions which might be found in said premises, or any part thereof, and which might interfere with or obstruct such examination, inspection, and survey, provided that at or before the completion of such inspection, examination, and survey, the complainant should replace all such bulkheads, doors, or other obstructions so removed, and leave the premises in the same condition as found, so far as practicable. The defendants were required to hoist and lower complainant's representatives through the shafts on the Rarus and Johnstown lode claims in the control of the defendants, and furnish to the representatives of the complainant ingress to and egress from the said premises and the said workings at all reasonable times during the period of 15 days.

The defendants thereupon appealed from said order to this court, and petitioned this court for a writ of supersedeas. This petition was denied, the court holding that the order appealed from was in no sense final, and therefore not appealable. 126 Fed. 168. The defendants thereupon presented to this court a petition for a writ of certiorari to review the action of the Circuit Court in making the order of October 14, 1903. This petition was denied; the court holding that, having determined that the order was not appealable, the court had no power to issue the writ of certiorari. 126 Fed. 169. Thereafter another petition for writ of certiorari was filed in this court by the Johnstown Mining Company to review the same order. This petition alleged that it was not a party to the action in the Circuit Court, but, it appearing that the petitioner had acquired its title to a portion of the ground involved in the inspection order from the Montana Ore Purchasing Company during the pendency of the cause, and after the issues were joined in the same, this petition was also denied.

Pending these proceedings the order of the Circuit Court of October 14, 1903, was not enforced, and on November 3, 1903, the period for the inspection, examination, and survey mentioned in the order was extended by the court for a period of 21 days from November 4, 1903. Upon an attempt being made upon several days from November 4 to November 16, 1903, to execute and enforce the order, its execution is charged to have been impeded and obstructed by F. Augustus Heinze, Josiah H. Trerise, and Alfred Frank. The charge being brought to the attention of the Circuit Court by affidavit, that court issued an order, directed to Heinze, Trerise, and Frank, to show cause why they, and each of them, should not be committed for contempt in refusing to permit the inspection, examination, and survey as directed by the court. In response to this order, the parties named appeared, and severally pleaded "Not guilty." The court thereupon heard testimony upon said charge, and rendered its judgment on December 19, 1903, to the effect that the persons charged, to wit, F. Augustus Heinze, Josiah H. Trerise, and Alfred Frank, were each and all guilty of contempt of court in violating, obstructing, and refusing to obey the order of the court; that the acts of contempt were committed after notice and full knowledge of the issuance of the said order. From this order a writ of error was allowed, and on the 21st day of December, 1903, a bond on the writ of error for costs in the sum of $300 was accepted and approved by the judge holding the Circuit Court, but the judge refused to take a supersedeas bond to stay the judgment of the court in the contempt proceedings. Thereupon application was made to the writer of this opinion, as a judge of

the Circuit Court of Appeals, to take a supersedeas bond and direct the clerk of the Circuit Court of Appeals to issue a writ of supersedeas to the court below, staying the execution of the judgment of the court. The supersedeas bond was taken, and a writ of supersedeas issued accordingly.

Garret W. McEnerney, James M. Denny, and John J. McHatton, for plaintiffs in error Heinze and Trerise.

Robert B. Smith, for plaintiff in error Alfred Frank.

John F. Forbis, Crittenden Thornton, and J. F. Riley, for defendant in error.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

MORROW, Circuit Judge. The defendant in error has moved to dismiss the writ of error on the ground that this court has no jurisdiction to review the judgment of the Circuit Court in this case. At common law the exercise by a court of competent jurisdiction of the power to punish for contempt could not be reviewed. 9 Cyc. 61. "The power to punish for contempts is inherent in all courts. Its existence is essential to the preservation of order in judicial proceedings, and to the enforcement of the judgments, orders, and writs of the courts, and consequently to the due administration of justice. The moment the courts of the United States were called into existence and invested with jurisdiction over any subject, they became possessed of this power." Ex parte Robinson, 19 Wall. 505, 506, 22 L. Ed. 205.

The appellate jurisdiction of the Circuit Court of Appeals to review by appeal or writ of error final decisions in the District Court and the existing Circuit Courts is provided in section 6 of the act of March 3, 1891, c. 517, 26 Stat. 826, 828 [U. S. Comp. St. 1901, pp. 547, 549]. It is there provided that this jurisdiction shall be exercised in all cases other than those provided for in the preceding section of the act, unless otherwise provided by law. The cases provided for in the preceding section of the act relate to appeals and writs of error from the District and Circuit Courts direct to the Supreme Court, and do not include final decisions in the District and Circuit Courts in contempt proceedings. The primary object of the act of March 3, 1891, well known as a matter of public history, manifest on the face of the act, and judicially declared in the leading cases under it, was to relieve the Supreme Court of the overburden of cases and controversies arising from the rapid growth of the country and the steady increase of litigation, and, for the accomplishment of this object, to transfer a large part of the appellate jurisdiction of the Supreme Court to the Circuit Courts of Appeals thereby established in each judicial circuit, and to distribute between the Supreme Court and the Circuit Courts of Appeals, according to the scheme of the act, the entire appellate jurisdiction from the Circuit and District Courts of the United States. American Construction Co. v. Jacksonville Ry. Co., 148 U. S. 372, 382, 13 Sup. Ct. 758, 37 L. Ed. 486; United States v. American Bell Tel. Co., 159 U. S. 548, 551, 16 Sup. Ct. 69, 40 L. Ed. 255. Prior to this act the general appellate jurisdiction of the Supreme Court in civil cases was provided for in the several acts of Congress incorporated into sections 691, 692, and 693 of the Revised Statutes, and the authority to decide questions occurring on the hearing or trial of any criminal proceeding before a Circuit

Court, upon which the judges were divided in opinion, was provided for in section 697 of the Revised Statutes. Neither of these sections provided in express terms for the review of judgments in contempt proceedings, but very early in the judicial history of the Supreme Court the question arose whether the court had authority to review the judgments of the Circuit Courts in such proceedings. The first case in which this question was considered was Ex parte Kearney, 7 Wheat. 38, 5 L. Ed. 391. In that case a petition was presented to the Supreme Court for a writ of habeas corpus to bring up the body of Kearney, who was in prison under a commitment of the Circuit Court for an alleged contempt. The petitioner was a witness under examination in the Circuit Court, and had refused to answer a question put to him, on the ground that the answer might tend to criminate him as a particeps criminis. The objection was overruled, and, he having persisted in his refusal to answer the question, he was committed to jail for contempt. It was contended, in opposition to the petition for writ of habeas corpus, that the Supreme Court had no appellate jurisdiction in criminal cases, and that it could only revise the decisions of the Circuit Court in cases where there was a certificate of a division of opinion of the judges below. The writ was denied. Mr. Justice Story, in delivering the opinion of the court, said:

"It is to be considered that this court has no appellate jurisdiction confided to it in criminal cases by the laws of the United States. It cannot entertain a writ of error to revise the judgment of the Circuit Court in any case where a party has been convicted of a public offense. And undoubtedly the denial of this authority proceeded upon great principles of public policy and convenience. If every party had a right to bring before this court every case in which judgment had passed against him for a crime or misdemeanor or felony, the course of justice might be materially delayed and obstructed, and in some cases totally frustrated. If, then, this court cannot directly revise a judgment of the Circuit Court in a criminal case, what reason is there to suppose that it was intended to vest it with the authority to do it indirectly? It is also to be observed that there is no question here but that this commitment was made by a court of competent jurisdiction, and in the exercise of an unquestionable authority. The only objection is, not that the court acted beyond its jurisdiction, but that it erred in its judgment of the law applicable to the case. If, then, we are to give any relief in this case, it is by a revision of the opinion of the court, given in the course of a criminal trial, and thus asserting a right to control its proceedings and take from them the conclusive effect which the law intended to give them. If this were an application for a habeas corpus after judgment on an indictment for an offense within the jurisdiction of the Circuit Court, it could hardly be maintained that this court could revise such a judgment, or the proceedings which led to it, or set it aside and discharge the prisoner. There is, in principle, no distinction between that case and the present, for, when a court commit a party for contempt, their adjudication is a conviction, and their commitment, in consequence, is execution; and so the law was settled, upon full deliberation, in the case of Brass Crosby, Lord Mayor of London, 3 Wilson, 188."

In the case of New Orleans v. Steamship Company, 20 Wall. 387, 392, 22 L. Ed. 354, the Circuit Court of the United States for the District of Louisiana had obtained jurisdiction of a controversy between the steamship company and the authorities of the city of New Orleans concerning a lease of certain water-front property by the steamship company. An injunction had been issued by the Circuit Court, restraining the city authorities from interfering with the possession of the property as held by the steamship company. The city surveyor,

aided by a number of laborers, acting under an order of the city council approved by the mayor, destroyed the fence or inclosure erected by the company around the leased premises; and thereupon the mayor of the city applied to a city court for an injunction to restrain the company from rebuilding the inclosure which had been destroyed, and an injunction was granted by the city court accordingly. The company thereupon obtained a rule in the Circuit Court requiring the mayor to show cause why he should not be punished for contempt in taking such action in another tribunal. At the hearing the court decreed that the mayor should pay a fine of $300 for the contempt of court wherewith he was charged; that the city should be enjoined from interfering with the possession and infringement of the demised premises by the company during the life of the lease, and that the company should recover from the city $8,000 for damages; and that the city should pay the costs of the suit. From the decree in the case an appeal was taken to the Supreme Court of the United States, where the decree or judgment was affirmed. Speaking of the fine imposed upon the mayor, the court said:

"The fine of three hundred dollars imposed upon the mayor is beyond our jurisdiction. Contempt of court is a specific criminal offense. The imposition of the fine was a judgment in a criminal case. That part of the decree is as distinct from the residue as if it were a judgment upon an indictment for perjury committed in a deposition read at the hearing. This court can take cognizance of a criminal case only upon a certificate of division in opinion. In Crosby's Case, Mr. Justice Blackstone said: 'The sole adjudication for contempt, and the punishment thereof, belongs exclusively and without interfering to each respective court.'"

In the case of In re Chiles, 22 Wall. 157, 22 L. Ed. 819, the state of Texas applied to the Supreme Court for a rule on John Chiles to show cause why he should not be dealt with as guilty of a contempt of that court, in disobeying one of its decrees. The decree alleged to have been disobeyed by Chiles is found in Texas v. White, 7 Wall. 700, 742, 19 L. Ed. 227, and had relation to the title to certain bonds of the United States issued to the state of Texas. The suit was an original suit in the Supreme Court, in which the state of Texas, claiming the bonds as her property, prayed for an injunction to restrain the defendants White and Chiles from receiving payment from the national government, and to compel the surrender of the bonds to the state. The defendants filed separate answers. Notwithstanding the decree, Chiles continued to claim title to the bonds under a transaction not set up in his answer to the suit. The court held that he was not the less concluded and bound to obey the injunction; that notwithstanding the fact that, in the answer to the order to show cause, Chiles asserted a different title or source of title from the one imputed to him in the suit, and defended by him, he was in contempt of court in setting up and seeking to enforce his claim. He was found guilty of contempt, the court holding that punishments for contempt of court had two aspects, namely: (1) To vindicate the dignity of the court from disrespect shown to it or its orders; (2) to compel the performance of some order or decree of the court which it is in the power of the party to perform, and which he refuses to obey.

The next case is that of Hayes v. Fischer, 102 U. S. 121, 26 L. Ed.

95. The facts of the case are stated in the opinion of the court by Mr. Chief Justice Waite as follows:

"Fischer, the defendant in error, brought a suit in equity in the Circuit Court of the United States for the Southern District of New York to restrain Hayes, the plaintiff in error, from using a certain patented device. In this suit an interlocutory injunction was granted. Complaint having been made against Hayes for a violation of this injunction, proceedings were instituted against him for contempt, which resulted in an order by the court that he pay the clerk $1,389.99 as a fine, and that he stand committed until the order was obeyed. To reverse this order, Hayes sued out this writ of error, which Fischer now moves to dismiss on the ground that such proceedings in the Circuit Court cannot be re-examined here. If the order complained of is to be treated as part of what was done in the original suit, it cannot be brought here for review by writ of error. Errors in equity suits can only be corrected in this court on appeal, and that after a final decree. This order, if part of the proceedings in the suit, was interlocutory only. If the proceeding below, being for contempt, was independent of and separate from the original suit, it cannot be re-examined here either by writ of error or appeal. This was decided more than fifty years ago in Ex parte Kearney, 7 Wheat. 38 [5 L. Ed. 391], and the rule then established was followed as late as New Orleans v. Steamship Company, 20 Wall. 387 [22 L. Ed. 354]. It follows that we have no jurisdiction."

The next case is that of Worden v. Searls, 121 U. S. 14, 7 Sup. Ct. 814, 30 L. Ed. 853. The suit was a bill in equity in the Circuit Court to restrain infringement of letters patent, and for assessment of damages. A preliminary injunction was issued and served upon the defendants. Afterwards an order was made and entered by the court, entitled in the cause, imposing a fine of $250 on the defendants, to be paid by them to the complainant, for a violation of the preliminary injunction. This order was opened for a further hearing, and an order was made, entitled in the cause, imposing a fine of $1,182 on the defendants for such violation, to be paid to the clerk of the court, and by him to be paid over to the plaintiff, for damages and costs; the defendants to stand committed until the same should be paid. An appeal by the defendants from the order was allowed, and an order was made that all proceedings to enforce the collection of the fine be stayed until the further order of the Circuit Court on the giving of a specified bond, which bond was given. On the report of the master on the reference under the interlocutory decree, a final decree was entered that the plaintiffs recover against the defendants $24,573.91 as profits, and $386.40 costs. From this final decree the defendants appealed to the Supreme Court. In that court the defendants asked for a review and reversal of the orders imposing fines for violation of the preliminary injunction. The complainant contended that the Supreme Court could not review the action of the Circuit Court in punishing a contempt committed by a violation of such injunction: (1) Because the proceedings were criminal in their character; (2) because the action of the Circuit Court was by section 725 of the Revised Statutes [U. S. Comp. St. 1901, p. 583] expressly made discretionary. The court held, with respect to these objections, that it had jurisdiction to review the final decree in the suit and all interlocutory decrees and orders; distinguishing the facts of the case from those of Ex parte Kearney, 7 Wheat. 39, 5 L. Ed. 391, and the case of New Orleans v. Steamship Company, 20 Wall. 387, 22 L. Ed. 354. The court also held that section 725 of the Revised

Statutes [U. S. Comp. St. 1901, p. 583] did not make the action of the court imposing a fine for contempt such a matter of discretion that the orders imposing the fines were not reviewable. The court said: "They were, to all intents and purposes, orders in the course of the cause, based on the questions involved as to the legal rights of the parties." It was further held that, although the court had jurisdiction of the suit and of the parties, the order for the preliminary injunction was unwarranted, as a matter of law, and the orders imposing the fines, so far as they had not been executed, were, under the special circumstances of the case, reviewable by the court, under the appeal from the final decree. The final decree of the Circuit Court was reversed, and the case remanded, with directions to dismiss the bill, with costs, but without prejudice to the power and right of the court to punish the contempt referred to in the orders by a proper proceeding.

It appears from these decisions that the Supreme Court draws a distinction between a contempt proceeding where the court is called upon to vindicate its authority and dignity, and where the enforcement of its orders and decrees are, to all intents and purposes, orders in the course of the cause based on the questions involved as to the legal rights of the parties. The first are in the nature of criminal proceedings, and under the law as it stood prior to the act of March 3, 1891, establishing the Circuit Courts of Appeals, the jurisdiction of the Supreme Court to review the judgment of the Circuit Courts in criminal cases was upon a certificate of division of opinion between the judges of the latter court. And since, if the judges of the Circuit Courts disagreed, there could be no judgment of contempt (California Paving Co. v. Molitor, 113 U. S. 609, 618, 5 Sup. Ct. 618, 28 L. Ed. 1106), it followed that no cases of that character were reviewed by the Supreme Court. With respect to the second class of contempts, the Supreme Court had authority to review such interlocutory judgments or decrees upon an appeal from the final decree in the cause. This, then, was the state of the law upon this subject when the Circuit Courts of Appeals were established, in 1891, and those courts succeeded to a portion of the appellate jurisdiction previously conferred upon the Supreme Court. There is, however, this difference in the appellate jurisdiction of the two courts: The Supreme Court had jurisdiction to review questions occurring on the hearing or trial of a criminal case in the Circuit Court upon a certificate of division of opinion between the judges of the Circuit Court. The Circuit Court of Appeals has jurisdiction, under the act of March 3, 1891, to review final decisions in a criminal case not capital in either the Circuit or District Court, upon a writ of error.

We now proceed to consider the cases where the Circuit Courts of Appeals have had under consideration the question as to their jurisdiction to review decisions of the District and Circuit Courts in contempt proceedings:

The case of Nassau Electric Ry. Co. v. Sprague Electric Ry. & Motor Co., 95 Fed. 415, 37 C. C. A. 146, was an action brought to restrain the infringement of a patent. The Circuit Court of Appeals for the Second Circuit held that the order imposing a fine for the violation of a preliminary injunction in the cause could not be reviewed upon a writ of error; it could only be reviewed upon an appeal from a final decree

in the cause; citing In re Debs, 158 U. S. 573, 15 Sup. Ct. 900, 39 L. Ed. 1092.

In Cary Mfg. Co. v. Acme Flexible Clasp Co., 108 Fed. 873, 48 C. C. A. 118, the same court reviewed, upon writ of error, a judgment of the Circuit Court imposing a fine upon the defendant for a violation of an injunction issued by the court against an infringement of a patent. This proceeding was, however, after the final decree sustaining the patent and adjudging an infringement of the patent in the Circuit Court, and after the affirmance of this final decree in the Circuit Court of Appeals.

In Butler v. Fayerweather, 91 Fed. 458, 33 C. C. A. 625, an attorney was being examined in a case in the Circuit Court, to which he was not a party. He was asked a question which he refused to answer, upon the ground of privilege. For this refusal he was committed for contempt. A writ of error was sued out to review the order of commitment in the Circuit Court of Appeals. The court held that the order proceeded upon a matter distinct from the general subject of litigation; that the aggrieved party would have no opportunity to be heard when the cause should be before the court at the final hearing, and as to him the proceeding was finally determined when the order was made. Not being a party to the cause, he could not be heard on an appeal from the final decree, and, unless he could be heard upon a writ of error, he had no review, but must submit to the determination of the court below, if the court had jurisdiction, however unwarranted it might be by the facts or the law of the case. The court was of the opinion that it had the power to review the order, and upon the merits reversed the judgment of the Circuit Court.

Flower v. MacGinniss, 112 Fed. 377, 50 C. C. A. 291, was a case in the same court. A witness in an equity cause, not a party to the suit, had refused to submit to an examination upon the ground that issues had not been joined in the cause, and the complainant was therefore not entitled to take his testimony. He was adjudged guilty of contempt. A writ of error was sued out to review the order in the Circuit Court of Appeals. The right to review the order by writ of error was sustained, on the authority of its previous decision in Butler v. Fayerweather, supra.

In King v. Wooten, 54 Fed. 612, 4 C. C. A. 519, certain property in the possession of the receiver of a federal court was levied on and sold for taxes by a state sheriff, and the purchaser replevied it from the receiver, who gave a forthcoming bond. The receiver then filed a petition asking the protection of the court appointing him, and, after hearing, it was decreed that the sale was null and void; that the purchaser and sheriff were in contempt of court; that they desist from any interference with the property; that the purchaser dismiss his replevin action, and that the receiver pay all taxes due the sheriff; and that after the purchaser had dismissed said suit, and the defendants had paid all the costs of the proceeding, they, and each and all of them, should stand acquitted of the contempt of court. Respondents appealed to the Circuit Court of Appeals for the Fifth Circuit. The court dismissed the appeal, holding that the proceeding was clearly a contempt proceeding—one which, in the very nature of the case,

must be summary, to be at all effective; that it was manifestly not intended to conclude the ultimate rights of the purchaser at the tax sale, but was only to the effect and extent that he could not in that way dispossess the receiver.

In the recent case of In re Nevitt, 117 Fed. 448, 54 C. C. A. 622, before the Circuit Court of Appeals of the Eighth Circuit, Judge Sanborn delivered an elaborate opinion upon the subject of contempt proceedings in the federal courts. The case came before the court upon the petition of two of the judges of the county court of St. Clair county, in the state of Missouri, and upon the petition of their counsel, for the issue of the writ of habeas corpus to relieve these judges from an imprisonment which they were enduring until such time as they should comply with a mandamus of the United States Circuit Court for the Western Division of the Western District of Missouri, which directed these judges to levy a tax to make partial payment upon a judgment recovered by one Douglas against the county of St. Clair, and to make partial payments upon other judgments of like character based upon certain bonds of the county of St. Clair. One phase of the question before the court was the claim that the contempt of which the judges stood convicted was a "distinct and substantial offense against the United States," and that, as such, it fell within the pardoning power of the President of the United States; and, for the purpose of applying to the President for the release of the petitioners, the appellate court was asked to order a stay of proceedings in the lower court. The court reviews numerous decisions upon the subject of contempt, and disposes of the application for a stay of proceedings in the following language:

"This is not a criminal, but a civil, contempt—a proceeding instituted for the purpose of protecting and enforcing the private rights and administering the legal remedies of the judgment plaintiff, Douglas; and, whatever the authority of the President may be to pardon for a criminal contempt, he is, upon principle and upon authority, without the power to relieve from either fine or imprisonment imposed in proceedings for contempts of this character. He has no more power to deprive private citizens of their lawful rights or legal remedies without compensation than have the courts or the Congress."

The further discussion of the subject of contempt by the court is applicable to the question before this court in the present case. The court says:

"Proceedings for contempt are of two classes—those prosecuted to preserve the power and vindicate the dignity of the courts, and to punish for disobedience of their orders, and those instituted to preserve and enforce the rights of private parties to suits, and to compel obedience to orders and decrees made to enforce the rights and administer the remedies to which the court has found them to be entitled. The former are criminal and punitive in their nature, and the government, the courts, and the people are interested in their prosecution. The latter are civil, remedial, and coercive in their nature, and the parties chiefly in interest in their conduct and prosecution are the individuals whose private rights and remedies they were instituted to protect or enforce. Thompson v. Railroad Co., 48 N. J. Eq. 105, 108, 21 Atl. 182; Hendryx v. Fitzpatrick (C. C.) 19 Fed. 810; Ex parte Culliford, 8 Barn. & C. 220; Rex v. Edwards, 9 Barn. & C. 652; People v. Court of Oyer and Terminer, 101 N. Y. 245, 247, 4 N. E. 259, 54 Am. Rep. 691; Phillips v. Welch, 11 Nev. 187, 190; State v. Knight, 3 S. D. 509, 513, 54 N. W. 412, 44 Am. St. Rep. 809; People v. McKane, 78 Hun, 154, 160, 28 N. Y. Supp. 981; 4 Bl. Comm. 285; 7 Am. & Eng. Enc. Law, 68. A criminal contempt involves no element of per-

sonal injury. It is directed against the power and dignity of the court, and private parties have little, if any, interest in the proceedings for its punishment. But if the contempt consists in the refusal of a party or a person to do an act which the court has ordered him to do for the benefit or the advantage of a party to a suit or action pending before it, and he is committed until he complies with the order, the commitment is in the nature of an execution to enforce the judgment of the court, and the party in whose favor that judgment was rendered is the real party in interest in the proceedings."

The court thereupon reaches the conclusion that the proceeding for contempt under which the petitioners were held imprisoned in that case was not criminal in its nature, but civil, remedial, and coercive, instituted and maintained for the purpose of enforcing the private rights of the judgment creditors to the collection of their judgments. The prayer of the petitioners was accordingly denied, and the petitions dismissed.

The case of In re Debs, 158 U. S. 564, 15 Sup. Ct. 900, 39 L. Ed. 1092, and 159 U. S. 251, 15 Sup. Ct. 1039, remains to be considered. A bill in equity had been filed by the direction of the Attorney General of the United States in the Circuit Court for the Northern District of Illinois, alleging that Debs and others had combined and conspired together to obstruct the operation of certain lines of railways engaged in interstate commerce and in carrying the United States mails, and that they threatened to continue to restrain, obstruct, and interfere with interstate commerce and the transmission of the mails. The bill prayed for an injunction, which was issued and served upon the defendants. Subsequently an attachment was issued against the defendants, charging them with violating the injunction, and upon a hearing they were found guilty of contempt of court and sentenced to imprisonment. Petitions were thereupon presented to the Supreme Court of the United States on behalf of the defendants, one for a writ of error, and the other for a writ of habeas corpus. The petition for a writ of error was denied. 159 U. S. 251, 15 Sup. Ct. 1039. The court, in its statement of the case upon the petition for a writ of habeas corpus (158 U. S. 573, 15 Sup. Ct. 900, 39 L. Ed. 1092), states that the petition for a writ of error had been denied on the ground that the order of the Circuit Court was not a final judgment or decree. In support of the petition for a writ of habeas corpus a number of objections were urged to the jurisdiction of the Circuit Court to adjudge the petitioners guilty of contempt of court—among others, that the judgment of the court had invaded the constitutional right of the petitioners to a trial by a jury. The Supreme Court sums up its answer to this objection, and states the law of contempt applicable to such a case, in the following comprehensive language:

"In brief, a court enforcing obedience to its orders by proceedings for contempt is not executing the criminal laws of the land, but only securing to suitors the rights which it has adjudged them entitled to."

In the present case the order of the court provided, in substance, that the Butte & Boston Consolidated Mining Company, through its agents and representatives, should be permitted, during a period prescribed in the order, to survey, examine, and inspect certain underground workings from the Rarus, Johnstown, and Pennsylvania claims, beneath the surface of the Michael Devitt claim, owned by the com-

plainant; and for that purpose such representatives of the complainant were to be permitted to remove or open all doors, bulkheads, or other obstructions which might be found in said premises, obstructing and preventing such examination and survey. The order was for the purpose of enabling the complainant to maintain its legal rights in said premises in the pending suits. The action of the appellants in refusing to comply with this order of the court was a resistance on their part to an adjudicated right in favor of the complainant. But it was provided in the judgment of contempt that the commitment should continue only until they should consent to the inspection, examination, and survey of the underground workings specified in the order, and until they should give the necessary orders and provide the necessary means for making such examination, inspection, and survey, and should permit the removal of the obstructions provided to be removed in said order, or until the further order of the court. It was further provided that, when the appellants should comply with the order of the court, the order should be discharged as to both fine and imprisonment against each and all of said parties, and none of the parties should be further held or chargeable thereunder. As said by the court in In re Nevitt, 117 Fed. 461, 54 C. C. A. 635:

"They carry the keys of their prison in their own pockets. Governments are founded to administer justice. Courts are established to determine the rights and remedies of litigants by peaceable decisions under the law, instead of by the wager of battle. They are not infallible, but no better method of determining adverse claims has yet been devised."

No constitutional right is denied to the appellants in this case. They are not required to furnish evidence against themselves. They are simply to unbar their doors, stand aside, and allow the representatives of the complainant to ascertain whether in the depths below the surface of their own property the defendant in the suit in which this controversy has arisen is not engaged in extracting and carrying away the wealth of the property. The complainant is simply asking to be allowed to establish and protect its own property and rights, and it would be a miserable failure of justice if the court has not the power to enforce obedience to its orders in such a proceeding.

The next question to be considered in this connection is the objection of the appellants that the Johnstown Mining Company is the owner in possession, and entitled to the possession, of the machinery, shafts, premises, and underground workings required to be used, entered, and inspected under said order of survey, examination, and inspection; that said Johnstown Mining Company is not a party to the action; that Josiah H. Trerise and Alfred Frank are not parties to the action, and therefore not subject to the jurisdiction of the court.

The petition for an order of the court for an examination, inspection, and survey of the underground workings and openings in the Rarus and Johnstown claims was presented to the Circuit Court on October 1, 1903. On October 13, 1903, the Montana Ore Purchasing Company, one of the defendants in the action, filed its answer to this petition, in which it denied generally the allegations of the petition, and, among others, denied that it was in possession or control of the shafts or openings in that portion of the Johnstown and Rarus lode

claims lying north of the Michael Devitt lode claim, or extending into the Michael Devitt lode claim; denied that the survey, inspection, and examination mentioned in the petition was necessary for the purpose of the action, or to enable the complainant to prepare the case for trial, or for any matter connected therewith; denied that the defendants or either of them, by means of workings made from the Rarus or Johnstown claims, or any other means, since the service of the injunction in the case, trespassed upon or mined or extracted any ores from within the Michael Devitt lode claim, or any portions of the claim mentioned in the petition. Upon the petition and answer the court on October 14, 1903, made the order of inspection, examination, and survey prayed for in the petition. Then followed the several appeals to this court to set aside the order of inspection. All of these appeals being denied, an attempt was made to execute the order of the court, when the execution of the order was obstructed by the appellants. In the answer of the Montana Ore Purchasing Company to the order to show cause, filed November 2, 1903, it alleged that it was not then, and had not been since the ——— day of August, 1903, in possession of the Rarus shaft or shafts, or any portion of the Rarus claim lying north of the Michael Devitt claim. On the same day the Johnstown Mining Company filed its special appearance in court, in which it denied the jurisdiction of the court over it to enforce obedience to the order of the court, and expressly of any such order as requested by the complainant, and refused to submit itself to the jurisdiction of the court. There are two deeds in the record, executed by the Montana Ore Purchasing Company, by F. Augustus Heinze, president—one dated August 5, 1903, filed for record in the office of the county recorder on October 17, 1903, and the other dated September 1, 1903, filed for record in the office of the county recorder on November 3, 1903. These deeds convey to the Johnstown Mining Company certain portions of the surface and underground veins of the Johnstown and Rarus claims. The Johnstown Company thus became a purchaser pendente lite, and derived its title and possession from the Montana Ore Purchasing Company after issue had been joined in the suit, and the deeds of conveyance were filed of record after the commencement of the proceedings for inspection, examination, and survey. In our opinion, this change of title to a portion of these claims and underground veins, under the circumstances disclosed by the evidence, in no way affects the question before the court. The Johnstown Company, as such purchaser, became subject to all the proceedings and decrees in the suit relating to the property involved in the suit. The original injunction in the case was directed to the Montana Ore Purchasing Company, and its clerks, agents, attorneys, servants, workmen, and lessees. In the proceedings relating to the order of inspection, that corporation undertook at first to represent all opposing interests, and, as we read the testimony in the case, it is still the real party in interest. The appellant F. Augustus Heinze is the president of that corporation. Josiah H. Trerise, another appellant, testifies that he is the superintendent of the corporation; and Alfred Frank, the third appellant, testifies that he is a mining engineer superintendent in the employ of the Montana Ore Purchasing Company and the

Johnstown Mining Company. The court below, in its judgment of contempt, found as a fact that Heinze, Frank, and Trerise had full knowledge and notice of the order of inspection and its terms, and during all the times mentioned in the order they were able to comply with its terms. Equity always attempts to get at the substance of things, and to ascertain, uphold, and enforce rights and duties which spring from the real relations of parties. It will never suffer the mere appearance and external form to cancel the true purpose, objects, and consequences of a transaction. 1 Pom. Eq. Jur. (2d Ed.) § 378.

The conclusion we reach is that the judgment of contempt of court which the appellants seek to have reviewed upon the present writ of error is a judgment in a civil proceeding; that it is remedial and coercive in its execution, and that it has been entered by the court for the purpose of enforcing the private rights of the complainant judicially determined in its favor; and that the appellants are subject to its terms and conditions. It follows that it is a judgment that cannot be reviewed upon this writ of error, and the writ of error is therefore dismissed, with costs to the defendant in error.

ALLEN-WEST COMMISSION CO. v. GRUMBLES et ux.

(Circuit Court of Appeals, Eighth Circuit. April 8, 1904.)

No. 1,979.

1. GIFT—INTENTION OF DONOR—RENUNCIATION OF DOMINION—DELIVERY.
   A fixed intention by the donor to irrevocably divest himself of title, dominion, and control of the subject of the gift at the very time he attempts to make it, the actual accomplishment of that purpose, and the delivery of the subject of the gift, are indispensable conditions of a valid donation.

2. SAME—CORPORATE STOCK—DELIVERY OF CERTIFICATES.
   The delivery of the subject of the gift must be made in the most effectual mode to command dominion over it.
   The delivery of certificates of shares of stock, when they are present and their delivery is practicable, is indispensable to a valid gift of stock in a corporation, because the possession of the certificates commands the dominion of the stock in the most effectual way.

3. SAME—DELIVERY OF WRITTEN ASSIGNMENT—EFFECT.
   The delivery of a written assignment of stock in a corporation is ineffectual to make a valid gift, while the donor retains the certificates.

4. SAME—EVIDENCE—CONCLUSIONS.
   G., the owner of 110 shares of stock in a corporation, delivered a written assignment of his interest in its business to his wife in May, 1899, when he was free from debt. He retained the certificates of the shares, voted them, and received dividends upon them, in money and in stock, until February, 1903, when he had become heavily involved in debt. He then transferred the stock to his wife by an indorsement and surrender of the certificates to the corporation.
   Held, G. had no intention in May, 1899, to then divest himself of the dominion and control of the stock, a delivery of the certificates of the stock was indispensable to accomplish such a purpose, and the delivery of the written assignment, while the donor retained and used the certificates to control the stock, was insufficient to complete a valid gift.

¶ 2. See Gifts, vol. 24, Cent. Dig. § 50.

5. GARNISHMENT—ORDER ON GARNISHEE TO DELIVER INTO COURT.

Under the statutes of Arkansas, where the garnishee appears by affidavit, and does not appear in person, or submit to an examination, or make default, the plaintiff is not entitled to an order that the garnishee shall deliver the property of the defendant in his possession, or that he shall pay the money which he owes the defendant, into court. His remedy is by compelling an examination under oath, or by an action under section 360, Sand. & H. Dig.

(Syllabus by the Court.)

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

The Allen-West Commission Company, a corporation, brought an action against J. H. Grumbles to enforce his liability under the statutes of the state of Arkansas for the debt of a bank of which Grumbles was president, and recovered a judgment of $21,133.35 against him. No attack is made upon this judgment. The indebtedness which it evidences had arisen in the years 1902 and 1903. On March 30, 1903, the plaintiff issued an attachment in its action against Grumbles, and garnisheed Mary E. Grumbles, his wife. The ground of the attachment and garnishment was that Grumbles had disposed of his property with intent to delay and defraud his creditors. The defendant in the action denied this averment. The issue thus made was tried by the court, which made a special finding of facts, dissolved the attachment, and discharged the garnishee, on the ground that there was no proof that Grumbles had disposed of any of his property with intent to delay or defraud his creditors. The writ of error challenges the judgment of dissolution of the attachment and of discharge of the garnishee, and counsel for the plaintiff in error rely upon the following facts to sustain their averment that this judgment was erroneous:

In May, 1899, the Mann-Tankersley Drug Company was a corporation of the state of Arkansas, engaged in the business of dealing in drugs at wholesale and retail at Pine Bluff, in that state, and the defendant James H. Grumbles was free from debt, and was the owner of 110 shares of stock in this corporation, of the value of $3,700, which was evidenced by a certificate of his ownership of these shares, which was in his possession. On May 14, 1899, he made and delivered to his wife an instrument in these words:

"Know all men by these presents, that I, J. H. Grumbles, of Nashville, Arkansas, for and in consideration of the sum of five dollars ($5.00) to me in hand paid by Mary Grumbles, and for the further consideration of love and affection that I have for my beloved wife, Mary Grumbles, and for the further purpose of making a division of my property with my wife, the said Mary Grumbles, the receipt whereof is hereby acknowledged, do hereby bargain, sell, and deliver unto the said Mary Grumbles all my right, title, and interest in the Mann-Tankersley Drug Company business, a corporation organized and existing under the laws of the state of Arkansas, and doing business in the city of Pine Bluff, Arkansas, under the corporate name of the Mann-Tankersley Drug Co., said business being a wholesale and retail drug business, and my interest in said business or corporation being of the value of about thirty-seven hundred dollars. To have and to hold the same unto the said Mary Grumbles, and her heirs and assigns, forever. And I, the said J. H. Grumbles, do hereby covenant to warrant and defend the title to said bargained interest in the said Mann-Tankersley Drug Co. business unto the said Mary Grumbles, and unto her heirs and assigns, forever, with all privileges and rights enjoyed by me in said business.

"Witness my hand and seal this 14th day of May, 1899.

"J. H. Grumbles."

He kept the certificate for the 110 shares of stock in his possession, and voted and received dividends in money upon it until February, 1903. Prior to this time he had incurred his liability to the plaintiff and had become insolvent. On February 7, 1903, the surplus earnings of the 110 shares of stock entitled it to a dividend of 144 additional shares of stock, and these additional shares were issued to and received by Mr. Grumbles. On February,

25, 1903, Grumbles indorsed and surrendered the certificates for the entire 254 shares, and caused new certificates therefor to be issued to his wife, Mary E. Grumbles. On March 14, 1903, Mary E. Grumbles sold this stock to innocent purchasers for $6,032.50. No notice of the May assignment to Mrs. Grumbles was given to the Mann-Tankersley Company until after January, 1903. The stock stood in the name of James H. Grumbles on the books of the corporation until February 25, 1903. The transfers of it subsequent to February 24, 1903, were entered on the books of the corporation, and the certificate thereof was filed with the clerk of Jefferson county, in the state of Arkansas, before the attachment herein was made.

W. B. Smith (J. M. Moore, on the brief), for plaintiff in error.

W. T. Wooldridge (F. G. Bridges, W. P. Feazel, and J. W. Bishop, on the brief), for defendants in error.

Before SANBORN, THAYER, and HOOK, Circuit Judges.

SANBORN, Circuit Judge, after stating the case as above, delivered the opinion of the court.

The crucial question in this case is: Did the delivery in May, 1899, by the defendant Grumbles to his wife, of the formal bill of sale of his interest in the Mann-Tankersley Drug Company business, constitute a completed gift of his 110 shares of stock in the corporation, in view of the fact that Grumbles retained the certificate of the shares, kept the stock in his own name upon the books of the company, voted and received dividends upon it until after he had become hopelessly insolvent and then transferred it to his wife by an indorsement and surrender of the certificate without the use of the assignment of 1899, of which no notice had been given to the corporation? If this question should be answered in the affirmative, the transfer by Grumbles to his wife in February, 1903, was no evidence of an intent on his part to hinder or defraud his creditors, because the stock had not been his since May, 1899. If, on the other hand, this question should be answered in the negative, that transfer was conclusively fraudulent as against creditors, because it was a voluntary conveyance, without valuable consideration, after the donor had become heavily indebted to his various creditors.

While the assignment recites a consideration of five dollars and of love and affection, counsel for Mr. and Mrs. Grumbles do not claim, nor has the court below found, that this instrument evidences any sale for value of the 110 shares of stock, or that $5, or any other sum, was ever paid as a part of the consideration for the execution or delivery of that assignment. Moreover, if that question were presented here for our consideration, the written instrument and the facts disclosed by the findings of the court would lead our minds to the conclusion which counsel for all parties to this litigation have tacitly adopted. At the time the assignment was made the stock was worth about $3,700. It is not a rational inference that property of this value was sold for $5. Again, the entire assignment must be read and construed as a whole. When thus read, it declares that it was made for $5, for love and affection, and for the purpose of making a division of the property of the grantor. The natural inference from these recitals is that it was a voluntary assignment without valuable consideration, and that the reference to the $5 is the usual form of recital

which is frequently inserted in instruments of this character, when no valuable consideration is actually paid. Baltimore Retort & Fire Brick Co. v. Mali, 65 Md. 93, 94, 3 Atl. 286, 57 Am. Rep. 304.

We come, therefore, to the only question to which counsel have addressed their arguments—to the question whether or not, under the law applicable thereto, the facts of this case will sustain the conclusion that the defendant Grumbles made a valid gift of his stock in the Mann-Tankersley corporation to his wife on May 14, 1899, when he delivered to her the assignment in question. In every case of an alleged gift, the burden of proof is upon the donee to establish a complete and valid donation. Jones v. Falls (Mo. App.) 73 S. W. 903. Among the indispensable conditions of a valid gift are the intention of the donor to absolutely and irrevocably divest himself of the title, dominion, and control of the subject of the gift in præsenti at the very time he undertakes to make the gift (Lehr v. Jones, 74 App. Div. 54, 77 N. Y. Supp. 213; Bickford v. Mattocks, 50 Atl. 894, 95 Me. 547; In re Estate of Soulard, 141 Mo. 642, 657, 659, 43 S. W. 617; Newman v. Bost [N. C.] 29 S. E. 848, 850); the irrevocable transfer of the present title, dominion, and control of the thing given to the donee, so that the donor can exercise no farther act of dominion or control over it (Basket v. Hassell, 107 U. S. 602, 614, 615, 2 Sup. Ct. 415, 27 L. Ed. 500; Cook v. Lum, 55 N. J. Law, 373, 376, 26 Atl. 803); and the delivery by the donor to the donee of the subject of the gift or of the most effectual means of commanding the dominion of it. This delivery must be an actual one "so far as the subject is capable of it. It must be secundum subjectam materiam, and be the true and effectual way of obtaining the command and dominion of the subject." 2 Kent's Com. 439. If the subject of the gift is a chose in action, such as a bond, a note, or stock in a corporation, the delivery of the most effectual means of reducing the chose to possession or use, such as the delivery of the bond, or the note, or the certificate of stock, if present and capable of delivery, is indispensable to the completion of the gift. Richards v. Delbridge, L. R. 18 Eq. 11; Knight v. Tripp, 121 Cal. 674, 679, 54 Pac. 267; Miller v. Jeffress, 4 Grat. 472, 480; Matthews v. Hoagland, 48 N. J. Eq. 455, 487, 21 Atl. 1054; Wadd v. Hazelton, 137 N. Y. 215, 219, 33 N. E. 143, 21 L. R. A. 693, 33 Am. St. Rep. 707; Matter of Crawford et al., 113 N. Y. 560, 21 N. E. 692, 5 L. R. A. 71; Beaver v. Beaver, 117 N. Y. 421, 22 N. E. 940, 6 L. R. A. 403, 15 Am. St. Rep. 531; Liebe v. Battmann, 33 Or. 241, 54 Pac. 179, 72 Am. St. Rep. 705; Williams v. Chamberlain, 165 Ill. 210, 218, 46 N. E. 250; Gartside v. Pahlman, 45 Mo. App. 160.

Stock in a corporation is a chose in action, and the certificates are the evidence of its existence and of its amount. They bear some analogy to the title deeds of real estate (Com. v. Crompton, 137 Pa. 138, 20 Atl. 417); but they are far more commanding and useful in the handling of the stock they represent than are title deeds in the handling of the land they describe. Because the stock in a corporation is transferred by means of the delivery, or by means of the indorsement and delivery of the certificates, the latter by a sort of mental substitution come to be thought of and dealt in as the stock itself. The stock of corporations is ordinarily transferred on the books of the company

only by the surrender of the certificates and the issue of new ones to the grantees. Hence assignments, bills of sale, and conveyances, without the accompanying possession and delivery of the certificates, are much less effectual or available to command the title, the dominion, or the control of the stock than the mere possession of the certificates themselves. The indorsement and delivery, or the mere delivery, of the certificates, without entry of the transfer upon the books of the corporation, is generally held to constitute a valid sale of the stock between vendor and vendee, or a completed gift of it between donor and donee. Such an indorsement and delivery of the certificates generally enables the holder to enforce a transfer of the title to the stock upon the books of the corporation. Basket v. Hassell, 107 U. S. 602, 614, 615, 2 Sup. Ct. 415, 27 L. Ed. 500; Com. v. Crompton, 137 Pa. 138, 20 Atl. 417; Hopkins v. Manchester (R. I.) 19 Atl. 243; Walsh v. Sexton, 55 Barb. 251; Leyson v. Davis (Mont.) 42 Pac. 775, 793, 31 L. R. A. 429; First National Bank of Richmond v. Holland, 99 Va. 495, 39 S. E. 126, 55 L. R. A. 155, 86 Am. St. Rep. 898; Stone v. Hackett, 12 Gray, 227, 231; Cushman v. Thayer Mfg. Jewelry Co., 76 N. Y. 365, 32 Am. Rep. 315; Grymes v. Hone, 49 N. Y. 17, 10 Am. Rep. 313; Reed v. Copeland, 50 Conn. 472, 47 Am. Rep. 663.

If, by an indorsement and delivery of the certificates of stock with the donative intention, the defendant had completed his gift to his wife, a court of equity would have compelled the corporation to transfer the shares upon its books. The difficulty with this case is that the certificates of shares were not delivered, no intention on the part of the donor to immediately renounce dominion and control of the stock was formed, and no executed gift was made. This was the situation: Grumbles made the assignment of his interest in the drug business to his wife on May 14, 1899. His interest was 110 shares in the stock of the corporation which was operating that business, and he held the certificate of his ownership of these shares while the title to them stood in his name upon the books of the company. The holding of the certificate of shares of stock is the customary and most effectual means of using the rights and privileges which the stock confers. The indorsement and delivery of this certificate is the usual and most efficient way of transferring the stock. Three things were essential to a valid gift of this stock by the defendant: (1) A fixed purpose, at the time he made the assignment to his wife, to then divest himself of all title, dominion, and control of the stock, and to vest these irrevocably in his wife; (2) the immediate and perfected execution of this purpose; and (3) the delivery to his wife of the most effectual means of using and reducing the stock to possession. The indorsement and delivery of the certificate to his wife would have proved all these prerequisites. Such an indorsement and delivery was the true, customary, and most effectual way to evidence the intention to transfer the title, the control, and the dominion of the stock, and to accomplish that purpose. The fact that the defendant did not pursue this plain method is in itself cogent proof that he intended to accomplish no such purpose. He made no indorsement or delivery of the certificate. He made no assignment of the stock by name or description, but simply delivered to his wife an assignment of his interest in

the business of the corporation, which she never used to obtain control or dominion of the stock, but which she quietly tucked away and never brought to light until creditors were pressing her husband for the payment of his debts, nearly four years after she received the assignment. Neither Grumbles nor his wife gave notice to the corporation of this nominal conveyance until after his bank had failed, in February, 1903, and his creditors were clamoring for payment. He received annual dividends upon the stock from May, 1899, until February, 1903. In the latter month a stock dividend of 144 additional shares accrued upon his stock, and he took the additional shares in his own name, and finally, after he had become insolvent, he transferred all these shares to his wife in February, 1903, not by the use of the dormant assignment of 1899, but by the usual and most effectual method—by an indorsement and delivery of the certificates. These are all the facts in this case from which the intention of the defendant when he made the assignment of 1899 may be deduced. He knew how to divest himself of title, of control, and of dominion of the stock; for he did so by indorsement and delivery of the certificates in February, 1903. If he ever intended to do so before that time, the evidence of that intention in this record is imperceptible. A man is presumed to intend the natural and probable consequences of his acts. The consequences of the acts of Grumbles here were that, although he delivered to his wife the dormant assignment, he retained the apparent title, the actual control and dominion of the stock, and the enjoyment of every right and privilege it commanded, for nearly four years after he parted with the written assignment, and until the pressing claims of creditors admonished him that his stock was liable to be applied to the payment of his debts, and then for the first time he invoked its aid. The deduction from these facts is irresistible. It is that the defendant Grumbles intended in 1899 exactly what he did in that and the subsequent years. He intended to retain the appearance of title, the actual dominion, control, and beneficial use of his stock, until the claims of creditors or his own decease compelled him to relinquish them. That intention is fatal to the existence of the gift he asserts. Gallagher v. Donahy (Kan.) 69 Pac. 330.

But, even if Grumbles had intended to renounce dominion and control of the stock, he could not have accomplished that purpose by the mere delivery of this assignment, because it had not that effect, and because he failed to deliver to his wife the most effectual and appropriate means of reducing the stock to possession and use—the certificate of the shares. The assignment was by its terms a conveyance of his interest in the drug business and a covenant to defend the title to that interest, together with all the rights and privileges enjoyed by him in the premises. It did not transfer the beneficial use of the stock, the privilege of voting it and of drawing dividends upon it, because these rights and privileges were transferable only by a transfer of the title of the stock upon the books of the corporation, upon the surrender of the certificate. The possession of the certificate was the sine qua non of that transfer, and the most extensive effect that the assignment could have had was to give Mrs. Grumbles the covenant or promise of her husband that he would deliver the certificate, so that she could

transfer the stock and secure its beneficial use. But a gift of a covenant or promise is void, because it is unexecuted, and every valid gift must be executed and complete. Harris v. Clark, 3 N. Y. 93, 112, 51 Am. Dec. 352.

It is said that the assignment gave the donee the right to compel the defendant to surrender the certificate and transfer the stock. But the fact is that Grumbles' possession of the certificate left him the unrestricted power, by the surrender of the certificate and the sale of the stock to a bona fide purchaser, to deprive his wife of every right under the assignment, except a right of action for damages for conversion of the stock. A gift of a right of action for conversion of stock is not a gift of stock. The present transfer of dominion and control of the stock, so that the donor cannot deprive the donee of it, is essential to a valid gift of stock. The gift of a right of action for conversion of it, or of the possibility of compelling a delivery or transfer of it by a suit in equity, is not sufficient, when the donor retains the unrestrained power to place the title, possession, and control of the stock beyond the reach of the donee at any time, and thereby to defeat such a suit in equity. Again, if the assignment had been in terms a conveyance of the stock, it would not have sustained the defendant's claim of a gift, because he failed to deliver the certificate of the shares. The certificate was the usual and most effective means of reducing the stock to possession and use. It was present. It was capable of manual delivery. In this state of the case its delivery was indispensable to a valid gift, and a separate assignment of the stock without a delivery of this certificate was ineffective.

Counsel for the defendant argue that a complete gift may be made by a written assignment or conveyance, without a delivery of the subject of the gift, and cite authorities to support this position. It is true that in cases where manual delivery of the subject of the gift, or of the evidences which command it, is impracticable or impossible, and in cases in which a written conveyance is the most effectual mode of divesting the donor of dominion and control of the thing, such a conveyance is sufficient. But it is equally true that a written assignment is utterly inadequate, where the delivery of the subject of the gift or the delivery of the evidences of it is practicable, and the latter is the more ready and efficient way of commanding the dominion and control of the subject of the gift. Thus in Grymes v. Hone, 49 N. Y. 17, 10 Am. Rep. 313, a gift by means of a written assignment of 20 out of 120 shares of stock that were evidenced by a single certificate was sustained; in Bond v. Bunting, 78 Pa. 210, a gift by an assignment of all over $5,600 that should be realized from an insurance policy was maintained; and in Banks' Adm'r v. Marksberry, 3 Litt. 276, a gift by an assignment of the future income of a slave was held valid—without a delivery of the subjects of the gift. But the reason for these decisions is that the delivery of these subjects was impracticable, because others than the donee had rights and interests in them which entitled them to their possession. Again, a gift by means of an assignment made by the owners of a fund that had been collected from an insurance policy and was in the hands of executors of an estate was a good gift without a delivery of the money, because it was not in

the possession of the donors, and hence was incapable of manual delivery by them. Matson v. Abbey, 70 Hun, 475, 24 N. Y. Supp. 284. So in Tarbox v. Grant, 56 N. J. Eq. 204, 39 Atl. 378, 380, a trust deed to a third party, trustee, for the benefit of the children of the grantor, of his equitable interest in the property, was sustained as a creation of a trust; and in Walker v. Crews, 73 Ala. 412, a deed of promissory notes which by its terms reserved the right in the donor to retain and collect the notes, and to invest and reinvest their proceeds for the donee, was sustained as a gift and a declaration of trust, without a delivery of the notes. But an instrument like the assignment at bar, which was executed as an absolute conveyance, and which contains no declaration of trust, cannot be sustained as the creation or the declaration of a trust for the benefit of the donee. Wadd v. Hazelton, 137 N. Y. 215, 219, 220, 33 N. E. 143, 21 L. R. A. 693, 33 Am. St. Rep. 707; Young v. Young, 80 N. Y. 437, 36 Am. Rep. 634; In re Estate of Soulard, 141 Mo. 659, 43 S. W. 617; Richards v. Delbridge, L. R. 18 Eq. 11, 14, 15, overruling Morgan v. Malleson, L. R. 10 Eq. 475, and Richardson v. Richardson, L. R. 3 Eq. 686; Milroy v. Lord, 4 De Gex, Fisher & Jones, 264, 274, in which Lord Justice Turner well said: "If it is intended to take effect by transfer, the court will not hold the intended transfer to operate as a declaration of trust; for then every imperfect instrument would be made effectual by being converted into a perfect trust." Again, a recorded deed of real estate, or a recorded brand of cattle, in the name of the donee, without a delivery of the subjects of the gifts, may well be sustained, because the donor, by placing the record title in the donee, places the property irrevocably beyond his dominion or control. Holmes v. McDonald, 119 Mich. 563, 78 N. W. 647, 75 Am. St. Rep. 430; Love v. Francis, 63 Mich. 181, 29 N. W. 843, 6 Am. St. Rep. 290; Adams v. Adams, 21 Wall. 185, 191, 22 L. Ed. 504; Hillebrant v. Brewer, 6 Tex. 45, 55 Am. Dec. 757. But "if an owner of shares of stock in a corporation, intending to give them to A., should take the scrip to the office of the company and surrender it, and receive new scrip in the name of A., has he by this change of title on the books of the company, while retaining the entire possession and control of the scrip, and without any delivery thereof to A., accomplished a valid executed gift of the ownership of the shares to his intended donee? We should say clearly not." Matter of Crawford et al., 113 N. Y. 560, 567, 21 N. E. 692, 5 L. R. A. 71. The reason for the difference between a gift executed by a recorded deed of real estate and one unexecuted by a failure to deliver certificates of stock is that the record title to real estate controls and draws to it the possession and dominion of the property and of its title deeds, while, on the other hand, the possession of certificates of shares of stock commands the dominion and control and the record title of the stock.

The clew to the labyrinth of decisions upon this subject is the reason of the rule which makes delivery of the thing, or of the most available means of commanding its dominion and control, indispensable to the validity of a gift. That reason is the imperative necessity of requiring the renunciation by the donor, not only of all possession, dominion, and control of the thing, but of all appearance thereof, lest

by such an appearance he should lead creditors, purchasers, and others to believe, and to credit him in the belief, that he is the owner of that which in reality belongs to his donee, and lest by fraud and perjury gifts be proved which never in fact existed. Yancey v. Field, 85 Va. 756, 8 S. E. 721. This reason of the rule conditions the nature of the delivery it requires, and demands that that delivery shall, in every case, whether evidenced by written assignment or oral statement, consist as far as practicable of a delivery of that thing which will most effectually and irrevocably divest the donor of the dominion and the control of the subject of the gift, and thus of the appearance of title, whether that thing be the subject itself, a symbol of the subject, a written assignment of it, or the patent evidences of it whose delivery constitute the most effectual mode of transferring the dominion over it. In the case at bar that thing was the certificate of the shares. The delivery of that certificate was the most effectual mode of divesting the defendant of his title, of his dominion, and of his control of the stock and of the appearance thereof. It was the most efficient way of avoiding the mischief which the rule of delivery was established to prevent, while, on the other hand, the delivery of the dormant and unused assignment, unaccompanied with the delivery of the certificate, was the least effective for these purposes, and the most efficient way of promoting the mischief at which the rule was leveled. The failure to deliver the certificate was fatal to the alleged gift, because without its delivery the dormant assignment did not irrevocably deprive the defendant of the dominion and control of the stock, but left them all perfectly amenable to his will.

This conclusion is not without support in the decisions of the courts. In Basket v. Hassell, 107 U. S. 602, 614, 2 Sup. Ct. 415, 27 L. Ed. 500, a case in which the Supreme Court held that the delivery of a certificate of deposit to an intended donee, with an indorsement upon it to pay it to the latter's order, but not until the donor's death, was not a valid gift, because it did not deprive the donor of the present power of dominion and control. That court declared, as a result of a review of the authorities relative to the delivery of a chose in action, that the rule was—

"That the instrument or document must be the evidence of a subsisting obligation, and be delivered to the donee, so as to vest him with an equitable title to the fund it represents, and to divest the donor of all present control and dominion over it, absolutely and irrevocably."

In Knight v. Tripp, 121 Cal. 674, 676, 679, 54 Pac. 267, the Supreme Court of California held a formal written assignment delivered to the donee insufficient to sustain a claim of a gift, and said:

"There must be both a purpose to give and the execution of this purpose. The purpose must be expressed, either orally or in writing, and it must be executed by the actual delivery to the donee of the thing given, or of the means of getting possession and enjoyment thereof. A written instrument may be available for designating the property intended to be given, as well as to show the intention of the donor; but by itself it no more establishes the gift than would the same words orally delivered by the donor. * * * It is the fact of delivery that converts the unexecuted and revocable purpose into an executed and complete gift."

In Baltimore Retort & Fire Brick Co. v. Mali, 65 Md. 93, 96, 3 Atl. 286, 57 Am. Rep. 304, the subject of the intended gift was stock in a

corporation, the certificate for which remained uncut in the stock book of the company. Thereupon the owner made a written assignment of the stock to his daughter, which recited that it was for value, although no valuable consideration was actually paid, and delivered it to the attorney for the corporation, with instructions to transfer the stock to the daughter on the books of the company as soon as the attorney obtained the consent of the mortgagee of the corporation. The court held that the intended gift was incomplete and void, because the owner had not irrevocably parted with his control and dominion of the stock.

In Matthews v. Hoagland, 48 N. J. Eq. 455, 485, 490, 21 Atl. 1054, 1065, 1067, the court refused to sustain an attempted gift of stock, evidenced by the delivery of the indorsed certificates, without any accompanying assignment, on the ground that—

"The failure of the record owner of the stock to clothe the donee with the means of at once acquiring the benefits of the stock leaves unperformed an act which prevents the gift from taking effect in præsenti, which is vital to a gift inter vivos."

In Snyder v. Snyder (Mich.) 92 N. W. 353, 354, an attempt was made to sustain a gift of a mortgage by means of a written assignment made by the donor to her son in 1888 and recorded in 1893. But it was defeated, because until she died in 1899 the donor enjoyed the beneficial use of the mortgage, not by virtue of any of the terms of the assignment, but by virtue of an oral agreement aliunde to that effect.

In Snook v. Sullivan, 53 App. Div. 602, 607, 66 N. Y. Supp. 24, affirmed in 167 N. Y. 536, 60 N. E. 1120, an alleged gift, evidenced by an assignment and delivery of the certificate of the stock, was defeated, where the donee, after the assignment, drew the dividends, as he had done before, as attorney in fact of the donor, and presumably applied them to her use.

And in Bauernschmidt v. Bauernschmidt, 97 Md. 35, 54 Atl. 637, 642, 643, the Court of Appeals of Maryland held that there was no completed gift of stock by a husband to his wife, although he placed the title of 30 shares of it in her name upon the books of the corporation and issued a certificate therefor in her name, which he subsequently surrendered to the corporation, and although he caused 140 shares of the stock to be transferred to himself and his wife, and caused a certificate therefor to be issued in their names, because during all this time he actually had the dominion and control of the stock by virtue of his possession of the certificates. The court declared in words which are peculiarly applicable to the facts of the case before us:

"He, and he alone, voted the 140 shares, and his final assertion of control over the certificate representing those shares was manifested when he transferred it in blank and delivered it to Sperry, Jones & Co. His dealing with the stock, and her acquiescence in what he did, and the fact that he could, and did, as the actual owner of all the property which the company possessed, exercise complete control over those 140 shares, show that he had never surrendered dominion over them, or put it out of his power to revoke the gift of them."

Other authorities almost without limit could be cited in support of the position that this alleged gift was incomplete and invalid, because

the defendant failed to renounce dominion and control of its subject; but perhaps our views have already been sufficiently illustrated, and farther discussion will be omitted.

The dormant assignment of May 14, 1899, did not effect a valid gift of the stock of the defendant Grumbles, because he then had no intention to immediately and irrevocably divest himself of the control and dominion of the stock, because he retained the possession of the certificate, and all the rights and privileges which the stock conferred, until February, 1903, and because he failed until that time to irrevocably divest himself of the title, dominion, and control of the stock. As this stock remained his property until many months after his indebtedness to the plaintiff accrued, his voluntary transfer of it to his wife in 1903 was in the eyes of the law a fraud upon the plaintiff, and the judgment of the circuit court that the attachment be dissolved, and the garnishee, Mary E. Grumbles, be discharged, cannot be sustained.

The statutes of Arkansas provide that each garnishee summoned shall appear in person or by his affidavit disclosing his indebtedness to the defendant and the property of the defendant in his possession (Sand. & H. Dig. § 357); that he may be required to appear in person and to submit to an examination under oath; that if, when he appears in person and is examined under oath, and when he makes default by failing to appear and the court hears proofs, the court finds that he has in his possession property of the defendant or that he is indebted to the defendant, it may order the garnishee to deliver the property or to pay the amount of the debt into the court. Sections 358, 359, Sand. & H. Dig. The counsel for the plaintiff ask this court to direct the court below to order the garnishee, Mrs. Grumbles, to pay the proceeds of the sale of the defendant's stock which she has received into the Circuit Court upon the reversal of the judgment dissolving the attachment and discharging the garnishee. But the garnishee, Mrs. Grumbles, has not as yet come within the terms of the provisions of the statutes which have been cited. She has not appeared in person or been examined under oath. She has not made default in appearance. She appeared by her affidavit, in which she denied that she was in possession of any of the property of the defendant, and denied that she was indebted to him. In this state of the case the court below may undoubtedly compel her to appear in person and to submit to an examination under oath, and then, if the evidence sustains the charge of the plaintiff, it may order her to pay the proceeds of the sale of the stock into court. But, in the absence of any proceeding of this character and of any appearance of Mrs. Grumbles in person, the remedy of the plaintiff is to proceed against her by an action under section 360, Sand. & H. Dig., which provides that, when the garnishee fails to make a disclosure satisfactory to the plaintiff, he may proceed in an action against her by filing a complaint and causing a summons to be issued upon it. The time has not yet arrived under these statutes when the plaintiff is entitled to an order on the garnishee to pay the moneys she obtained from the sale of the stock into court.

The judgment of the court below, that the attachment be dissolved, and that the garnishee, Mrs. Mary E. Grumbles, be discharged, must be reversed, and the case must be remanded to the Circuit Court, with

instructions to enter a judgment that the attachment is sustained, and to take further proceedings not inconsistent with the views expressed in this opinion.

It is so ordered.

CITY OF MOBILE v. SULLIVAN TIMBER CO.

(Circuit Court of Appeals, Fifth Circuit. April 8, 1904.)

No. 1,312.

1. LAND UNDER NAVIGABLE WATERS—OWNERSHIP.
   The state of Alabama, when admitted into the Union, acquired by the compact the title to the soil below high-water mark under the navigable waters within the limits of the state which had not been previously granted.

2. SAME—CONVEYANCE—TRUSTS.
   By Act Ala. Jan. 31, 1867 (Laws 1866–67, p. 307), granting to the city of Mobile so much of the shore and soil under the Mobile river as was within the city's boundaries, the city acquired title to the land so conveyed as trustee for the public, and could not convey the same for the benefit of riparian proprietors.

3. SAME—IMPLIED LICENSE—CUSTOM.
   Where a city held the title to the land under a navigable river within the city's limits below high-water mark in trust for the public, a custom under which riparian proprietors used the land for the erection of wharves, etc., was not available to support a contention that the city had thereby been divested of its title to the land.

4. SAME—ESTOPPEL.
   Where a city held the title to land under a navigable stream in trust for the public, and a river commission was authorized to establish wharves, bulkheads, boom lines, etc., the fact that neither the city nor the commission objected to the construction of expensive works, including bulkheads, etc., in the river, by a riparian proprietor, did not estop the city to deny such proprietor's right to continue to occupy the same.

5. SAME—CONDEMNATION.
   Where a riparian proprietor, with the knowledge of a city holding the title to land under a navigable stream for the benefit of the public, constructed an expensive work, including wharves, booms, bulkheads, etc., on the land, in order to render the river available for use in lumbering operations, and thereafter such proprietor paid taxes and fees to the city for the privilege of erecting and maintaining such structures, the city was only entitled to a restoration of the land so used on payment of reasonable compensation to such proprietor for the loss sustained.

Appeal from the Circuit Court of the United States for the Southern District of Alabama.

L. H. & E. W. Faith, for complainant.

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

Before McCORMICK, Circuit Judge, and SPEER and PARLANGE, District Judges.

SPEER, District Judge. This cause presents an appeal from a decree of the Circuit Court for the Southern District of Alabama. It appears from the record that the Sullivan Timber Company, a cor-

¶ 1. See Navigable Waters, vol. 37, Cent. Dig. § 184.

poration of the state of Florida, had been sued in ejectment by the city of Mobile to recover two pieces of real estate. This was riparian land. One lot was between Old Water street and the channel of the Mobile river on its western side, and the other was between the channel of the Mobile river and a line parallel with and 100 feet east of the high-water mark on the western side of the river. These actions were brought by the city of Mobile to assert its title not only to the shore and part of the river bed, but also to the immediately abutting upland. The title to this land was originally in the United States government, and it passed to the state of Alabama by virtue of the act of Congress under which the state was admitted into the Union. Subsequently the title passed to the city of Mobile by virtue of certain statutes. The first was approved January 31, 1867 (Laws 1866–67, p. 307), and provides that the shore and the soil under Mobile river situate within the boundary lines of the city of Mobile, as defined and set forth in section 2 of the act to incorporate the city of Mobile, approved February 2, 1866 (Laws 1865–66, p. 202), "be and the same is hereby granted and delivered to the city of Mobile." The second section declares the municipal authorities of the city trustees "to hold, possess, direct, control and manage the shore and soil herein granted in such manner as they may deem best for the public good." Again, on December 5, 1896 (Acts 1896–97, p. 49), the General Assembly of Alabama enacted—

"That the absolute and unconditional title and right to all real estate, rights, and easements, pertaining, or incidental, to any real estate, or any right therein, or thereto, heretofore vested in the mayor, alderman and common council of the city of Mobile, or in the port of Mobile, or in the present city of Mobile, or in any municipal corporation of Mobile, however said corporation may have been named or called, whether held in trust, or otherwise, except such as have heretofore vested in the trustees for the holders of the bonds of the city of Mobile, is hereby vested absolutely, and unconditionally in the city of Mobile, to be by it held, managed, controlled and disposed of, as to it may seem best."

These statutory grants to the city of Mobile are in accordance with the salutary principle embodied in the Constitution of many of the states, including that of the state of Alabama, by which it is guarantied that the navigable waters of the state shall be forever preserved as public highways.

It is alleged that the Sullivan Timber Company, which was the defendant in the actions of ejectment brought by the city, had taken possession of the shore and soil in controversy, and had erected thereon certain wharves and other obstructions, which set out into the river midway between the shore and what is termed "the point of practical navigability." These structures were wholly disconnected with the shore and with the navigable channel, and have the effect to obstruct all communication between the shore and the navigable part of the stream. By these structures, it is insisted that the defendant has inclosed a part of the Mobile river, and, excluding all other persons therefrom, uses this to float its own barges and logs. It is insisted by the city that the action of ejectment was brought to maintain the communication between the upland belonging to the city with the navigable river, and to assert its public ownership, in order that all portions of this important navigable stream and harbor,

upon which definite rights of wharfage have not been granted, may remain available to the general public in accordance with the act under which the state was admitted into the Union. These actions having been instituted in the state circuit court of Mobile county, Ala., the defendant thereto, the Sullivan Timber Company, caused them to be removed into the United States Circuit Court, and, after removal, there filed the bill on which the decree here complained of was rendered.

By the averments of this bill the following contentions are presented for the complainant: First. That the city of Mobile claimed the lands under the act of January 31, 1867, which vested the title in the city as trustee for the public good. That this enactment, in connection with the act of February 18, 1895 (Acts 1894-95, p. 815), as amended by the act of December 5, 1896 (Acts 1896-97, p. 49), vested the absolute and unqualified legal title to the shore and soil under Mobile river in the city of Mobile, discharged and freed from the trust created by the act of 1867. That this was the sole title of the city of Mobile. That the municipal corporation for whose benefit these enactments had been passed had been annulled and abolished on February 11, 1879, and, as a substitute therefor, a new municipal corporation was created, called the "Port of Mobile." That the Legislature of Alabama gave this new corporation no power, title, authority, or jurisdiction to the shore and soil under the Mobile river. However, by an amendment made to its charter on December 8, 1880, the corporation was given power to establish and declare by ordinance a designated line along the river front, within the corporate limits of the city, beyond which wharves and other structures should not be built. That, acting under the authority last mentioned, in 1882, the police board of the port of Mobile established such channel lines, and declared that wharves and similar structures should neither extend beyond nor fall short of said lines. By the act of December 10, 1886, the municipality was again entitled the "City of Mobile," and it was given power to establish channel lines, but with the proviso that, if the Legislature should create a harbor commission, the power in the city of regulating wharf and boom lines should be suspended so long as the commission was clothed with that power. That on February 28, 1887, such a commission, with such power, was created. It was organized in 1887, and is now exercising the powers and jurisdiction given to it by the act. The bill further alleges that the timber company owns the upland in front of which is the locus in quo; that its predecessors in title and itself, at great expense, built wharves, bulkheads, booms, etc., on the shore and over the water in front of their upland out to the established lines; that at still further expense it had built in the lower marsh land, and improved the upland—built sawmills, etc., thereon; that these improvements were made under permission obtained from the city of Mobile and the Mobile river commission, respectively, and the work was done under the supervision of the appellant's civil engineer. The bill further avers that the timber company, which is the appellee here, as the owner of the upland, had the right of access from its upland to the navigable portion of said river in front of it, and to the wharves

built out thereto, subject to such reasonable regulations as the city might prescribe. This right, it is averred, was secured by the common law of the state of Alabama, as well as by the Constitution and statute laws thereof.

There are the usual prayers for process and for temporary injunction pendente lite. Another and more important prayer is that on the hearing:

"The court will be pleased to perpetuate such injunction, and decree that the city of Mobile and all persons claiming under it be perpetually enjoined and restrained from prosecuting said ejectment suits aforesaid, and from molesting or disturbing your orator in the possession of said property out to the said channel lines of Mobile river, as established, and from asserting title or claim thereto, and, further, that the court may be pleased to quiet the right, title, and possession of orator in its wharf, bulkheads, and improvements from orator's upland out to the said channel line of Mobile river aforesaid."

Motions to dismiss the bill for want of equity and demurrers thereto were overruled, and certain amendments followed. The bill as amended was retained in court, and upon the pleadings and proof the court rendered a decree in favor of the Sullivan Timber Company, and the city of Mobile brought this appeal.

A reference to the decree granted by the court will discover that it is of the most sweeping character. By its perpetual injunction it finally concludes the appellant from asserting any claim whatever to, or from any interference with, the use and possession by the Sullivan Timber Company of its wharves, docks, booms, and other improvements erected by it, in front of its upland, on the lands and premises in controversy. It clearly has the practical effect to vest the fee to this important wharf property, which may be highly essential to the future prosperity of the port, in the Sullivan Timber Company, and its successors in title.

We are of the opinion that while that company may possess equities of importance, which the court, after proper inquiry, may feel authorized to protect, the decree transcends any right to which the complainant is entitled, and has the effect to reverse the policy of the state, intended to secure to the public access to its navigable streams and harbors. This policy is increasingly important in view of the already augmented commerce of the Gulf ports, and the phenomenal augmentation which will necessarily be caused by the construction of the Isthmian Canal.

While the briefs of opposing counsel in this case afford a great plentitude of authority, and, indeed, exhibit commendable industry and research, our determination with regard to the title of the city must be controlled by the latest and most authoritative decision upon the subject. This is found in the case of Mobile Transportation Co. v. Mobile (decided by the Supreme Court of the United States January 5, 1903) 187 U. S. 479, 23 Sup. Ct. 170, 47 L. Ed. 266. There it is conclusively settled that the state of Alabama, when admitted to the Union, became entitled to the soil under the navigable waters below high-water mark within the limits of the state, not previously granted. It is further held in the same case that the legislation of the state conveying to the city of Mobile the shore and soil under Mobile river is not unconstitutional,

as impairing the vested rights of owners of grants bordering on Mobile river, for the reason that such grants do not relate to land bordering on tidal streams; and further that, as the state held the lands below high-water mark as trustee for the public, it had the right to devolve the trust upon the city of Mobile. In short, this case adjudicates the title of the lands in controversy under the acts and resolutions of Congress, the ordinances of Alabama, and the acts of the General Assembly of the state hereinbefore enumerated. It is difficult, in view of this decision, to understand how any controversy can be maintained as to the title of the city. Many decisions of the Supreme Court of Alabama are reviewed in the learned opinion of Justice Brown. His conclusions are, as stated, that the title to all lands under tidal waters in Alabama below high-water mark are in the state, and subject to such disposition as that made by the state in this case in behalf of the city of Mobile. He continues:

"The status of real estate within a particular jurisdiction is not so much one of contract as of policy, which may be changed at any time by the Legislature, provided no vested rights are disturbed. Of course, if riparian proprietors have acquired the title to the property below high-water mark by a grant or prior possession good against the state, they could only be dispossessed by proceedings in eminent domain. The act of 1867 declared no more than that the rights possessed by the state in the shore and soil under Mobile river were granted to the city. We see nothing objectionable in this act. What the state held, it held as trustee for the public, and it had a right to devolve this trust upon the city of Mobile. What it had not, it could not grant, and the rights of the riparian proprietors were neither enlarged nor restricted by the act." "Upon the whole," the learned justice concludes, "we are of opinion that there is no defect upon the face of the title of the city which the transportation company was entitled to avail itself of."

It is true that in that case the court expressly declined to pass upon the defenses of estoppel by reason of improvements made upon this land with the acquiescence of the city, license to build wharves, and payment of taxes; the unconstitutionality of the act of 1867, because the title of the act does not describe its subject; want of power in the state to convey its title to the city; and the statute of limitations. The Supreme Court makes no deliverance upon these subjects, because they are all of a local nature, and present no federal question. Some of these are, however, in the case at bar, for the reason that jurisdiction of the cause is now taken because the controversy is between citizens of different states.

Starting, then, with this authoritative demonstration that the legal title to the locus in quo is in the city, upon what equity can there be based a right in the complainant to the perpetual injunction granted, which will forever debar the city from the assertion of that title?

It is urged in behalf of the appellee that its structures were erected under a license granted by the Mobile river commission. This, however, seems to stand exclusively upon the nonaction of that commission, rather than upon any express permission. Surely it will take something more than proof of the quiescence of a commission like that to estop the municipality which holds title for the public benefit from proceeding with its duty to protect the public interest. Estoppels are not favored by the law, and this would

seem especially true when by such estoppel it is attempted, by the omission or indifference of officials, to finally conclude the rights of the public to a public use. The alleged immemorial custom of persons to erect wharves on such broad harbor lines as those of the Mobile river and the adjacent waters, even if clearly demonstrated, can have no legal effect against the assertion by the state of its right to control the wharf lines of its navigable streams. For a custom to be valid, it must be lawful; and it can never be lawful for the citizen or a corporation to take possession of property belonging to a state, or a municipality created by it, hold it indefinitely, and justify that conduct by proof of custom. Indeed, did the claim of the appellee depend upon a positive and perpetual grant from the city, if given without proper consideration, it would be in this case of no more avail than the quiescence of the commission or the immemorial custom on which the appellee relies. The rights of the public cannot be divested in such manner. In the case of Mayor of Jersey City v. American Dock & Improvement Company (N. J.) 23 Atl. 682, Chief Justice Beasley, for the court, declares:

"Nor would even the joint action of the board and the city give a semblance of legality to the transaction. If the municipal corporation had, by the most formal writing, assented to the commission's grant, and had joined in it as a party, the instrument would have been an absolute nullity. This result proceeds from the characteristics of the property in question, and which have been heretofore fully defined. The title is vested in the city in trust for the public, and is therefore inalienable and indisposable, except by legislative action. The composition of the so-called title of the defendant, it will be observed, consists of the acquiescence and neglect of the trustee of a public use, and the act of a board having no power over the subject. Such a claim seems to be singularly futile."

It is true that the act of 1896 to which reference has been made seeks to make a change in the character of this property and the manner in which it may be disposed of, but, since this was long after the concurrence upon which the appellee places reliance, it does not affect the question.

It is, however, contended by the appellee that it has paid to the city fees and taxes for the privilege of erecting its structures; that these were accepted; that its work was done in compliance with the rules and regulations of the commission, and under the supervision of the city engineer; that neither the city of Mobile, nor the river commission, ever made any objection or protest against its expensive work, such as filling in of the lowlands, construction of bulkheads, wharves, and booms; that the city of Mobile stood silently by and permitted all this to be done without objection, and without challenge of the occupation being made by the appellee during a long series of years. Upon these facts it is urged that it would now be unconscionable to permit the city to oust the appellee, and thus inflict upon it the great loss which would necessarily result. It seems highly probable that such facts make a meritorious showing for suitable relief, on proper pleadings. It is equally clear that these contentions could not forever defeat the right of the city to control the wharfage within its jurisdiction. A simple illustration

will show how untenable is the appellant's claim on this subject. The defendant's structures are in their nature temporary; its business, of a character possibly limited by the available timber supply. When the uses of its structures have departed, they will rapidly decay. Can it be insisted that, because of its license to erect them, it can retain the title to the riparian soil upon which they stand? If this were true, a licensee erecting structures of the most perishable character might acquire, without consideration, wharf rights as valuable as the docks on the Mersey at Liverpool, or the piers on the Hudson at New York. While, therefore, this claim must be denied, it does not follow that the appellee is without a remedy. If its structures have been erected, and its outlay and expenditure have been made, because of a license granted by the city, before the city, for its own purposes, can reassume control of the real estate in dispute, there should be a just accounting, and ascertainment and allowance of compensation for the losses the appellee will incur because of the negligent or unjustifiable action of the city authorities. The true equity seems to be found on the median line between the contentions of the controverting parties. The city, for the public welfare, is entitled to control its river front, except where the title to its wharves is parted with in compliance with positive law. If it is deemed necessary by the city to cause the removal or destruction of the appellee's wharves, sawmills, and booms, a judicial estimate should be made of the damage to the appellee thus incurred. Since, however, there are no averments or prayers in the bill before the court which will justify such direction, it will be incumbent upon the appellee, who was the complainant in the Circuit Court, to amend the bill in such manner as to avail itself of the relief and compensation, which may be ascertained by an appropriate inquiry.

In view of these considerations, we determine that the decree of the court below be modified as follows, and it is accordingly ordered: That the permanent injunction granted be set aside, and the temporary injunction pendente lite be reinstated. That the appellee, who is the complainant in the Circuit Court, have leave within 30 days from the date whereon the mandate of this court shall be made the judgment of the Circuit Court to amend its bill, and by such amendment offer to restore to the appellant the real estate in dispute upon the payment of such compensation as may, by agreement between the parties, or upon judicial inquiry, appear to be equitable and just, for the losses and damages, if any there be, which it may appear the complainant will sustain because of the revocation by the city of its implied license to erect said structures. That in case such suitable amendment, with appropriate prayers, is made, the bill as amended will proceed as usual in equity. In case, however, the appellee, the complainant in the Circuit Court, shall not exercise the option offered of amending his said bill, it is directed that at the expiration of the time above specified the same shall be dismissed at the cost of complainant. That the cost of this appeal be taxed against the appellee.

WEIDENFELD v. NORTHERN PAC. RY. CO.

(Circuit Court of Appeals, Eighth Circuit. March 14, 1904.)

No. 1,942.

1. CORPORATIONS—RAILROADS—PREFERRED STOCK—RETIREMENT—CONVERSION.
Laws Wis. 1895, c. 244, p. 475, chartered the Northern Pacific Railway Company, and authorized it to classify its stock into common and preferred, and to make such preferred stock convertible into common, on such terms and conditions as might be fixed by the board of directors. The act also authorized the company to borrow from time to time such sums of money and on such terms as the corporation or its board of directors should agree, and in its corporate name to execute evidences of indebtedness, and make the same convertible into its capital stock of any class upon such terms and conditions as its board of directors deemed advisable. *Held*, that the corporation, under such provisions of its charter, had authority to issue certificates of indebtedness with which to retire the preferred stock, and to immediately convert such certificates into common stock.

2. SAME—RATIFICATION.
The certificates of indebtedness having been issued under express statutory authority conferred by Laws Wis. 1895, p. 475, c. 244, § 11, the conversion, even if not originally authorized, was subsequently confirmed by Laws Wis. 1897, p. 632, c. 294, and Laws Wis. 1899, p. 296, c. 193, authorizing the consolidation of railroad companies, validating agreements on which their stocks had been issued, together with their plans of reorganization, etc.

3. SAME—REDUCTION AND INCREASE OF STOCK.
Where a corporation issued certificates of indebtedness with which to retire its preferred stock, and immediately thereafter converted such certificates into common stock, such transaction should be considered as a whole, and hence the issuance of the certificates and retirement of the preferred stock did not operate as a reduction of capital, nor the issuance of such additional common stock as an increase thereof.

4. SAME—RIGHTS OF STOCKHOLDERS.
Where a corporation issued certificates of indebtedness with which to retire its preferred stock, for which the holders of the common stock were entitled to subscribe, a common stockholder could not object that the transaction was invalid on the ground that the preferred stockholders were not entitled to share therein.

5. SAME—PREFERRED STOCK—STOCKHOLDERS' RIGHTS.
Where, at the time of the reorganization of a railroad company, preferred stock was issued under a resolution of the stockholders on the express condition that the company, at its option, might retire the same at its election on certain dates, and each certificate contained a recital of such condition, each preferred stockholder acquired his stock subject to the terms of an express contract which denied him the right to share in new stock issued as a part of a scheme for the retirement of such preferred stock, and that when his stock was so retired he thereupon became a stranger to the company.

6. SAME—ACTIONS AGAINST CORPORATION—PARTIES.
Where a stockholder of a corporation brought suit to restrain it from carrying out a scheme to retire its preferred stock and to issue common stock in its place, but the thing primarily complained of was the ownership of a majority of the corporation's stock by a securities company formed for that purpose, the end sought being the destruction of the securities company's title to its stock and its status as a stockholder, the securities company is an indispensable party defendant, and is not represented in the suit by the corporation.

Appeal from the Circuit Court of the United States for the District of Minnesota.

This is an appeal from a decree dismissing the appellant's intervening petition. The suit was originally instituted by one Peter Power in the district court of Hennepin county, Minn. By his verified bill of complaint, which was filed December 30, 1901, Power alleged that he was then, and had been for more than six months, the owner and holder of 100 shares of the common stock of the defendant, the Northern Pacific Railway Company. He complained that the company, without authority of law, was about to retire all of its preferred stock, amounting to $75,000,000; also that the board of directors and other officers of the company had entered into an illegal combination and conspiracy with similar officers of the Great Northern Railway Company and of the Chicago, Burlington & Quincy Railway Company for the purpose and with the object in view of merging and consolidating the railway systems of the three companies, which were alleged to be parallel and competing, under one management, in violation of the laws and public policy of the United States, the state of Minnesota, and the other states traversed by said railroad systems, and that to accomplish such merger and consolidation they had caused to be incorporated under the laws of the state of New Jersey a corporation known as the Northern Securities Company, with authority to purchase and hold the stocks, bonds, and securities of other corporations, the intention being to cause a majority of the stock of all three companies mentioned to be transferred to the securities company, and to be controlled by it, thereby securing the conduct of the entire business of the three systems by one corporation, and the illegal suppression of competition. It was also alleged by Power that the movement to retire the preferred stock of the Northern Pacific was for the sole purpose of enabling those stockholders and officers who favored the merger to accomplish their unlawful purpose. The relief sought by Power was the prevention by injunction of the retirement of the stock and of the consummation of the merger. The cause was removed by the defendant company to the Circuit Court of the United States for the District of Minnesota, the complainant, Power, being a citizen of the state of New York and the defendant a citizen of the state of Wisconsin. The proofs taken by the defendant showed conclusively that Power never owned any stock in the Northern Pacific Railway Company, and had no interest whatever in any of the matters alleged in his complaint. When the cause was ready for hearing in September, 1902, and long after the retirement of the preferred stock of the Northern Pacific and its conversion into common stock of that company, the appellant, Camille Weidenfeld, by leave of court filed his intervening petition, the averments of which, though much more specific and in detail, are substantially along the lines of the original bill. The principal difference relates to the acquisition of the stock of the Chicago, Burlington & Quincy Company by the other companies—a difference which is not material to a determination of the controlling issues in the case. Weidenfeld alleged that since December 26, 1901, he was the owner and holder of 100 shares of the common stock of the defendant of the par value of $100 each. The prayer of his intervening petition was that all of the steps and proceedings taken by the defendant, its officers, directors, and stockholders, looking to the organization of the securities company and the transfer to it of the controlling interest in the stock of the defendant, be adjudged fraudulent and void; that the defendant be adjudged to have combined and consolidated its stock, property, and franchises with the stock, property, and franchises of the Great Northern Company, a parallel and competing line of railway, contrary to the laws of the state of Minnesota; that the organization of the securities company by the defendant and those associated with it be held and adjudged to be a conspiracy in violation of the law and policy of the state of Minnesota, and that all transfers of stock in the defendant company to it be adjudged to have been in furtherance of the conspiracy and void; and generally that a continuance of such conspiracy and combination by the company, whether by its directors, officers, and agents, or by its constituent members or stockholders, be enjoined; and for general relief.

The facts relating to the merger are substantially those which were recited and passed upon by the court below in United States v. Northern Securities

Co. (C. C.) 120 Fed. 721, and a full narrative of them is unnecessary here. The above outline of the averments in the pleadings and of the prayers for relief is sufficient for the purpose of this appeal. A reference more in detail, however, should be made to that feature of the case relating to the retirement of the preferred stock. The defendant, Northern Pacific Railway Company, derives its corporate existence from certain laws of the state of Wisconsin. Originally incorporated as the Superior & St. Croix Railroad Company, its name was changed on the 1st day of July, 1896, about the time of its acquisition of the properties of the Northern Pacific Railroad Company which were then in the hands of a reorganization committee. To enable the defendant to effect such acquisition, its capital stock, which was theretofore $5,000,000, was increased to $155,000,000, divided into $75,000,000 of preferred stock and $80,000,000 of common. This increase of the capital stock and its classification into preferred and common were duly authorized by law and by the unanimous vote of the stockholders. The resolution of the stockholders recited as an express condition to the issue of the preferred stock that the company might, at its option, retire the same in whole or in part, at par, from time to time, upon the 1st day of any January prior to 1917. Accordingly each certificate of preferred stock, the form of which was prescribed by the board of directors and thereupon approved by the stockholders, contained the condition that "the company shall have the right, at its option, and in such manner as it shall determine, to retire the preferred stock in whole or in part, at par, from time to time upon any 1st day of January prior to 1917." The same recital appears in every certificate of common stock issued by the company. The preferred stock possessed a preferential 4 per cent. noncumulative dividend feature, with provision for the ratable division of the remainder of the surplus net earnings in any fiscal year among all of the stock of both classes, after an equal payment upon the common. It was provided by chapter 244, p. 475, of the Laws of 1895 of the state of Wisconsin, which is one of the various acts conferring upon the defendant company its corporate existence and its powers, that it should possess authority to classify its stock into common and preferred, and to "make such preferred stock convertible into common stock upon such terms and conditions as may be fixed by the board of directors." By the act mentioned the company was also "authorized to borrow from time to time such sums of money and upon such terms as the corporation or board of directors shall agree upon or authorize as necessary and expedient; and in its corporate name execute and deliver its notes, bonds, debentures or other evidences of indebtedness in such form as shall be from time to time prescribed by the board of directors and in such amount as shall be deemed from time to time by said board expedient; and may make the same convertible into its capital stock of any class upon such terms and conditions as to the board of directors may seem advisable." And general power was conferred upon the board of directors to use such evidences of indebtedness in any manner which, in their judgment, would subserve and promote the corporate purposes. By another section of the act it was provided, with certain exceptions not material here, that "all of the affairs of said company shall be managed by a board of directors, who shall be stockholders, and are hereby vested with all the powers of the corporation." On November 13, 1901, the board of directors of the company adopted a resolution by which it was determined to retire the entire issue of preferred stock at par upon the 1st day of January, 1902, the funds for such purpose to be obtained by the issue and sale of certificates of indebtedness or bonds which were convertible at their face into common stock at par. The plan pursued was in strict conformity with the terms of the resolution. The holders of the preferred stock were duly notified that their stock would be retired on January 1, 1902. Certificates of indebtedness aggregating $75,000,000, dated November 15, 1901, maturing January 1, 1907, and bearing interest at 4 per cent. after January 1, 1902, were issued. They were at once offered to the common stockholders at par, each stockholder being given the right to subscribe for and purchase the same to the amount of $^{75}/_{80}$ of the amount of common stock owned by him. On November 15, 1901, a contract was entered into with the Standard Trust Company of New York, whereby the latter agreed to purchase such of the certificates as were not taken by the common stockholders. The certificates, according to their terms, were, at the option of the company, convertible into common stock at par at any time

after their date, and likewise so convertible upon demand of the certificate holder at any time after January 1, 1902. Immediately after the certificates were issued, the company, acting through its board of directors, exercised its option to require their conversion into common stock. The result was that on January 2, 1902, all of the preferred stock of the company had been retired, all of the certificates of indebtedness had served their temporary purpose and had been retired, and the place of the preferred stock in the capitalization of the company had been taken by an equal amount of the common stock, the aggregate capitalization of $155,000,000 being preserved and maintained.

The intervention of the appellant was heard upon the proofs taken in the main branch of the case. The Circuit Court, upon final hearing, dismissed Power's original bill of complaint and appellant's intervening petition. Power did not appeal.

M. H. Boutelle and A. W. Bulkley (Bulkley, Gray & Moore, on the brief), for appellant.

C. W. Bunn and F. B. Kellogg (C. A. Severance, on the brief), for appellee.

Before SANBORN, VAN DEVANTER, and HOOK, Circuit Judges.

HOOK, Circuit Judge, after stating the case as above, delivered the opinion of the court.

The appellant's objections to the conversion of the preferred stock of the Northern Pacific into common stock are: (1) That the retirement of the preferred stock constituted a decrease of the corporate capitalization without authority of law; (2) that the issue of the convertible certificates of indebtedness was not for the acquisition or construction of additional lines of railroad or other properties, and was therefore unauthorized and void; (3) that after the decrease of the capitalization by the retirement of the preferred the issue of an equal amount of common stock was an unauthorized increase in the capitalization. Appellant also contends that the reservation by the company of the option to retire the preferred stock, and the insertion in all of the certificates of stock of both characters of a recital of such reservation, were without authority of law; also that the scheme of retirement and conversion was void for the reason that the privilege was not accorded the preferred stockholders of subscribing to the new issue of common stock. The answer to these various contentions may be briefly stated. In the reorganization of the Northern Pacific Railroad Company and the acquisition of its properties by the defendant in 1896 the bonded indebtedness of the former was converted into the preferred stock of the latter, and in consideration of that fact the reorganization committee and the holders of the securities and the stock of the two companies expressly contracted that the defendant should have the right to retire such stock on the 1st day of any January prior to 1917. To avoid error on the part of any one subsequently dealing in the stock of the defendant, every certificate that was ever issued by it bore upon its face an evidence of such agreement. The preferred stock was intended to be of a temporary character, and to retain in some measure the quality of the original indebtedness, which it succeeded. We do not doubt that the defendant possessed adequate authority to so condition it under the broad and comprehensive powers conferred by its charter, but,

even if what it did in that respect was not originally authorized, confirmation may be found in the subsequent legislation of Wisconsin. Chapter 294, p. 632, Laws 1897; chapter 193, p. 296, Laws 1899. The certificates of indebtedness which were designed to provide a fund with which to retire the preferred stock were issued pursuant to express statutory authority, the limitation being that of a lawful corporate purpose; and these in turn were with like authority convertible into the common stock of the company. Section 11, c. 244, p. 483, Laws 1895.

Counsel in their criticisms have adopted too narrow a view of what was done under the resolution of November 13, 1901. The capital stock of the company was not reduced, nor was it increased. The various steps which were adopted should not be regarded as isolated acts. The issue of the convertible certificates and their sale, the retirement of the preferred stock with the proceeds, the retirement in turn of the certificates themselves, and the issue of an equal amount of common stock of the company constituted in a larger sense but steps to one ultimate act, and that act was the conversion of the preferred stock into the common stock of the company. Every conversion of a security of one class into a security of another necessarily implies a retirement of the former, although every retirement does not necessarily signify a conversion. The issue of the convertible certificates was but a temporary expedient in the process of conversion. Having served their temporary purpose, they passed out of existence, and no longer remained as obligations of the company. As the company was clothed with the express power to convert its preferred stock into stock of another character, and the conversion as effected had due regard to the rights of all parties, an extended consideration of some intermediate but nonessential step becomes profitless. It is true that the preferred stockholders were not accorded the privilege of subscribing to the new issue of common stock; but certainly that fact is not a proper subject for complaint on the part of appellant. His holdings were confined to 100 shares of common stock. He is not the protector or conservator of the personal rights of the preferred stockholders. The claim that their rights were denied may well be left to them to be asserted. As a common stockholder, the appellant was accorded every consideration which he could lawfully claim. He was entitled to subscribe for the new common stock to an amount proportionate to his holdings of the former issue—the same right that was given to every common stockholder. He was not required to exercise such right if he did not so desire, and, if he thought the amount allotted to him for subscription was excessive, he was entitled to reduce it to an amount measured by his sense of the equities of the situation. One may not invoke the aid of the courts in respect of matters in which he has neither a personal nor a representative interest. Smith v. Gale, 144 U. S. 509, 12 Sup. Ct. 674, 36 L. Ed. 521. Moreover, it may well be said that each preferred stockholder acquired his stock subject to the terms of an express contract which denied him the right to share in the new stock assigned for subscription, and that, when his stock was retired, he thereupon became a stranger to the company, without voice

or right of participation in its intracorporate acts and relations. It is also contended by appellant that the retirement of the preferred stock was intended to further the accomplishment of an unlawful merger in the name of the securities company; that without the elimination of the preferred stock the holders of a majority of all the stock of the Northern Pacific, preferred and common, were opposed to the merger; and that, therefore, the taint of the ultimate purpose affected the legality of the retirement. Waiving the question which at once suggests itself—whether it is permitted to inquire into the motives which prompt the doing of that which in itself is expressly authorized by law—we find nothing in the record which supports the premises from which the conclusion is drawn. The evidence conclusively shows that the purpose to retire the preferred stock at the earliest practicable opportunity had its birth when the stock was first issued in 1896. That opportunity arose when the market value of the common stock reached par. Were the preferred stock wholly replaced in the capitalization of the company by an equal amount of common stock, the great advantage to the holders of the original issue of common stock, to whom the option of retirement belonged, is at once apparent. The provision for a preferential dividend on nearly one-half of the total issue of stock would no longer exist, and the surplus net earnings in each fiscal year would then be ratably divided among all of the stockholders of the company. All of the testimony appearing in the record is to the effect that the conversion of the stock was planned and executed upon its own merits, and had no bearing upon the transaction with the securities company. It also appears that before the conversion was consummated the contending elements among the stockholders who were struggling for the control of the company adjusted their differences, and that subsequently practically all of the stock of the defendant was sold to the securities company, or exchanged for stock of that company. If we may, without direct evidence, assume with counsel that this harmony was due in part to a recognition of the power of the holders of a majority of the common stock to force the retirement of the preferred, nevertheless the fact so assumed is entirely too remote for consideration in connection with the contention of the appellant.

The remaining contention of appellant, necessary to be considered, is that the Circuit Court erred in holding that the securities company was an indispensable party to the suit, and that in its absence the intervening petition could not be maintained. The theory of the appellant is that, as an individual stockholder, he can maintain a suit against his corporation as sole defendant to prevent it from commencing or continuing the doing of those things which are beyond its corporate powers, are in violation of law, and which may lead to a forfeiture of its corporate franchises; that, in respect of the charges made in his intervening petition and the relief sought thereby, the defendant company may stand as the sole representative in the suit of all of the stockholders, including the securities company, and that, therefore, the presence of the latter may be dispensed with. But appellant ignores the force of the

pressing and insistent fact that the very thing of which he complains is primarily the ownership by the securities company of a majority of the stock of the defendant, and the end which he is seeking is the destruction of its title and its status as a stockholder. It is of the foundation of our jurisprudence that the rights of a person shall not be directly affected by a judicial proceeding to which he is not a party, and in which he cannot be heard for their defense and protection. Out of this principle has grown the rule, always recognized and enforced, that a suit will not be entertained in the absence of a person who has an interest in the controversy of such a nature that a final decree cannot be rendered without either affecting that interest or leaving the controversy in such a condition that its final determination may be wholly inconsistent with equity and good conscience. Minnesota v. Northern Securities Company, 184 U. S. 199, 235, 22 Sup. Ct. 308, 46 L. Ed. 499; New Orleans Waterworks v. New Orleans, 164 U. S. 471, 17 Sup. Ct. 161, 41 L. Ed. 518; California v. Southern Pacific Company, 157 U. S. 229, 15 Sup. Ct. 591, 39 L. Ed. 683; Christian v. Railroad, 133 U. S. 233, 10 Sup. Ct. 260, 33 L. Ed. 589; Ribon v. Railroad Companies, 16 Wall. 446, 21 L. Ed. 367; Shields v. Barrow, 17 How. 130, 15 L. Ed. 158; Taylor v. Southern Pacific Company (C. C.) 122 Fed. 147; Hollifield v. Railroad Company, 99 Ga. 365, 27 S. E. 715; Joslyn v. St. Paul Distilling Company, 44 Minn. 184, 46 N. W. 337. Taylor v. Southern Pacific Company, Hollifield v. Railroad Company, supra, and the case at bar, are identical in important and controlling features. In each case the complainant was a minority stockholder of the defendant corporation, and in each case the complainant undertook to lay the ax at the root of the title of an absent stockholder. In the two cases cited it was held that the presence of a stockholder whose rights were attacked was indispensable to the accomplishment of the complainant's purpose.

It is true that, generally speaking, a corporation is the proper representative of all of its stockholders in a suit in which the relief sought will affect each and all of them in the same way and to the same degree. In one sense all of the stockholders are the corporation, and the corporate body, as a legal entity, may be intrusted with the defense of those rights which are common to all. Obviously, the very foundation of this rule is a community of interest, with respect of the object of the suit, between the corporation and all of its stockholders. But where the gravamen of the complaint consists of a vital conflict of interest between the corporation and one or more of its stockholders, or between different stockholders or classes of stockholders, the reason for the rule concerning the representative character of the corporation ceases. The underlying theory of appellant's case is that the corporate powers of the Northern Pacific which he is seeking to protect and the claims of the securities company are conflicting to such a degree that the continued assertion and recognition of the latter will destroy the existence of the former. In other words, he says that, if the securities company is permitted to dominate and control the Northern Pacific in connection with a similar relation to the Great North-

ern, the independence of the Northern Pacific will cease, its capacity to perform its duties to the public will be destroyed, and ultimately its corporate franchises may be annulled. A greater conflict between opposing interests can scarcely be imagined, and in view of such a conflict it cannot reasonably be said that in the suit before us the Northern Pacific may stand as the accredited representative of the securities company.

We may agree with counsel that there are involved in this suit questions concerning the corporate functions of the Northern Pacific, and also conditions which threaten its corporate integrity. But all of this would merely show that the Northern Pacific was an indispensable party to the controversy. It would not tend to show that some other corporation did not also possess such an interest in some other phase of the controversy as made its presence equally indispensable. The power of another to hold and own stock of the Northern Pacific and to exercise the rights of a stockholder are not corporate functions of that company. But the question whether the securities company may lawfully continue to own the stock of the Northern Pacific which it held when the appellant intervened, and may lawfully continue to exercise the rights incident to such ownership, is one affecting the corporate powers of the securities company. It is a question in which that company has an immediate and vital interest. The force of these observations is apparent when it is remembered that appellant is seeking a decree that the transfer to the securities company of a controlling interest in the stock of the Northern Pacific be adjudged fraudulent, illegal, and void, and that the organization of the securities company be held to be an illegal conspiracy, and, in substance, that the Northern Pacific and its officers be enjoined from according to the securities company the rights and privileges of a stockholder. We are of the opinion that the securities company was an indispensable party to the controversy, and that the Circuit Court correctly held that the suit could not be maintained in its absence. These conclusions make it unnecessary to consider the other matters presented in the briefs of counsel.

The decree of the Circuit Court will be affirmed.

BLACK HILLS & N. W. RY. CO. et al. v. TACOMA MILL CO.

(Circuit Court of Appeals, Ninth Circuit. March 4, 1904.)

No. 988.

1. INJUNCTION—ADEQUATE REMEDY AT LAW—CONDEMNATION PROCEEDINGS.
An injunction will not be granted to restrain proceedings by a railroad company to condemn land for right of way in Washington on the ground that it is not for a public use, since, under the statutes of the state, as construed by its Supreme Court, that question may be litigated in the condemnation proceedings.

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

This is a suit in equity brought by the appellee to restrain the appellants from proceeding with a certain condemnation suit for the appropriation of

lands of the appellee. Affidavits were filed in support of the bill, and counter affidavits in opposition to the application for a temporary injunction. At the hearing an interlocutory decree was entered, granting the injunction prayed for. The case is now before this court on appeal from the interlocutory decree.

Considering the events connected with this suit in chronological order, it appears that the Black Hills & Northwestern Railway Company, appellant herein, petitioned the superior court of Washington for the condemnation of a right of way across certain lands belonging to the Tacoma Mill Company, appellee herein, alleging that the petitioner was a corporation organized under the laws of Washington, and engaged in the construction of a line of railroad in the state of Washington for the carriage of freight and passengers; that the defendant Tacoma Mill Company was a California corporation engaged in operating a sawmill for the manufacture of lumber in the state of Washington, and is the owner of certain lands in Thurston county, in said state; that the petitioner has constructed and has ready for operation a line of railroad which has for point of commencement and intersecting with the Olympia & Gray's Harbor Branch of the Northern Pacific Railway, a point one mile west of the town of Little Rock, in Thurston county, Wash., and extends to a certain point in said county adjacent to lands owned by the defendant; that the petitioner has projected its said line of railroad from said point over the defendant's lands to a terminus on the Pacific Ocean in said state; that the petitioner has sought the right of way from defendant by purchase, but that defendant has refused to permit petitioner to enter thereon, or to construct said railroad thereon, or to sell or convey such right of way to petitioner. The petitioner prayed that condemnation proceedings be instituted for the appropriation of the defendant's lands to the extent of a right of way for said projected railroad, under a statute of Washington permitting the appropriation of private property by corporations when the public interest demands, and when the purpose is a public use. Upon motion of the appellee, the proceeding was removed to the United States Circuit Court for the District of Washington. Before a hearing was had on the petition, the appellee brought suit in equity to restrain the condemnation proceeding, alleging as grounds for the relief prayed for that the defendants Thomas Bordeaux, A. H. Anderson, and Joseph Bordeaux owned all the capital stock of the appellant Mason County Logging Company, which company was organized to carry on a general sawmill and logging business, and is not authorized to act as a common carrier, nor to exercise the right of eminent domain; that said company owns large tracts of timber land adjacent to the lands of the appellee, and has been engaged in hauling the logs cut from its said lands over its logging road to the Northern Pacific Railway, and thence to tide water under a special freight rate; that said Thomas Bordeaux, A. H. Anderson, and Joseph Bordeaux organized the defendant Black Hills & Northwestern Railway Company as a common carrier of freight and passengers, and with the power to exercise the right of eminent domain, with the sole design of extending the logging road of the Mason County Logging Company to the lands of said company lying beyond the lands of the appellee, so as to enable it to haul the timber therefrom at reduced freight rates; that the right of way attempted to be condemned is sought for the sole purpose of constructing such a logging road for the timber of the appellant logging company; and that it was never intended that the appellant railway company should exercise any of the functions of a common carrier. It is alleged that no line of railway has ever been projected by the appellant railway company, except across the lands of the appellee; that, if such a railroad should be constructed, it could be used for no useful purpose, save to transport the logs of the said logging company, and that the public interest does not require the prosecution of such an enterprise, nor is the same a public use. The bill charges that the appellant railway company was fraudulently incorporated for the purpose of unlawfully by a fraudulent compliance with the laws of the state relating to the exercise of eminent domain, securing ingress and egress to and from the timber lands of the said logging company. In support of this bill, affidavits were filed by the appellee alleging that the said logging company had endeavored to negotiate with the appellee for a right of way for a logging road across the lands of the appellee, and upon the refusal to grant that privilege the appellant

Thomas Bordeaux had stated that the logging company would incorporate a railroad company and force a right of way. It is also alleged in the affidavits that the country through which the line of road is projected beyond the lands of the appellee is impracticable for the successful operation of a railroad.

This showing is met by the appellants by affidavits showing that the logging company has been engaged in the logging business in the district in question for four years, and has constructed some six miles of standard gauge main line railroad, and four miles of side tracks and switches, over which it hauled its logs to the Northern Pacific Railroad; that the town of Mumby has been built upon the said line of road, with about 15 families resident there, and 8 or 10 families in the vicinity; that there are a public school, a post office, and a sawmill at said town; that said logging company, while not authorized or desiring to do business as a common carrier, had for some time been obliged, from the necessities of the situation, to carry both freight and passengers over its road. It was alleged that the projected line of road had long been contemplated; that it would be constructed with ordinary grades, and would open up a country rich in timber land, and which, when logged off, would be valuable for agricultural purposes; that said road would furnish an outlet from said district to Puget Sound, on one side, and to Gray's Harbor, on the other. The allegations of fraudulent incorporation are declared to be untrue.

Upon this showing, the court below entered an interlocutory decree restraining the appellants from proceeding with the condemnation suit.

Charles F. Munday, George C. Israel, and James B. Howe, for appellants.

Struve, Hughes & McMicken, W. T. Dovell, and James M. Ashton, for appellee.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

MORROW, Circuit Judge (after stating the facts as above). The appeal is from the order of the court granting the preliminary injunction, and the errors specified are that neither the bill, nor the affidavits filed in support of the bill, state any ground of jurisdiction in a court of equity, for the reason that it appears therefrom that complainant cannot suffer any injury or damage whatsoever by the prosecution of the condemnation proceedings; that the bill, and affidavits filed in support thereof, show that complainant has a plain, adequate, and complete remedy at law, namely, its defense to the condemnation proceedings, wherein all of the questions sought to be raised by complainant in the present suit can be raised and adjudicated.

It is provided in the statutes of the state of Washington that any corporation authorized by law to appropriate land, real estate, premises, or other property for right of way, or any other corporate purposes, may present to the superior court of the county in which any land, real estate, premises, or other property sought to be appropriated shall be situated, or to the judge of such superior court in any county where he has jurisdiction or is holding court, a petition in which the land, real estate, premises, or other property sought to be appropriated shall be described with reasonable certainty, and setting forth certain particulars concerning the ownership of the property, and the object for which the land is sought to be appropriated. The statute requires that a notice, stating briefly the objects of the petition, and containing a description of the land, real estate, premises, or property sought to be appropriated, and stating the time and

place when and where the same will be presented to the court, or judge thereof, shall be served on each and every person named therein as owner, incumbrancer, tenant, or otherwise interested therein, at least 10 days previous to the time designated in such notice for the presentation of such petition.

It is further provided that at the time and place appointed for hearing said petition, or to which the same may have been adjourned, if the court or judge thereof shall have satisfactory proof that all parties interested in the land, real estate, premises, or other property described in said petition have been duly served with notice, and shall be further satisfied by competent proof, among other things, that the contemplated use for which the real estate, premises, or other property sought to be appropriated is really a public use, that the public interests require the prosecution of such enterprise, and that the land, real estate, premises, or other property sought to be appropriated are required and necessary for the purpose of such enterprise, the court or judge thereof may make an order directing the sheriff to summon a jury to ascertain, determine, and award the amount of damages to be paid to the owner or owners, and to all tenants, incumbrancers, and others interested, for the taking or injuriously affecting such land, real estate, premises, or other property. 2 Ballinger's Ann. Codes & St. Wash. §§ 5637, 5638, 5640, 5641. From these provisions of the statute, it appears that, before there can be an ascertainment of the value of the land sought to be appropriated by the petitioner as a right of way, all parties interested in the property described in the petition have the right to have the court determine in the condemnation proceedings the question whether the contemplated use for which the property is sought to be appropriated is really a public use, and not a private use, whether the public interest requires the prosecution of the enterprise, and whether the land sought to be appropriated is necessary for the purposes of such enterprise.

But it is contended by the appellee in support of the interlocutory decree of the court below that the petitioner, the Black Hills & Northwestern Railway Company, is not acting in good faith, within the purview of the statute granting to corporations the right to exercise the power of eminent domain, and that this question cannot be litigated in the condemnation proceedings; that the inquiry which the court is authorized to make is limited by the apparent authority conferred upon the corporation by the statute; that, in this case, behind the apparent authority conferred by the articles of incorporation is a question of fraud in the organization of the corporation, whereby its promoters have unlawfully colluded to place themselves, as a corporation, in a position whereby they are able to impose upon the court, and appropriate the property of the complainant for a private use.

If the facts charged in the bill of complaint are true, concerning the fraudulent character of the incorporation of the Black Hills & Northwestern Railway Company, there is, without doubt, a remedy by information in the nature of quo warranto to dissolve the corporation. Section 5780 et seq., Ballinger's Ann. Codes & St. Wash.

In National Docks R. R. Co. v. Central R. R. Co., 32 N. J. Eq. 755, an injunction had been granted restraining the construction of a rail-

road by the complainants across the lands of the defendants, and from instituting condemnation proceedings for the taking of land for such purpose. It was contended by the defendants, upon the writ of error to the appellate court, that the complainants, in incorporating, were the mere agents of a storage company, using its money for stock subscriptions, and that the road was designed for the sole convenience of the storage company; no public use or necessity being involved in the proposed appropriation of land. The situation was very similar, it will be observed, to that in the case under consideration. The court there said:

"These reasons, if they have any force, go directly to the legality of the organization of the railway company. If they should prevent the exercise by the company of the powers which the general railroad law confers upon corporations created under it, it is because the company should not have been created in the mode and for the purposes in and for which it has been organized, and should be disbanded. It is not denied that every formal requirement of that law has been complied with, and that, to all external appearance, this company is a corporation by virtue of its provisions; but it is claimed that, the motives and purposes of its corporators being what they are, they have usurped a corporate existence which the law did not authorize them to assume, and hence, while they may retain the form, they cannot exercise the functions, of a corporation. Not because this corporation threatens to assail any rights of the complainants, which, if lawfully organized, it would not be permitted to invade, but because it is a corporation de facto, merely, and not de jure, does the chancellor prevent it from doing what only a legal corporation may do. An inquiry and judgment of this nature are, we think, beyond the powers of the court of chancery, at least in a suit between private parties. Whenever it is sought to impugn the legality of a corporation which exists under the forms of law, the remedy is by quo warranto, or information in the nature thereof, instituted by the Attorney General."

The court, after considering other matters presented by the bill of complaint, said:

"Most of these questions are questions of law, which certainly have not been heretofore settled in the complainants' favor; and no rule of equity is more firmly established than the doctrine that a complainant is not in a position to ask for a preliminary injunction, when the right on which he founds his claim is, as a matter of law, unsettled."

The court accordingly dissolved the injunction. See, also, Holly Shelter R. Co. v. Newton (N. C.) 45 S. E. 549.

But in our opinion there is also a remedy provided by the statute, in the defenses that may be made to the condemnation proceeding. The wrong which it is charged the petitioner is about to accomplish by the proceeding is the taking of complainant's property for a private use, and this wrong is specifically made a defense by the statute; and, when made, it raises a question which the court is required to determine in limine upon satisfactory proof, and not merely upon the showing that the petitioner is a corporation authorized by law to exercise the right of eminent domain. This is clearly the view of the law entertained by the Supreme Court of Washington.

In Western American Co. v. St. Ann Co., 22 Wash. 158, 60 Pac. 158, the Supreme Court had before it a judgment in a proceeding brought to condemn a right of way across certain land. The points urged by the appellant were, that the land sought to be condemned was attempted to be appropriated for a private, and not a public, use,

and that the respondent was not authorized by its charter to condemn said right of way or exercise the right of eminent domain for the uses set forth in the petition. It was objected by the respondent that the appeal could not be entertained, for the reason that the statutory provision for an appeal in condemnation proceedings was limited to an appeal from the amount of damages. The Supreme Court sustained this objection, and, in the course of its opinion, said:

"It is argued by the respondent that, inasmuch as the law makes the question of public use a judicial question, it must be contemplated that that judicial question is to be settled by the appellate court; but we do not see any particular merit in this contention, for questions which the law submits to the exclusive jurisdiction of the superior courts may be as purely judicial questions as though they were tried in this court."

The Constitution of the state of Washington provides, in article 1, § 16, that:

"Whenever an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be really public shall be a judicial question, and determined as such, without regard to any legislative assertion that the use is public."

In article 4, § 4, the Constitution gives the Supreme Court of the state power to issue all writs necessary to the complete exercise of its appellate and revisory jurisdiction.

In Seattle & Montana R. R. Co. v. Bellingham Bay & Eastern R. R. Co., 29 Wash. 491, 69 Pac. 1107, 92 Am. St. Rep. 907, the superior court had determined that the right of way described in the petition and sought to be appropriated was necessary for the petitioning railroad company, and the intended use was a public one, and that the public interest required the appropriation. The proceeding was taken to the Supreme Court by certiorari. The Supreme Court held that, under the provisions of the Constitution cited, it had the power to issue the writ of certiorari to bring before it the proceedings of the superior court for the purpose of reviewing the determination of that court upon the question whether the contemplated use of the property sought to be condemned was really a public use. The court thereupon reviewed the proceedings for that purpose, and held that competent proof had been made of all the facts necessary to be proved, and affirmed the judgment of the superior court. This decision is, in effect, a determination that the question whether the property sought to be appropriated was for a public use, and the necessity for that use, could be litigated in the condemnation proceeding. To the same effect is State ex rel. Smith v. Superior Court, 30 Wash. 219, 70 Pac. 484, and State v. Superior Court of King County (Wash.) 72 Pac. 89.

The good faith of the appellant in the prosecution of the condemnation proceeding is necessarily involved in the question whether the land sought to be appropriated is really for a public use, and, as this question may be litigated in the condemnation proceeding, the complainant has a plain, adequate, and complete remedy at law. The rule under such circumstances is stated in Lewis on Eminent Domain (2d Ed.) vol. 2, § 646, as follows:

"A bill in equity will not lie to enjoin proceedings for condemnation, for the reason that the mere taking of such proceedings does no injury to prop-

erty, and for the further reason that the grounds relied upon for an injunction may be urged in defense of the proceedings. The making of a public improvement cannot be enjoined on the ground that it is unnecessary or is being made to further private ends, but, where the ground relied upon cannot be litigated in the condemnation proceedings, an injunction will be granted."

The decree of the Circuit Court is reversed, with direction to dismiss the bill.

SWAN v. WESTERN UNION TELEGRAPH CO.

(Circuit Court of Appeals, Seventh Circuit. January 5, 1904.)

No. 1,006.

1. TELEGRAPHS—MESSAGES—TRANSMISSION—DELAY—NOTIFICATION TO SENDER—NEGLIGENCE.

Where a mining expert delivered a telegram to defendant telegraph company advising the purchase of certain mining stock, which message he directed to be transmitted to plaintiff and 293 others, who were his clients, under an agreement to transmit the same at once, there being other methods of rapid communication between the sending office and plaintiff's place of business, it was the duty of the telegraph company, on discovering that it would not be able to transmit such message to plaintiff without delay, by reason of a defect in its wires, to promptly notify the sender of such fact, he being a person well known to the company's agents at the sending office, and easily accessible.

2. SAME—DAMAGES.

Where a mining expert delivered a message to a telegraph company to be sent to plaintiff, his client, advising the purchase of certain mining stock, which defendant agreed to promptly transmit, but failed to notify either the sender or the addressee that there had been several hours' delay, by reason of which the addressee was led to purchase the stock at a higher price than he would have been compelled to pay if the message had been promptly delivered before the close of an exchange on the day it was sent, the addressee was entitled to recover the difference between what he had to pay for the stock which he purchased the succeeding day and what the stock would have cost him if the telegram had been transmitted within a reasonable time after it was received for transmission.

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

Henry L. Clarke, for plaintiff in error.

P. B. Eckhart, for defendant in error.

Before GROSSCUP and BAKER, Circuit Judges, and BUNN, District Judge.

BUNN, District Judge. This action was brought by Charles J. Swan, the plaintiff in error, against the Western Union Telegraph Company, to recover damages for losses sustained on account of the failure of the defendant company to give notice of the delay in sending an important business telegram relating to the purchase of certain mining stock on

¶ 1. Delay in delivery of telegram, failure to disclose that line was not in working order, see note to Pacific Postal Telegraph Cable Co. v. Fleischner, 14 C. C. A. 177.

¶ 2. Measure of damages in actions against telegraph companies, see notes to Western Union Telegraph Co. v. Coggin, 15 C. C. A. 235; Same v. Morris, 28 C. C. A. 59.

See Telegraphs and Telephones, vol. 45, Cent. Dig. § 72.

the Boston Stock Exchange. A jury was waived, and the case tried by the court upon the following stipulation of facts, to wit:

"It is hereby stipulated and agreed by and between the parties herein, by their respective attorneys, that:

"The plaintiff makes no claim against the defendant on account of negligent delay in transmitting and delivering the message in controversy, and said question may be considered by the court as eliminated from the case; but the plaintiff charges the defendant with negligently failing to give due notice of delay of the message, or by reason of the '3 27 PM' under the sender's signature, with wrongfully misleading the plaintiff as to such delay, as set forth and charged in the declaration. On May 1, 1901, and for some time theretofore and thereafter, the defendant corporation was engaged in and operating a public telegraphing business and service for compensation between and within Chicago, Illinois, and Houghton, Michigan. On said 1st day of May, 1901, one Horace J. Stevens, a mining expert, and editor of certain copper-mining publications, and assistant commissioner of mineral statistics for the state of Michigan, occupied an office in the said town of Houghton, and was well known to the local office of the defendant at Houghton. On the said 1st day of May, 1901, at about 9:15 a. m., the defendant, at its public office in Houghton, Michigan, received from said Horace J. Stevens, of Houghton, Michigan, a communication to be telegraphically transmitted and delivered to the plaintiff herein in words and figures as follows:

"'Houghton, Michigan, May 1, 1901.

"'Dr. C. Joseph Swan,

"'34 Washington St., Chicago.

"'Ten to twenty dollars quick rise in Mohawk. Has Wolverine lode rich as Quincy beside million dollars worth "Mohawkite" almost spot cash opened in three upper levels. Advise quick purchase.

"'Horace J. Stevens.'

"And about four o'clock in the afternoon of the said 1st day of May, 1901, the defendant delivered to the plaintiff, and he paid the charges on, a typewritten message in words and figures as follows:

"'253. CH. MD. JO. 31 Collect,

"'Houghton, Michigan, May 1, 1901.

"'Dr. C. Joseph Swan,

"'34 Washn St Chgo,

"'Ten to twenty dollars quick rise in Mohawk. Has Wolverine lode rich as quincy beside million dollars worth "Mohawkite" almost spot cash opened in three upper levels advise quick purchase.

"'Horace J. Stevens.

"'3 27 PM'

"The plaintiff had no notice that the message accepted as aforesaid by the Houghton office of the defendant would be or had been delayed in the transmission and delivery beyond the time ordinarily required for the transmission and delivery of such a message or for more than one-half hour after its acceptance by the defendant. The message first above quoted was accepted by the defendant from the said Stevens in manner and form as follows, viz.: The entire message, except the name and address of the sendee, was written by Stevens on one sheet of paper, and on a number of other sheets were written the names and addresses of 294 sendees, including the plaintiff. When the said message and lists of sendees were presented by Stevens at the Houghton office of the defendant a consultation was had between Stevens and the manager of the said office as to the most expeditious and convenient method of transmitting the message; and at the suggestion of the said manager it was arranged that the body of the message should be wired to Chicago and followed by the list of addresses for Chicago and points beyond, the Chicago office to relay the message to such further points. Thereupon the sheets of addresses were rearranged by Stevens, and numbered in red pencil, and the sheet bearing the plaintiff's name and address became the first sheet, with the plaintiff's name number 17 on the list, and preceded by 13 addresses for Chicago and points beyond and 3 'local' addresses. The said manager of the defendant advised Stevens that the transmission of the matter so accepted would

be promptly proceeded with, and the said Stevens had no notice that the message to the plaintiff would be delayed beyond the time that would ordinarily be required for the transmission and delivery of such a message so accepted.

"On the said 1st day of May, 1901, there were, besides the service of the defendant, two other available means of rapid communication from Houghton, Michigan, to Chicago, Illinois, viz.: the service of the Postal Telegraph Co. and the long-distance telephone, the latter directly connecting with the office of the plaintiff. From the opening up to the hour of noon on the Boston Stock Exchange on the said 1st day of May many hundred shares of Mohawk stock sold at 39, and on said day until the noon hour there was not more than ¼ of one point of fluctuation from 39 in the sales of said stock. Thereafter the said stock rose, and the last sales before the close of said exchange at 3 p. m. of the said day were at 47, and the following morning the market opened at 51. The plaintiff could have communicated by telephone with his brokers in Chicago, Wm. H. Colvin & Co., at any time on the said 1st day of May, and the said brokers then had such security for the plaintiff's orders that they would at once have proceeded to execute by telegraph his telephone order to buy one hundred shares of Mohawk on the Boston Exchange. The plaintiff would testify that he inferred that the message delivered to him as aforesaid had been transmitted within the time ordinarily required for such a message, and had been sent by the said Stevens after the close of the Boston Stock Exchange, whereon Mohawk was listed, on the said 1st day of May, and that such message applied to the market of the following or 2d day of May, 1901. The plaintiff would testify that he further inferred and understood, and was not informed to the contrary, that the hour date of '3 27 PM' appearing directly under the signature of the said Stevens on the said message indicated the hour at which the said message had been delivered by the said Stevens to the defendant. On the morning of the 2d day of May, 1901, about 10:30 a. m. (Central time), the aforesaid brokers of the plaintiff, at his order to buy 'under 50,' bought for him on the Boston Exchange one hundred shares of Mohawk at 49½, which was as high as any subsequent sale of that day, and several points below a few earlier sales of the same morning; and he would testify that he ordered such purchase about 10 a. m. on the ground of the advices contained in the aforesaid message, and upon his aforesaid inferences and understanding as to the time of sending of said message. Later on the said 2d day of May and on the next following day Mohawk fell, and on the 3d day of May, 1901, closed at 42, and thereupon the plaintiff made inquiry of the said Stevens by long-distance telephone as to the reason for such fall, and then and there for the first time it became known to the plaintiff and to the said Stevens that the above-stated delay of the message of Stevens had occurred. Thereupon the plaintiff made inquiry on the said 3d day of May, 1901, at the Chicago office of the defendant, as to the cause of the aforesaid delay and the Chicago office wired the inquiry to the Houghton office, and the latter wired back that 'wire trouble' had 'delayed (Houghton) business all around (on May 1, 1901)'; and the said Chicago office referred the plaintiff to the New York office of the defendant as to any claim for damages, and such claim was forthwith made in writing by the plaintiff, and from time to time repeated until the beginning of the present suit. The plaintiff would testify that the one hundred shares of Mohawk purchased as aforesaid were held by him until the autumn of 1901, and finally sold at 49, and while so held their value at one time decreased to about 30, and at another time the plaintiff was called upon to pay and did pay an assessment of three hundred dollars on the said shares; and he also paid to his brokers one-eighth of one point per share for buying and one-eighth of one point per share for selling said one hundred shares; and while so holding said shares he was deprived of all interest that might have accrued from the moneys so invested.

"This suit was not brought until after the refusal of the defendant to settle the aforesaid claims of the plaintiff. And the foregoing statement of facts shall constitute all and the only evidence to be submitted by either party on the trial of this cause.

"Chicago, June 30th, 1902.

C. Joseph Swan,
"By Henry Love Clarke, His Attorney.
"Western Union Telegraph Co.,
"By Henry D. Estabrook, Its Attorney."

The court below, upon the hearing, after overruling several proper special requests to find for the plaintiff, rendered judgment in favor of the defendant. We think this was error, and that judgment should have been given in favor of the plaintiff for $1,050 and interest, that being the amount of damages sustained by him by reason of the defendant's neglect in not giving notice of the obstruction in its telegraph lines between Houghton and Chicago; the stipulation showing that at the first opportunity after the receipt of the message he paid $49.50 per share for 100 shares which would have cost him $39 per share if the message had been sent in due course of business on the morning of May 1st, within a reasonable time after its receipt at the defendant's office in Houghton. It seems evident that the duty was with the defendant company to send the message in due course, or, if it was unable from obstruction of its lines to do so, then to notify the sender of that fact so that he might avail himself of one of the two other methods of quick communication that were open to him. It does not appear from the statement of facts whether the obstruction in the lines existed at 9:15 a. m. of May 1st, the hour when the message was handed in at the Houghton office, or came in after that time. If we were to indulge in any presumption from the facts that are in evidence, it would seem reasonable to suppose that the inability existed at the time of receiving the message, when, according to the stipulation of facts, the company's manager advised Mr. Stevens that the transmission of the message would be promptly proceeded with. Thirty minutes would probably have given ample time for transmitting the message if proceeded with according to such promise, but it was not sent until nearly seven hours after its receipt. So that, if the lines were not down at the receipt of the message, they were but shortly after; otherwise the message would have been sent. But that question does not seem to be material, as the obligation resting upon defendant would be of a similar character in either case. If the lines were already down, it was the duty of the defendant to so inform the sender, so that he could avail himself of another line of communication, or, if he so chose, to take the chances on the defendant's restoring its service in time. If communication was obstructed after the message was received, this fact being unknown to Mr. Stevens, it was equally incumbent upon the defendant to give him timely notice of that fact. Without any explanation or excuse for the delay in sending the message from 9:15 in the morning to 4 o'clock in the afternoon, or of notifying the sender of the disability to send, the inference of culpable neglect is palpable; and, to aggravate the case, the company at some point, whether at Houghton or Chicago does not appear, placed under the sender's name the figures "3 27 PM," from which the plaintiff understood that the message was received by the company at Houghton at that time, which would have given the very reasonable time of 33 minutes for its transmission from the Houghton office to Chicago. But under the stipulation we are not at liberty to lay any stress upon this circumstance. There is nothing in the case to show what these figures placed under the sender's name import—whether they are to note the time of the receipt of the message at Houghton, the time of sending, or the time of its receipt at the office in Chicago. It was open to the plaintiff to make inquiry, if he did not know what

the figures meant. There is no evidence that he did so. He assumed that the figures noted the time the message was received by the company at its office in Houghton. These figures placed by the company under the sender's name are relied upon by the plaintiff as one ground of negligence, but we place the decision of the case solely on the ground of the negligence of the defendant in failing to give notice that its lines were obstructed so that the message could not be sent. Whether the obstruction in the lines existed when the message was delivered, or occurred after that time, it was equally incumbent upon the company to notify the sender of the fact, so that he could send the message by another line of communication. That the defendant's line was out of order was a fact unknown to the sender, but must have been well known to the defendant. Under these circumstances it was the plain duty of the defendant to give timely notice of its inability to send the message.

We have assumed thus far that there was delay due to wire trouble as stated by the Houghton office. Counsel for appellee, however, insist that, though there is thus a showing of delay, there is no showing that the delay was unreasonable, or that the Houghton office had such knowledge concerning the delay as imposed upon it the duty to inform the parties interested that the message had been delayed; and in support of this insistence point to the opening paragraph of the stipulation that "the plaintiff makes no claim against the defendant on account of negligent delay in transmitting and delivering the message in controversy, and said claim may be considered by the court as eliminated from the case." While such paragraph exempts appellee from damages in this suit on account of negligent delay in transmitting the message, it works no exemption from damages growing out of the negligent failure to give notice of the delay; for appellee is expressly charged in the stipulation with negligently failing to give due notice of the delay. The two grounds of action thus indicated—the one eliminated and the other clung to—are distinct. It is with respect, then, to the second ground, only, that the fact of delay cuts any figure. The stipulation shows the fact of delay; but leaves it open whether the cause and nature of the delay were such that the agent should have given notice to the parties interested; and on this open question of fact, the evidence of which was wholly within the possession of appellee, the burden of proof, in our opinion, was on the appellee.

Our view may be summed up thus: The suit being for damages growing out of the agent's failure to give notice of the delay, and the bare fact of delay appearing in the stipulation, the burden was on appellee to show the nature and cause of the delay; and, in the absence of such showing it will be presumed that the agent at Houghton had such information as imposed on him the duty of informing the parties interested—a duty that was not in fact performed. The case is not distinguishable in principle from Fleischner v. Pacific Postal Telegraph Cable Co. (C. C.) 55 Fed. 738, affirmed by the Circuit Court of Appeals for the Ninth Circuit, 66 Fed. 899, 14 C. C. A. 166. The general rule applicable in that case was laid down by that court as follows:

"As has been said, plaintiff in error contracted to transmit and deliver this message. At the time its wires were down, and there was an impossibility in performing the contract as required. The general rule is that, when an

impossibility of performance is known to the promisor, but is not known to the promisee, the former is liable in damages for failure to perform. 3 Am. & Eng. Enc. Law, subd. 73, p. 898, tit. 'Contract'; 2 Parsons, Cont. 673."

The analogous rule more specifically adapted to telegraph companies is laid down by Gray in his work entitled "Communication by Telegraph" (section 18), as follows:

"If a telegraph company is unable, through a disarrangement of its lines or other cause, to do what it makes a business of doing, it must inform those who wish to employ it of the fact, and thus acquaint them with the advantage of employing other means. A telegraph company offers and is employed solely to effect the rapid communication of a message. The excuse for a failure to effect that communication that the company, when it made the contract, knew that it could not perform it, can hardly be deemed a valid one."

That rule, as there laid down, commended itself to the United States Circuit Court of Appeals in the case afore cited, and commends itself to this court as applicable to the case in hand.

It appears from the agreed facts that the plaintiff was one of 294 persons to whom this same message was to be sent. A list of these persons was prepared, with the plaintiff's name standing as No. 17 in the list, preceded by 13 other addressees for Chicago and beyond and 3 local addressees. There was to be but one dispatch for these 294 customers, so that the profits, considering the amount of work to be done, would no doubt be considerable. It does not appear whether or not this circumstance had any influence upon the conduct of the company in retaining the dispatch for so many hours without giving notice to Mr. Stevens, who had an office in Houghton, was a public character, and well known to the local office of the defendant at Houghton, that an obstruction in the wires rendered it impossible to transmit the message. But whether the inducements for retaining and sending the message, rather than having another company do it, were great or small, the defendant had a duty to perform. Although not a common carrier in the sense of being insurers, a telegraph company owes an obligation to the public analogous to that of a common carrier.

On the question of damages we have encountered no such difficulty as seems to have been experienced by the court below in finding a proper measure of damages for the case. If the plaintiff was entitled to recover even nominal damages, that would be better than to give a judgment for costs against him. The proper measure of damages is what the plaintiff lost through the negligence of the defendant, which was the difference between what he had to pay for the stock on the morning of May 2d and what it would have cost him in the forenoon of May 1st, when he should have received the dispatch, or notice that it could not be sent.

The judgment of the court below is reversed, and judgment ordered in favor of the plaintiff in error for the sum of $1,050, with interest from the 2d day of May, 1901, besides costs.

ROBINSON v. PITTSBURG COAL CO. et al.

(Circuit Court of Appeals, Sixth Circuit. May 4, 1904.)

No. 1,261.

1. MASTER AND SERVANT—INJURIES TO SERVANT—CAUSE OF INJURY—QUESTION FOR JURY.
   In an action for injuries to a seaman by the breaking of a mast, caused by its being struck by a bucket of ore negligently swung from the hold by stevedores engaged in unloading a vessel, whether it was the erratic movement of the bucket which caused the accident, or whether the derrick engineer was negligent in attempting to swing the bucket from the hatch to the dock while such movement was going on, was for the jury.

2. SAME—FELLOW SERVANTS.
   Where a seaman was injured by the falling of a mast, caused by its being struck by a bucket of ore being hoisted from the hold by a derrick engineer employed by a different master from the owner of the vessel, the seaman and the derrick engineer were not fellow servants.

3. SAME—PROXIMATE CONCURRING CAUSE.
   Where a seaman was killed by the falling of a mast after it was struck by a bucket of ore negligently hoisted from the hold of the vessel by an engineer employed by another master to unload the vessel, in the absence of proof that the mast was not sufficiently strong to stand all the uses for which it was designed, and, if it had been entirely sound, it would have sustained, without breaking, the strain put upon it by the blow from the loaded bucket, the fact that the mast had become decayed was not a proximate cause of the accident.

In Error to the Circuit Court of the United States for the Northern District of Ohio.

Paul Howland and Charles F. Lang, for plaintiff in error.

Squire, Sanders & Dempsey, for defendant in error Pittsburg Coal Co.

H. H. McKeehan (Hoyt, Dustin & Kelley, of counsel), for defendant in error Pittsburg Steamship Co.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

RICHARDS, Circuit Judge. This was an action to recover damages for the death of James Kerr, an employé of the Pittsburg Steamship Company, by the wrongful acts of that company and the Pittsburg Coal Company. Kerr was employed as a watchman on the steamer Bartlett, and was killed while the boat was being unloaded by the Pittsburg Coal Company at its docks in Cleveland, July 1, 1901. The Bartlett was a whaleback steamer loaded with iron ore. At the time of the accident, Kerr was at the capstan on the forward turret, trying to heave the vessel closer to the dock. The boat was being unloaded by revolving derricks located on and operated from the dock. Next the turret was the foremast, and just aft of it hatch No. 1. A heavy bucket of iron ore, lifted out of this hatch and swung forward and toward the dock, struck the lamp guy of the foremast. The strain broke off the mast

¶ 2. See Master and Servant, vol. 34, Cent. Dig. § 485.

seven or eight feet from the top, just below an iron collar or band to which the lamp guys were attached. The falling piece struck and killed Kerr. An inspection of the piece showed the mast was rotten where it broke.

It was claimed that the steamship company was negligent in sending Kerr into a dangerous place without warning him, in permitting the rotten mast to be in and on the steamship, in causing the steamship to be heaved closer to the dock while the unloading operations were in progress, and in causing the unloading to be begun and continued without removing the foremast.

The coal company was charged with negligence in permitting the bucket to come into forcible contact with the lamp guys, thus breaking off the masthead, in continuing the unloading operations while the vessel was being moved closer to the dock, in continuing the unloading operations without adjusting the unloading machinery to fit the altered situation of the vessel when brought closer to the dock, and in permitting all five of the unloading derricks to be operated at the same time. The court arrested the testimony from the jury, and directed a verdict for each of the defendants.

1. The Bartlett landed at the dock in the morning. She was moored eight to ten feet from the dock, not being able to get nearer on account of her draught. While she was in this position, the coal company began to unload. The unloading began about 10:30 or 11 o'clock, and stopped at 12 for dinner. Work was resumed at 1 o'clock. During the forenoon, while the unloading was going on, the boat was hove in nearer the dock "two or three times, probably four times." At this time she was in charge of the mate, Moser. She was hove in by order of the foreman of the dock, Weddow, who said to Moser as soon as the boat was tied up, "Get her alongside of the dock as quick as you can." Altogether she was hove in about two feet in the morning, so that, when the men quit work at noon, she was six or eight feet from the dock. After the mate had had his dinner, he heard the buckets and machines going again, and he went on deck and ordered the deceased, Kerr, to go forward and heave the boat in, if he could, with the steam capstan. Kerr proceeded to execute the order. What then occurred was thus described by the mate:

"A. Kerr went up on the forward turret, and took the turns of the line off the timberheads, where the line was made fast to the dock; and he gave it the steam in order to heave her in, but I didn't see him heave her in. I didn't see that the capstan moved. So I said, 'did you get any, Jim?' and he says, 'I got a little;' and that moment I saw a bucket coming toward the spar and strike the lamp guy, and the topmast came down and fell on Kerr, and he dropped down, and I jumped on the forward turret"—

The foremast was of pine, about 35 feet long, 10 inches in diameter at the butt, and tapering toward the top. It was fastened to the deck by two pieces of iron, and was held in place by three wire stays; one running forward, and the other two to each side of the vessel. The stay nearest the dock was removed. The mast stood on a line running through the center of the hatch, about a foot and

a half forward of it and next the turret. About 7 or 8 feet from the top of the mast there was an iron collar or band, resting on a shoulder cut into the mast. From this collar, two iron arms extended out and forward, to which were attached two lamp guys (wire ropes three-eighths of an inch in diameter), which ran parallel with the mast, to the turret where they were fastened. The mast was used to carry the ship's lights, and the lamp guys to raise the lights. The lamp guys were about 14 inches apart and extended about 3 inches beyond the side lines of the mast. They were in front of the mast, probably a foot from it. The iron bucket was about 3 feet square, and, when filled with iron ore, weighed nearly a ton. It struck the lamp guys midway between the turret and the iron collar. The mast broke just below the collar. It was rotten there an inch deep all around.

Just before the accident the mate was standing a little behind the hatch out of which the bucket was hoisted, and on the dock side, 15 or 20 feet from Kerr. Asked whether the vessel was drawn in after dinner, he said:

"It was so little that I couldn't see, and that caused me to ask Kerr if he got any slack on the line at all. He said, 'Yes, a little.'"

Asked where the bucket was when he first saw it, he said:

"A. When it struck the guy—when it came swinging in towards the guy." The Court: How you mean 'swinging in?'" A. Out from the dock towards the center of the vessel."

Examined further upon the same point, he said:

"A. I saw the bucket swinging towards the mast. So it must have come this way. The Court: Where was it when you saw it? A. It was right in range of my view between me, and swinging in towards the mast. * * * Q. And when you saw it, was when it was swinging around in a circle towards the dock, when it caught the mast? A. It swung towards the mast. It didn't swing in a regular circle. Q. It swung towards the mast? A. Yes, sir. Q. When was that? A. When I first saw it. Q. And when was it that you first saw it? A. When it was about two or three feet away from the guy, swinging towards the mast. I can't tell you the exact time."

O'Boyle, the engineer who operated the derrick at hatch No. 1, testified that after dinner he swung an empty bucket from the dock, and lowered it into the hatch. He did this slowly. The bucket cleared the lamp guy 2 or 3 feet. He waited 10 or 15 minutes, and then raised and swung the loaded bucket, which struck the lamp guy and broke the mast. Asked to describe the motion of this bucket, he said:

"A. The bucket came up good and straight, but the momentum of the bucket was what caught him. I couldn't see the man, where he was, at all. It was the momentum of the bucket which caught the lamp guys. The Court: What do you mean by that? You say the bucket came up straight. A. Yes, sir. Q. Now you say the momentum of the bucket. Do you mean it swung out? A. Yes, sir; and I couldn't stop it. Q. When you turned the boom, the bucket swung out? A. Yes, sir. Q. How much did it swing from being in an upright position? A. About 3 or 4 feet."

On cross-examination the witness was asked:

"Q. I want to know if you did not say to Mr. Howland, there, that, after that bucket came up out of the hatch and started back for the dock, it was swinging back and forth? A. Well, a bucket naturally would swing back

and forth. Q. Did you say that to him? A. Yes, sir; I did. Q. And the bucket was swinging back and forth, you said, through the air, about 3 or 4 feet, didn't you? A. Yes, sir."

The witness, on cross-examination, testified that in the morning the boom was lower down, in order to reach out farther over the vessel. It does not appear when he raised the boom. He says he did not during the forenoon, and he evidently did not after dinner. It was his opinion the boat was moved in during the noon hour, but he did not see it. When he swung the empty bucket out to the hatch after dinner, he says it cleared the mast about two or three feet. He moved that bucket "slow."

This was substantially all the testimony with respect to the accident itself. There was some additional with respect to the rotten mast.

2. The court below, after holding that the rotten mast was not connected with the accident in a way to render the steamship company liable on that account (a ruling which we sustain), assumed that the occasion of the accident was "the bringing nearer together of the vessel and the machinery for unloading it," and, asserting that the deceased did this, and failed to notify either the mate of the vessel or the agent of the coal company of the extent of the movement of the vessel nearer the dock, held that neither the steamship company nor the coal company was liable under the circumstances.

We have examined the testimony carefully, and are at a loss to comprehend how the court below reached the conclusion that the only reasonable inference to be drawn from the testimony is that the vessel was hove in two feet nearer the dock during the noon hour, when the deceased tried to work the capstan, and that this was the cause of the accident. Instead of establishing these facts, there was proof which, in our opinion, tended to show that there was no movement of the vessel during the noon hour, when the deceased tried to operate the capstan, and that the cause of the accident was not the movement of the boat, but of the bucket. It was not the dock hands, but the sailormen, who hove in the boat. They were in command of the mate, and acted under his orders. The mate had been directed by the foreman of the dock hands to get the boat along side of the dock as quick as he could. He therefore was the one of all others who was in the best position to state when the boat was hove in. He testified she was hove in probably four times during the morning—in all, 2 feet. He directed Kerr to try and heave her in further after dinner, and Kerr tried to do this with the steam capstan. He was only 15 or 20 feet away from Kerr, and watching him closely, when he tried to work the capstan, yet he could not see any movement at all. That is why he asked Kerr whether he got any slack, and Kerr said, "A little." He might have got a little by the stretching of the line. The tendency of this testimony is to show that, in point of fact, Kerr did not move the vessel at all. If he had moved the boat but a few inches, the mate, watching closely the working of the capstan, would instantly have observed the movement.

Not only does the testimony fail to show with any degree of certainty that the boat was hove in by the deceased a distance sufficient to cause the bucket, in its regular course, to catch the lamp guy,

thus causing the accident, but it tends to show that the reason the bucket struck the lamp guy was because of its erratic movement, occasioned by the improper and negligent operation of the derrick by O'Boyle, the engineer on the dock. The mate and O'Boyle were the two persons who had opportunity to observe the motion of the bucket when it struck the lamp guy. They both testified that at the time the bucket was not swinging around on its regular circle from the hatch towards the dock, but out from the dock towards the mast—in other words, back and forth, or to and fro, across the line of its usual circular course. The mate was in a position—on the dock side of the vessel, just aft of the hatch—where he would notice such a divergence of the bucket from its regular course. He says the bucket "came swinging towards the guy"; "swinging out towards the mast"; "it swung towards the mast"; "it didn't swing a regular circle." The derrick engineer says the bucket came up good and straight, but "it was the momentum that caught him," and, asked to explain what he meant by the momentum, said the bucket "swung out," and he could not stop it; that "it swung out about 3 or 4 feet." On cross-examination he admitted that he had stated that the bucket "was swinging back and forth about 3 or 4 feet."

The engineer testified that, when the empty bucket was swinging slowly from the dock to the hatch, it missed the mast and the lamp guys by only two or three feet. He had the means, therefore, of knowing that the loaded bucket, swinging back and forth, across the line of its course and towards the mast, a distance of about three or four feet, as he put it, was liable to hit the mast or the lamp guys if swung around while that erratic movement continued.

One of the claims of the petition is that the coal company was negligent in permitting the loaded bucket to strike the lamp guys, and thus break the mast. In view of the testimony to which we have called attention, we think it was clearly a question for the jury to determine whether it was the erratic movement of the bucket which caused the accident, and whether the coal company, through its employé, the derrick engineer, was negligent in attempting to swing the bucket from the hatch to the dock while this movement was going on. Dunlap v. N. E. R. R., 130 U. S. 649, 9 Sup. Ct. 647, 32 L. Ed. 1058; R. R. v. Converse, 139 U. S. 469, 11 Sup. Ct. 569, 35 L. Ed. 213; Richmond & Danville R. R. v. Powers, 149 U. S. 43, 13 Sup. Ct. 748, 37 L. Ed. 642; Gardner v. Mich. Cen. R. R., 150 U. S. 349, 14 Sup. Ct. 140, 37 L. Ed. 1107. The deceased was not, in the view we take of the case, a fellow servant of the derrick engineer, nor did he assume the risk of being injured by the negligence of servants of the coal company engaged in unloading the vessel.

3. While unable to agree with the court below that there was no proof presented to sustain a verdict in favor of the coal company, we approve of its action in directing a verdict for the steamship company. The claim against the latter turned upon the part played in the accident by the rotten mast. There was no testimony tending to show that the mast was not strong enough to stand all the uses for which it was designed and employed, namely, the carrying of lights and signals, and no testimony tending to show that the mast, if en-

tirely sound, would have sustained, without breaking, the strain put upon it by the blow of the loaded bucket when it struck the lamp guy. The steamship company could not be held liable for failing to guard against an accident which it had no reason to anticipate, either by providing a stronger mast, or by warning the deceased not to stand near the mast while the derrick was being operated.

The judgment of the court below is affirmed as to the Pittsburg Steamship Company, but reversed as to the Pittsburg Coal Company, and the case remanded for a new trial.

THREE PACKAGES OF DISTILLED SPIRITS v. UNITED STATES ex rel. WESTHUS, Collector of Internal Revenue.

(Circuit Court of Appeals, Eighth Circuit. April 4, 1904.)

No. 1,988.

1. INTERNAL REVENUE—LIQUOR PACKAGES—CHANGING CONTENTS AFTER STAMPING—FORFEITURES—EVIDENCE.

Where, on an information to forfeit certain liquors on the ground that distilled spirits of a different quality had been put into the barrels after they were originally stamped and branded, in violation of Rev. St. § 3455 [U. S. Comp. St. 1901, p. 2279], it was conceded that the claimant was entitled to reduce the proof by the addition of water, and the uncontradicted evidence showed that the spirits contained in the packages had been reduced in proof between 12 and 14 degrees, after they had been gauged and stamped, by the addition of water, in conformity with the law and in the presence of a government gauger, the discrepancy in the percentage of the alcohol contained in the liquor was insufficient to form a basis for an inference that the change was occasioned by the addition of "other spirits of a different quality."

2. SAME—ISSUES—PROOF.

Where an information for the forfeiture of certain packages of liquors alleged that, after the barrels had been inspected, gauged, and stamped, something else than the contents which were therein when said barrels and packages were so lawfully stamped, branded, and marked, to wit, distilled spirits of a different quality, had been placed therein, in violation of Rev. St. § 3455 [U. S. Comp. St. 1901, p. 2279], evidence that at the time the proof of the liquors was reduced by the addition of water, after the packages had been stamped, some caramel coloring matter had been put into the packages to deepen the color, was not within the information, and therefore inadmissible.

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

For opinion below, see 125 Fed. 52.

Warwick M. Hough (Jacob Klein, on the brief), for plaintiff in error.

David P. Dyer (Horace L. Dyer and Bert D. Nortoni, on the brief), for defendant in error.

Before SANBORN, THAYER, and HOOK, Circuit Judges.

THAYER, Circuit Judge. This is an information which was filed by the United States against three packages of distilled spirits to obtain a forfeiture of the same under section 3455 of the Revised Statutes of the United States [U. S. Comp. St. 1901, p. 2279]. The A.

Graf Distilling Company claimed the liquor and interposed a defense against the forfeiture. Section 3455 of the Revised Statutes of the United States, quoting only so much thereof as is essential, is as follows:

"Whenever any person sells, gives, purchases, or receives any box, barrel, bag, vessel, package, wrapper, cover, or envelope of any kind, stamped, branded, or marked in any way so as to show that the contents or intended contents thereof have been duly inspected, or that the tax thereon has been paid, or that any provision of the internal revenue laws has been complied with, whether such stamping, branding, or marking may have been a duly authorized act or may be false and counterfeit, or otherwise without authority of law, said box, barrel, bag, vessel, package, wrapper, cover, or envelope being empty, or containing anything else than the contents which were therein when said articles had been so lawfully stamped, branded, or marked by an officer of the revenue, he shall be liable to a penalty of not less than fifty nor more than five hundred dollars. * * * And all articles sold, given, purchased, received, made, manufactured, produced, branded, stamped, or marked in violation of the provisions of this section, and all their contents, shall be forfeited to the United States."

The information which was filed by the government alleged in the second article:

"That prior to the times of said seizure of said barrels and packages they and each of them had been purchased and received by A. Graf & Company, they then being stamped, branded, and marked so as to show that the contents thereof were distilled spirits of a certain proof, which had before then been duly inspected by an officer of the revenue, to wit, a United States gauger; that afterwards and before said seizure said barrels and packages and each of them, and the contents therein contained, were sold to divers persons, each of the barrels and packages at the time of the sale last aforesaid then containing things else than the contents which were therein when said barrels and packages were so lawfully stamped, branded, and marked by said officer of the revenue, to wit, distilled spirits of a different quality, in violation of section 3455 of the Revised Statutes of the United States, whereby and by force of said statute said barrels and packages and all the contents thereof became and are forfeited to the United States."

At the conclusion of the evidence the claimant below, who is the plaintiff in error here, requested the trial court to direct the jury to return a verdict in its favor, on the ground that there was no substantial evidence to sustain the charge which was contained in the information. This instruction was refused, whereupon the trial court, of its own motion, after reciting the substance of the statute as above quoted, charged the jury as follows:

"If he sells the barrel, the barrel having been branded or stamped by one of the revenue officers pursuant to law, and the barrel is empty, that is the first condition. Under those rules no one is permitted to sell the empty barrel containing this brand, because it may be used as an instrument for defrauding the government of its wealth. The second condition is that he may not sell it if it contains anything else at the time of the sale than the contents which were therein when said liquor had been lawfully stamped, branded, or marked. Now, it is claimed that after the gauger put his stamp on those casks, after the proof had been reduced, that between that time and the time when the claimant here, Mr. Graf, sold it, something had been put into those casks. If there was anything put in there other than water, then I charge you that you should find in favor of the government."

An exception was taken to the action of the court in both of the respects last stated, and these exceptions present the principal ques-

tions to be determined on appeal; the jury having returned a verdict in favor of the government.

It will be observed that the information alleged that the barrels and packages in question, when sold, contained "things else than the contents which were therein" when the packages and barrels were stamped and branded, "to wit, distilled spirits of a different quality." After a careful examination of the record we are of opinion that there was no substantial evidence offered by the government to sustain the allegation that distilled spirits of a different quality had been put into the barrels after they were originally stamped and branded. The testimony shows that the spirits which were contained in the three packages now in controversy were manufactured in Kentucky, where the packages were originally stamped and branded by a government gauger. They were subsequently sold by the distiller and transported to the city of St. Louis, Mo., where the proof was reduced by the addition of water. The proof was reduced by the addition of water from 102°, the original proof, to about 90°, or, as one witness says, to 88°. The government obtained samples of the spirits in their original condition from Kentucky, and caused them to be compared by experts with samples which were taken from the packages in controversy after the proof was reduced. The comparison thus made disclosed the presence of a larger percentage of alcohol in the sample which was obtained from Kentucky than in the sample which was taken from the other packages. The former sample contained 52.03 per cent. of alcohol, while the sample taken from the other packages contained 44.52 per cent. Because of this discrepancy, one of the government's witnesses said that the inference was that a part of the original contents of the casks had been withdrawn and other neutral spirits of a cheaper character substituted. This is the only evidence that we find in the record to sustain the allegation that "distilled spirits of a different quality" had been put into the barrels after they were originally stamped and branded. Now, in view of the admitted facts that the spirits contained in these packages had been reduced in proof after their removal to St. Louis by the addition of water, that the proof was so reduced in conformity with law and in the presence of a government gauger, and that by the addition of water the original proof had been reduced as much as 12° or 14°, we have not been able to conclude that the observed discrepancy in the percentage of alcohol formed a sufficient basis for an inference that the change was occasioned by the addition of other spirits of a different quality. It is conceded that the claimant had the right to reduce the proof by the addition of water. To that effect are the authorities, as well as the rulings of the Commissioner of Internal Revenue. United States v. Thirty-Two Barrels of Distilled Spirits (D. C.) 5 Fed. 188; Three Packages of Distilled Spirits (D. C.) 14 Fed. 569; United States v. Fourteen Packages of Whiskey, 66 Fed. 984, 14 C. C. A. 220; United States v. One Package of Distilled Spirits (D. C.) 88 Fed. 856; United States v. Bardenheier (D. C.) 49 Fed. 846. See, also, letter of the Commissioner of Internal Revenue of date August 8, 1900. The government offered no testimony tending to show that the reduction in the percentage of alcohol could not have been occasioned or was not

adequately accounted for by the addition of water in the manner above mentioned. The mere fact, therefore, that the proof of the spirits had been reduced so as to show a smaller percentage of alcohol, raised no presumption that it had been reduced by putting other spirits of a different quality into the packages, when the reduction could be as well accounted for by the doing of a lawful act, which had in fact been done; that is, by the addition of water. Under these circumstances, we think that there was no substantial evidence that other distilled spirits of a different quality had been introduced into the packages after they were originally stamped and inspected.

In the course of the trial considerable evidence was introduced having a tendency to show that, either at the time when the proof was reduced or subsequently, some caramel coloring matter had been put into the packages to deepen the color of the spirits; and the instruction which the trial court gave was to the effect that if anything whatever was put into the packages, other than water, they became subject to forfeiture. It is most probable, we think, that the jury found that caramel coloring matter had been introduced into the packages, and that they had become forfeited for that reason. This presents the question whether the information was sufficient to warrant a forfeiture on that ground. It did not allege that coloring matter had been put into the barrels after they were stamped, and pray for a decree of forfeiture for that reason, but did allege that the "something else" which had been added was "distilled spirits of a different quality" than those contained in the barrels when they were originally inspected and branded. This was the precise issue tendered by the information. Now, waiving the question whether, when one puts a substance like caramel coloring matter, on which the government does not levy a tax, into a barrel of distilled spirits, he thereby does an act which renders it forfeitable under section 3455 of the Revised Statutes, we think that such an act was not charged in the information, but an altogether different act, and that the government should be held to proof of the fact which it had alleged. In ordinary civil cases the rule is that the proof must conform to the allegations. In a civil suit a party is not permitted to state one cause of action and recover upon another, and there is greater reason why the rule should be enforced in the case in hand, because it is a proceeding of a quasi criminal nature to enforce a forfeiture of property. We feel constrained to hold, therefore, that under such an information as was filed the government was not entitled to a decree of forfeiture on the ground that caramel coloring matter had been put into the packages after they were stamped, and, as there was no substantial evidence to sustain the allegation that other distilled spirits had been put into the packages, we think that the claimant's peremptory instruction to find in its favor ought to have been given. The judgment of the lower court is accordingly reversed, and the case remanded for a new trial.

WEEKS v. SCHARER.

(Circuit Court of Appeals, Eighth Circuit. March 18, 1904.)

No. 1,851.

1 MASTER AND SERVANT—INJURIES TO SERVANT—MINES—EVIDENCE—SELF-SERVING STATEMENTS.

Where, in an action for injuries to a miner, negligence was alleged, in that defendant failed to promulgate and enforce a rule that the trapdoors at the top of the shaft should be closed when the hoist bucket was being unloaded at that place, evidence of defendant's son that the superintendent of the mine was directed to instruct the employés that such doors should be closed at such times, offered in support of the testimony of plaintiff's fellow servant, who alone testified that instructions concerning the closing of such doors had been actually given to the employés, is inadmissible, as being of a self-serving character.

2. TRIAL—ARGUMENT TO JURY—MISCONDUCT OF COUNSEL—CURING ERROR.

Where, on the attention of the court being called to misconduct of plaintiff's counsel in making a certain argument to the jury, which was not supported by the evidence, the court promptly sustained the objection, and directed the jury to disregard such improper statement, the error was cured.

3. FELLOW SERVANT—INCOMPETENCY—SUPERIOR SERVANT—NOTICE.

Where a shift boss in a mine had no power to hire or discharge the workmen under him, but was merely a fellow servant of plaintiff of a superior grade or class, the fact that he had power to temporarily suspend workmen did not render him a vice principal, so as to charge the master with the knowledge of such shift boss as to the incompetency of a fellow servant, by whose negligence plaintiff was injured.

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

On March 20, 1899, and for some time prior thereto, Weeks was the lessee and was engaged in the operation of a mine in Teller county, Colo. Part of the time his son was about the mine as the representative of the owner, but during all of the time the immediate direction, supervision, and control of the mining operations were exercised by a superintendent. On the day referred to, Scharer, who was employed as a trammer, was struck and severely injured in the 500-foot level, near the vertical shaft of the mine, by a jackscrew which had been allowed to fall from the mouth of the shaft at the surface, and which, meeting an obstruction in its descent, bounded into the drift where he was working. One Murcray, a fellow servant of Scharer, had taken the jackscrew to the surface, and was endeavoring to remove it from the bucket in which the ascent had been made, when it escaped his control, and fell down the shaft, with the result mentioned. The mouth of the shaft was equipped with trapdoors, but they were not closed while Murcray was endeavoring to remove the jackscrew. Scharer brought suit against Weeks, alleging that he failed in his duty as employer to make, promulgate, and enforce a rule that the trapdoors at the top of the shaft should be closed when a bucket was being loaded or unloaded at that place; also that Murcray was a negligent and careless workman, and that his habits and character in that regard were either known to their common employer or could have been known by the exercise of ordinary care, and that he should have been discharged before the occurrence of the injury complained of. The action was tried, and resulted in a judgment of the Circuit Court in favor of Scharer, which was reversed by this court. Weeks v. Scharer, 111 Fed. 330, 49 C. C. A. 372. It was again tried with a similar result. To reverse the second judgment, Weeks prosecutes this proceeding in error.

The defense was that a rule requiring the closing of the trapdoors had been duly made and promulgated; that the careless habits of Murcray were not known to Weeks, and that, therefore, he was not negligent in retaining him in

his service; that Scharer and Murcray were fellow servants, and that damage to the former by the negligent act of the latter could not be visited upon Weeks. As tending to prove the making and promulgation of the rule, Weeks offered the testimony of his son as to instructions given to the superintendent regarding the operation of the trapdoors. An objection thereto was sustained by the Circuit Court. In his closing argument to the jury the counsel for Scharer, without the authority of any evidence in the case, spoke of an alleged custom among other mine owners to instruct their shift bosses to report men who were found to be careless and reckless. Objection being made to this conduct by opposing counsel, the court promptly sustained the objection, and directed the jury to disregard the statement. In order to show that Weeks had notice of the negligent and careless habits of Murcray, testimony was received that one of the shift bosses was fully advised thereof. There was also testimony tending to show that the shift boss had power to temporarily lay off or suspend the workmen, but not the power to hire or discharge them. Weeks requested that the jury be instructed that notice to the shift boss of Murcray's habit of carelessness was not notice to him, and would not be such notice unless he had invested the shift boss with authority to hire and discharge the workmen. The Circuit Court refused to so instruct the jury, but, on the contrary, instructed them that, if the shift boss had authority "to discharge incompetent miners or to suspend them," he represented Weeks, and that notice to him was notice to Weeks. These three matters are relied upon by Weeks, the plaintiff in error, for the reversal of the judgment of the Circuit Court.

Lester McLean (W. Scott Bicksler and Edmon G. Bennett, on the brief), for plaintiff in error.

Horace N. Hawkins (Thomas M. Patterson and Edmund F. Richardson, on the brief), for defendant in error.

Before SANBORN, VAN DEVANTER, and HOOK, Circuit Judges.

HOOK, Circuit Judge, after stating the case as above, delivered the opinion of the court.

In view of the testimony on behalf of the plaintiff it became important to the defendant, Weeks, to prove that he discharged his duty to make, promulgate, and enforce a rule that the trapdoors at the mouth of the shaft should be closed when the bucket was being loaded or unloaded at that place. To this end he sought to show by his son that the superintendent was directed to instruct the employés accordingly. The proffered testimony was excluded by the trial court. It is clear that the testimony was of a self-serving character, and inadmissible, and that its purpose was to improperly strengthen the statement of Murcray, who alone testified for defendant that instructions concerning the closing of the trapdoors were actually given to the employés. The superintendent was not a mere servant of the owner. In addition to his general powers of management and supervision of the operations of the mine, he had been invested with the power to hire and discharge the employés. He represented the owner in respect of the primary and personal duties of the latter to the workmen. He also possessed the power, and it was his duty, to make and enforce all needful rules and regulations for the protection of the men under him; and, being clothed with this power and charged with the corresponding duty, the further directions from the son of the owner were wholly superfluous. It is contended that the testimony which was rejected tended to show the making of a rule with respect

to the closing of the trapdoors, although it might not tend to show that such a rule was actually promulgated. But the mere promulgation of the rule by the superintendent or other person in authority involved at once its making or establishment. The alleged directions from the son without corresponding action by the superintendent would have been futile, while action by the superintendent without the alleged directions from the son would have been sufficient. The testimony was properly excluded.

It is also assigned as error that counsel for Scharer during his closing argument assumed, without warrant and authority in the record, to inform the jury that shift bosses in other mines were charged with the duty of advising their principals of the careless and reckless habits of the workmen. This matter may be dismissed from further consideration with the observation that the attention and action of the court were at once invoked, and the court promptly sustained the objection, and directed the jury to disregard the improper statement. Portland Gold Min. Co. v. Flaherty, 111 Fed. 312, 49 C. C. A. 361.

There remains the question of the correctness of the instruction that notice to a shift boss of the reckless habits of a servant is notice to the master if the shift boss has authority to suspend, but is without authority to discharge, such servant. The instruction was predicated not upon any claim of negligence in the original hiring of Murcray, but upon the failure to discharge him after an alleged notice of his reckless habits. To bind the master in such a case the notice must be given to the master himself, or to some one who represents him in respect of his positive duty to exercise reasonable care in the retention of his servants. Notice of the character of a servant given to a fellow servant who does not stand in the place of the master is ineffective. It is settled doctrine in the courts of the United States that mere differences in grades of service or in power or authority with respect to each other will not detach one of a number of employés from the class of fellow servants. The presumption is that all who enter the service of a common master, and engage in a common service or in the same general undertaking, are fellow servants. A few of the multitude of cases will serve to illustrate the application of these rules. The following have been held to be fellow servants: Conductor and brakeman on a freight train (Railroad v. Conroy, 175 U. S. 323, 20 Sup. Ct. 85, 44 L. Ed. 181); foreman and laborer in mine (Alaska Min. Co. v. Whelan, 168 U. S. 86, 18 Sup. Ct. 40, 42 L. Ed. 390); roadmaster, foreman of section gang, member of gang and train conductor (Martin v. Railroad, 166 U. S. 399, 17 Sup. Ct. 603, 41 L. Ed. 1051); foreman and section hands (Railroad v. Peterson, 162 U. S. 346, 16 Sup. Ct. 843, 40 L. Ed. 994, and Railroad v. Charless, 162 U. S. 359, 16 Sup. Ct. 848, 40 L. Ed. 999); foreman and other members of switching crew (Railroad v. Keegan, 160 U. S. 259, 16 Sup. Ct. 269, 40 L. Ed. 418); foreman of a shift of miners and members of another shift (Davis v. Mining Co., 117 Fed. 122, 54 C. C. A. 636); foreman and employés in railroad machine shop (Gaynon v. Durkee, 87 Fed. 302, 31 C. C. A. 306); foreman of a quarry and a stone cutter (Reed v. Stockmeyer, 74 Fed. 186, 20 C. C. A. 381); foreman of street gang and laborer (Balch v. Haas, 73 Fed. 974, 20 C. C. A. 151); foreman and member of bridge gang, the former having

power to hire and discharge the men and to direct and control them in their work (Railway v. Brown, 73 Fed. 970, 20 C. C. A. 147); shift boss and miner (Weeks v. Scharer, 111 Fed. 330, 49 C. C. A. 372). For the negligence of one of these resulting in injury to the other the master is not liable unless he has intrusted to the negligent servant the performance of his positive duties as master. And in such case, when liability exists, the negligence must arise from the failure to perform the particular duty of the master with which the servant is charged. Thus it was held in Railroad v. Peterson and in Railroad v. Charless, supra, that a railroad company was not liable to a member of a section gang for the personal negligence of his foreman, although it appeared that the latter had the power to hire and discharge the men and to manage and superintend their labors.

The shift boss and Scharer and Murcray were mere fellow servants of a common employer, unless the possession by the shift boss of the power to temporarily suspend his co-workers raised him to a different class, and charged him with the positive duty of the master in respect of the competency of the employés. If the shift boss had been clothed with power to discharge the men under him, he would then have occupied the position of a vice principal, and it would have been his duty to exercise reasonable care to retain in the service only those who were careful and prudent. But does he occupy such a position merely because he has the power to temporarily suspend them? The absence of the power to discharge, in connection with the possession of the power to suspend, would seem naturally to imply that the shift boss had not been charged with that positive duty of the master, and that the master had withheld an authority which alone is controlling and effective. An essential and important quality of representation would seem to be lacking. The power to suspend the workmen pertains more to the usual and ordinary progress and performance of the work. It is a part of that authority which is generally intrusted to superintendents, foremen, and bosses who direct the body of employés where to work, how to work, and when, and concededly the possession of such powers does not make a superintendent, a foreman, or a boss a vice principal. Superintendence without the power of temporary suspension is unusual. Such power appeals to the mind as being a natural and inherent quality of mere superintendence. It pertains to the province of ordinary supervision. It is similar in character to the power to temporarily suspend the prosecution of the work which in itself operates as a suspension of the workmen, and such power is plainly included in that of ordinary superintendence. We are of the opinion that a shift boss who is without the power to discharge the workmen under him is not charged with the master's duty as to the exercise of care in the retention of none but competent servants, and is therefore not the master's representative in that respect, although he may possess the power of temporary suspension. The position of vice principal necessarily implies the investiture of authority commensurate with its duties. The power to temporarily suspend a workman may well be exercised by a fellow workman of a superior grade or class without destroying their legal relation to each other. We are aware that the Circuit Court of Appeals for the Sixth Circuit has announced a contrary view. Rail-

road v. Henthorne, 73 Fed. 634, 19 C. C. A. 623. But we believe that the conclusion which we have reached is in accord with the spirit of the later decisions of the courts upon this subject. Attention is called by counsel to the former opinion in this case. Weeks v. Scharer, supra. It is apparent from a cursory reading of that opinion that this court did not hold that the mere possession by a servant of the power to suspend his fellow servants raised him to the position of a vice principal. The record then before the court did not present such a question, and the employment in the opinion of the term "suspend" was in connection with a reference to the doctrine of a number of cases which were therein cited; that of Railroad v. Henthorne, supra, being among them.

Counsel for Weeks did not strictly comply with rule 11 of this court (90 Fed. cxlvi, 31 C. C. A. cxlvi) in the assignment of the error involved in the instruction complained of; but in view of his manifest purpose to challenge the correctness of that feature of the instruction which relates to the power of the shift boss to suspend the other workmen, and of the further provision of the same rule that the court may, at its option, notice a plain error which is not assigned at all, we have deemed it proper to give due consideration to their contention. We are of the opinion that the instruction as given was erroneous.

The judgment of the Circuit Court will be reversed, and the cause remanded for a new trial.

HEINZE et al. v. BUTTE & BOSTON CONSOLIDATED MIN. CO. et al.

(Circuit Court of Appeals, Ninth Circuit. February 16, 1904.)

Nos. 958, 966.

1. APPEAL—INTERLOCUTORY ORDERS MADE IN RECEIVERSHIP.

Neither an order of a Circuit Court approving monthly reports of a receiver, nor one directing him to pay expenses incurred by him, made before the coming in of his final account, is a final order, appealable to the Circuit Court of Appeals; both being clearly interlocutory orders, directly and not collaterally connected with the receivership, and subject to review on final settlement of the receiver's account.

Appeals from the Circuit Court of the United States for the District of Montana.

On motions to dismiss appeals.

John J. McHatton, James M. Denny, and John W. Cotter, for appellants.

John F. Forbis and L. O. Evans, for Butte & Boston Consolidated Min. Co.

H. J. Burleigh, for John S. Harris, receiver.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

GILBERT, Circuit Judge. Two appeals are here presented: An appeal from the order of the Circuit Court directing the receiver, in a suit for partition, to pay to his attorney the sum of $350, as his com-

¶ 1. What decrees are final, see note to Brush Electric Co. v. Electric Imp. Co. of San Jose, 2 C. C. A. 379.

pensation for professional services rendered by him, and his expenses incurred in representing the receiver before this court on the application made by the appellants for a writ of supersedeas or order to stay the orders whereby the Circuit Court had appointed the receiver, and had thereafter extended the receivership over the whole of the mining property involved in the suit, with directions to operate the same; and an appeal from the order of said Circuit Court made on November 10, 1902, allowing and confirming eight monthly reports of said receiver, said monthly reports being numbered 23 to 30 inclusive. Motions are made to dismiss these appeals on the ground that the orders therein referred to were not final, and are therefore not appealable.

The appellants concede the general rule to be that no appeal may be taken to this court from an interlocutory order unless the order is expressly made appealable by statute, but they contend that the orders appealed from are not interlocutory, but final, for the reason that they make final disposition of a portion of the funds in the hands of the receiver—funds which are a portion of the subject of the controversy between the parties to the partition suit.

It is true that the Supreme Court has recognized an exception to the general rule that an order made before the final disposition of a cause, and before the final account of a receiver is filed, is not appealable, in the case of Trustees v. Greenough, 105 U. S. 527, 26 L. Ed. 1157. That was an appeal from an order directing that the complainant in the suit be paid out of the fund in the receiver's hands the costs, expenses, and counsel fees incurred by him in a suit which he had brought against the trustees of bonds issued by a corporation and secured by a trust fund, to secure the due application of the trust fund and prevent the waste thereof, the result of which suit was to bring the fund under the control of the court for the common benefit of all the bondholders. The expenses and fees were not incurred by the receivership, but preliminary thereto, and in preserving the trust fund from waste. The court, not without apparent hesitation, sustained the appeal, on the ground that the order was a final decision in a collateral matter. Said the court, "Though incidental to the cause, the inquiry was a collateral one, having a distinct and independent character, and received a final decision." That ruling was followed in Hovey v. McDonald, 109 U. S. 150, 3 Sup. Ct. 136, 27 L. Ed. 888; Williams v. Morgan, 111 U. S. 684, 699, 4 Sup. Ct. 638, 28 L. Ed. 559; Tuttle v. Claflin, 88 Fed. 122, 31 C. C. A. 419; and Grant v. Los Angeles, etc., Ry. Co., 116 Cal. 71, 47 Pac. 872. But we find no decision holding that an appeal may be taken from an interlocutory order confirming a receiver's report, or directing the receiver to pay expenses incurred by him, before the coming in of his final account, except the decision of the Supreme Court of North Carolina in Battery Park Bank v. Western Carolina Bank, 36 S. E. 39, where the appeal was sustained, not upon any recognized principle applying to appeals from interlocutory orders, but upon the ground that such an order is in effect a final appropriation of a part of the assets, and "no harm can come to any one interested in the suit by regarding it as final." It is true that it is generally held that an order confirming the final account of a receiver is appealable, notwithstanding that no final disposition may have then been made of the suit wherein

the receiver was appointed. Hinckley v. Railroad Co., 94 U. S. 467, 24 L. Ed. 166; State v. District Court (Mont.) 72 Pac. 613. But the right to appeal, even from such an order made prior to the final disposition of the action, has been denied in New York, where, owing to the language of the Code of Civil Procedure of that state, which allowed appeals from judgments or orders "finally determining actions or special proceedings," it was held that an order confirming the final account of a receiver was neither an order made in a special proceeding, nor a judgment finally determining an action. People v. Am. L. & T. Co., 150 N. Y. 117, 44 N. E. 949; N. Y. Security & T. Co. v. Saratoga Gas & Elec. Co., 156 N. Y. 645, 51 N. E. 297. In California, where the statute allowed appeal from a final judgment, it was held, in a suit for the dissolution of a partnership, that an order made upon objections and a hearing approving the final account of the receiver, after the plaintiff had filed written notice of his abandonment of the suit, but before the entry of a judgment of dismissal, was not appealable, for the reason that it was an order made before judgment. Rochat v. Gee, 91 Cal. 355, 27 Pac. 670. And in Illinois Trust & Savings Bank v. Railroad Co., 99 Cal. 407, 33 Pac. 1132, where an appeal was taken from an interlocutory order in a foreclosure suit, made after notice and a hearing, making the indebtedness contracted by the receiver in another suit a paramount lien on the funds in his hands, and directing its payment out of the proceeds of the foreclosure sale, the appeal was dismissed for the reason that it was not a final judgment. In that case the court, after referring to the protection to all parties afforded by the personal liability of the receiver and the sureties on his official bond, said:

"To enforce this liability, the court may compel the receiver to account for the funds that have come into his hands, and the order settling his account is reviewable in this court, on appeal from the judgment if made before judgment, or on appeal from the order if made after judgment."

In Free Gold Mining Co. v. Spiers, 135 Cal. 130, 67 Pac. 61, it was held that an order directing the receiver of a mining property to purchase a cyanide tailings plant in order to work a large body of valuable tailings belonging to the property was not appealable.

The order approving the receiver's monthly accounts, which is the subject of one of the appeals now under consideration, was not an order made upon a matter collateral to the partition suit or to the receivership of the fund in controversy, nor do we think it was a final judgment. The receiver, being an officer of the court appointed to preserve and manage the property which was the subject of the suit, in accordance with his duty as such officer, filed his monthly accounts for the purpose of informing the parties litigant and the court of his management of the property and his receipts and disbursements of the fund, and for the further purpose of obtaining the sanction of the court therefor, as well as for the allowance of his monthly compensation. Upon the report so filed an order was obtained expressing the judgment of the court upon the matters so presented. Such an order made during the progress of the receivership, and before the final account is, we think, clearly interlocutory. If such an order be held appealable, it follows that every order directing the action of the

receiver in the disbursement of any portion of the funds in his hands, and each order approving his monthly accounts, may be made the subject of an appeal, and the matters involved in the receivership may be brought into this court piecemeal. In a receivership such as this, extending over a long period of time, such a rule would involve burdensome litigation. The order herein appealed from involves the approval of eight monthly reports. It has been followed by two later appeals which are now pending in this court—an appeal from the order made February 27, 1903, approving the 31st, 32d, 33d, and 34th monthly reports, and an appeal from the order of March 18, 1903, approving the 35th and 36th monthly reports. It would doubtless be succeeded by other appeals if the present appeal were sustained. All the matters involved in the monthly reports may be reviewed by the Circuit Court on presentation of the receiver's final account. That court still retains and may then exercise the power to consider the whole subject of the receivership, and may make such final order concerning the same as shall seem just and reasonable in the light of the facts that shall then have been disclosed. From such an order either party may appeal, and thereupon may review the same, as well as all the interlocutory orders approving the monthly accounts. The act of Congress creating the Circuit Courts of Appeals confers upon this court appellate jurisdiction to review by appeal or writ of error "final decision" in the Circuit and District Courts in the classes of cases to which its appellate jurisdiction extends. "If the judgment is not one that disposes of the whole case on its merits, it is not final." Bostwick v. Brinkerhoff, 106 U. S. 3, 1 Sup. Ct. 15, 27 L. Ed. 73. The foregoing considerations apply also to the appeal from the order directing the payment of counsel fees by the receiver. That was an order made in the receivership, and concerning the conduct of the receiver. We are unable to see that it stands on different ground from the other appeal. It is true that, if the money be paid to the receiver's attorney under the order of court, it is a final disposition of the sum so paid. But the court thereafter still had the receiver's account under its control. If the sum so paid were improperly disbursed, the error in its payment may be reviewed in adjusting the receiver's final account. It was not paid in a matter collateral to the suit or to the subject-matter thereof, but in a matter relating solely to the receivership. The argument that the money so paid is a final disposition of so much of the funds in the receiver's hands applies with equal force to any item of the current expense account of the receiver. In each case the money paid is a final payment out of the fund in the receiver's hands. But the liability of the receiver and that of his bondsmen will stand for protection to the parties to whom the fund in controversy rightfully belongs, and that protection may be made available on adjustment of the final account of the receiver, or on appeal from the order allowing the same.

Both appeals will be dismissed.

CLARK v. KANSAS CITY, FT. S. & M. R. CO.

(Circuit Court of Appeals, Sixth Circuit. May 5, 1904.)

No. 1,247.

1. RAILROADS—FIRES—STATUTES—APPLICATION.
Sand. & H. Dig. Ark. § 7362, providing that any person who shall set on fire any grass or other combustible material within his inclosures, so as to damage any other person, shall make satisfaction in single damages to the party injured, etc., has no application to an action for the destruction of a warehouse near a railroad right of way from fire set out by members of a track crew on the right of way.

2. SAME—FEDERAL COURTS—CONTRIBUTORY NEGLIGENCE—BURDEN OF PROOF.
In the federal courts the burden of proof of plaintiff's contributory negligence, alleged as a defense, is on the defendant.

3. SAME—EVIDENCE.
Plaintiff owned a warehouse near a railroad right of way, constructed of planks, with an iron roof, and inclosed by a picket fence. On a certain Sunday, certain track crews living in "camp cars," and stationed near the warehouse, maintained fires on the right of way during the day for the purpose of washing their clothes; and during the forenoon plaintiff's agent called the attention of defendant's station agent to the fires, and the danger to plaintiff's property. One of the fires was within 40 feet of the warehouse, and another about 140 feet away, with the wind blowing in the direction of the warehouse at a velocity of 15 miles per hour. After the warehouse and fence had been closed and locked for the night, the building was set on fire by sparks and destroyed. *Held*, that plaintiff was not guilty of contributory negligence, as a matter of law, precluding him from recovering against the railroad company.

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

This action was brought in the state circuit court of Shelby county, Tenn., and removed into the Circuit Court of the United States for the Western District of Tennessee. The object of the suit was to recover damages for the destruction by fire of the cotton seed house or warehouse of plaintiff in error, situated on land adjoining the right of way of defendant in error at the station and village of Clarketon, Ark. The fire occurred about 11 o'clock p. m. Sunday night, January 13, 1901, resulting in total destruction of the warehouse and its contents, it being at the time full of cotton seed. The action proceeded upon the ground that the building was set on fire by sparks negligently suffered to escape from fires started and in use on the right of way of defendant in error during the day time of January 13, 1901.

The facts which the evidence established and tended to show need only be given briefly: A gang or crew of railroad hands in the service of defendant in error, while remaining during Sunday on a side track at said station in "camp cars," built and started fires on the right of way of the company for the purpose of washing their clothes, and maintained the fires during the day. The warehouse was constructed of plank, with an iron roof, and inclosed by a picket fence, and the doors or gates to the house and picket fence were closed and locked on Sunday night, at the time the building was set on fire. In process of time, as a result of seasoning and shrinkage, small cracks were left between the edges of the planks, through which flying sparks might pass and come in contact with the contents of the building. One of these fires was as close as 40 feet to the house, while another was about 140 feet away. The wind was from the southwest, and in the direction of the warehouse from the fires, and blowing with a velocity of 15 miles an hour. There had been no fire in the warehouse or on the plaintiff's premises during the day. During the forenoon of Sunday, agents of the plaintiff called the attention of the station agent and also the timekeeper of the gang to the fact of the fires, and the danger to plaintiff's property in consequence of the escaping sparks.

The defendant's evidence only tended to show that the fires were not so large and the velocity of the wind not so great as stated by witnesses for plaintiff, and that the wind was not constantly in the direction of the warehouse. The station agent, Slagle, denies any recollection of his attention being directed to the fires and the danger by either Madden or Willard, the agents of plaintiff in error. Besides this, there was nothing material in the evidence, so far as it is now important. No precautionary action was taken by either party to guard against the danger in relation to the fires, or the protection of the building, beyond what we have stated.

At the conclusion of the whole of the evidence the court, on defendant's motion, directed a verdict in its favor, on which judgment was entered, and the case is brought here on error for review.

Carroll, McKellar, Bullington & Biggs, for plaintiff in error.

C. H. Trimble, for defendant in error.

Before LURTON and RICHARDS, Circuit Judges, and CLARK, District Judge.

CLARK, District Judge, after making the foregoing statement, delivered the opinion of the court.

The liability of the defendant, as determined under common-law rules, is supposed to be changed or affected by statute, as found in the Code of Arkansas (section 7362, Sand. & H. Dig.), which is as follows:

"If any person shall set on fire any grass or other combustible material within his enclosures, so as to damage any other person, such person shall make satisfaction in single damages to the party injured, to be recovered by civil action in any court having jurisdiction of the amount sued for; but if such person shall, before setting out the fire, notify these persons whose farms are adjoining said place which he proposes to burn, that he is going to fire such grass or other combustible matter, and shall use all due caution to prevent such fire from getting out, to the injury of any other person, he shall not be liable to pay damages, as provided in this section."

It is quite clear, we think, that the statute is not applicable to a case like the one with which we are here dealing, and that the subject of this enactment may be dismissed, as the case is controlled in its result entirely by common-law principles.

It is said in brief, and was stated in the argument at bar, that the learned judge in the court below withdrew the case from the jury under the view that the contributory negligence of the plaintiff's agents was so conclusively shown as to require that this issue should be treated as one of law, by peremptory instruction. We conclude that this was error, on the facts disclosed in the record. It could hardly be doubted, on this record, that the timekeeper and station agent were both notified of the fires and the danger apprehended for the distinct purpose of causing some precaution to be taken. This was at the hour of 9 or 10 o'clock a. m. Sunday, and the fire occurred, as stated, about 11 o'clock at night. After thus giving notice, what further act or duty were the plaintiff's agents required to do? It is suggested that they should have gone on the premises of defendant and extinguished the fire, but such a course of action would or might have brought on difficulty with the gang who were using the fires. It is evident some difficulty would be experienced in pointing out just such specific affirmative action as was called

for, beyond what was done, in order to exonerate plaintiff's agents from the charge of contributory negligence. It is not controverted, and could not be, that, apart from the origin of these fires and any liability in that regard, whenever the fires became a known fact and a condition on the premises of the defendant, it was at once charged by law with the obligation to exercise reasonable care and caution to prevent damage to adjacent property liable to be ignited by escaping sparks. In support of this proposition the cases of St. Louis Southwestern R. R. Co. v. Ford, 65 Ark. 96, 45 S. W. 55, and Ball v. Grand Trunk R. Co., 16 U. C. C. P. 252, may be referred to as in point. See, also, the cases of St. Louis & San Francisco Ry. v. Mathews, 165 U. S. 5, 17 Sup. Ct. 243, 41 L. Ed. 611; Milwaukee, etc., Railway Co. v. Kellogg, 94 U. S. 469, 24 L. Ed. 256; and 13 A. & E. Encycl. of L. (2d Ed.) p. 464, and cases collated.

In determining the questions of negligence and contributory negligence, the jury would necessarily consider distance, the character of the exposure to the fires, the hour of night, the direction and velocity of the wind, the condition of the weather as to dryness or moisture, and as being clear or cloudy. In short, every fact and circumstance constituting the entire situation would be given due and proper attention. An important matter for consideration would be the precautions which either party could have easily or conveniently adopted to guard against the apparent danger. A duty rested on each party to exercise proper care. Such means and methods as were readily and practically available to the agents of each party should have been adopted, to the extent of exercising reasonable care and prudence. Such precautions as a reasonably prudent man would be expected to take under the given circumstances would be the measure of care required by law. These precautions should have been taken by the defendant, in the first instance, to prevent the emission of sparks liable to set on fire buildings situated close by; and, in the second place, like care should have been exercised by plaintiff to prevent the building from being ignited. Neither party was required to resort to unreasonable or extremely difficult measures of precaution. The plaintiff was not required to adopt unreasonable methods of extreme difficulty to guard against a danger negligently set up and maintained by the defendant on its own premises.

We are clear that, in view of all the facts and circumstances, the danger was not so threatening and immediate as to require the court to treat the alleged contributory negligence of the plaintiff as plainly evident, and as a question of law. On the contrary, we think negligence and contributory negligence were both issues of fact which the court should have submitted to the jury for determination. Dunlap v. Northeastern Railroad Co., 130 U. S. 649, 9 Sup. Ct. 647, 32 L. Ed. 1058; Mexican Cent. Ry. Co. v. Murray, 102 Fed. 264, 42 C. C. A. 334; Delaware, etc., Railroad v. Converse, 139 U. S. 469, 11 Sup. Ct. 569, 35 L. Ed. 213; Richmond & Danville Railroad v. Powers, 149 U. S. 43, 13 Sup. Ct. 748, 37 L. Ed. 642; Choctaw, Oklahoma, etc., R. R. Co. v. McDade, 191 U. S. 64, 24 Sup. Ct. 24, 48 L. Ed. ——.

The burden of proof was, of course, upon the defendant to establish the fact of the plaintiff's contributory negligence, as in other

cases. Strawboard Co. v. C. & A. R. R. Co., 177 Ill. 513, 53 N. E. 97; Northern Pac. R. Co. v. Lewis, 51 Fed. 658, 2 C. C. A. 446.

The judgment is accordingly reversed, and the case remanded, with directions to set aside the verdict and award a new trial.

WESTERN UNION TELEGRAPH CO. v. SCHRIVER et al.

(Circuit Court of Appeals, Eighth Circuit. March 16, 1904.)

No. 1,906.

1. TELEGRAPHS—FRAUDULENT MESSAGES—PARTIES.

Plaintiffs, dealers in live stock, were negotiating a sale of cattle to B., and, pending the negotiations, a fraudulent telegraph message, purporting to have been sent by the Bank of D., was received by the Commercial Bank of B., alleged to have been plaintiffs' agent for the purpose of receiving an assurance that B.'s check for the cattle would be paid on presentation; stating that the Bank of D. would honor B.'s draft for a certain amount. The Commercial Bank exhibited the telegram to plaintiffs, who, relying on the genuineness thereof, accepted B.'s check, and delivered the cattle. The check was not paid, B. proved to be insolvent, and the transaction resulted in a loss to plaintiffs of the entire value of the cattle. *Held*, in an action against the telegraph company for negligence in sending the same, an instruction based on the theory that it was permissible for the jury to say and to find that the telegraph company was fairly charged by the language of the telegram with notice that some one other than the addressee was intending to act on the information therein given, and would be affected by it, so as to take the telegram out of the well-recognized rule that a telegraph company cannot be liable to a stranger to the company and to the telegram, was erroneous.

In Error to the Circuit Court of the United States for the Northern District of Iowa.

Asa F. Call (Geo. H. Fearons and Craig L. Wright, on the brief), for plaintiff in error.

D. M. Kelleher (John A. Senneff, M. F. Healy, T. D. Healy, L. M. Shaw, and Jacob Sims, on the brief), for defendant in error.

Before SANBORN, THAYER, and VAN DEVANTER, Circuit Judges.

VAN DEVANTER, Circuit Judge. Plaintiffs in the Circuit Court, defendants in error in this court, recovered a judgment against the telegraph company for $8,872, with interest, as damages occasioned to them by the company's transmission and delivery of this telegram:

"Denison, Iowa, March 14, 1902. To Commercial Bank, Britt, Iowa: We will honor Barnes draft for eight thousand nine hundred seventy-two dollars. [Signed] Bank of Denison."

Plaintiffs were dealers in live stock, and negotiated a sale of cattle to one Barnes, who made payment therefor by a check drawn by him on the Bank of Denison, and made payable to plaintiffs. The contention of plaintiffs was that the telegram was transmitted and delivered without the authority or knowledge of the Bank of Denison; that "defendant company knew, or by the exercise of reasonable care and

caution would have known," this; that the Commercial Bank at Britt was the agent of plaintiffs for the purpose of receiving assurance that Barnes' check would be paid upon presentation; that, upon the delivery of the telegram by defendant to the Commercial Bank, it was exhibited by the latter to plaintiffs, and, relying upon the telegram as genuine, plaintiffs then accepted Barnes' check, and delivered the cattle to him; that the check was not paid, Barnes proved to be insolvent, and the transaction resulted in a loss to plaintiffs of the entire value of the cattle. It was not claimed that defendant had any knowledge of the transaction between Barnes and plaintiffs, or of the relation of the Commercial Bank of Britt to plaintiffs, or that defendant had any knowledge of the purpose of the telegram, otherwise than as its purpose was disclosed upon its face. The transmission and delivery of the telegram in the name of the Bank of Denison was procured by Barnes, and the circumstances under which this was done were the subject of conflicting evidence. The company's charge for the message was paid at the sending office, and not by the bank at Britt or by plaintiffs.

Different rulings during the trial show that the court proceeded upon the view that it was permissible for the jury to say and find that the telegraph company was fairly charged by the language of the telegram with notice that some one other than the addressee, the Commercial Bank, was intending to act upon the information therein given, and would be affected by it, and, that if the jury placed this construction upon the telegram, the case would be taken out of the well-recognized rule, stated and applied by this court in McCornick v. Western Union Telegraph Co., 25 C. C. A. 35, 39, 79 Fed. 499, 38 L. R. A. 684, viz.: "But a telegraph company cannot be liable to a stranger to the company and to the telegram—one to whom it has never delivered the message, and to whom it owes no duty whatever—merely because he has seen the telegram and acted upon it to his injury." The court gave expression to this view in different portions of the charge to the jury, including the last paragraph, which was:

"In order to entitle the plaintiffs to recover in this action, it must appear that this dispatch, sent in the name of the Bank of Denison, was of such a character as upon its face it showed that it dealt with money or property; that it was of such a character as that the telegraph company could be fairly held to infer from the telegram that some person other than the Commercial Bank might be interested in it; that in fact it was delivered by the telegraph company, and was delivered under circumstances charging the telegraph company with a want of ordinary care in receiving it; and that it did not use ordinary care to ascertain whether the Bank of Denison authorized the dispatch to be sent; and that the evidence shows that in fact the Bank of Denison did not send this telegram, or authorize it to be sent; and that, as a consequence of acting upon it, the plaintiffs parted with their property, and have been damaged in the value of the cattle."

This is complained of, and we think it was error. The language of the telegram is clear, and is confined to a statement that the sender, a bank, will honor Barnes' draft for a stated sum. This statement is addressed to another bank, a part of the business of which is to advance money on checks or drafts drawn upon distant banks and others. It is a matter of common knowledge that these advances are made at times directly to the drawer, and at other times to the payee or

a remote holder, and that in each instance the bank advancing the money is a principal in the transaction, incurs a risk to the extent of the money advanced, and is influenced by its information respecting the probability of payment by the drawee. The telegram could therefore properly and reasonably relate to a possible and probable transaction of concern to the addressee, and in which its action would be influenced by the information given, all of which is apparent upon reading the telegram. It is true that checks and drafts are, for purposes of collection, frequently committed by the payee or holder to a bank under circumstances where the bank does not become the owner, risks nothing upon the probability of payment by the drawee, and is not influenced by information upon that subject; but this telegram contains nothing which suggests that it relates to such a transaction. In the absence of anything to the contrary, the inference to be properly drawn from the face of a telegram or other communication of this nature is that it relates to a matter which concerns the one addressed, and that it is his action, and not that of another, which is to be influenced. That no inference of its relation to a transaction like that between plaintiffs and Barnes properly or reasonably arises from the face of this telegram is quite manifest when it is considered that the telegram does not make the slightest reference to any past or prospective sale of cattle or other property, or to any person other than the addressee, the sender, and Barnes, or to an absence of interest on the part of any one of them in the information given. To say that the telegraph company "should have fairly inferred" from the face of the telegram that some one other than the addressee was "the real party in interest," as by one paragraph of the court's charge the jury were permitted to say in this case, is to reject the language used in the telegram, and the reasonable inference therefrom, and to substitute in their stead surmise and conjecture. Of course, this is not reasonable or permissible.

It is urged that the Commercial Bank of Britt, to which the telegram was addressed and delivered, was in fact the agent of plaintiffs for the purpose of receiving the information conveyed in the telegram, and that therefore plaintiffs were not, in legal contemplation, strangers to the company or to the telegram, but were the real parties in interest, and, as undisclosed principals of the addressee, may maintain this action, although there was no indication in the telegram that it was intended for them, or that the addressee was only an agent. But if the rule of law invoked in this contention be applicable to an action such as this, as to which no opinion is now expressed, it does not avoid the error already shown. It is so much of a departure from the view disapproved by us, which controlled the course of the trial, and under which the jury returned the verdict which supports the existing judgment, that to now apply it to the evidence for the purpose of sustaining the verdict and judgment would be to take the place of the trial court and jury, and to transcend the authority of an appellate tribunal.

The judgment is reversed, with a direction to grant a new trial.

DENVER & R. G. R. CO. v. ARRIGHI.

(Circuit Court of Appeals, Eighth Circuit. March 18, 1904.)

1. MASTER AND SERVANT—RAILROADS—INJURIES TO SERVANT—COUPLING CARS—STATUTES—ASSUMPTION OF RISK—CONTRIBUTORY NEGLIGENCE.

Act March 2, 1893, c. 196, § 8, 27 Stat. 532 [3 U. S. Comp. St. 1901, p. 3176], providing that any employé of any interstate carrier who may be injured by any car used in interstate traffic by reason of the same not having been equipped with an automatic coupler device coupling by impact shall not be deemed to have assumed the risk thereby occasioned, though continuing in the employment of the carrier after the unlawful use of the car had been brought to his knowledge, did not relieve an employé injured by a car not so equipped from liability for his own contributory negligence.

2. SAME—EVIDENCE.

Plaintiff, a skilled switchman, was injured while attempting to couple two cars equipped with link and pin couplings, with which he was perfectly familiar. The engineer was under his direction at the time, and backed the train so slowly that it barely moved. Plaintiff took hold of the link of the approaching car with his left hand to guide it, and, having done so, left his hand between the drawheads until his fingers were crushed by the impact. *Held*, that under the particular facts appearing in the case the plaintiff was guilty of contributory negligence as a matter of law.

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

Arrighi, the plaintiff below, was a switchman in the service of the railroad company in its yards at Salida, Colo. The railroad company was a common carrier engaged in interstate commerce as well as in commerce within the state. On the evening of November 19, 1901, Arrighi was injured while endeavoring to effect a coupling of two narrow-gauge freight cars, one of which was at the time employed in moving interstate traffic. Neither car was equipped with couplers coupling automatically by impact. The drawbars of each were equipped with old-style link and pin couplings. It therefore became necessary for Arrighi to go between the ends of the cars in the performance of his duty. In making the coupling his left hand was crushed between the drawheads, resulting in the loss of the first three fingers thereof and the corresponding metacarpal bones. He brought suit against the railroad company, and at the trial rested his right to recover solely upon the failure of the defendant to comply with the provisions of the act of Congress of March 2, 1893, c. 196 (27 Stat. 531 [U. S. Comp. St. 1901, p. 3174]), requiring the equipment of cars used in moving interstate traffic with couplers operating automatically. He recovered a judgment for $10,000, and the defendant prosecuted a writ of error from this court.

Wm. W. Field (Wolcott, Vaile & Waterman and E. N. Clark, on the brief), for plaintiff in error.

Harvey Riddell (William L. Dayton, on the brief), for defendant in error.

Before SANBORN, VAN DEVANTER, and HOOK, Circuit Judges.

HOOK, Circuit Judge, after stating the case as above, delivered the opinion of the court.

The trial court denied a request of the defendant that the jury be instructed to return a verdict in its favor for the reason that the

¶ 1. Assumption of risk incident to employment, see note to Chesapeake & O. R. Co. v. Hennessey, 38 C. C. A. 314.

plaintiff was guilty of negligence contributing to his injury. The action of the court in that respect is assigned as error. Prior to the time when the act of Congress became fully operative, the employés of a railroad company subject to its provisions, engaged in coupling cars used in moving interstate traffic, but not equipped with automatic couplers, assumed the ordinary risks and hazards of that employment, and the company was not liable to them for injuries resulting therefrom. The common-law doctrine of the assumption of risk was then applicable. But a new rule is prescribed by the act. It specifically provides that the employés shall no longer rest under the burden of that assumption in respect of any car used contrary to its provisions. While this is true, the railroad company is not thereby deprived of the defense of contributory negligence. With an exception, unnecessary to be noted here, the risks and dangers of an employment which at common law are assumed by the employé are not those which arise from the negligence of either party. And when the burden of those assumed risks and dangers were lifted from the employé by statutory enactment, and cast upon the railroad company, there was not transferred therewith a responsibility for the negligence of the employé himself. The rationale of the doctrine of assumption of risk is not that which supports the rule of contributory negligence. They operate differently, and are dependent upon widely different principles. Railroad Company v. McDade, 24 Sup. Ct. 24, 48 L. Ed. 96; St. Louis Cordage Company v. Miller (C. C. A.) 126 Fed. 495. It cannot be assumed that by the passage of a salutary law designed for the protection of those engaged in a hazardous occupation Congress intended to offer a premium for carelessness, or to grant immunity from the consequences of negligence. The reasonable conclusion is that the defense of contributory negligence is as available to a railroad company after as before the passage of the act of Congress, although it has not complied with its requirements.

The undisputed facts in this case are as follows: The plaintiff was a skillful workman in his calling, having had about 11 years' experience in railroading. He was thoroughly acquainted with the old-style link and pin couplings and the method of operating them. He knew that the cars which he sought to couple were so equipped. There was no defect in the couplings which contributed to the accident. The engine which was moving the car up to make the coupling was being directed by him, and they came up so slowly as to to be barely moving. Not a single fact, circumstance, or condition appeared in connection with the cars, their surroundings, equipment, or operation which was exceptional, or which seemed in any way to contribute to the accident. The plaintiff adopted the most dangerous method of performing his duty. He took hold of the link of the approaching car with his left hand to guide and direct it, and, having done so, he simply left his hand between the drawheads until his fingers were crushed by the impact. His attention was not momentarily distracted; the moving car did not approach more rapidly than he calculated; he did not stumble or lose his balance, nor was he unable to see clearly; he was not unfamiliar in any de-

gree with the character of the appliances about which he was engaged; and it does not even appear that he endeavored to remove his hand. In fact, if the plaintiff had declared that he made no effort to remove his hand from between the drawheads, he would not have added much to the force of the facts and circumstances shown by the record. The plaintiff himself was the principal witness in his own behalf, and the conditions which we have recited were shown almost wholly by his own testimony. The conclusion is irresistible that the plaintiff's injury was caused by his own want of proper care, and was not the result of the ordinary and usual risks and dangers of his employment. Bearing in mind the limitations upon the power of the trial court in respect of the defense of contributory negligence, we are nevertheless of the opinion that upon the evidence then before it the instruction requested should have been given.

The judgment of the Circuit Court is reversed, and the cause remanded for a new trial.

GILL et al. v. GENERAL ELECTRIC CO.

(Circuit Court of Appeals, Third Circuit. May 2, 1904.)

No. 26.

1. CONTRACTS—EXECUTION—PERSONS LIABLE—SIGNATURE—EFFECT.
Where the acceptance of an offer to sell certain machinery was signed "G. & Co., by S. S. G.," by the other member of the firm, and by W. B. G. individually, the latter rendered himself liable as a joint contractor, and not merely as a guarantor.

2. SAME.
Where an acceptance of a proposal for the sale of machinery was signed "G. & Co., by S. S. G., W. B. G., and T. H. G.," the word "by" after the partnership name was limited to the partner first signing, and did not authorize an inference that the signature of W. B. G., who was not a member of the firm, was made only as one of the three agents of the firm.

3. SAME.
Where an offer for the sale of machinery was made to G. & Co. "(for the N. Umbrella Co.)," and an acceptance of the offer was signed by G. & Co. and by one not a member of such firm, such signature bound the signers personally, and not as agents of the umbrella company.

4. SAME—WRITTEN INSTRUMENTS—PAROL EVIDENCE.
Where a series of writings was intended to embody an entire contract, from which it appeared that one of the defendants was a joint contractor, parol extraneous evidence was inadmissible to vary or annul his connection therewith.

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

For opinion below, see 127 Fed. 241.

David Lewis, for plaintiffs in error.

H. B. Gill, for defendant in error.

Before ACHESON, DALLAS, and GRAY, Circuit Judges.

¶ 4. See Evidence, vol. 20, Cent. Dig. § 1906.

DALLAS, Circuit Judge. This was an action by the General Electric Company against Sidney S. Gill, William B. Gill, and T. Harvey Gill, to recover a balance due for electrical apparatus supplied and set up under and in pursuance of a certain proposal, acceptance, and approval in writing. The proposal, dated May 29, 1902, was made by the electric company, and was thus addressed:

"To Messrs Gill & Co. (for the National Umbrella Co.)
"(Hereinafter called the purchaser.)
"Address 1000 Chestnut St., Philadelphia, Pa."

It contained this clause:

"The foregoing proposal is subject to the approval of * * * the Manager of its (the Electric Company's) Philadelphia Office."

The acceptance was as follows:

"To General Electric Company: Your proposal as above is hereby accepted this 4th day of June, 1902.

"Gill & Company,
"By Sydney S. Gill,
"W. B. Gill,
"T. Harvey Gill."

The approval was in these words:

"Approved, Philadelphia, June 16, 1902.

"General Electric Company
"By E. D. Mullen,
"Manager, Phila. Office."

Sydney S. Gill and T. Harvey Gill made no defense, and judgment was entered against them by default. As to William B. Gill the case went to trial, and the court below directed a verdict against him for an agreed amount. It is averred that this direction was erroneous, because, as is contended, William B. Gill was not liable under the contract sued upon. We cannot sustain this contention. It is true that he was not a partner in the firm of Gill & Co., to whom the proposal was addressed, but it is also true that he united with the members of that firm in accepting it. The paper which he signed is unambiguous and explicit, and it is impossible to ascribe any other significance to his signature. It must therefore be assumed that the approval by which the contract was completed was given upon the mutual understanding that all those who had executed the acceptance would be bound by it. This is the only construction, if construction it may be called, of which the acceptance is susceptible, and there is nothing in the proposal which calls for its rejection. The fact that Sydney S. Gill and T. Harvey Gill constituted the firm of Gill & Co., to whom the proposal was addressed, is unimportant. As between themselves, these two may have regarded the transaction as a partnership one, but, as to the electric company, the position of the three accepting persons was simply that of joint contractors.

Looking only at the signatures to the acceptance, independently of the oral evidence which was referred to by the court below, we concur in its opinion that the word "by" after the partnership name, applies to Sydney, and to him alone. It cannot be supposed that this name was actually written by more than one person, and it could not have been written by authority of William B. Gill, for he not only concedes, but insists, that he was not a partner. Therefore the con-

tention that he signed merely as one of three agents of the partnership of Gill & Co. appears to be baseless; and the alternative suggestion that he and the others signed, not for themselves, but as agents of the National Umbrella Company, is likewise inadmissible. The language of the writing is, "Your proposal as above is hereby accepted." Accepted by whom? Of course, by the signers; and neither in the paper itself nor in the signature of William B. Gill is there any intimation of agency. It is argued, however, that it should be understood that he signed for the umbrella company, because the proposal was addressed to "Gill & Co. (for the National Umbrella Co.)," and contained some provisions apparently intended for the benefit of the last-named company. But, waiving the question whether this peculiar form of address and these provisions should be understood to import that the proposal was originally made to Gill & Co. as agents of the umbrella company, the fact is patent that William B. Gill was not addressed at all. His liability resulted from his joinder in the acceptance of the subsequently approved proposal, no matter how or to whom it was addressed; for by that act he made himself a party to the contract, although he may have had no connection whatever with the negotiations which preceded it. Leith v. Bush, 61 Pa. 395; Knisley v. Shenberger, 7 Watts, 193; Clark v. Rawson, 2 Denio, 135; Staples v. Wheeler, 38 Me. 372; Thompson v. Coffman, 15 Or. 631, 16 Pac. 713.

Inasmuch as the series of writings which have been considered were obviously designed to embody the entire contract, and as from them alone it appears that William B. Gill was a party to it, it would be difficult to maintain that in a court of law any extraneous evidence could change it, or could vary or annul his connection with it. Shankland v. City of Washington, 5 Pet. 393, 8 L. Ed. 166. But, even if it were otherwise, the evidence dehors the writings would not have warranted a finding that William B. Gill had not personally and directly assumed the responsibility they imposed. There was testimony that "a form of guarantee * * * filled out for William B. Gill to sign as security," was given by a representative of the electric company to Sydney S. Gill, but the undisputed evidence is that, instead of executing that paper, William B. Gill signed the acceptance, and that thereafter the electric company's approval, which had previously been withheld, was given. The contention of the plaintiffs in error that from these facts the jury should have been permitted to infer that "it was the intention of the parties, as to William B. Gill's signature, to have treated him as a guarantor, not as a principal," is, we think, manifestly unsound. Such an inference would not only have conflicted with the plain meaning of the instrument which he actually signed, but could not have been rationally deduced from the evidence as a whole. In our opinion, the only reasonable, and therefore the only permissible inference from it, is that which was drawn by the learned trial judge: "W. B. Gill signed the acceptance, instead of the separate guaranty that had been sent for his signature, because he intended to bind himself for the fulfillment of the contract, in response to Mr. Mullen's demand, and it was simpler to have one paper than two."

Upon any possible view of the case, therefore, the binding direction which was given was proper, and the judgment, which was subsequently entered upon the verdict that was rendered in conformity with that direction, is accordingly affirmed.

VAN INGEN et al. v. SCHOPHOFEN.

(Circuit Court of Appeals, Eighth Circuit. March 26, 1904.)

No. 1,940.

1. BANKRUPTCY—DISCHARGE—OBJECTIONS—FAILURE TO KEEP BOOKS.

A bankrupt's discharge can be prevented under Bankr. Act July 1, 1898, c. 541, § 14b, 30 Stat. 550 [U. S. Comp. St. 1901, p. 3428], for his failure to keep books of accounts or records showing his true financial condition with intent to defraud, etc., only on proof that his failure to keep such books was with a fraudulent intent to thereby conceal his financial condition, and also in contemplation of bankruptcy.

2. SAME—EVIDENCE.

Where a bankrupt's discharge was sought to be prevented on the ground that he had failed to keep books showing his true financial condition, etc., but the only proof of his intent was his statement that his failure to enter certain loans was induced by fear that, if the objecting creditor knew that he got money outside, such creditor would close him up, and that he thought that he could work along from season to season and pay his debts, such evidence did not justify a presumption that his failure to keep proper accounts was induced by contemplated bankruptcy.

Appeal from the District Court of the United States for the Western District of Missouri.

This is an appeal by a creditor from an order granting a discharge to a bankrupt. On June 19, 1902, Schophofen was adjudged a bankrupt upon the petition of Van Ingen & Co., one of his creditors. His discharge, which was applied for in due course, was opposed by the creditor, the specification of objection being that the "bankrupt, with fraudulent intent to conceal his true financial condition, and in contemplation of bankruptcy, failed to keep books of account or records from which his true condition might be ascertained, in this: that in the schedule of liabilities filed by said bankrupt * * * he scheduled an indebtedness of one thousand dollars to Fredericka Schophofen (his wife), and six hundred thirty-five dollars to Joseph Sach Rowitz, but failed to keep any books or records of any kind whatever showing said indebtedness, or anything whatever relating to the same; that he failed to keep any cashbook or record of the amount of cash received by said bankrupt, and failed to keep any books or records showing the amount of profit made by said bankrupt in his business." At the hearing before the referee the bankrupt was the only witness offered by the objecting creditor. There was no evidence tending to show that the failure to keep a cashbook or record of profits was with fraudulent intent, or in contemplation of bankruptcy; but when the bankrupt was asked by counsel why he had not made entries showing the indebtedness to his wife and to Rowitz upon the imperfect record which he styled his ledger the bankrupt answered: "Because I thought that if your client [Van Ingen & Co.] saw that we had to get money outside to run the shop he would close us up. I thought that I could work along from season to season; that business would get better, and I could pay up." Upon this state of facts the referee recommended the discharge of the bankrupt, and it was accordingly granted by the District Court.

Samuel Feller (Karnes, New & Krauthoff, on the brief), for appellants.

Wilhelm Heidelberger (J. H. Bremermann, on the brief), for appellee.

Before SANBORN, THAYER, and HOOK, Circuit Judges.

HOOK, Circuit Judge, after stating the case as above, delivered the opinion of the court.

To defeat the discharge of the bankrupt the appellant relies upon section 14b of the bankrupt act of July 1, 1898, c. 541, 30 Stat. 550 [U. S. Comp. St. 1901, p. 3428], the pertinent provision of which is that the bankrupt shall be discharged unless he has "with fraudulent intent to conceal his true financial condition and in contemplation of bankruptcy * * * failed to keep books of account or records from which his true condition might be ascertained." Two conditions must accompany and give character to the failure of the bankrupt to keep the requisite books of account or records in order to justify its use as a bar to his discharge. In connection with such failure there must be present in his mind not only a fraudulent intent to thereby conceal his true financial condition, but also a contemplation of proceedings in bankruptcy. The existence of the former without the latter is insufficient. The case before us turns upon the fact that the ledger of the bankrupt, the only record kept by him, did not show the indebtedness to two of his creditors, the inquiry as to the purpose of the omission, and his answer. He admitted that his intent was to prevent the appellant, his principal creditor, from ascertaining that he had secured financial assistance from others, and by fair inference from this admission it may be assumed that the first condition operating to prevent his discharge was proven. But was his failure to exhibit such indebtedness upon his books in contemplation of bankruptcy? The bankrupt testified that he thought he could work along from season to season; that business would get better, and that he could pay up. This testimony affirmatively negatives the contention that he was then contemplating bankruptcy. The appellant claims in this connection that the bankrupt was in a state of hopeless insolvency, and that, therefore, it may be presumed that he had in contemplation the necessary end and consequence of that condition. But, assuming that such a presumption may be utilized in a case of this character, it is sufficient to say that the record does not supply the fact from which it is drawn. It does not appear that the bankrupt was hopelessly insolvent. The items and the gross amount of his indebtedness appear in the record, but the amount or value of his assets is not shown. For aught that appears, the hope of the bankrupt to ultimately pay all of the claims of his creditors may have been fairly justified by his business prospects and the amount of his assets. At any rate, we cannot assume a condition not shown by the record, and then predicate thereon a presumption to supply a reason for reversing the order of the trial court. As bearing upon the question whether the bankrupt had in contemplation proceedings in bankruptcy, it should be observed that he did not voluntarily seek the benefit of the provisions of the act, but that, on the contrary, the proceeding was an involuntary one, and was instituted by the appellant as petitioning creditor. Radical changes were made in the provisions of the act of 1898 concerning the discharge of bankrupts by the amendatory act of February 5, 1903 (32 Stat. 797 [U. S. Comp. St. Supp. 1903, p. 410]), and among them was the elimination

of the requirement that the failure to keep books of account from which the bankrupt's financial condition might be ascertained must, in order to operate as a bar to his discharge, be in contemplation of bankruptcy. But the case in hand is controlled by the provisions of the original act.

The order of the District Court will be affirmed.

TERRY et al. v. JOHNSTON, Sheriff, et al.

(Circuit Court of Appeals, Fifth Circuit. February 9, 1904.)

No. 1,265.

1. EXECUTION—LEVY—REDELIVERY BOND—JUDGMENT—ENFORCEMENT—INJUNCTION.

Where a surety on a forthcoming bond made no objection to the sale of his property under an execution on a judgment on the bond, other sureties and the principal, who had become a bankrupt, were not entitled to enjoin such sale.

Appeal from the District Court of the United States for the Western District of Louisiana.

I. C. Terry, for appellants.

Frank P. Stubbs and Frank P. Stubbs, Jr., for appellees.

Before McCORMICK and SHELBY, Circuit Judges.

McCORMICK, Circuit Judge. The appellants exhibited in the District Court a bill for injunction. After notice, the matter came on for hearing, and the defendants submitted a general demurrer to the bill, which the court sustained, dissolved the restraining order, and denied the application for injunction, at the cost of the applicants.

The bill shows that there existed in the Sixth judicial district court of Louisiana, Ouachita parish, a judgment against I. B. Kidd in favor of one Julius Lemle, for $401, with interest thereon from October 5, 1895, at 8 per cent. per annum, to satisfy which an execution was issued and levied upon the property of the defendant in the judgment. After this levy the defendant in the judgment appeared before the sheriff, and, with accepted sureties, gave a delivery bond, by the terms of which the defendant agreed to return the property to the sheriff whenever the same should be demanded and offered for sale to satisfy that execution, and, in event of failure to return the property as conditioned, then the sureties on the bond should become liable therefor. There appears to have been some interruption in the proceedings in the state court, and to have been a new advertisement of the property for sale to take place on May 4, 1901. Before that day arrived the defendant in the judgment presented to the bankrupt court for that district his petition, asking to be adjudicated a voluntary bankrupt, which was done; and on the sale day, instead of producing the property according to the terms of the delivery bond, he advised the sheriff that so much of the property as was still in existence was in the possession of a keeper

appointed by the referee in bankruptcy in behalf of the United States marshal, and therefore could not be delivered. To this notice the sheriff paid no attention, but at the appointed time and hour called for the property to be sold, and, on its not being delivered, declared the forthcoming bond forfeited, on which there was duly entered judgment against the sureties, and to enforce which process was issued and levied on the property of D. A. Breard, Sr., one of the sureties on the forthcoming bond. The property seized was advertised for sale to take place June 14, 1902. The surety whose property was seized took no action, but on the 13th of May, 1902, I. B. Kidd, defendant in the judgment, and who had been adjudged a bankrupt; George C. Terry and I. C. Terry, husband of George C. Terry, who joined therein with his wife, George C. Terry; John Kidd and Laura Kidd, creditors of the bankrupt (said George C. Terry being also one of the sureties on the forthcoming bond)—instituted this proceeding and obtained a restraining order against the sheriff selling the property of the other surety, D. A. Breard, Sr.

It is not necessary to specify all of the errors assigned. The first is that the decree is inequitable, and the second, "that by the order of dissolution of said injunction said court practically permits a grave injustice to be done to the above creditors." The court of bankruptcy, it appears, was not able to see how seizure of a stranger's property to satisfy an admitted debt of a bankrupt could harm the bankrupt or his creditors, or why, if the party whose property was seized did not complain, others should be heard to do so. It is clear to us that the demurrer to the bill is well taken.

The judgment of the District Court is therefore affirmed.

REMBERT ROLLER COMPRESS CO. v. AMERICAN COTTON CO. et al.

(Circuit Court of Appeals, Fifth Circuit. March 29, 1904.)

No. 1,289.

1. PATENTS—INFRINGEMENT—METHOD OF BALING COTTON.

The Rembert patent, No. 441,022, is for a method of baling cotton by which it is ginned, condensed, and baled into standard compressed bales ready for shipment in one continuous operation. The method consists in passing the cotton in a sheet after it leaves the condenser between rolls, the sheet being then folded to the proper size for a bale, and the air between the layers pressed out by an ordinary press. The theory of the patentee, as stated in his application and amendments thereto, is that, when cotton is subjected to a pressure just short of that which will injure the fiber, it for a time loses its elasticity, and the sheets will therefore remain in the same compressed condition in which they leave the rolls until they can be baled. *Held* that, in view of the prior art and the proceedings in the Patent Office, the patent must be restricted to a method which depends for its successful operation upon the utilization of such theory, there having been prior patents for mechanism for compressing cotton in layers; that, as so restricted, the method as shown by the evidence lacks utility; and that, if conceded validity, the patent is not infringed by the use of the mechanism of the Graves patent, No. 473,144, by which the cotton, after being compressed in sheets, is kept under continuous pressure until the sheet has been rolled into a bale.

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

A bill was filed in the Circuit Court for the Eastern District of Texas by the Rembert Roller Compress Company, a Texas corporation, against the American Cotton Company, a New Jersey corporation, having its principal office in the state and city of New York, and doing business in the Eastern District of Texas under a permit from the state of Texas, and against the Wharton Gin & Milling Company, a Texas corporation, having its place of business in the Eastern District of Texas (it being alleged that the Wharton Gin & Milling Company is the agent of the American Cotton Company, conducting in part the business of the American Cotton Company in the county and town of Wharton, in the Eastern District of Texas), and against R. H. Houston, president of the Wharton Gin & Milling Co. The purpose of the bill is to restrain the defendants from infringing letters patent No. 441,022, issued to Henry Rembert on the 18th day of November, 1890, and assigned by said Rembert to the Rembert Roller Compress Company. The patent set up in the bill is a process patent. The object of the method so patented is to gin, condense, and bale cotton in one continuous operation, and so effectually to reduce the size of the resulting bale of cotton in the first original initial process as to make it of suitable dimensions and density for market, or for transportation by rail or sea to final destination. This patent contains a description of an apparatus which the patentee says is considered "best adapted for carrying out the patented process under certain conditions mentioned in connection with the apparatus," but "it is to be distinctly understood that this apparatus is not the essence of the present invention," and that the method herein claimed may be carried into effect by various other mechanisms, which will suggest themselves to the skilled mechanic as equivalents of the one described. The precise claim of the complainant as to this process patent can be gathered from an extract from the bill, as follows:

"Heretofore the usual method of handling and baling cotton practiced in the Southern States has been as follows: The cotton fiber, when it comes from the field of production, is first passed through the gin and the condenser, and from the latter it is carried to an ordinary 'country' or 'plantation' press, where it is pressed and baled. The bales formed by these 'plantation presses,' as they are termed, are very large and bulky, and therefore require considerable space for storage, and greatly increase the cost of transportation. The bales, after being formed, are then transported to a compress located at some concentrating point, where they are subjected to a very heavy pressure, sufficient to reduce their size and increase their density to the required 'standard' fixed by the railroad companies, boards of trade, and others, after which they are ready for shipment, by rail or otherwise, to the manufacturers. This method of handling and baling the cotton had many disadvantages and drawbacks. In the first place, the usual method of handling the loose cotton in the ginnery establishment, previous to being baled, causes the atmosphere of the building to be completely filled with floating fiber finely comminuted, which dust not only stifles and interferes with the attendants, but also greatly increases the danger and risk of a conflagration, and thereby increases the cost of the fire insurance. It also necessitates the employment of a number of attendants, which materially lessens the profits of the producer. The bales, when they come from the first pressing operation, are necessarily large and bulky, and low in density, inasmuch as the ordinary plantation or country presses are not adapted for heavy pressing, and for that reason are not only difficult to handle and require a large storing space for their keeping, but also greatly increase the cost of transportation from the ginning establishment to the compress, which is often located a long distance from the ginning point; but probably the most serious drawback attendant upon the use of the foregoing manner of handling cotton is the great cost of building and maintaining the powerful hydraulic and steam compresses required for compressing the bales before they are shipped to the manufacturer, and the expense to which the producer is put in having the bales thus compressed. To reduce the bales to the standard size and density required by the trade, these presses are necessarily large

and expensive, not only in building but in maintaining them in operation, as is evident. By this invention of Henry Rembert are obviated the main difficulties in the manner of handling and baling cotton heretofore in vogue, and substitute therefor a simple and inexpensive method, that may be carried out in the ginning establishment without the employment of costly labor and powerful compresses, and by means of which the cotton is not subjected to unnecessary handling or exposure, but by a continuous process is formed into bales of a size and density that will equal the standard compressed bales. This method may be carried out and operated by means of the same power that operates the ginning mechanism, and from this fact it derives one of its chief advantages."

The bill then states the claims made by Henry Rembert in his patent, which are as follows:

"(1) The method of baling cotton, which consists in compressing the same progressively, accumulating the compressed fiber previous to its expansion in the form of a bale, applying the pressure to expel the air, and finally tying the bale, substantially as specified.

"(2) The method of baling cotton, consisting in compressing the same in the form of a continuous sheet, lapping said sheet before it has had time to expand in the form of a bale, and subsequently applying pressure to expel the air from between the layers, substantially as specified.

"(3) The method of baling cotton, which consists in condensing the same in the form of a continuous soft bat, compressing the same progressively, accumulating the compressed fiber previous to its expansion in the form of a bale, applying pressure to expel the air, and finally tying the bale, substantially as specified."

The allegations of the bill show that exactly what Henry Rembert claims to have discovered was that the elasticity, or tendency to expand, in cotton, can be suspended for an interval; that cotton can be compressed to a point just short of crushing and injuring the fiber, so that it will retain its density, when so compressed in detail, that it can be baled, and, when so baled, be a compressed bale. It is claimed that Henry Rembert found a bat of cotton which had been run over by a train on a railroad track, and discovered that, while the wheel passing over the cotton on top of the rail crushed the fiber, the flanges of the wheel compressed a part of the bat to a point just short of injuring the fiber, and then or thereafter resulted his intellectual conception of the use of the discovery, which it is said he then made. The practical use of this alleged discovery was, as shown by the extract from the bill, to compress finally at the gin, and thereby obviate the expense and trouble of making the old-fashioned plantation bale of cotton at the gin, and then transporting it to the compress, and having it there compressed, so as to be of sufficient density for commercial use for shipping by rail and by sea. The bill then alleges infringement on the part of the American Cotton Company and the Wharton Gin & Milling Company, and prays for an injunction and accounting.

There was a demurrer to the bill, which demurrer was overruled, and the bill was answered by the American Cotton Company and the Wharton Gin & Milling Company. In the answer the defendants admit the issuance of the letters patent to Henry Rembert for an alleged method of invention of baling cotton, but deny that he is the original and first inventor of the alleged method or invention as set forth in his bill. It is also admitted that the letters patent and the invention set forth therein have relation to an alleged method of baling cotton, and that said alleged method is adapted to be practiced at the point of ginning, to form a continuous process of ginning; but it is stated that defendants are not informed, save by complainant's bill, that the object of said alleged method is to gin, condense, and bale the cotton in one continuous operation, and so effectually to reduce the size of the resulting bale of cotton in this first original initial process as to make it of suitable dimensions and density for market or transportation by rail or sea to final destination, and they therefore deny the allegation in the bill in this behalf, and leave the complainant to make proof thereof. The defendants deny the alleged discovery of a "law of nature," and they deny that the elasticity of cotton can be suspended, and utmost density short of crushing

its fiber obtained in detail, before baling. They also deny that the letters patent in suit embrace the conception of a new property in cotton, by which it remains compressed, and so retains its density when compressed in detail. They also deny that, when cotton is compressed as set forth in said letters patent, it can be baled, and, when baled, is a compressed bale. They also deny that the alleged invention of Rembert obviated the main difficulties in the manner of handling and baling cotton in vogue prior to said application, and substantially they deny that by Rembert's alleged invention a simple method was discovered of baling and compressing cotton by one continuous operation at the point of ginning, thereby saving two operations, viz., the ginning and forming into a plantation bale at the gin, and then transportation to another point and compression there. The defendants in their answer then deny that Henry Rembert was the true original and first inventor of the alleged method or process of baling cotton to which the letters patent No. 441,022 relate, and on information and belief allege that, long before any invention or discovery made by Rembert, the same and substantial and material parts thereof had been invented, and had been known to and used by others in this country, and had been in public use or on sale in the United States for more than two years prior to the date of the application for said letters patent. The names and places of residence of persons who had such prior knowledge, and by whom the same was publicly used or sold, are then given. The defendants, further answering on information and belief, say that the letters patent issued to Henry Rembert are invalid and void, because the alleged invention therein set forth and claimed, or material and substantial parts thereof, had prior to any alleged invention or discovery thereof by Henry Rembert been patented and been described in printed publications in the United States and foreign countries. It then sets out a number of patents, antedating that of Henry Rembert, issued by the United States Patent Office, and two issued in Great Britain. The defendants deny any infringement on the part of the American Cotton Company or the Wharton Gin & Milling Company.

In effect, the pleadings here raise, so far as we deem it material to consider them, issues as to the patentability of Rembert's alleged discovery on the ground that the same lacks novelty and utility as to the prior art, and as to whether Rembert's patent is infringed by the process or method in use by the American Cotton Company and the Wharton Gin & Milling Company. A large amount of testimony was taken, and the case heard upon the pleadings and proof, and after consideration the court made a final decree dismissing the complainant's bill. In a brief opinion filed by the judge presiding in the Circuit Court, the following conclusions of law and fact are stated:

"Conclusions of Fact. I find, from the facts: First, that the Rembert patent, as it relates to the method of compressing cotton, is without novelty; second, that said patent is without utility; third, that the inventor of the Rembert process is not a pioneer in the art of compressing cotton; fourth, that the method patented by Rembert is without claim to priority; fifth, that the defendants the American Cotton Company and the Wharton Gin & Milling Company are not infringing upon the method or machinery covered by the patent issued to the complainant.

"Conclusions of Law. Applying the law to the facts above stated, the bill of complainant should be dismissed, which is accordingly done; the costs to be ascertained and taxed against the complainant."

George E. Mann, for appellant.

Eugene Williams, Richard N. Dyer, and Frank L. Dyer, for appellees.

Before PARDEE, Circuit Judge, and SPEER and NEWMAN, District Judges.

After stating the case as above, the opinion of the court was delivered by NEWMAN, District Judge.

The first inquiry in this case is: Did Henry Rembert make a patentable discovery and one having utility? The claim is that he discovered

that the resiliency, or tendency in cotton to expand, could, by compression to a point just short of injuring the fiber, be arrested or suspended for a sufficient length of time for it to be folded or lapped into a bale, so that the only thing left to be done would be by slight compression to expel the air from between the laps or layers, and apply the fastenings, making in this way a bale of sufficient density to be a standard commercial bale for shipment to distant points by rail or water. The density required by the various cotton exchanges is not less than 22½ pounds per cubic foot. The additional advantage claimed is that this result is obtained by one continuous operation at the point of ginning. The practicable method of utilizing this alleged discovery was by passing the cotton between two rollers, so as to form a bat to be lapped into a bale. Unless it is true that cotton will remain in this compressed condition after passing between the rollers a sufficient length of time to carry out the remainder of the process—that is, to lap into a bale, exclude the air, and tie—there is no merit in the complainant's claim.

The file wrapper proof in this case shows that Rembert's original specifications and claims were unsatisfactory, notwithstanding amendments thereto, and were rejected by the Patent Office. The application was again amended and renewed, and was finally granted with the claims which have been set out above. The amendment to Rembert's specifications, so far as important, which finally caused the granting of the letters patent, was as follows:

"A marked distinction between my method of producing a bale of compressed cotton and those which preceded it lies in the fact that I effect the compression progressively; that is to say, by compressing a small portion or unit of the mass at a time, and thereafter accumulating these compressed units, instead of effecting the compression of the entire mass at one operation, as heretofore practiced. The expressions 'compression' and 'compressed cotton,' as used in the present specification and claims, refer to that extreme compression, such as is effected by the so-called 'compresses' of the present day, and which, falling just short of the crushing of the individual fibers, so solidifies or condenses the mass that the elastic or expansive tendency is for the time being suspended."

There was also an amendment, in connection with the foregoing, in reference to the apparatus accompanying the application, as follows:

"While I have illustrated and described herein that form of apparatus which I consider best adapted for carrying out my process under certain conditions, it is to be distinctly understood that this apparatus is not the essence of the present invention, and that the method herein claimed may be carried into effect by various other mechanisms, which will readily suggest themselves to the skilled mechanic as equivalents of the one herein shown and described."

In the remarks accompanying the applicant's last amendment was the following:

"It is now well recognized in the art that by compressing cotton to a point just short of crushing the fiber is to cause it to cohere for a short space of time, so that, although relieved of pressure, it will for the time being retain its solidified and condensed condition. Applicant's results are attained by taking advantage of this fact."

So that we thus reach Rembert's precise discovery, as shown by this file wrapper proof; that is, the utilization, as he says, of a law of na-

ture, the suspension of the elasticity or tendency in cotton to expand for a brief interval after being relieved from heavy pressure.

The rejection of Rembert's original claim by the Patent Office was on several grounds. One of those was Clemens' patent, No. 7,612, September 3, 1850. The Clemens patent, which caused the first rejection of Rembert's application, will be gathered from a part of the specifications, as follows:

"Cotton and other substances above enumerated have always heretofore been packed and pressed by pressure applied by a platen or follower directly to the whole mass. This of necessity requires great power, and, if the substance or substances be matted and in uneven lumps, the whole mass cannot be well condensed. By my invention I am enabled to condense the mass into a much smaller compass, and by much less power than heretofore, while at the same time the substance or substances can be unpacked to more advantage for the purpose of manufacture, particularly when applied to cotton. The first part of my invention consists in packing the substances above enumerated and all others of a like character in a series of successive layers or strata, by the action of a roller or rollers, or cylinders, or curved or beveled faces on the surface thereof, the pressure being in succession applied to one or more of such layers or strata, whereby the substance or substances to be pressed and packed are more evenly distributed, and therefore in a condition to be condensed into a more compact mass and with less power, for the reason that the power is divided and applied by the surface of the roller or rollers or cylinders, or their equivalents, to a small portion of the surface of each layer or layers, instead of to the whole mass at once. The second part of my invention, which relates to the means for applying the first part of my invention, consists in combining with rollers or cylinders, or their equivalents for laying and compressing in successive layers or strata, a bed which shall recede from the surface of the rollers or cylinders as the layers or strata accumulate, and which either traversed back and forth under them, or over which they traverse from end to end to distribute the layers or strata. The third part of my invention consists in combining with a press for packing and pressing substances in successive layers or strata, by means of rollers or cylinders, or their equivalents, a lapping machine for laying or forming the fibrous substance or substances to be packed into a lap or laps, preparatory to the operation of laying and pressing. The fourth part of my invention consists in combining with each of the laying and compressing rollers, or their equivalents, a series of rollers, or their equivalents, for retaining the layers in their compressed state as the bed traverses under them."

Clemens' administrator, Chetlain, obtained a patent in 1876 (No. 187,814) for an improvement in cotton presses. A brief statement from the specifications will show what his patent embraced:

"Cotton, which in a loose state is very bulky, should be compressed in small quantities in order to condense it as much as possible, and to obtain the maximum density each increment to the volume of the cotton should be compressed at the time it is added to the bale. This improved cotton press packs the cotton in this manner, and at the same time in such a way that it can afterward be used from the bale to the best advantage. The cotton, as it comes from the gin, is formed into a continuous sheet, which is pressed and laid under pressure in folds doubled one upon the other. The bale is thus formed of continuous parallel layers of cotton greatly condensed."

Rembert's patent was rejected on the further ground of the English patents to Lahaussois of November 22, 1877. The character of that patent may be gathered from a brief extract from the specifications, as follows:

"In the presses, as hitherto constructed, the entire mass required for a single bale has been placed in the press, and the whole mass compressed at one time. In such pressing the portion situated at the surface is much more

compact and dense than that near the middle of the bale. The object of this invention is to make the bale equally dense throughout; and it consists in pressing the material in successive layers, one after the other, and then combining the several layers into one bale, as more fully hereinafter described."

Taking this file wrapper proof in connection with what is otherwise shown by the record, it is manifest that Rembert's alleged discovery is confined within very narrow limits. It is the application of that quality in cotton which causes it to cohere after severe compression for a brief interval to practical purposes in compression and baling. Unless this suspended elasticity after compression to a point just short of injury to the fiber occurs, and unless this quality in cotton, if it exists, can be applied as claimed, Rembert's patent would be invalid, and his case must fail for this reason. It is contended on behalf of the defendants that, after any compression of cotton short of crushing the fiber, expansion occurs immediately, and that practical experiments with Rembert's method have demonstrated this. There is considerable evidence in the record on this subject.

William F. Ladd, who had been vice president of the Rembert Compress Company since 1893 and up to the time he testified in this case, was examined with reference to the expansion of cotton under the Rembert process after leaving the rollers. His first allusion to it is as follows:

"Q. Did you notice that the sheet, or bat, expanded after it left the compression rollers? A. Yes, sir. Q. And I suppose, while it was accumulating in the press box, and before the final pressure was applied, it also expanded? A. Yes, sir. Q. Do you recollect whether the final pressure which you applied actually compressed the layers which had accumulated in the press box? A. After the cotton passed through the rollers it expanded to twice its thickness in the press box, and by the application of pressure in the press box it was compressed back almost to the same thickness it had in passing through the rollers."

On examination in rebuttal, Mr. Ladd testified as follows on this subject:

"A. Several of the witnesses whose testimony you have asked me about say that the pressure of the baling press was to not only exclude the air from between the laps or folds of the bat that had been condensed by the rolls, but that it compressed the bats themselves. I want to explain that the fact is that when the bat had passed between the rolls it fluffed a little as it got the air into its exposed surface, and so the air between the bats was also in the surface of the bats to some extent; but there is no question in my mind that a press with a power of some 50 tons to the whole surface of the bale did not do more than squeeze out the air that there was between the layers, as this bat had just been a few minutes before subjected to a roller pressure of several thousand tons to the surface of one lap of the bale, and while the surface fluffed, the body of the bat was still compressed, so that there could be no density added by a plantation press that at the outside could not put a pressure to the whole surface of a bale of over 50 tons. The average country press, with which many first-class Rembert bales were made, is not over 30 or 40 tons. The best, such as was used with the Rembert at Palmer, and part of the time at Galveston, only gave a pressure of about 50 tons."

The testimony of Henry Rembert, the patentee, on this subject, can be gathered substantially from a few questions and answers on his cross-examination. After testifying that the cotton bat, before it entered the compression rollers, was about two inches thick, or should be about that thickness, and that as it passed immediately between the

rollers it was not thicker than a piece of brown paper, then testified as follows:

"Q. How thick was the bat after it left the compression rolls? A. I could not tell you, sir. I could not measure it. Q. If its expansion was suspended by the compression of the compression rolls, is it your view that the bat, after it left the compression rollers, was as thin as when it was subjected to the maximum compression as it was when between the rolls? A. I expect probably the body of the bat was, but there was a good deal of fuzz on each side of it, which was sticking to each roll. It would fuzz up a little, but the main body of the bat was thin. Q. Your point, then, is that the bat was compressed by the compression rolls, so as to be reduced to an extremely thin sheet, and that, after leaving the compression rollers, certain of the fibers on the surface protruded to form a fuzz, or fuzzy surface, which gave the appearance of thickness to the bat? A. No, sir; I could not say that it did. You could see it was simply a loose fuzz that was pulled up when the bat left the two rolls, and I suppose the cotton sticking to the rolls caused it to pull out a little. The main body of the bat was firm. Q. It was like a blanket, as I understand you? A. No, sir; I could not say it was. The blanket is not as firm. The fuzz stuck out like a blanket, but the main body of the bat was firm, and the blanket is not. Q. The body of your bat, after passing through the compression rollers, was firmer than the blanket? A. Yes, sir."

This embodies about the strongest testimony for the complainant as to the suspension of elasticity in cotton, after leaving the compression rollers.

T. J. Griffin, who was a machinist, and had been in the employ of the Rembert Company, testified as follows:

"Q. Were any rolls put on the folder, so as to assist in holding down the bat of cotton in the compress box? A. Yes, sir; there was an addition of three rollers placed on the machine, one of which was a wooden roll set directly over the positive compression roll, or a little past the center nearest the condenser from said compression roll, to gradually press down the mass of cotton as it passed down the chute before entering between the compression rolls. Then there were a set of rolls placed on a traveler inside of the receiving box, connected by means of rocker arms to the sides of the folder, so that the stroke of the folder going backwards and forwards to hold the mass of cotton that those rollers would come in contact with [the accumulated mass of cotton in the receiving box], and press it down, so as to obviate the necessity of punching it down with a stick. Q. Well, now, were those follower rollers intended to keep the cotton from expanding in each layer? A. Yes, sir; the intent of those rollers was to squeeze the air from under each bat as it was folded or deposited by the folder. Q. And was it also its purpose to compress and keep compressed the cotton in each layer? A. No, sir; as it would expand after passing through the rolls. Q. Well, did the cotton expand after passing through the compression rolls? Is that what you refer to? A. Yes, sir. Q. Explain just how it appeared and did as it passed before, through, and after the compression rolls. A. Before it passed through the compression rolls it was in a fluffy mass or bat, the rollers being tied together in housing, with sufficient pressure exerted on the templet screws, so as to make the negative or friction roll rotate thereby. When the rolls were properly adjusted, by dropping a piece of ordinary paper through the rolls, it would flatten, or have a tendency to flatten, and, in passing from a three to a six inch bat of cotton in its fluffy state between the rolls, it would necessarily put an enormous, incalculable pressure on the journals. After passing through the rolls and allowing it to remain in the receiving box for a few moments, or pulling it off of the bat, as we often done, as it passed through the folder, we would find the bat of cotton had expanded, with the cotton dry and fluffy, to half an inch thick. Q. How thick was it as it passed through the rollers just in the line of contact? A. That I cannot answer intelligently, as the rollers were rigidly in contact. The only elasticity or give that there could possibly be in the spring on the shaft or housings. Q. Would it be less

than a quarter of an inch? A. Yes, sir. Q. Much less? A. Yes, sir. Q. You might estimate it by saying less than one-sixteenth of an inch? A. I should say so. Q. After the cotton had gone through the compression rollers, it would expand until it was a half an inch in thickness? A. Yes, sir. Q. You say that with the cotton in its normal condition that it would expand to even more than that at times? A. Yes, sir; and, to illustrate, with damp or green cotton we could easily, without any punching or pushing down of the accumulated mass of cotton into the receiving box, make a bale of cotton weighing from 550 to 600 pounds. In cotton that was dry and fluffy, very often we could not get in the same sized receiving box a bale weighing from 400 to 450 pounds. Q. What is the normal condition of cotton—dry and fluffy, or green and wet? A. Dry and fluffy."

In reference to the experimental plant carried on at Galveston, Mr. Griffin testified as follows:

"A. There were something like between 1,000 and 1,200, I will say, of bales of cotton made on the experimental plant in Galveston. Some few bales of the cotton, I understood, were ginned for customers, and others were ginned on account of the company—cotton they had bought. My understanding, which was quite frequent, that the bales of cotton we were making did not have a sufficient density, and that I was told that I would have to apply more pressure on the ordinary press, which in every instance that I done, the result would be a broken press, and parts of the press would have to be carried off, and as often as twice and three times a day, to be repaired, and to my personal knowledge I know of a great number—how many I can't say exactly—that were carried and placed under the follower blocks of the Taylor compress and there recompressed. A great many bales, however, and a majority of the bales that we made in Galveston, were shipped away on board of cars, and I presume, not hearing anything more and not being connected with the office, that they were satisfactory. In many instances I have calculated the density of those bales, and found them, not a great many of them over the average of 22½ pounds per cubic foot, and a great many under the required density; that is, after it had passed the experimental stage, it was ginned (or we tried to gin, up to the period the cotton seed became damaged), they would be run straight along, and a great many bales would be perfect, and others would be imperfect. * * *"

G. T. Loutitt, who was employed as a mechanical draughtsman by representatives of the Rembert Company, and who had a contract to build one machine, testified on this subject as follows:

"Q. Very briefly, just explain how and where the cotton went after passing out of the condenser in the Rembert method. A. The cotton came out of the condenser in a sort of a bat, and passed between two cast-iron rolls. Underneath these rolls there was a folder, which folded the cotton in an oblong bale, you can call it—not a square bale. It folded it in a box the same size as the bale. This box was made so that it would revolve, and afterwards the cotton was put under a screw press, and in some instances a hydraulic press, and in some instances a knuckle-jointed press, so that the cotton could be brought down to what the Rembert people called a 'compressed bale.' Q. Now, in passing from the condenser to the rolls, about how thick was the bat, as you first saw it, if you can remember? A. It was about two or three inches thick—2½ inches; about that. Q. It passed into the crevice between the compression rollers, then, just before going in, at two or three inches thick? A. Yes, sir. Q. While it was between the compression rollers, how thick was it? A. That is hard to judge. I should judge about three-eighths to half an inch. Q. Were the rollers so arranged as to meet before the cotton came into it? A. Well, they were screwed up almost tight, so that the faces were almost tight together. Q. When you first saw it, were those rollers both fixed, so that there was no give to them, or was one of them arranged so that it would move back and forth? A. By loosening the screw, you could. Q. When you had tightened the screw? A. It would not give—only the spring, that is, in the iron. * * * Q. Then the only give was the give that the iron would give by reason of its flexibility?

A. Yes, sir; that is right. Q. As it passed through, then, it was in a very thin band or bat? A. Yes, sir. Q. You said about half an inch. Do you speak advisedly? Was it as much as that from your experience? A. No; not at the point of contact. No, sir; not at all. I do not think that between the rollers it was more than three-sixteenths of an inch—from one-eighth to three-sixteenths. In fact, sometimes they were almost tight up. Q. When the cotton, then, passed in, they were almost tight up? A. Yes, sir; almost tight up. Q. And the actual thickness of the bat at that point, as it passed the point of contact of the rollers, you think would be very thin? A. Yes, sir; very thin. Q. The exact thickness you could not accurately estimate? A. No sir. Q. Now, after it passed out from this crevice or point of contact, what was the actual, practical result, as you observed it? Did the cotton widen out, or did it remain thin? A. It widened out a good deal. It expanded. Q. How much? A. I should say it would expand to an inch and a half or two inches—an inch and a half, anyhow. Q. Do you remember, by fixing in your mind the first time you ever saw the process, it being a novelty—did it fix itself in your mind? A. Yes, sir."

There is much testimony in the record as to the difference in the operation of the Rembert process with damp cotton and with dry cotton. When working with damp cotton, it would retain its compressed condition much better than when the cotton was dry and fluffy, which fact hardly needs expert testimony to demonstrate.

Benjamin Worley tried one of the plants of the Rembert Company, and the first year it was put up, after making five or six bales, and it failing to work satisfactorily, he shut it down, and the next year it was put in perfect order and again tried. As to the last experiment Mr. Worley testifies as follows:

"Q. Well, was it put in perfect order next season? A. Well, it was, yes, sir; but it did not accomplish the desired results. Q. That is what I was getting at. Did you try to run it parts of two seasons? A. Not the same plant. We did the system. Q. That is what I am speaking of, the system? A. Yes, sir; we tried to run it a part of two seasons. Q. Then, taking the first efforts that you made, you say you packed a few bales of cotton on it? A. Yes, sir. Q. Mr. Rembert came up, and you had a talk with him, and he told you to put it out, and to put back your old system? A. Yes, sir. Q. Did you do that? A. Yes, sir; he told me to throw it out, but I put back my old system on my own account. Q. He told you to put it out? A. Yes, sir; his words were: 'Throw the damn thing out. It is no good.' Q. That is what Rembert himself said? A. Yes, sir. Q. But he stated he would perfect it for the next year? A. Yes, sir. Q. And there was an effort made in that direction? A. Yes, sir; a very strong one too. Q. Now, taking up the first year, what was the cause of what you call a failure? A. Well, sir; there was only one cause. That was that the cotton would not hold the compression after it passed through the rolls. The cotton was too dry. It would expand to fully 50 per cent. of its original size or thickness. We passed a bat through there six inches thick, and it came out three. * * * Q. Now, what would it take to make the method work upon dry cotton at any time? Did any suggestion come to your mind about it? A. Yes, sir; there is only one thing that would make it work. The cotton was compressed, and, if they had just had some contrivance to have held it under compression after they had compressed it, it would have been a success. It had time to expand, you see, after leaving the rollers until it reached the box, and it expanded to 50 per cent. of its original thickness."

Mr. Worley then testified to the fact that the cotton usually retained its compressed condition better near the coast, as at Galveston, when it was damp, and, substantially, that after getting 50 miles from the coast the cotton would be too dry to retain its compressed condition by this process. Mr. Worley further testified:

"Q. When this cotton got to the box where it was to be formed into the bale, could they get enough cotton in there to make the regulation size bale? A.

They could make the regulation size, but not the weight. Q. Well, by size I mean weight. What was the trouble? A. They could not get enough cotton in there. It was too bulky. The box would not hold sufficient cotton to make the regulation weight bale. By regulation weight is meant 500 pounds. Q. Now, when you had gotten in there as much as you could get in this press box, was the mass as it then existed loose and fluffy, or were these laps in a state of thin felt bands? A. No, sir; they were loose and fluffy. Q. In making the bale and tying it, after this step was reached in the process, what result was necessary from the press in order to make a bale? A. It was necessary to put on more pressure than we could obtain from the press to make a bale. We could not get the pressure. If we wanted to make a compressed bale out of it, the press that we used was not sufficiently strong to make it. Q. Was there any other duty for the press to perform than pressing the air from between the layers? A. Well, if they wanted to make a success of it, there was. Q. What was it? A. It did not only have to press the air from the layers, but it had to still go further. It had to press the cotton close enough to make a condensed compressed bale of it; but the press did not have the power to do that."

A. D. Thomas, a witness for the defendants, who seems to have practical knowledge of the subject in question, says in his testimony:

"I do not think it possible to compress cotton in a thin sheet, so that it will not expand, without injuring the fiber."

D. H. Harkey, a witness for the defendants, testifies as to the press at Palmer, Tex.: "By the time they got the bale ginned, it was flabby and loose, and in a great pile"—and that after leaving the compression rollers the cotton expanded enough to require compression to press it again.

J. J. Payne, a witness for the defendants, testified:

"Q. When it came out from under that little crevice between the rollers, do you remember how thick the bat was there? A. I don't know. It was not half an inch thick, I would not suppose—hardly. Q. Afterwards, when it was accumulated in the press box, did it remain like it was when it passed through the rollers? A. No, sir. Q. What did it do then? A. It expanded, and that was the trouble. They could not hold it."

We think it is demonstrated by the evidence in this case that the theory upon which the Rembert patent is based is not sound. The evidence shows that, when cotton is passed between the rollers as proposed by Rembert, the elasticity or tendency in cotton ordinarily dry to expand is not suspended long enough to fold it into a compressed bale as proposed, and to make in that way a compressed bale; using the term "compressed" in its commercial and technical sense. One of the great difficulties about Rembert's alleged discovery is the fact that it requires that the cotton shall be compressed to a point just short of, but not quite to, injury to the fiber. It requires such a nice adjustment of the machinery in order to reach this point of compression, and especially with reference to the dampness or dryness of the cotton, that in practical experiments, as this evidence shows, it proved almost, if not quite, impossible to make the process a success, for this very reason. This is illustrated by a brief extract from the testimony of Mr. Worley, the witness who has been before referred to:

"Q. Did you find that the cotton at Gatesville could be compressed to a degree of compression which would destroy its elasticity, but not injure the fiber? A. No, sir; I did not. Q. Whenever you got to the point where the elasticity was destroyed, the cotton was destroyed? A. Yes, sir."

The foregoing, of course, are not all the witnesses examined pro and con, even on this particular question; but those we have referred to, and the extracts from their testimony, we think, present fairly the character of the testimony submitted by the parties respectively as to this matter. At all events, we think it is fairly established, by the evidence as to the practical experiments with this process and with the machines adapted to its use, that the fiber was injured, or, if not, that expansion immediately after compression by the rollers resulted, so as to prevent the making of a satisfactory compressed bale.

With the particular feature which has been discussed eliminated from the Rembert patent, which, indeed, is the whole invention claimed, it is unnecessary to refer to the prior art further than we have in citing the patent by Clemens' administrator, Chetlain, and the Lahaussois British patent. The Clemens patent of 1850 was for a "method of packing and compressing substances into bales or packages in a series of successive layers or strata by means of rolling pressure or its equivalent." It combines with the laying and pressing rollers, or cylinders, "a bed which shall be gradually separated from the rollers or cylinders as the layers or strata accumulate," etc. The patent of Clemens' administrator of 1876 is to "provide a machine that will bale cotton by a continuous automatic action in direct connection with the process of ginning it." It provides for a "mechanism for forming the loose cotton as it comes from the gin into a sheet, for conveying the sheet into the baling bed, and depositing it, under pressure, in layers doubled back and forth, one upon another," etc. Lahaussois' British patent of 1877, to be used for hay, cotton, and other substances, provided for "pressing the material in successive layers, one after the other, and then combining the several layers into one bale." The pressure on the layers is by "two compression cylinders." Two patents to Samuel D. Keene, issued in 1884, No. 307,119 and No. 307,200, might also be cited in this connection as anticipating the Rembert patent, when the latter is confined within the narrow limits we have indicated; but we deem it unnecessary to discuss further this feature of the case.

If the Rembert patent could be sustained, we are satisfied that it is not being infringed by the defendants' method and apparatus. The defendants are using, somewhat modified, the apparatus for which John W. Graves obtained a patent December 5, 1893, the application for which was filed April 22, 1890, and renewed May 5, 1893, No. 473,144. In the specifications attached to his application, after referring to the former method of baling cotton, he states his invention in this way:

"My invention consists, first, in improved mechanism for baling cotton and other fibrous materials, which consists in feeding and simultaneously subjecting the same, in the form of a bat or sheet, to friction and pressure during the baling operation, by means of a belt, within the loop or bight of which the bale is formed by continuous accretion and rotation of the fiber, and by effecting its compression in detail, or layer upon layer, as it is fed to the bale, which is preferably effected, when baling cotton by delivering the sheet or bat into the press from the condenser of a gin in an unbroken condition; second, in mechanism for causing the bat or sheet of fiber, as it is fed into the press, to be subjected to constant friction and compression, which, never being released until the bale is finished, results in the greatest attainable density of the material, and in the layers throughout the bale constituting retaining bands for those wound interiorly thereof, which are held or bound by the layers outside; third, in mechanism which is adapted for applying the

covering or bands, when such are used, to the completed bale, without permitting the same to expand; fourth, in devices for permitting the loop or bight of the belt to automatically accommodate itself to the increasing size of the bale; fifth, in automatic tensioning devices, whereby the pull or pressure upon the belt is increased approximately in the ratio of increase of the diameter of the bale; sixth, in automatic devices for sustaining the increased size and weight of the bale in the same plane, while permitting it to move freely within the bight of the belt; and, seventh, in the special mechanisms employed for carrying out the objects or purposes of this invention, as hereinafter fully disclosed in the description, drawings, and claims."

John W. Graves, testifying in this case as to the apparatus used by the defendants, says:

"In my patent, No. 510,388, I use the endless belt, passing over a series of rollers and about a central spindle or core, and about which the bale is wound; the bale being formed by winding up convolutely a continuous sheet or bat of cotton subjected to pressure during the formation of the bale. In the apparatus now used by the American Cotton Company, a device similar in construction is used, consisting of an endless belt passing over a series of rollers and about a central core or spindle, about which the cotton is wound; the same pressure being retained until the bale is completed and tied out. The press used at present by the American Cotton Company is identically the same in principle and method as that employed by me in all my experiments. The same principle of passing the covering around the bale while under pressure and tied out is employed. The only difference of importance between the machines of my patent and that used at present by the American Cotton Company is in the manner of applying the pressure to the belt under which the bale is formed."

Magnus Swenson, manager of the operating department of the American Cotton Company, and a witness for the defendant, describes the defendant's apparatus and method as follows:

"The apparatus consists primarily of two horizontal rolls, with a core, which is held in movable check plates, and which it located between those two rolls. One of the rolls is mounted in stationary bearings, while the other roll is mounted in bearings that are allowed to slide or move away from the fixed roll. The movement of this movable roll is resisted by two hydraulic jacks located at the end of the press. The press is furnished with gearing that revolves the two baling rolls in the same direction. An endless belt, called the 'baling belt,' which is practically as wide as the baling rolls, passes over both of the baling rolls and underneath the core, and in the slack loop of the belt is located a roll which guides the belt and keeps it tight. The bat former is located directly over the press, and consists of a chamber, in the upper part of which is located a perforated drum, which revolves at a rapid rate. This drum condenses the cotton by allowing the air to pass out through the perforations in the drum, and the cotton falls down on two other perforated drums which are located in the lower part of the case or bat former. These two drums rotate slowly, and form the cotton into a loose bat or sheet. This sheet passes down between two doffer rolls, located underneath the bat-forming drums; these rolls giving the bat sufficient pressure to make it smooth and coherent. This bat passes down a chute, and the action of the press carries the bat underneath the core, whereon it is wound into a bale, owing to the pressure which is exerted by the resistance of the movable roll and belt. The cotton bat goes into the press continuously until the bale is of sufficient size, when it is covered with burlap and ejected from the press; the core being removed after the bale has been taken out."

As will be perceived from the foregoing, there is nothing whatever in the machine or method used by the defendants which infringes in the least upon the precise process or method for which Henry Rembert obtained the patent in suit in this case. There is no attempt in

any part of the operation of the defendant's machine or process by which the suspension of elasticity in cotton is utilized in any way in forming the bale, or the bat of which the bale is made. In another part of the testimony of Mr. Swenson, the following questions and answers will show that this is true.

"Q. You state that with the apparatus originally used by the Cotton Ginners' Compress Company, as well as with the apparatus now used by the American Cotton Company and its licensees, the cotton sheet or bat is caused to pass between a pair of doffer rollers, which slightly compress it. Can you form an opinion as to the relative density of the sheet or bat after it leaves the batting or doffer rollers, as compared with the available density of the sheet or bat after it is wound in position on the finished bale? A. The bat is compressed when it goes through the doffer rolls to about an inch in thickness. This immediately swells out until it is about four inches in thickness, and this bat is condensed in the press to about a fourth of one inch in thickness. From which it is readily seen that the pressing of the cotton is practically all accomplished in the press, as the pressure which it receives between the doffer rolls has practically nothing whatever to do with the density of the bale. Q. I understand from this that with the apparatus of the American Cotton Company a very much greater density is secured in the baling press than is secured by the operation of the batting or doffer rollers. Is this correct? A. That is correct, as the pressure which the bat receives between the doffer rolls is only for the purpose of making it adhere and for smoothening it, and has nothing to do with the density which it gets in the press."

The compression of the bale by the defendants' method and apparatus is obtained by winding up a bat in cylindrical form. Each convolution adds pressure to that already wound, and ultimately makes the required density in the bale. Each layer, as the bale is continuously wound, keeps the layer underneath in its compressed condition. In Graves' specifications practically what is done by the defendants is described in this way:

"To effect the compression or baling of the fiber, by winding the bat smoothly or without tangling or twisting its fibers, around a removable core or shell, so that the pressure upon the fiber will constitute the main retaining element or holding means for the completed bale, and so that any light wrapping or covering which will arrest the expansion of the outer layer of the bat, will also prevent all expansion of the rest of said bale; also, the fiber will be left in such condition that, when said covering has been removed, the rotation of said bale can be reversed, and the bat unwound in a continuous or unbroken sheet, but in a more compressed condition than when it was originally delivered from the condenser."

For the purpose of determining whether the defendants' apparatus and method infringes the Rembert process, we think Rembert patent should be confined within the limits heretofore stated. It will not be extended beyond the language of the patent, and its history in the Patent Office. Giving it a very liberal construction, it must still be viewed in the light of the language of the patent, and the file wrapper evidence. In Shepard v. Carrigan, 116 U. S. 593, 6 Sup. Ct. 493, 29 L. Ed. 723, the rule on this subject is stated in this way:

"This fact, and the file wrapper and contents, of which we have stated the substance, make it clear that the claim and specification of the Macdonald patent must be construed to include, as their language requires, a fluted or plaited band or border as one of the essential elements of the invention. Without this element the patent would not have been issued. The Patent Office decided that without it the invention had been anticipated. Where an applicant for a patent to cover a new combination is compelled

by the rejection of his application by the Patent Office to narrow his claim by the introduction of a new element, he cannot, after the issue of the patent, broaden his claim by dropping the element which he was compelled to include in order to secure his patent. Leggett v. Avery, 101 U. S. 256, 25 L. Ed. 865; Goodyear Dental Vulcanite Co. v. Davis, 102 U. S. 222, 228, 26 L. Ed. 149; Fay v. Cordesman, 109 U. S. 408, 3 Sup. Ct. 236, 27 L. Ed. 979; Mahn v. Harwood, 112 U. S. 354, 359, 5 Sup. Ct. 174, 6 Sup. Ct. 451, 28 L. Ed. 665; Cartridge Co. v. Cartridge Co., 112 U. S. 624, 644, 5 Sup. Ct. 475, 28 L. Ed. 828; Sargent v. Hall Safe & Lock Co., 114 U. S. 63, 5 Sup. Ct. 1021, 29 L. Ed. 67."

In Sutter v. Robinson, 119 U. S. 530, 7 Sup. Ct. 376, 30 L. Ed. 492, it is said on this question:

"A comparison of the patent as granted with the application very conclusively establishes the limits within which the patentee's claims must be confined. He is not at liberty now to insist upon a construction of his patent which will include what he was expressly required to abandon and disavow as a condition of the grant. Shepard v. Carrigan, 116 U. S. 593, 6 Sup. Ct. 493, 29 L. Ed. 723, and cases there cited."

In Corbin Cabinet Lock Co. v. Eagle Lock Co., 150 U. S. 38, 14 Sup. Ct. 28, 37 L. Ed. 989, there is this statement:

"Having originally sought broader claims, which were rejected, and having acquiesced in such rejection, and having withdrawn such claims and substituted therefor this narrower claim, describing a particular or specific lock, as such, neither the patentee nor his assignees can be allowed, under the authorities, to insist upon such construction of the allowed claim as would cover what had been previously rejected."

There is nothing whatever in the defendants' apparatus or method which infringes in any way, as we see it, upon the Rembert process or method of utilizing the alleged temporary suspension of elasticity in cotton for the purpose of forming a compressed bale. The defendants do not pretend by their machine to suspend the elasticity in the cotton as or after it passes through the rollers and before baling; but the elasticity or expansion is afterwards reduced and confined by the process of forming into a cylindrical bale, as has been described. In this view of the case, it is unnecessary for us to notice the contention between the parties as to the priority of conception or of use by Graves and Rembert of their respective inventions. We think the method and machine used by the defendants so easily distinguished from the Rembert process, and any machinery by which it might be utilized, as to render the consideration of their claims as to priority in time of discovery and use unnecessary.

Our conclusions are:

First. That the Rembert patent, No. 441,022, confined, as it must be, within the limits we have suggested, lacks utility.

Second. That, if it could be given a broader scope than that of utilizing the alleged suspended elasticity in cotton for the purpose of forming a compressed bale, it was anticipated in the prior art.

Third. Confining complainant's alleged invention within the limits we have herein suggested, it is not in any way infringed by the defendants' apparatus and method of baling and compressing.

We think, for these reasons, that the decree of the Circuit Court dismissing complainant's bill was right, and it is affirmed.

BARBER v. NATIONAL CARBON CO. et al.

(Circuit Court of Appeals, Sixth Circuit. May 4, 1904.)

No. 1,143.

1. PATENTS—SUIT FOR INFRINGEMENT—CONSTRUCTION OF PLEA.

A plea to a bill for infringement of a patent alleged that complainant was employed by defendant, a corporation engaged in the manufacture of carbons, as a mechanical engineer, and agreed to give his time, skill, and attention and inventive ability to the service of defendant in and about the cheapening and improving of the process of electroplating, and other processes in the manufacture of carbons; that while so employed, and at defendant's expense, he made the inventions covered by the patent, which consist of a process and machine for electroplating; that such inventions and improvements "belong" to defendant; that "said defendant is entitled to the perpetual use of the same, and that, by reason of the facts hereinbefore stated, * * * complainant is not entitled to any relief prayed for in said bill of complaint, but that said defendant * * * is entitled and has the right to the perpetual use in its business for its purposes" of said inventions. *Held*, that such plea should be construed as a plea of license only, which was all that was required to constitute a defense to the bill.

2. SAME—INFRINGEMENT—IMPLIED LICENSE.

Defendant company, which was a manufacturer of carbons, employed complainant as a mechanical engineer on salary; a part of his duty being to devote his time and skill to the improvement and cheapening of the processes of such manufacture, an essential one of which was electroplating. While so employed, complainant invented a valuable process for electroplating, and a machine for carrying out the same, both of which he patented. Under his directions, special buildings were made at defendant's works to accommodate seven of such machines, six of which were built and installed also under his direction, and a seventh was installed after his employment ended. *Held*, that while defendant did not become the owner of the patent, in the absence of an express agreement to that effect, it had an implied license to use the seven machines, and any replacement of them, together with the patented process, in the manufacture of carbons, so long as it continued in the business.

Appeal from the District Court of the United States for the Northern District of Ohio.

This is a bill alleging infringement of letters patent No. 523,099, issued to the complainant, Clarence M. Barber, July 17, 1894. The patent is both for a process and an apparatus for electroplating.

The defendants filed a plea in the following words and figures:

"In the Circuit Court of the United States, Northern District of Ohio, Eastern Division.

"Clarence M. Barber, Complainant, v. The National Carbon Company, et al., Defendants. In Equity.

"The defendants, the National Carbon Company, Washington H. Lawrence, Benjamin F. Miles, Webb C. Hayes, Harvey E. Hackenberg, John H. Osborn, Myron T. Herrick, and James Parmelee, by protestation, and not acknowledging or confessing all or any part of the matters and things in said bill of complaint mentioned to be true in such manner and form as therein set forth, for their joint and several plea thereto say: Said National Carbon Company is a corporation duly organized and existing, and engaged in the business of manufacturing carbons, and that the other defendants herein are officers and directors of said National Carbon Company, excepting said John H. Osborn.

¶ 2. See Patents, vol. 38, Cent. Dig. §§ 125, 302.

That, in the manufacture of carbons, one of the important processes consists in electroplating, and that an economical apparatus and process for electroplating is very useful and essential to the proper and successful conduct of said business of manufacturing carbons. That in the fall of 1889 the said National Carbon Company, being engaged in such manufacture, and being desirous of cheapening and improving the process of manufacturing, employed the complainant herein, Clarence M. Barber—he claiming at that time to be, and the defendant company employing him by reason of such claim upon his part, a skilled mechanical engineer—and it paid to him a salary for his services of forty dollars per week. These defendants say that said Barber was so employed for the express purpose of giving to the company the benefit and advantages of his mechanical and inventive skill in cheapening and improving, among other processes used by said company, that of electroplating, and to assist the officers and employés in making such inventions. Defendants say that said complainant accepted said employment for the purpose above stated, and agreed to give his time, skill, and attention and inventive ability to the service of said defendant company in and about the cheapening and improving of the process of electroplating and other processes in the manufacture of carbons. That on or about June 1, 1893, this defendant increased the wages of complainant to $3,000 per year, which it paid to him until he severed his connection with the company on or about April, 1894. These defendants further say that said complainant, while so employed, devoted a large part of his time to experiments in the line of devising and perfecting a process for cheapening and improving the system of electroplating; that, for that purpose, he was furnished with all needed assistance by the said carbon company, and with all such material as he desired to use for such purpose; that he was specially employed to devise and perfect processes in the manufacture of carbons, and particularly the process of electroplating, among others; that his skill, ability, and services in that direction were paid for by the defendant carbon company, and his inventive ability, time, and skill had been sold to and purchased by the defendant company, so far as the same pertained to the process of electroplating, and other processes for cheapening and perfecting the manufacture of carbons. These defendants say that said complainant devised the alleged patented invention while in the employment of the said defendant carbon company; that his employment was expressly in the line of such devising, inventing, and improving; that the defendant company furnished the material, tools, and everything necessary to enable him to make such invention; that the same was in the line of his employment, and that the improvements and inventions claimed by the complainant to have been patented, as in the bill set forth, belong to the National Carbon Company; that said defendant is entitled to the perpetual use of the same, and that, by reason of the facts hereinbefore stated, and by reason of the employment of said complainant by the defendant carbon company, and the character of said employment, complainant is not entitled to any relief prayed for in said bill of complaint, but that said defendant carbon company is entitled and has the right to the perpetual use, in its business, for its purposes, of the improvements and claimed inventions of the complainant in his bill set forth. All of which matters and things the defendants aver to be true, and plead the same to said bill, and ask the judgment of the court whether they shall be required to make further answer.

The National Carbon Company,
"By W. H. Lawrence, President."

To this the complainant filed a replication. Evidence was taken, and the case heard upon the issue thus presented by the plea, whereupon the court below dismissed the bill, finding that the defendants had not infringed, other than by the use of the process in seven electrotype machines made according to the claims of the patent, and that, under the evidence, the defendants were entitled to a general license to use the process and machine in connection with their business as manufacturers of carbons.

R. S. Taylor, for appellant.

Squire, Sanders & Dempsey, and Frederick P. Fish, for appellees.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

LURTON, Circuit Judge, after making the foregoing statement, delivered the opinion of the court.

The discussion has largely turned upon the proper interpretation of the plea. The appellant insists that it is a good plea of title to the "inventions" made by Barber, and that an agreement to give one's time, skill, and inventive ability is, in legal effect, an agreement that the fruit of his inventions shall become the property of his employer. By this method of reasoning it is sought to secure a holding that the plea is a good plea of title, notwithstanding the absence of any averment that there was an "agreement" that the company should have title to his inventions, or to any patent that he might obtain for them. In short, a distinction is made between an employment under which one agrees "to use his best efforts and devote his knowledge and skill in devising and making improvements" in an article made by his employer, and an agreement by which the employé "agrees to give his time, skill, and attention and inventive ability" to the service of his employer in and about cheapening and improving the process used in his business. In the case first put, which is precisely the case stated in Hapgood's bill, as reported in Hapgood v. Hewitt, 119 U. S. 226, 229, 7 Sup. Ct. 193, 197, 30 L. Ed. 369, the bill was held bad, the court saying:

"There is nothing set forth in the bill as to any agreement between the corporation and Hewitt that the former was to have the title to his inventions, or to any patent that he might obtain for them. The utmost that can be made out of the allegations is that the corporation was to have a license or right to use the inventions in making plows. It is not averred that anything passed between the parties as to a patent. We are not referred to any case which sustains the view that, on such facts as are alleged in the bill, the title to the invention or patent for it passed."

There is some room for the distinction insisted upon in the decision of District Judge Graham in Hapgood v. Hewitt (C. C.) 11 Fed. 422, and the statement by the Supreme Court in the same case (119 U. S. 233, 7 Sup. Ct. 193, 30 L. Ed. 369) that they concurred in the views of the Circuit Court, although that general statement is followed later by the paragraph set out above.

Whiting v. Graves, 3 Ban. & A. 222, Fed. Cas. No. 17,577, and Wilkens v. Spafford, 3 Ban. & A. 274, Fed. Cas. No. 17,659, both hold that only a license, exclusive or otherwise, according to the terms of agreement, would result from a contract for the inventive ability of a workman. We do not find it important to decide the question thus mooted. If it be concluded that it is not essential that there shall be an express agreement that the employer is to have the title to the inventions of the workman, or to any patent he may obtain for them, if the contract provided that the employer should have the benefit of the employé's inventive faculties, it does not necessarily follow that this plea is to be construed as other than a plea of license. We are not required to assume, as a necessary conclusion from the fact that Barber is averred to have agreed to give the company his "time, services, and inventive ability," that the pleader intends to assert title. The plea is to be construed by looking to all of its averments, and from the whole document determine whether the defense, from the facts stated and the conclusions drawn, is that of license or

title. To stand narrowly upon an inference that the title is claimed from the contract to give the company the benefit of his inventive abilities will be to ignore other facts, and, more than all, to ignore the conclusion which the pleader himself drew from the facts he had stated.

The business of the carbon company was not the making or selling of machinery or mechanism for any purpose. They were engaged in making carbons. The plea states this, and that a part of the process consisted in electroplating such carbons. The plea then avers that Barber agreed to give his "skill, attention, and inventive ability to the service of said defendant company *in and about the cheapening and improving of* the process of electroplating, and other processes in the manufacture of carbons." At most, the employment was for this purpose. Why shall we deduce the conclusion that anything more than a license to use such inventions as he should make in the business of the company would result from an agreement of that kind? But the conclusion which the plea draws from the agreement stated is in accordance with the tendency of the law to preserve to a workman as large a benefit from the results of his intellectual faculties as is consistent with the contract between him and his employer. The plea concludes by claiming that "the defendant is entitled and has the right to the perpetual *use, in its business, and for its purposes,* of the improvements and claimed inventions of the complainant in his bill set forth," etc. The italics are ours.

A right to a use in its business and for its purposes is a license, and is a very different estate from a title to the inventions of the complainant. We think, therefore, the proper construction of the plea is that the pleader is to be understood as setting out a state of facts from which he deduced the claim of a license in behalf of the defendant, and that it was not intended to set up a claim of title to the invention. The establishment of a license was all that was required to constitute a defense, and there was no necessity for pleading more than that. Any other construction would lead to the consequence that the plea would be double, as claiming both the title to the invention and a license to use it. We do not think the plea intends this, but only to lay the ground upon which at least a license would result, and then to put forward the claim of a license as a sufficient defense to the matter of the bill.

This brings us to the scope of the license implied from the circumstances as established by the evidence in support of the plea. The evidence does not show any contract by which Barber was to make inventions or devote his inventive faculties to the service of the carbon company, or any agreement that any inventions should belong to the employer, or any patent which he should obtain thereon. It does show that he was employed because he was a mechanical engineer, and that he was expected to devote his time and service to the cheapening of the processes used by the carbon company. But nothing was said upon the subject of inventions, or the use of his inventive faculties for their benefit, unless an agreement to devote his knowledge, skill and service to the cheapening and improving of the processes used in the factory involves the inventive faculty also.

The precise terms of his employment are somewhat indefinite, but the things which Barber set to do and that he continued to do justify the interpretation the court below put upon the contract of employment. In the course of his employment, Barber made the very valuable invention for which he obtained a patent. That his employers knew of his purpose to apply for a patent, we, from the evidence, think most likely. When he built and established his first machine, he placed thereon plates with an inscription thereon, "Patent Applied For." When this machine was started, the officers and directors were called in to inspect it. It is impossible to believe that these plates escaped their observation. The fact that the plates were thus conspicuously affixed is at least indicative of Barber's intention to protect his invention with a patent, and we can but believe that this fact was also known to his corporation.

The fact of knowledge of Barber's intention to patent his invention, however, is only significant in respect of the scope of the license implied from the fact that he made his invention while in the employment of the carbon company, and that, while so in their employment, six machines were constructed, wholly or partly, for the company, under his personal direction, and without any announcement of any purpose to claim a royalty for their use. The evidence shows that the machine for the use of the process of the patent was one of costly character, occupying very great space. To use them profitably, the factory must be specially constructed upon plans adapted to furnish the space needed. To properly install Barber's machines, special designs for buildings were therefore prepared under Barber's direction, and machines were either built or started according to his plans before he was discharged. In one of defendant's factories there was space especially designed for another of his machines, and after his discharge a seventh machine was built for the place thus prepared.

In Withington-Cooley Co. v. Kinney, 68 Fed. 500, 15 C. C. A. 531, 537, we had the question of the scope of duration of a license implied from service, and said:

"The duration and scope of a license must depend upon the nature of the invention, and the circumstances out of which an implied license must be presumed, and both must at last depend upon the intention of the parties."

In that case the employer was a manufacturer of power presses for sale, and the employment of Kinney had relation to the making of patterns and drawings for such patterns. Kinney made an improved press, and built patterns by which such improved presses were made in the shop for the purpose of supplying his employers' trade. We held, under the circumstances, that Kinney must be presumed to intend that his employer should use his improvement in such new machines as he should make while personally engaged in the business of supplying such machines to the trade. We therefore held that the license, to be presumed, "was not limited by the mere life of the patterns, but was intended as an authority to make and sell power presses embodying Kinney's improvement so long as Babcock should continue in business."

In Solomon v. United States, 137 U. S. 342, 346, 11 Sup. Ct. 88, 89, 34 L. Ed. 667, Clark, while in the employment of the government

and at the expense of the government, devised a self-canceling revenue stamp, which was adopted by the government upon his recommendation. It was held that a perpetual license to make and use that stamp was to be presumed. In that case the principle was said to be this:

"If one is employed to devise or perfect an instrument, or a means for accomplishing a prescribed result, he cannot, after successfully accomplishing the work for which he was employed, plead title thereto as against his employer. That which he has been employed and paid to accomplish becomes, when accomplished, the property of his employer. Whatever rights as an individual he may have had in and to his inventive powers, and that which they are able to accomplish, he has sold in advance to his employer. So, also, when one is in the employ of another in a certain line of work, and devises an improved method or instrument for doing that work, and uses the property of his employer and the services of other employés to develop and put in practicable form his invention, and explicitly assents to the use by his employer of such invention, a jury or a court trying the facts is warranted in finding that he has so far recognized the obligations of service flowing from employment, and the benefits resulting from his use of the property, and the assistance of the co-employés, of his employer, as to have given to such employer an irrevocable license to use such invention."

In Lane & Bodley v. Locke, 150 U. S. 193, 14 Sup. Ct. 78, 37 L. Ed. 1049, a license to continue to make and use a stop valve in their business was presumed. In Gill v. United States, 160 U. S. 426, 16 Sup. Ct. 322, 40 L. Ed. 480, the cases are all reviewed, the principle upon which they rest held to be an application of the law of estoppel in pais.

In view of the fact that buildings specially designed for the use of Barber's process and apparatus were constructed under his direction, we think the presumption is that he intended to grant to the carbon company the right to use his process in connection with the machines, for which space in the several factories had been specially arranged with his knowledge and under his direction. The right of use presumed is the right to use such number of machines as had been prepared for, and that the right is not limited to the life of the particular machine, but will include replacements so long as the carbon company continues in the manufacture of carbons. The scope of the license therefore includes the seventh machine, constructed after Barber was discharged, to occupy the place prepared for it under Barber's direction. By his conduct, Barber has estopped himself from asserting that the use of his invention to this extent is an infringement of his right as a patentee.

The defendants have therefore not exceeded the license implied from the facts, and the decree is, upon this ground, affirmed, so far as it dismissed the bill of the complainant.

The following is the opinion of the District Court (Wing, District Judge):

A bill has been filed in this case alleging infringement of letters patent No. 523,099, issued to the complainant, Clarence M. Barber, July 17, 1894, for a process and apparatus for electroplating. The defendants filed a plea. To this plea the complainant filed replication. Testimony has been taken by both the complainant and the defendants, and after arguments the cause has been submitted.

The plea sets forth that the invention described and claimed in the patent issued to the complainant was discovered and perfected while the complainant was in the employ of the defendant corporation, the National Carbon Company, and that in the experiments, and the expenditure of the work, labor, material, and money, nothing of any of these contributing factors was used except what belonged to the said defendant the National Carbon Company.

The plea alleges, in terms, that the defendant was engaged in the business of manufacturing carbons; that in such manufacture one of the important processes consists in electroplating, and that an economical apparatus and process for electroplating is very useful and essential to the proper and successful conduct of said business of manufacturing carbons. The plea further alleges as follows: "That in the fall of 1889 the said National Carbon Company, being engaged in such manufacture, and being desirous of cheapening and improving the process of manufacturing, employed the complainant herein, Clarence M. Barber—he claiming at that time to be, and the defendant company employing him by reason of such claim upon his part, a skilled mechanical engineer—and it paid to him a salary for his services of forty dollars per week. These defendants say that said Barber was so employed for the express purpose of giving to the company the benefit and advantages of his mechanical and inventive skill in cheapening and improving, among other processes used by said company, that of electroplating, and to assist the officers and employés in making such inventions. Defendants say that said complainant accepted said employment for the purpose above stated, and agreed to give his time, skill, and attention and inventive ability to the service of said defendant company in and about the cheapening and improving of the process of electroplating, and other processes in the manufacture of carbons. * * * These defendants say that said complainant devised the alleged patented invention while in the employment of the said defendant carbon company; that his employment was expressly in the line of such devising, inventing, and improving; that the defendant company furnished the material, tools, and everything necessary to enable him to make such invention; that the same was in the line of his employment, and that the improvements and inventions claimed by the complainant to have been patented as in the bill set forth belong to the National Carbon Company; that said defendant is entitled to the perpetual use of the same; and that by reason of the facts hereinbefore stated, and by reason of the employment of said complainant by the defendant carbon company, and the character of said employment, complainant is not entitled to any relief prayed for in said bill of complaint, but that said defendant carbon company is entitled and has the right to the perpetual use, in its business, for its purposes, of the improvement and claimed inventions of the complainant in his bill set forth."

The complainant urges that, because it is a fundamental rule in equity pleading that a plea shall present a single point for adjudication, and because this plea sets up more than one defense, it is "bad in law." It is further urged that the proof does not support the charge in the plea that the complainant agreed to give his inventive ability to the service of the defendant company, nor the claim that the invention patented to the complainant belongs to the National Carbon Company, and, further, that the court can consider but this one defense set up in the plea, to wit, the defense of ownership of the patent by the defendant corporation, and that in consequence the decree should be for the complainant. This is, in effect, an objection to the plea for duplicity. The authorities are numerous, and settle the doctrine in equity, that the form of a plea may not be objected to by the complainant after replication filed and proof taken. In the case of William Oliver and Micajah T. Williams et al. v. Robert Platt, 3 How. 333, 411, 11 L. Ed. 622, the Supreme Court of the United States say: "The objection of multifariousness cannot, as a matter of right, be taken by the parties, except by demurrer or plea or answer; and, if not so taken, it is deemed to be waived. It cannot be insisted upon by the parties even at the hearing in the court below, although it may at any time be taken by the court sua sponte, wherever it is deemed by the court to be necessary or proper to assist it in the due administration of justice. And at so late a period as the hearing, so reluctant is the court to countenance the objection that, if it can get on in the cause to a final decree without serious embarrass-

ment, it will do so, disregarding the fault or error, when it has been acquiesced in by the parties up to that time." To the same effect are the following: Stead's Ex'rs v. Course, 4 Cranch, 403, 412, 2 L. Ed. 660; Hughes v. Blake, 6 Wheat. 453, 472, 5 L. Ed. 303; State of Rhode Island and Providence Plantations v. State of Massachusetts, 14 Pet. 210, 257, 10 L. Ed. 423; John G. Nelson et al. v. John J. Hill et al., 5 How. 127, 131, 12 L. Ed. 81; Farley v. Kittson, 120 U. S. 303, 314, 7 Sup. Ct. 534, 30 L. Ed. 684; Sharon v. Hill (C. C.) 22 Fed. 28, 29; Converse v. Michigan Dairy Co. et al. (C. C.) 45 Fed. 18; Ranger v. Champion Cotton Press Co. et al. (C. C.) 52 Fed. 611.

The proof does not show that the complainant agreed to convey any invention that he might discover during his employment by the defendant corporation, or any patent issued therefor, to such corporation. I think it clear, however, from the proof, that Barber was employed by the defendant corporation, because he was a mechanical engineer, to assist in making improvements in the methods in use by the company in the preparation of its products, although such improvements might amount to invention. The convincing fact in this connection is that Barber himself so interpreted his duties under his contract of employment. He admittedly spent his time, which belonged to the company, in making experiments which led to the invention for which he obtained a patent, and perfected such invention by material of the company, the labor of himself and others paid by the company, and the use of considerable money of the company. To find that he was doing this on his own account would be to attribute to him dishonest motives. The only understanding upon his part of his duties under his contract of employment that would justify the course which he himself states that he pursued would be that he was employed to do the things which he did do.

The bill charges general infringements. There is no proof of infringement by any of the defendants except the use by the defendant corporation, the National Carbon Company, of six machines which the complainant caused to be constructed while in the employ of the company, and with its means and material, and a seventh machine constructed after his discharge, but in a building specially adapted by the complainant for the location of such a machine. The patent is for a process. The facts shown by the proof, under the allegations of the plea, make it clear to me that the defendant the National Carbon Company is entitled to a general license under the patent, so far as the invention as described therein may be used in connection with the manufacture of carbons.

The bill should be dismissed.

THOMSON-HOUSTON ELECTRIC CO. v. OHIO BRASS CO. et al.

(Circuit Court, D. Massachusetts. April 27, 1904.)

No. 1,237.

1. PATENTS—INVENTION—COMBINATION OR AGGREGATION OF OLD ELEMENTS.
The combination of two known devices in a single device, which results in a new utility by uniting the functions of the two in a single article, may involve invention.

2. SAME—INFRINGEMENT—INSULATING TURN-BUCKLE.
The Van Depoele patent, No. 394,039, claim 18, for a turn-buckle the body portion of which is composed of insulating material, for use on the span wire in overhead trolley systems, is for a combination which unites the functions of a turn-buckle and an insulator, previously used separately, and discloses invention. Also *held* infringed.

In Equity.

Thomas J. Johnston, for complainant.
Edmund Wetmore and Macleod, Calver & Randall, for defendants.

HALE, District Judge. This suit is brought for infringement of claim 18 of letters patent No. 394,039, dated December 4, 1888, to Charles J. Van Depoele. The claim alleged to have been infringed is as follows: "A turn-buckle, the body portion of which is composed of insulating material, substantially as described." The defenses are that there is no invention, and that there has been no infringement. The claim covers an insulated turn-buckle, such as is alleged to be used on an electric railway under the suspended conductor system. The purpose of the device is to unite in a single structure means for tightening the span wire and means for furnishing insulation between the trolley wire and the ground. It is well known that the grounded rails on an electric road usually form the return circuit of an overhead trolley railway. Necessarily the trolley wire must be carefully insulated from the ground, or from any structure electrically connected with the ground. It is alleged that the practice is to insulate the trolley wire itself from the span wire, and then to place an insulating turn-buckle in the span wire also, so that, if any accident should destroy the insulation at the first point, there would still remain effective insulation between the electric current and the ground. Previous to this device it is alleged that a metallic turn-buckle had always been used, with separate insulating devices wherever such insulation was required. The problem in the mind of the inventor was to unite the two functions of tightening the span wire and at the same time affording an electrical barrier to prevent the passage of the electric current.

The defendants urge the defense of invalidity. They insist that turn-buckles were old, and insulating material was old, and that it was not invention to put them together. It does not appear that these two elements have ever been put together until this union was effected by Van Depoele. The devices referred to in the prior art are ordinary metallic turn-buckles and swivels. Some of the swivels to which reference is made contain insulating material, and are al-

¶ 1. See Patents, vol. 38, Cent. Dig. § 29.

leged to have been used for purposes of insulation as well as for the usual purposes of swivels. Where swivels are so constructed, they require only the addition of a screw to make them insulating turn-buckles. The Clark patent, No. 227,095, comes the nearest to presenting a case of anticipation, but this patent, in any event, requires the function of tightening to be added to the swivel in order to make it a reference for an insulating turn-buckle. It is claimed, too, that the Clark patent does not even present an insulated swivel, and that provision is made for preventing the insulation, instead of effecting it. We think, however, the discussion on these lines is immaterial. The whole question of invalidity is presented clearly and distinctly by the learned counsel for the defendants in his claim that the turn-buckle of the patent in suit presents merely a union of two well-known devices, namely, the old metallic turn-buckle and insulating material, which also was old. It is urged with great force that the mere uniting of two instruments is not invention. The well-known theory of the patent law is cited as contained in the Supreme Court decision that it is not invention to substitute rubber for part of the lead in lead pencils, so that the lead pencil will form a combined pencil and eraser. Reckendorfer v. Faber, 92 U. S. 347, 23 L. Ed. 719. See, also, Rubber Tip Pencil Co. v. Howard, 20 Wall. 498, 22 L. Ed. 410. The Supreme Court has announced the doctrine with great clearness that the combination of old devices into a new article without producing any new mode of operation is not invention. Pickering v. McCullough, 104 U. S. 310, 26 L. Ed. 749; Floresheim v. Schilling, 137 U. S. 64, 11 Sup. Ct. 20, 34 L. Ed. 574. These cases present the uniting of two functions without adding any new utility. On this subject the well-known doorknob case is perhaps the leading one, and demands careful consideration. Hotchkiss v. Greenwood, 11 How. 248, 13 L. Ed. 683. The patent in that case was for a clay or porcelain doorknob. The court said:

"But in the case before us the knob is not new, nor the metallic shank and spindle, nor the dovetail form of the cavity in the knob, nor the means by which the metallic shank is securely fastened therein. All these were well known, and in common use; and the only thing new is the substitution of a knob of a different material from that heretofore used in connection with this arrangement. Now, it may very well be that by connecting the clay or porcelain knob with the metallic shank in this well-known mode an article is produced better and cheaper than in the case of the metallic or wood knob; but this does not result from any new mechanical device or contrivance, but from the fact that the material of which the knob is composed happens to be better adapted to the purpose for which it is made. The improvement consists in the superiority of the material, and which is not new, over that previously employed in making the knob. But this, of itself, can never be the subject of a patent. No one will pretend that a machine made in whole or in part of materials better adapted to the purpose for which it is used than the materials of which the old one is constructed, and for that reason better and cheaper, can be distinguished from the old one; or, in the sense of the patent law, can entitle the manufacturer to a patent. The difference is formal, and destitute of ingenuity or invention. It may afford evidence of judgment and skill in the selection and adaptation of the materials in the manufacture of the instrument for the purposes intended, but nothing more."

But on careful examination of the device claimed in the patent in suit, and of all that class of authorities to which we have called attention, we are satisfied that the insulated turn-buckle does not come

within the reasoning of these cases. In the lead pencil case no new utility was presented by the patent. The device still remained a lead pencil at one end and an eraser at the other end. The combination of the old devices did not produce any new and single mode of operation. The two old functions were left of erasing at one end and of writing at the other. So, also, in the doorknob case, the patent did not produce any new mode of operation. It did not unite any two functions. The doorknob was still a doorknob, and only a doorknob. It presented a plain, simple substitution of materials and an improvement of a commercial product by such substitution. But, while the commercial product was improved, it was not made functionally different. The courts have, however, distinctly held that where to a prior structure a part is added which gives a new utility, there is invention. In the Faber Case, which we have cited, Mr. Justice Hunt clearly draws the distinction between a case where no new utility is found and a case in which a new combination does result in a new utility. He says, in speaking of the result in the matter of the rubber-ended lead pencil:

"A pencil is laid down and a rubber is taken up, one to write, the other to erase. A pencil is turned over to erase with, or an eraser is turned over to write with. The principle is the same in both cases."

He further, in his opinion, shows other instances of the same character. He says:

"It is the case of a garden rake, on the handle end of which should be placed a hoe, or on the other side of the same end of which should be placed a hoe. In all these cases there might be the advantage of carrying about one instrument instead of two, or of avoiding the liability to loss or misplacing of separate tools. The instrument placed upon the same rod might be more convenient for use than when used separately. Each, however, continues to perform its own duty, and nothing else. No effect is produced, no result follows from the joint use of the two. A handle in common—a joint handle—does not create a new or combined operation. The handle for the pencil does not create or aid the handle for the eraser. The handle for the eraser does not create or aid the handle for the pencil. * * * Perfection of workmanship, however much it may increase the convenience, extend the use, or diminish expense, is not patentable. * * * The combination, to be patentable, must produce a different force or effect, or result in the combined forces or processes from that given by their separate parts. There must be a new result produced by their union. If not so, it is only an aggregation of separate elements. An instance and an illustration are found in the discovery that by the use of sulphur mixed with india rubber the rubber could be vulcanized, and that without this agent the rubber could not be vulcanized. The combination of the two produced a result or an article entirely different from that before in use. * * * A stem-winding watch key is another instance. The office of the stem is to hold the watch or hang the chain to the watch. The office of the key is to wind it. When the stem is made the key, the joint duty of holding the chain and winding the watch is performed by the same instrument. A double effect is produced, or a double duty performed, by the combined result. In these and numerous like cases the parts co-operate in producing the final effect; sometimes simultaneously, sometimes successively. The result comes from the combined effect of the several parts, not simply from the separate action of each, and is therefore patentable."

In the case at bar the insulated turn-buckle presents a case in which there is combined in one device the utility of tightening the wire and of insulating it at the same time and in the same instrument. We think this involves invention. The device is a very simple one, but its

simplicity should not be urged against its patentability. As in the case of the watch key, a double effect is produced, and a double duty performed by the combined result. To the ordinary duties of the turn-buckle is added the new function of insulation. After the combination is made it seems entirely easy and simple, so easy and simple that expert witnesses readily say that nothing was involved in it but the mere "expected skill of the mechanic." But we must remember that we are examining a combination after it is made, and we must not be misled by what Judge Putnam calls "the ease with which interested ingenuity dresses up matters occurring after the fact." American Pulp Company v. Howland Company (C. C.) 70 Fed. 986. However obvious the combination before us may be said to have been, it was never made before, so far as the testimony shows. In Webster Loom Company v. Higgins, 105 U. S. 580, 26 L. Ed. 1177, Mr. Justice Bradley says:

"It may be laid down as a general rule, though perhaps not an invariable one, that, if a new combination and arrangement of known elements produce a new and beneficial result never attained before, it is evidence of invention. * * * It may have been under their very eyes. They may almost be said to have stumbled over it, but they certainly failed to see it, to estimate its value, and to bring it into notice. * * * Now that it has succeeded, it may seem very plain to any one that he could have done it as well. This is often the case with inventions of the greatest merit."

In Regent Company v. Penn Company, 121 Fed. 83, 57 C. C. A. 334, Judge Baker says:

"The device seems exceedingly simple, but its simplicity in such an old field should be a warning against a too ready acceptance of the ex post facto wisdom of the bystander."

On examination of the device in suit, we think it presents more than an aggregation. Although it is a simple device, under the great mass of patent decisions relating to simple devices we think this may properly be held not to have been the result of the mere use of the skill of a mechanic, nor the mere use of the reasoning faculty, but to present some patentable invention.

It remains for the court to inquire whether or not the patent has been infringed. The device of the patent is a turn-buckle, the body of which has in it an insulating material. The thought of the inventor is, as we have said, to combine the process of tightening and insulating in one instrument. To do this he makes an ordinary turn-buckle with a body of an insulating material. The body of a turn-buckle is the middle of it, the part between the ends, the portion that rotates. This is the natural construction to give to the term "body portion" as used in the patent. As you take a turn-buckle in your hand and look at it, it naturally divides itself into two parts. The portion which constitutes the body is one part, and the ends are the other part; in other words, the body is everything except the ends. This interpretation of the word "body" is borne out by the use of the term in former patents. It is not necessary that the whole of the body should be of insulating material. The inventive idea was that there should be enough insulation in the turn-buckle to make the device perform the function of an insulator. The device which the defendants use is composed partly of metal and partly of insulating material. The complainant's device

has the same composition. Without describing in detail the two devices, it is enough to say that when put to use the operation of the device used by the defendants is that an insulating material is placed under compression, while in the complainant's device it is placed under tension. The result is that the device used by the defendants appears to be stronger and better adapted to resist strain than the device of the complainant. But we cannot find that it is functionally different. It effects the same result by substantially the same method. The fact that the construction used by the defendants improves the construction of the complainant does not tend to prove that it does not infringe; in fact, it must infringe before it can improve. In the recent case of Electric Smelting Company v. Reduction Company (C. C. A.) 125 Fed. 926, Judge Coxe says:

"If the inventor produces a new and useful result, he does not lose his reward because he or some one else subsequently renders it more useful."

In the case at bar we find the defendants using a device which both infringes and improves the complainant's device. It is not necessary to decide whether the defendants themselves have effected the improvement, or whether they are using an improvement that some one else has invented. It seems clear to the court that there has been an infringement by the defendants of the patent in suit. We conclude that the patent is valid, and that it has been infringed.

A decree is to be entered for complainant for an injunction and for an accounting.

KEMP v. McBRIDE.

(Circuit Court, D. Massachusetts. April 18, 1904.)

No. 1,708.

1. PATENTS—ANTICIPATION—FEED MECHANISM FOR CARDING MACHINES.
The Kemp patent, No. 718,130, for feed mechanism for carding machines, *held* valid as against the claim of an infringer that he was himself the original inventor of the mechanism covered thereby.

In Equity. Suit for infringement of letters patent No. 718,130, for feed mechanism for carding machines, granted January 13, 1893, to Harry Kemp. On final hearing.

Roberts & Mitchell and Robert Cushman, for complainant.
Patrick L. McBride and Albert M. Moore, for defendant.

HALE, District Judge. This suit in equity is brought to restrain the alleged infringement of a patent for feed mechanism for carding machines, No. 718,130, issued to the complainant January 13, 1903. The answer of the defendant sets up that the machine described in the patent in suit was invented by the defendant, and by him introduced into public use, before it was invented by the complainant. The defendant further in his answer alleges that the invention and substantial parts of the same were introduced into public use, and were advertised and sold by the defendant as his own. The novelty and utility of the invention are therefore admitted. The

infringement of the patent is also admitted, unless the court shall find that the original invention was the defendant's, instead of being that of the complainant. The defendant shows in his evidence that he has been placing the device upon the market, as well as advertising and selling it, and that he has himself applied for a patent for this identical invention. The only question, then, before the court, is whether the complainant or the defendant is the true inventor. The record shows that the defendant has submitted testimony, and has, by counsel, appeared in a contest of the case, up to the time of the final hearing. At that hearing, however, he did not submit a brief, nor appear in court to argue his case.

The subject-matter of the invention relates to a feeding device, for a carding engine. The patent in suit is for an improvement upon the Apperly feeder. In the carding of wool, it is usual to arrange three carding engines tandem. The first carding engine is called the "first breaker"; the second is called the "second breaker"; the third is called the "finisher." Between the first and second breakers, and between the second breaker and the finisher, some sort of a feeding device is required to take the sliver of wool delivered from the next preceding carding engine and feed it into the next succeeding carding engine. This sliver of wool so delivered from engine to engine consists of a coarse, untwisted strand or roping of partly carded fibers. To this feeding mechanism the Kemp patent in suit relates. The features of novelty in the feeding mechanism in controversy consist of the pivoted plate attached to the carrier or traveler, and in the parts carried by that plate. These parts comprise a pair of gears in train, mounted on yielding or movable bearings in the plate, and adapted to carry feed-rolls of various diameters. By these means the feed-rolls separate more or less, as may be required to accommodate the passage of the slivers of wool, which may not be of uniform thickness, and the feed-rolls themselves may be changed, if desired, rolls of larger diameter having a relatively greater surface speed than rolls of smaller diameter. This process enables the operator to feed the sliver of wool with greater or less speed, as the exigencies of the work require. The gears are so constructed that they will remain in mesh, and insure the positive driving of the feed-rolls at all points of separation of the gear axes. When a wide range of movement of the gear axes is desired, in order to afford a considerable separation of the feed-rolls, or to permit a variation in the size of the change feed-rolls, the gears are constructed with elongated teeth, so that they will still remain in mesh as their axes separate. As defined in the patent, the condition to be observed is simply that the gear teeth shall be of greater depth than the extreme range of separation of the gear axes.

The testimony induces the court to believe that the machine embodying these features was conceived by the complainant, the patentee, in the latter part of the year 1898. At that time he made a sketch showing the essential features of the invention. He also made a leather-board pattern of it, and began the construction of a model, partly of metal and partly of wood. He completed the model in the early part of the year 1899. Ample testimony tending

to show his invention, as above detailed, has been offered. It appears from testimony aside from that of the complainant that he fully explained his invention to several parties. The testimony of these witnesses is persuasive to the court. The record further shows that in September, 1901, the patentee began the construction of a full-sized working machine, embodying all the features of his invention. He completed this machine early in November, 1901, and placed it in operation in the Ætna Mills, at Watertown, Mass., on Monday of the second week in November, 1901. From that time forward the machine did practical work in the Ætna Mills for three or four months. This machine is in evidence, and has been verified by witnesses who saw it, who helped Mr. Kemp to construct it, and who operated it while it was running in the Ætna Mills.

In 1902 the complainant applied for a patent for this machine, and on January 13, 1903, the patent in suit was issued. The defendant testifies that in May, 1901, he conceived the idea of making the feed-rolls of a self-adjustable card-feeder. He does not show what the exact device was which he claims to have conceived at that time. He does not show affirmatively and conclusively that the device which he conceived was the invention in controversy. His bare assertion of his secret thought, unsupported by any corroborative evidence, is not satisfactory proof of the conception of the invention. The earliest date of this inventive thought, which the defendant has made out by sufficient legal evidence, is the latter part of November or the first of December, 1901, when he says he made a machine like the infringing exhibit which is brought before the court. This infringing machine is conceded to contain all the elements of the patented invention. The date of the making of this machine is established only by the verbal testimony of the defendant and one of his men, and is not corroborated by any drawings, models, or machines; but it appears from the testimony that the complainant's actual and practical use of his full-sized machine was three or four weeks earlier than the date testified by the defendant to have been the time when he made his first machine, and the testimony shows that the complainant conceived the idea of his invention three years before this time. It seems clear, then, upon examination of the testimony, that, on the face of the record, the weight of the evidence shows the complainant to be the first inventor.

The testimony before the court, however, is persuasive that, prior to any date on which defendant claims to have made an invention, the complainant fully described and explained his whole invention to the defendant. Kemp had made McBride his licensee under an earlier patent for another type of machine. In the course of negotiations relating to the license under this earlier patent, Kemp disclosed to McBride all his ideas relating to feed mechanisms, patented and unpatented, including the invention in controversy. He made sketches for McBride and explained in detail to him the feeder of the patent in suit. The testimony shows that he made these disclosures upon at least three different occasions between December, 1900, and June, 1901, and this was before defendant had produced any feed mechanism at all. The court must therefore come to the conclusion that the complainant

was the first inventor of the device in controversy, and that the defendant obtained his information concerning the device from the complainant, and afterwards proceeded to put such invention upon the public. In the Barbed Wire Case, 143 U. S. 275, 12 Sup. Ct. 443, 36 L. Ed. 154, Mr. Justice Brown comments upon certain unpatented devices claimed to be anticipatory of the patent in suit in that case, the existence of which was proved only by oral testimony. Although his language is not intended to apply to precisely such testimony as is offered by the defendant in the case at bar, it is clearly descriptive of this class of testimony. He says:

"Witnesses whose memories are prodded by the eagerness of interested parties to elicit testimony favorable to themselves are not usually to be depended upon for accurate information. The very fact, which courts as well as the public have not failed to recognize, that almost every important patent, from the cotton gin of Whitney to the one under consideration, has been attacked by the testimony of witnesses who imagined that they had made similar discoveries long before the patentee had claimed to have invented his device, has tended to throw a certain amount of discredit upon all that class of evidence, and to demand that it be subjected to the closest scrutiny. Indeed, the frequency with which testimony is tortured, or fabricated outright, to build up the defense of a prior use of the thing patented, goes far to justify the popular impression that the inventor may be treated as the lawful prey of the infringer."

In further commenting upon the fact that the patentee, who had obtained his patent, was in position to demand distinct proof of anticipation before his own patent could be overthrown, the court says:

"We are not satisfied, however, that he [the patentee] was not the originator of the combination claimed by him of the coiled barb, locked and held in place by the intertwisted wire. It is possible that we are mistaken in this, but some one of these experimenters may have, in a crude way, hit upon the exact device patented by Glidden, although we are not satisfied from this testimony whether or by whom it was done. It is quite evident, too, that all, or nearly all, of these experiments were subsequently abandoned. But it was Glidden, beyond question, who first published this device, put it upon record, made use of it for a practical purpose, and gave it to the public."

We think that the language of the Supreme Court, in the case we have cited, applies to, and is descriptive of, the testimony offered by the defendant in attacking the patent in the case at bar. The complainant has obtained his patent, and is entitled to protection under that patent. There is not sufficient testimony offered to defeat this patent. The court will not at this point in the case make a decree for exemplary damages under Rev. St. U. S. § 4919 [U. S. Comp. St. 1901, p. 3394], but will leave the case for an accounting, and for a final order on the question of damages after such accounting.

A decree is to be entered for complainant for an injunction and an accounting.

FELT & TARRANT MFG. CO. v. MECHANICAL ACCOUNTANT CO.

(Circuit Court, D. Rhode Island. April 4, 1904.)

No. 2,645.

1. PATENTS—INVENTION—USE OF DEVICES COMMON IN OTHER ARTS.
To prevent the excessive rotation of a wheel by a stop, either positive or frictional, and to remove the stop to permit the further operation of the wheel, are features so common in machine construction that they cannot be monopolized by any mechanic for the purposes of a particular art.

2. SAME—INFRINGEMENT—ADDING MACHINES.
A preliminary injunction against infringement of the Felt patent, No. 371,496, for an improvement in adding machines, denied, the patent never having been adjudicated, and it appearing from the showing made that there are serious doubts as to invention and as to the scope and validity of the claims.

In Equity. Suit for infringement of letters patent No. 371,496 for an adding machine, granted to D. E. Felt October 11, 1887. On motion for preliminary injunction.

Munday, Evarts & Adcock and Henry Love Clarke, for complainant.

Wilmarth H. Thurston and Warren R. Perce, for defendant.

BROWN, District Judge. The patent to Felt, No. 371,496, dated October 11, 1887, is for improvements in adding machines, and especially for improvements upon the machine of Felt's prior patent, No. 366,945, dated July 19, 1887. The patent in suit has not been adjudicated, and the evidence of public acquiescence in the claims in suit is not satisfactory, for the reason that the complainant's commercial machine is not constructed under a single patent, but contains also many features claimed in the prior patent. See Upton v. Wayland (C. C.) 36 Fed. 691; George Ertel Co. v. Stahl, 65 Fed. 519, 13 C. C. A. 31. The defendant's machine is constructed under letters patent to Turck, No. 679,348, dated July 30, 1901, and No. 720,086, dated February 10, 1903; and the defendant, upon this hearing, is entitled to the benefit of the presumption, from the grant of letters patent, of a substantial difference between the inventions. Kokomo Fence Machine Co. v. Kitselman, 189 U. S. 8, 23 Sup. Ct. 521, 47 L. Ed. 689. It is quite clear that the real questions in the case are much narrower than the reasons advanced by the complainant in support of the petition for a preliminary injunction. Not only must enlargement of the patent in suit by Felt's prior patent be avoided, but it must also be recognized that Felt's prior patent is in the prior art of this case, and tends to narrow the claims in suit. The case presents questions which are very close to the line between invention and the application of the ordinary skill of mechanics skilled in the art. Claims 1, 2, 3, 4, 5, 6, 7, and 22 relate to stop devices for preventing overrotation of numeral wheels. It is said by the complainant that all of the claims include a "positively acting carrying stop-mechanism" as an essential element. The function of the stop is to correct the mechanical error of excessive rotation of a nu-

meral wheel. A numeral wheel in a calculating machine is moved in two ways: by impulses from the key-mechanism, and by impulses from the carrying-mechanism. The carrying-mechanism is the means whereby a complete revolution of one numeral wheel causes the next higher wheel in the series to advance one step. The motion of the numeral wheel from either impulse is likely to be excessive. Overrotation causes inaccuracy in the operation of the machine. This mechanical difficulty of overrotation is common to counting machines in which all impulses are applied to the first wheel of the series, and to calculating machines in which an impulse may be applied by a keystroke to any wheel of a series. The prior art is full of stop devices to prevent overrotation. It is sufficient, however, at present, to refer to Felt's prior patent, which shows a positively acting detent for this purpose. The pressure of a key causes a detent to engage pins or teeth in the numeral wheel, and thus to stop the wheel; removal of pressure allows a spring to withdraw the detent. The detent of Felt's earlier patent stops rotation only when it is caused by the action of the key-mechanism. The key-mechanism serves not only to set the wheel in motion to perform a mathematical operation, but also to govern the stop which prevents the mechanical error of overrotation. It is, of course, obvious that a stop device with the limited function of arresting excessive motion of a wheel, or of any other moving part, must not block the operation of the machine. It must be released and taken out of the way to permit the machine to operate. This is one of the commonplaces of machine construction, and had been applied in many forms to adding machines. It was old to provide a stop to prevent overrotation under impulses from key-mechanism, and to have the key-mechanism control the stop. It was also old to provide a stop to prevent overrotation under impulses from carrying-mechanism, and to have the action of carrying-mechanism control the stop. The substance of one of Felt's improvements was to add to his older machine stops to prevent overrotation of the wheel when it was moved by carrying-mechanism. Felt, in his specification, referring to prior stop-motion devices, says:

"The stop-motion device, which remains in action until the wheel of the next lower order is near to the completion of its next revolution, is inapplicable, because it will prevent any movement of the numeral wheel by its own key."

It is apparent that there was no invention in the thought of using both a key-stop and carrying-stop upon a single wheel, or in having key-mechanism control a key-stop, and carrying-mechanism control a carrying-stop. The difficulty which Felt points out is, in substance, that the old carrying-stop, controlled only by carrying-mechanism, will block one of the intended operations of the calculating machine. This was a difficulty that did not arise in a counting machine where the impulses from the keys move directly only the first wheel. The key-board of a calculating machine contains nine keys for each numeral wheel. It is intended that the operator may, at pleasure, operate any one of the numeral wheels by striking a key. If a carrying-stop, controlled only by carrying-mechanism, is

used, this at times will be impossible. Felt introduced a carrying-stop which is controlled by the carrying-mechanism, as in the prior art; but added a new feature, which, so far as I am able to perceive, was not in the prior art. It was necessary to release his carrying-stop when the key-mechanism operated. He applied the familiar idea of using the key-mechanism to control a stop-motion detent. The novelty was that he made the key-mechanism control the carrying-stop at this time. His carrying-stop, therefore, apparently is differentiated from any carrying-stop of the prior art by the fact that it has the additional feature of a release by the key-mechanism.

The defendant argues that it was obvious to any one skilled in the art that when a stop detent is used in connection with a wheel that is adapted to be operated either by key-mechanism or by carrying-mechanism, then the withdrawal of the detent must be controlled by key-mechanism when the wheel is to be operated, by its key-mechanism, and must be controlled by the carrying-mechanism when the wheel is to be operated by the carrying-mechanism. The patentee, after stating in his specification that a carrying-stop which remains in action until near the completion of a revolution of a wheel of lower order will prevent any movement of the numeral wheel by its own key, says:

"Therefore the automatic stop-motion device must be independently released by its own key-mechanism, as well as by the carrying part." etc.

If it was obvious that the carrying-stop must be independently released by the key-mechanism, then there are most serious doubts both upon the question of invention and upon the question of infringement. If Felt and Turck each began to correct this error of overrotation with the obvious requirement that the carrying-stop must be released by the key-mechanism, then, according to my present impression, Turck's device must probably be regarded as substantially different from Felt's. It is by no means clear that the release of carrying-stop by key-mechanism was more than ordinary mechanical skill would have suggested. In the prior art the key-mechanism removed the stop which would otherwise block the movement of the wheel. An additional stop was added to the same wheel. Unless removed, this stop would block the wheel when the key-mechanism operated. The key-mechanism was made to remove that stop also. Was this so broad an improvement that Felt should be given a monopoly of the use of a positively acting detent to stop the overrotation of a numeral wheel under the action of carrying-mechanism?

In Colt's Patent Fire-Arms Mfg. Co. v. Wesson, 127 Fed. 333, in the opinion of the Circuit Court of Appeals for this circuit, it was said:

"The methods of locking and of holding in and out of operative position are innumerable; so that, unless extreme care is used in analyzing patents for inventions relating to that topic, the rule of equivalents, as applicable to alleged infringements, would block the path of invention to an extent which would be unreasonable."

This remark is applicable to this case. To think of preventing excessive rotation of a wheel, of doing this by a stop, whether positive

or frictional, and of removing the stop to permit the operation of parts, are features so common that they cannot be monopolized by any mechanic for the purposes of a particular art. There is ordinarily no more invention in the thought of making a stop positive, as distinguished from frictional, than there is in making it of steel, as distinguished from brass; and, in view of the positive stop of Felt's prior patent, the idea of a positive stop for the wheel, removed by the action of key-mechanism, was old.

Serious questions arise, not only upon the question of invention, but also as to the scope and validity of the claims. The patent is secondary in character. There is a large number of patents dealing directly with the problem of overrotation; and it must not be forgotten that the principal claims of the patent in suit relate not to the general principles of calculating machines, but to a device designed simply for the limited purpose of preventing the mechanical defect of overrotation of a wheel. While the special problem of releasing a carrying-stop detent to permit action of key-mechanism did not confront makers of counting machines, yet such machines are relevant to show the familiar means of controlling stops. In fact, it may be said that the problem of stopping the overrotation of a wheel by a detent, and of releasing the detent to free the wheel, probably ought to be regarded rather as a general problem of machine construction than as a problem in the particular art of counting machines or calculating machines. Mast, Foos & Co. v. Stover Mfg. Co., 177 U. S. 485, 492, 493, 20 Sup. Ct. 708, 44 L. Ed. 856. So far I am rather inclined to the view that Turck was at liberty to provide a positively acting stop against the action of his carrying-mechanism; that he was entitled to operate such a stop by his carrying-mechanism and by his key-mechanism; and that, while there doubtless would be infringement if a broad construction could be placed upon several of the claims, yet the claims probably are not valid unless strictly confined to the detailed constructions of Felt.

Claims 17 and 18 of the Felt patent in suit involve a distinct subject-matter. These claims call for mechanism whereby all of the carrying-stops are simultaneously released prior to the forward rotation of the numeral wheels for the purpose of rotating them to zero. There is a serious controversy as to the validity of these claims. It is contended that set-back mechanism of this general character was old, and that each claim is for a pure aggregation. Upon the whole, I think it clear that the case is not a proper one for a preliminary injunction.

Petition denied.

FERRY et al. v. WARING HAT MFG. CO.

(Circuit Court, S. D. New York. July 9, 1900.)

1. PATENTS—INFRINGEMENT—HAT RINGS.

The Ferry patent, No. 574,894, for a hat ring, for use in packing hats together in boxes for shipment, construed, and *held* not anticipated, and to disclose invention, in view of its superior utility and exceptional commercial success. Also *held* infringed.

In Equity. Final hearing on pleadings and proofs of a suit for infringement of United States letters patent No. 574,894, January 12, 1897 (applied for June 2, 1894), to F. P. Ferry, assignor of one-half to Theodore Clark & Co., for hat-packing ring.

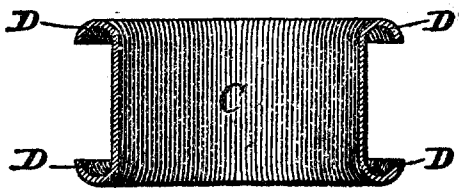
J. Edgar Bull and F. M. Smith, Jr., for complainants.
Chamberlain & Newman, for defendant.

LACOMBE, Circuit Judge. The first impression formed upon reading this patent is that there could be no patentable invention in so simple a modification of earlier forms. But the evidence is most persuasive to the conclusion that, trivial though it seems, the improvement is one which has commercially proved exceptionally successful; and if it were, as defendant contends, a natural development from earlier forms, it is difficult to understand why, in view of the demands of the trade, no one produced it during the interval succeeding the earlier patent of January 6, 1891, unless it were that more than the mere technical skill of the handicraftsman in the art was required for its conception.

The patent relates to what are known as hat-packing rings or stays. The manufacturers of hats ship these articles in tall boxes, each containing several hats. To keep the hats in the box separate, so they will not rub against or mar one another, hat-packing rings are employed. Hat-packing rings of various forms have been employed for years. Any plain strip of pasteboard of suitable width, curved to conform to the contour of the hats, might be employed for the purpose. It is obvious, however, that the sharp or rough edge of a piece of pasteboard would chafe the hats where it was in contact with them. Various expedients had been adopted, prior to this patent, to overcome this difficulty. Strips of paper had been pasted over the raw edges of the cardboard, or they had been bound with flannel or other soft material, or the edges had been broken over, so that they stood at an angle with the body of the strip, forming a flange or broader strip for the hat to rest on.

The patentee, Ferry, in 1888 applied for a patent, issued January 6, 1891, covering a ring of a general cylindrical shape to contain the hat-crown; the edges of said ring being curled outwardly, so as to present a perfectly smooth, unbroken surface for contact with crown and brim of the hat. Fig. 3 sufficiently indicates the curved edges of the ring.

Fig. 3.



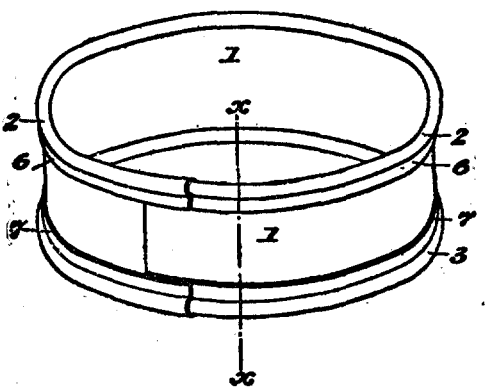
In this earlier patent, 444,343, the specification states:

"I am aware that packing-rings have been made with their edges bound with felt or other soft material, so as not to chafe the hats, but my invention contemplates no such construction. I am also aware that a packing-support for a single hat has been made wherein the top edge has been flanged or curled outwardly in order to afford a nonchafing support for the hat-brim, but this has never, to my knowledge, been done except in the instance of a separable ring; and, moreover, such construction could not be of advantage in packing a nest of hats, since it is essential that both the top and bottom edges of the ring should be so formed that the brim of the hat should not be chafed either on the upper or under surface. I therefore wish to be understood as distinctly disclaiming any flaring or curling of the edges of a hat-packing ring, save the outward curling of both the top and bottom edges of a closed pasteboard ring."

While affording theoretically a sufficiently broad and easy seat for the hat, this earlier ring was, comparatively speaking, expensive and difficult to manufacture. A considerable proportion of the product was unsalable because defective, and the beads, D, were liable to uncurl, kink, or break and chafe the hat. Moreover, this liability to uncurl or kink made it impracticable to dispose of them, save as completed rings, fastened together at the ends. They could not be nested and shipped in bulk. Freight to any distance, by reason of the bulk of parcel, was prohibitive.

The improvement of the patent in suit is sufficiently indicated in Fig. 2, and the following excerpts from the specification:

Fig. 2.



"In carrying out my invention, I take a piece of pasteboard, 1, of any suitable width and length, and curl over the opposite edges as shown at 2, 3, to form hollow beads, 4, 5, a surplus from such edges being left to form petticoats, 6, 7, which latter lie closely against the body of the strip. The object of the petticoat portions, 6, 7, is to give stability to the beads, 4, 5, and to prevent them from crawling back, and also give them greater body and flexibility. * * * The hollow beads at one end of the strip are readily inserted within the beads at the other end, since the latter beads yield readily to permit of this, and exert a grasp firm enough to prevent any accidental slipping of an adjustment. The hollow bead affords great advantages, in that it is not stiff or unyielding, but is flexible and resilient [in

earlier devices the edge had been turned over and glued down, sometimes with an extra thickness of material inserted—manifestly an unyielding and nonresilient finish], while its shape is preserved by the petticoats, 6, 7, which, as above set forth, snugly lie against the body of the strip."

To reduce the field of discussion presented on the record, touching infringement, the third claim, only, need be quoted. It reads as follows:

"(3) As a new article of manufacture, a pasteboard hat-packing ring, having closed beads at its edges, and, with the extreme edges of the stock beyond the beads disposed flat against the body of the strip, substantially as described."

Infringement of this claim seems plain, upon a mere inspection of the exhibits. The only question of difference between the parties is as to the "hollowness" of the beads. The beads of the patent, as shown in the drawing, are "hollow," in the full sense of the term. Hollowness is achieved by turning over a mandrel, or otherwise, sufficient material to form a tubular structure. In defendant's rings sufficient material is thus turned over, but it is also collapsed upon itself from the top downward, so that it no longer looks like a "hollow bead," but it is not pasted together or otherwise held rigidly, so that it cannot perform the useful function of end into end insertion, which the evidence shows to be the great commercial advantage of complainant's patent. The superabundance of material, giving a greater bearing surface than would the mere turning over of the material on a knife edge, affords a similar support for the hat, and it also secures the necessary play for insertion of the other end of the ring—a play which would not be secured without such superabundance of material. Of course, if it were pasted down or rigidly secured, it would be merely the device of earlier patents; but since it performs all the functions of the device of the patent, and in the same way, the difference between the two is verbal only. A web hose is a hollow structure for the transmission of water, although, when water is not flowing through it, it may lie perfectly flat, and be folded upon itself, with no suggestion of a tube about it.

The evidence establishes with a conclusiveness rarely found in patent suits that the advance from Ferry's patent of 1891 to the one in suit has produced a marked saving in the cost of manufacture and in the amount of waste, and has vastly enlarged the output field of the manufacturer. The earlier rings had to be completed as rings before shipment; that is, the ends had to be fastened together, or the edges would uncurl. Then, since freight is regulated to some extent by the size of the package, the manufacturer could supply only his immediate neighborhood. The device of the patent may be "nested" and shipped to remote places, each ring to be there fastened by insertion when put to use.

A number of patents have been introduced in evidence. It is sufficient to say that none of them anticipate. Some of them would seem to indicate that the improvement of the patent—now that we know of it—was to be expected of the skilled workman; but when it appears that an enormous increase in sales awaited the man who devised it, and that from the issuance of the first Ferry patent, of 1891, to the

application for the patent in suit, June 2, 1894, no one but the patentee came forward with such a device, the court is constrained to conclude that it exhibits patentable invention.

The evidence introduced by defendant is mainly directed to establishing the proposition that the complainants made and sold petticoated rings more than two years prior to the date of application. The testimony on this branch of the case is conflicting. Application was filed June 2, 1894. The burden is upon defendant to show public use and sale prior to June 2, 1892. There is not a scintilla of evidence that petticoated rings were made by hand. On September 30, 1891, a manufacturer named Wilkins supplied complainants with a two-part machine adapted for curling over the bead edgings and fastening the rings as shown in the 1891 patent. This was the first machine for making packing rings used by complainants. On June 24, 1892, the same manufacturer delivered a new machine to complainants, which was adapted to curl over a bead with a petticoat—not so long a petticoat as shown in the patent, or as is produced by later machines, but still sufficiently long to come within the patent. Both these machines exist to-day. They have been put in evidence and operated. The dates of their delivery are fixed beyond peradventure or dispute by book entries, dated bills, and letters. The complainants concede that they made rings with petticoats on the second machine and sold them shortly after its receipt. The question, then, is narrowed down to the single issue, were petticoated rings made commercially on the first machine? Those made on the second machine are out of the case. The weight of evidence seems to call for a negative answer to this question. Indeed, it would seem that such rings could not be made upon the first machine, except experimentally by altering the adjustment of parts in the bead-forming portion of the machine beyond the capacity of the mechanism, wedging the guides out of alignment, while the subsequent passing of such experimental rings through the ring-forming portion of the machine would practically ruin the greater portion of them. The defense of prior use is not established.

The evidence does not sustain the contention that Ferry was not an original inventor, by reason of a certain ring alleged to have been shown to him by the witness Hallock in February, 1890. That ring had its edges simply turned over flat down upon the stock. There was no suggestion in it of a bead, hollow, or collapsed. It was, as the witness says, "practically all petticoat."

There is no force in the proposition that complainant abandoned invention by stamping the petticoated rings made prior to the issuing of the patent in suit with the patent date of the earlier Ferry patent, on which they were an improvement.

Complainant may take the usual decree.

COMPTOGRAPH CO. v. MECHANICAL ACCOUNTANT CO.

(Circuit Court, D. Rhode Island. April 4, 1904.)

No. 2,644.

1. PATENTS—INFRINGEMENT—COMPUTING MACHINES.
A preliminary injunction against infringement of the Felt patent, No. 465,255, for improvements in recording computing machines, denied on the ground that the proofs left in doubt both the validity of claims and the question of infringement.

In Equity. Suit for infringement of letters patent No. 465,255, for a computing machine, granted to D. E. Felt December 15, 1891. On motion for preliminary injunction.

Munday, Evarts & Adcock and Henry Love Clark, for complainant.
Wilmarth H. Thurston and Warren R. Perce, for defendant.

BROWN, District Judge. This suit is for infringement of letters patent No. 465,255, to D. E. Felt, dated December 15, 1891, for improvements in recording computing machines. The subject-matter of claims 7 and 8 is "subtraction cut-offs." Claims 9, 10, 11, and 12 relate to means for returning all numeral wheels to zero.

In performing subtraction on an adding machine, the numeral wheels are given the same movements as in addition. Subtraction is performed by the addition of complementary numbers. Since the numeral wheels rotate as in addition, the carrying-mechanism, whereby a complete rotation of a wheel of lower order moves forward one step a wheel of higher order, will continue to operate, and to produce an error in the result. This error will occur at the left of the wheels operated. The patentee says:

"Another object of my invention is to prevent the carrying of fens from any column to the next higher whenever a subtraction is made, by means of adding a complementary number."

Referring to the machine of a prior patent to Felt, the patentee says:

"In my former machine, the 1 carried to the next higher numeral-wheel to the left of the highest numeral-wheel of the subtrahend was removed by adding a 9 to said numeral-wheel, and to all other numeral-wheels at the left of it. To save the carrying of the 1 above mentioned, and afterward adding the 9's as above described, I provide the following device."

The substance of the improvement was to provide for each carrying-mechanism an individual cut-off, so that the operator may at will prevent the occurrence of the carrying. It is necessary to put but one carrier out of operation. When the operator makes a subtraction, a lever at the left of the highest column or series of keys in which a key is struck is pushed backward. This raises a carrying-pawl, and thus prevents the carrying from the highest series. The defendant shows nothing in the prior art which will accomplish all that is accomplished by individual subtraction cut-offs.

It is quite clear that devices whereby all the carriers are simultaneously thrown out of operation are not full anticipations, since to throw out all the carriers would prevent the addition of complementary numbers. Felt, so far as appears, was the first to provide a comput-

ing machine with individual cut-offs for subtraction. He was not, however, the inventor of the general method of subtraction by addition, or of the use of complementary numbers or co-digits for subtraction.

As appears from the specification of the patent in suit, as well as in complainant's rebuttal affidavits, the error incident to doing subtraction on an adding machine was one that was well known, and whose cause, namely, the undesired operation of the carrier at the extreme left, was obvious. The error could be remedied by mentally disregarding it in reading the machine, or by adding a nine to that numeral wheel and all other numeral wheels at the left, or, as suggested by Grant, by turning one of the numeral wheels back one tooth by hand. Instead of allowing the error to occur, and then correcting it, Felt provided means to prevent its occurrence. Mechanically, the means are very simple; and, given the idea of doing this, it would involve nothing more than the most ordinary mechanical skill to accomplish it. A simple lever is provided for each carrying-mechanism, and a finger-piece to move the lever. That part of the carrying-mechanism which it is desirable should be operated is left in action, and that part which commits the error is stopped.

The important question in this case is whether Felt is entitled to a monopoly in means for controlling at will any one of the carrying-mechanisms for the purposes of subtraction. The remark from Colt's Patent Firearms Mfg. Co. v. Wesson (C. C. A.) 127 Fed. 333, is here applicable:

"The methods of locking and of holding in and out of operative position are innumerable, so that, unless extreme care is used in analyzing patents for inventions relating to that topic, the rule of equivalents, as applicable to alleged infringements, would block the path of invention to an extent which would be unreasonable."

There is a very extensive discussion of this question upon the defendant's brief, which leaves the impression that the question of the patentability of this broad feature is doubtful. The idea of correcting this error was a familiar one, but it had not been thought desirable to add to the old computing machine special mechanical parts for doing it. If given a broad construction, claim 7, perhaps, would be anticipated by the Shattuck patent, which contains means for throwing out of action all the carrying-mechanism simultaneously. Were this mechanism of Shattuck's applied at exactly the right time, it would prevent the occurrence of the undesired carrying; but it is obvious that it would involve a mental operation in order to time its application, and it is quite probable that there are certain operations which could not be foreseen in time by the operator. It certainly is not an anticipation of all that is in the individual cut-offs.

Coming to the question of infringement: Felt has provided a series of slides and levers actuated directly by the finger. These are new and additional parts, and are used only at the times when it is desired to subtract. In the defendant's machine, the carrying-pawl is thrown out of operation in every actuation of the keys, whether for subtraction, addition, or any other purpose. It is also said that the primary purpose in introducing the lever used by the defendant in subtraction was

not to permit the performance of subtraction, but to take up an extra throw or excess of motion, so as to prevent the ratchet, 115, from catching on the pawl, 135, and that it was afterwards discovered accidentally that this mechanism was capable of use for subtraction purposes by means of a half-stroke of one of the keys of the same series. If this is the fact, it is very doubtful if there is infringement. It is one thing to provide a separate part, or a series of stops, for the distinct purpose of correcting an error. It is another to utilize a part, having a distinct function, to perform the additional operation of correcting the carrying error. The performance of the same function is not alone a safe test of the equivalency of mechanism. The language of Kokomo Machine Co. v. Kitselman, 189 U. S. 8, 23 Sup. Ct. 521, 47 L. Ed. 689, possibly is applicable: "The machines lack that identity of means and identity of operation which must be combined with identity of result to constitute infringement."

It seems hardly reasonable to hold that all computing machines, however different in mechanical operation, however different in carrying-mechanism, shall be tributary to Felt, so far as concerns correcting mechanically this well-known error, and that no one after Felt shall be permitted to prevent the occurrence of this error by stopping the carrier which causes it.

The defendant's lever is actuated for the purposes of subtraction by a half-movement of one of the keys. It is the contention of the complainant that the actuation through a roundabout connection with the digit keys is a mere evasion. In support of this, it is pointed out that in the Turck patent there are subtraction cut-offs actuated directly by the finger, as in the Felt patent. Although the Turck patent does show such a construction, it is nevertheless true that a separate finger device is absent from the infringing machine, and that one of the previous members, namely, a key, is used to actuate the defendant's lever, which serves as a subtraction cut-off. A carrying-mechanism which is freed at every stroke of the key is appreciably different from a carrying-mechanism which is freed only by a separate device. Whether substantially different, I am now unable to determine.

As the record stands before me upon this petition, there is a serious question raised by the contention of the complainant that Turck's device is a merely colorable evasion. It is not clear upon the present record, and is hardly a proper question to be determined upon this petition.

Claims 9, 10, 11, and 12 relate to means for returning all numeral wheels to zero. By a single motion of the hand, the operator is enabled to release all the wheels from the carrying-stop detents, and also to rotate all of the numeral wheels to zero. Complainant emphasizes this one-motion feature. The defendant contends that the connection of two shafts, one of which operates to unlock the detents, and the other of which rotates the wheel, so that they will operate simultaneously, was not a patentable invention. It cites Office Specialty Mfg. Co. v. Globe Co. (C. C.) 65 Fed. 599. A long list of patents is also cited to show anticipation, and it is further contended that there is no infringement of the claims. These questions are all too doubtful to warrant a preliminary injunction.

Without going further into the merits, it may be said that the defendant has shown the present controversy to be such as the courts have usually refused to dispose of on a petition for a preliminary injunction. It may be said, also, in regard to this case, that the defendant's machine is of quite a different type from that of the complainant, so that it can hardly be said to be in competition in the same commercial field.

Petition denied.

KESSLER & CO. et al. v. ENSLEY CO. et al.

(Circuit Court, N. D. Alabama, S. D. April 15, 1904.)

1. CORPORATIONS—SUIT BY STOCKHOLDERS—RIGHT TO MAINTAIN.

While the mere refusal of the governing body of a corporation to bring suit to redress a fraud committed against it is not a ratification of such fraud, and does not in itself constitute a fraud against the corporation, yet where the refusal is from proper motives, and in the interest of the corporation, it is neither illegal nor immoral, it being the duty of such body in general to act for the pecuniary interest of the corporation; and where its action has been fairly approved by a disinterested majority of the stockholders it is binding on the minority, who cannot, in such case, maintain in their own name, on behalf of the corporation, the suit which the majority have determined to be against its interest as to a purely intra vires matter.

2. SAME—FRAUDULENT CONTRACTS—POWER OF RATIFICATION.

A contract or transaction by which officers have obtained property of a corporation by actual fraud, may nevertheless be ratified by the directors and a disinterested majority of the stockholders where they act fairly, in good faith, and with knowledge of the facts, and for what they believe to be the best interest of the corporation.

3. SAME—REFUSAL OF DIRECTORS TO SUE—BREACH OF TRUST.

It is the duty of the directors of a corporation, when requested by stockholders to bring suit to set aside a transaction by which property was obtained from the corporation by fraud, to consider the question carefully, and determine it solely on its merits, with reference alone to the best interests of the corporation; and a court will not refuse to entertain a suit by stockholders on behalf of the corporation to redress the fraud, where it appears from the allegations of the bill that the action of the directors in refusing to bring the suit was prejudicial to the corporate interests, that they acted negligently, or without proper deliberation, upon a mistaken view of the law with respect to their duty, or from extraneous motives, since in either case their action amounted to a breach of trust, although it is not charged that it was corrupt, or from motives of self-interest; and to establish such facts the complainants may show what was said as well as what was done by the directors at the time their action was taken.

4. SAME—ACTS CREATING ESTOPPEL.

A bill filed by stockholders of a land company which owned a town site and adjoining lands alleged that at a time when the individual defendants were officers and directors of the company they procured a sale of all of its property under a small judgment against the company, which they in fact owned, leaving the company only the right of redemption; that they subsequently procured the conveyance of such right of redemption by the company to trustees, in whom also had been vested the legal title, under a trust by which property was to be sold sufficient to pay the company's debts, when the remainder should be reconveyed; that subsequently defendants by fraud procured the assent of the stockholders to the sale by the trustees of some 200 acres of the choicest land of the company to themselves, through a second company, their ownership of

which they concealed, for a small fraction of its actual value. It further appeared that the trustees sold sufficient lands to pay the debts of the company, and reconveyed the remainder, which the company accepted and still holds. *Held* that, while the company was estopped by its subsequent action from questioning its conveyance to the trustees, it was not estopped from attacking the validity of the conveyance to defendants, in the absence of a ratification or laches, and that the refusal of the directors to bring a suit for the purpose did not amount to such ratification.

5. PLEADING—SUFFICIENCY—QUESTIONS ARISING ON DEMURRER.
In determining the sufficiency of a bill charging fraud, on demurrer the allegations therein are alone to be looked to, and the character of the parties charged cannot be considered.

6. EQUITY—LACHES—NOTICE TO STOCKHOLDER OF CORPORATE ACTS.
In a suit by a stockholder in right of the corporation to require a former officer to account for property which he is charged with having obtained by fraud from the corporation while such officer, the adverse possession of such property by defendant for a period of time within the statute of limitations cannot be held, as matter of law, to impute notice of the fraud to the stockholder, so as to charge him with laches, nor to charge him with knowledge of what was done at a stockholders' meeting which he did not attend.

7. SAME—FACTS IMPUTING NOTICE OF ACTUAL FRAUD TO STOCKHOLDER—RELIANCE ON INTEGRITY OF OFFICERS.
Stockholders who are complainants in a suit brought in right of the corporation to set aside a conveyance of property from the corporation to some of its officers are not chargeable with notice of actual fraud, which is alleged to have been practiced in obtaining the property, from which laches must be imputed to them, because it must be inferred from the allegations and silence of the bill that they had knowledge of facts which would render the transfer constructively fraudulent, it being alleged that they were ignorant of the actual fraud, and that the reason they did not make further inquiries was because of their confidence in defendants and their reliance upon their acting in good faith as trustees for the stockholders.

8. SAME—SUFFICIENCY OF BILL—OFFER TO DO EQUITY.
A bill by stockholders to set aside an alleged fraudulent sale of property by the corporation to defendants, which alleges that they have sold a portion of the property to bona fide purchasers, prays an accounting by defendants, and offers to allow them credit for any sums expended which will inure to the benefit of the corporation, contains a sufficient offer to do equity.

In Equity. On demurrers to amended bill.
See 123 Fed. 546.

This is a bill by minority stockholders of the Ensley Land Company, filed in right of the company, which refused to sue, to set aside certain transactions between the company and the respondents, who it is alleged, while occupying fiduciary relations, defrauded the corporation in the sale of 240 acres of land, of which respondents became purchasers. On demurrer to the original bill the court held that, as the majority of the stockholders and the two boards of directors, who refused to authorize the suit, were not charged to be interested, or acting from improper motive, the decision, which related to a matter intra vires, bound the minority, as it did not appear, on the facts shown by the bill, that it was to the interest of the corporation to bring suit, or that the directors and stockholders had not fairly decided the matter in the interest of the corporation; and also that the complainants had been guilty of laches. The case is reported Kessler & Co. et al. v. Ensley Co. et al. (C. C.) 123 Fed. 547. The bill was amended in particulars sufficiently shown in the present opinion. The respondents again demur. To distinguish the Ensley Land Company from the Ensley Company, and for the sake of brevity, the Ensley Land Company is referred to as the "Land Company," and the Tennessee Coal, Iron & Railroad Company is called the "Tennessee Company."

T. M. Steger, Smith & Smith, J. W. Baker, and I. K. Boyesen, for complainants.

Knox, Bowie & Dixon, Walker, Tillman, Campbell & Morrow, James C. Bradford, J. F. Martin, and E. J. Smyer, for defendants.

JONES, District Judge (after stating the facts as above). It was not ruled on the former hearing, as complainants seem to suppose, that the refusal of the boards of directors and stockholders, under the circumstances stated, to bring the suit, amounted to a ratification of the transactions complained of; but that, in view of the case disclosed by the original bill, the minority was bound by the action of the governing body, which was not charged to be interested, or acting from improper motive. It was stated arguendo that an honest and disinterested governing body or majority of stockholders, if rescission would not be advantageous or would be harmful to the corporation, might ratify actual fraud practiced on it by an officer or director. Complainants devote a large part of their argument to combating the correctness of the former opinion on these points. They insist that a corporation cannot in any case ratify a transaction whereby its officers obtain corporate property of large value by actual fraud, save by unanimous consent of the stockholders; and that the court, by refusing to entertain the stockholders' bill, when the corporation refuses to sue, enables the governing body or majority to accomplish indirectly, against the protest of the minority, that which could not be done directly save by unanimous consent. Upon these premises they vigorously contend that the governing body has no discretion to refuse to sue in a case like this when the minority demand it, and that their refusal to sue confers upon the minority an absolute and imperative right, beyond the power of a court of equity to control, to file the bill in their own name, making the corporation a defendant.

1. There is a manifest distinction in principle between committing a fraud upon a corporation or piling one fraud on another by abuse of corporate authority in vicious ratification, and the refusal by the governing body, on proper motives, of a request of some of the stockholders to bring suit to redress the fraud. Of and in itself the mere refusal to sue cannot be ratification. Unless the situation has been so changed, in consequence of the refusal, as to work an estoppel to complain of the fraud, the governing body may change its policy at pleasure. Of and in itself it is neither illegal nor immoral to refrain from redressing a fraud by suit. In the very nature of things, a refusal, in the interest of the corporation, to bring suit, cannot amount to a fraud upon the stockholders. They are allowed to bring suit when the corporation fails to do so solely to "prevent a failure of justice." The failure of justice to be prevented is the failure of justice to the corporation. The transaction here complained of is wholly intra vires, and involves private, not public, wrong. The complaining minority stockholders and the other stockholders alike assert only the right of the corporation. They have no independent rights against one another, or against the corporation. The only right which any stockholder may assert in a case of this kind is subject to the police power of the govern-

ing body, and the extent of the stockholder's right is narrowed and restrained by the fair exercise of this power.

Enforcing a corporate right, especially when, as here, the corporation must restore the purchase money and surrender the right to enforce the performance of other conditions of the sale in order to regain that which it sold, may be decidedly to its disadvantage. It is frequently the highest wisdom to refrain from attempting to redress violations of right. Probable gain is generally balanced against probable loss. Modern jurisprudence assimilates corporations as far as possible to natural persons in determining their discretion and power as to such matters. The governing body is expected, within the limits of the charter, by all means not violative of law and good morals, to promote the pecuniary advancement of the corporation in its dealings, whether with its own officers or third persons. Bearing this in mind, and that it is not the fact that a fraud has been committed, but the fact of rightful or wrongful refusal to redress the fraud, which determines whether equity will aid the stockholder, the question is not of difficult solution on principle. The stockholder appeals to the conscience of the chancellor at the very threshold of the litigation to set aside the judgment of a corporate tribunal provided in advance, to determine primarily for every stockholder the very question brought before the court. The law does not presume fraud, misconduct, or infidelity on the part of the directors; on the other hand, in the absence of showing to the contrary, presumes that they acted rightly and properly. When the governing body is not challenged as in any wise unfit or interested, and no ulterior or improper motive is imputed to it, the decision by such a body is prima facie right, and must stand, unless the court can see from the facts stated in the stockholder's bill that the decision, upon the facts presented, proves its own unworthiness—shows a failure of justice to the corporation, if the stockholder is not permitted to sue. The only right of the stockholder here is to show that the corporation has been wronged by the refusal to sue, and in that event to sue for it. Both factions have equal right to be heard on that question, not only before the court, but before the governing body. If the corporation's interest will not be promoted by suit to redress the fraud, there is no wrongful refusal to sue, no foundation for the stockholder's equity to compel suit, and no threatened failure of justice to the corporation to be averted. Of necessity, then, the governing body in every intra vires matter has a discretion to determine what action to take on the stockholder's request to sue; and when the stockholder comes into court the first question it must determine is whether that discretion has been properly or improperly exercised.

2. The assertion that a disinterested corporate body or majority of stockholders of a business corporation are powerless in any case, against the objection of a single stockholder, to ratify actual fraud, as to a matter intra vires, upon the corporation by one of its own officers, by which he obtains some of its property, cannot be accepted as a correct enunciation of the law. The case in hand involves an executed sale and conveyance of land thereunder, made under the confessedly corporate power to sell land to pay corporate debts. The vice imputed to the transaction is that it was accomplished by actual fraud of the corporation's

officers who became purchasers. Individual stockholders have no such interest in a purely corporate asset, or the undivided corporate property of a solvent, going corporation, as entitles them, in a case of this kind, to exact unanimity on the part of the stockholders before the corporation can have or exercise judgment of its own as to the wisest course to pursue with reference to a fraud concerning it. Want of unanimity in such a case cannot dethrone the governing body, or suspend or repeal those provisions of the charter which define their powers and duties, or transfer the duties and rights of the corporation in the premises to the minority. If the interests of the corporation are promoted by the refusal to sue, or by ratification, it is unconscientious to insist that it has been wronged by either ratification or the refusal to sue. That is quite a different thing from committing or defending a fraud. The stockholder, having only derivative and subordinate rights, cannot force the corporation to do that which will harm it, or fairly complain when it elects, for its own good, to stand upon the transaction, rather than repudiate it. The books are full of cases where corporations have been wronged by actual fraud of their officers. The corporation may hold them to such transactions, unless the thing done is forbidden by law, or condoning it is contrary to public policy. If the transaction in which the officer defrauded the corporation is one into which it might enter in the first instance, it is not contrary to public policy for the corporation to condone the fraudulent contract, and insist upon its performance, on sufficient consideration and motives. The wrong here is a private wrong, and a private person may condone a private wrong when the rights of the public or strangers are not involved. All the cases admit that the person defrauded, if sui juris, can ratify the fraud. The corporation is certainly sui juris as to matters intra vires. The difference in the cases results from the view taken of "the person" defrauded in a case of this kind. The cases which deny the right of the governing body to ratify insist that the whole body of stockholders make up and constitute "the person" who is defrauded, and necessarily that unanimity of the stockholders is required to create the assent of that person. These cases entirely ignore the nature and limitations of the right asserted and consequences which flow from it to the corporation, the only tests which determine whether the majority may ratify, when fairly done, against the wishes of the minority. Here the transaction sought to be avoided is already accomplished. Rescission cannot be made by the minority, it must be effected by the act of the corporation or of the court. The minority has only a joint interest with other stockholders, and the disinterested majority of the whole interest, in the absence of fraud, bad faith, and the like, determines what is best for the corporation. Equity in cases of this sort steps in, and strikes down either ratification or refusal to sue, only when the governing body has abused the corporation in ratifying the wrong, or in refusing to sue, or is unfit or interested, or dominated by improper motives, or has acted negligently, without the exercise of reasonable judgment and prudence, or in some way has been misled or deceived.

3. Complainants cite a number of cases to sustain their contention. It is impossible to analyze them all without unduly lengthening this opinion. The leading case upon which they rely is Cumberland

Coal Company v. Sherman, 30 Barb. 577. It was there held that a majority could not ratify a sale of land made by a director to himself, although there might be no actual fraud. In this respect it is directly opposed to Twinlick Oil Co. v. Marbury, 91 U. S. 587, 23 L. Ed. 328; Hotel Co. v. Wade, 97 U. S. 13, 24 L. Ed. 917; Pneumatic Gas Co. v. Berry, 113 U. S. 322, 5 Sup. Ct. 525, 28 L. Ed. 1003. In the latter case it was charged that defendants, who stood in fiduciary relations, "had in their possession, unaccounted for, at least sixty thousand dollars," derived from a lease made without authority, which belonged to the company. There had been much dealing with the directors, and finally they settled with the defendants, and executed a formal release. Under the circumstances, there being no bad faith, fraud, or concealment charged in the settlement, the release was upheld. The precise statement by the court in Cumberland Coal Co. v. Sherman, on this point, is:

"But, even if the confirmation had been legally made, and by a majority of the stockholders—which it clearly was not—when, as in this case, it must be made by a class, the sanction of a majority could not be obligatory on the rest; but the confirmation, to be complete, must be the joint act of the whole. Ex parte Hughes, 6 Vesey, 622; Ex parte Lacey, Id. 628; Ex parte Jones, Id. 377; Davoue v. Fanning, 2 Johns. Ch. 264."

Cumberland Coal Company v. Sherman, is largely, if not entirely, rested on Davoue v. Fanning, supra. In Davoue v. Fanning, Chancellor Kent, speaking of the Yorks Building Co. v. McKenzie, in the English House of Lords, on a like question, said that "it is perhaps one of the most interesting cases on a mere technical rule of law that is to be met with in the annals of jurisprudence." He founded his ruling in Davoue's Case upon the decisions of Lord Eldon. Chancellor Kent cites a decision of the New York Court of Appeals in Munro v. Allaire, 2 Caines, Cas. in Error, 183, 2 Am. Dec. 330, and regrets that Mr. Justice Benson, who delivered the opinion of the Court of Appeals, "much weakened the rule in the subsequent part of the opinion." Chancellor Kent says:

"Justice Benson makes a distinction to show that the rule thus laid down is not to be understood in absolute and unqualified sense. A trustee, it is said, is never to be assisted in this court by giving effect to such a purchase; but it does not follow that chancery is bound in every case, and of course, to annul such a purchase on the application of the cestui que trust. His words are that it is not in every instance indispensable that all the cestuis que trust should agree to waive the implied fraud. It may be sufficient for a majority, or such other number or proportion of them, to agree as to that, according to the circumstances of the case, it may be presumed there was no fraud in fact."

Lord Eldon, whose decisions are the main foundation of Davoue v. Fanning, declared in Sanders v. Sanders, 13 Vesey, 603, "he had frequently laid down as a principle in bankruptcy that, where trustees for infants had purchased trust property, the court would not disturb the sale if it appeared to be beneficial to the infants, and would disturb it if it did not appear for their benefit." That principle, his lordship added, "though open to objection, must be adhered to until a better could be found." Lord Hardwicke, in Whelpdale v. Cockson, 1 Vesey, 9, s. c. 5 Vesey, 692, held that a majority of the cestuis que trust were sufficient to establish the purchase, whether the minority

consented or not. On a creditors' bill against executors he ordered the creditors to elect whether they would abide by the purchase, and declared that, if the majority elected not to abide by it, he would order a resale. Chancellor Kent says that case was questioned and practically overruled in later cases. He puts his objection to it on the ground that "it seems contrary to the settled rights of the parties; for one cestui que trust has no power to control or give away the rights of another." It is to be observed that Lord Hardwicke in no way denied the principle that courts, on grounds of inexorable public policy, would set aside a trustee's purchase at his own sale, no matter how fair and free from fraud or imposition, as a matter of course, on seasonable application of the cestuis que trust. The divergence is only on the point whether the minority or majority is to be regarded as the cestuis que trustent who may complain of the sale. Chancellor Kent's reason for ignoring the wishes and interest of the majority is that "one cestui que trust has no power to control or give away the rights of another." Do we not inevitably give one cestui que trust "power to control the rights of another" when we allow minority stockholders to control the action of the corporation against the wishes of the majority stockholders? Kent was dealing with the case of cestuis que trustent whose rights against their trustee were several, direct, and primary; and not one like this, where the right asserted is purely derivative and joint, having to be worked out by enforcing the right of a third person, for whom a majority of those interested in the estate have the right to speak, and to elect not to attack the sale, if they act fairly and in good faith. He was not dealing with a case which involved not merely the question of resale, but also the disposition of the thing sold, and the abandonment of some other contract with the purchaser in connection with it, the loss of which might far outweigh any advantage from setting aside the sale. The doctrine he applied was intended as a shield for cestuis que trustent, and not to furnish a sword with which the few may stab the rights of the many, where all belong to a class whose correlative rights and duties are fixed and prescribed by contract among themselves, that the majority, acting disinterestedly and fairly, shall control. Exacting the rule of unanimity which Chancellor Kent applied to an entirely different case, in a case like this, is tantamount to declaring that the majority stockholders have no rights which the minority or the courts are bound to respect in setting aside a sale. The doctrine is, as Chancellor Kent described it, "a mere technical rule of law," which ought not to be allowed in equity to override substantial justice, or to enable a stockholder to harm a corporation, when his only equity in the premises is to sue to benefit it.

The case in Cumberland Coal Company v. Sherman, supra, came before the Supreme Court of Maryland, and is reported under the title Hoffman Steam Company v. Iron Co., 16 Md. 456, 77 Am. Dec. 311, and Cumberland Coal & Iron Company v. Sherman, 20 Md. 117. Unlike this case, it was an effort by the wronged corporation to rescind. It presented a flagrant example of attempts by the use of corporate power by an interested and dishonest majority to put corporate assets in the pockets of some of the stockholders to the prejudice

of the rest. Neither of those cases is authority to the point that actual fraud of an officer may not be ratified by the governing body, or by the vote of a majority less than the whole number of cestuis que trustent, if they are not interested in the fraud, and act upon good motives and sufficient consideration. The implication from their language is to the contrary. Brewer v. Boston Theater, 104 Mass. 394, expressly admits the right of a corporation in a case of this kind, when it acts through a disinterested and competent governing body, to ratify actual fraud upon it by its officer. It holds that a case like this is an exception to the rule it lays down, and cites Great Luxembourg Railway Co. v. Magnay, 25 Beavan, 586, on this point. Other cases, of which Hazard v. Durant, 11 R. I. 195, is an example, declare that a majority cannot "wantonly," or "willfully," or "gratuitously" condone a fraud against the wishes of a minority. These decisions go no further than to hold that ratification, which might otherwise be valid when made by a disinterested corporate tribunal, is fraudulent as to the stockholders, unless based upon a fair consideration moving to the corporation. The fact that harm would come to the corporation from rescinding is sufficient consideration for ratification, and takes the act out of the category of willful, wanton, or gratuitous abandonment of corporate rights, or gifts of corporate property, which at last are the things which are the essence of the fraud, of which these cases speak, upon the rights of stockholders. Greenwood v. Freight Company, 105 U. S. 16, 26 L. Ed. 961, is not in point. The Legislature repealed the charter of a corporation. Greenwood, who was a stockholder, insisted that the repeal impaired the obligation of the contract made by the charter between the state and the corporation within the meaning of the Constitution of the United States, and insisted that the directors bring suit to test the matter. It was clear, upon the facts stated, if the corporation had any rights, not to allow the stockholders to sue when the corporation refused would amount to its destruction. The court could see on the face of the bill that the corporation had all to gain and nothing to lose by bringing the suit. Heath v. Erie Railroad, 8 Blatchf. 347, Fed. Cas. No. 6,306, involved not only ultra vires, but illegal, acts, and the corrupt use of corporate power by the wrongdoers for their own benefit. It is not at all in point on the question here involved. Atwool v. Merriwether, 5 L. R. Eq. 649, sheds no light whatever on the principle which must govern in a case of this kind. In that case individual shareholders, who had been induced by a fraudulent prospectus to subscribe and pay for stock in a corporation formed solely for the purchase of a worthless mine from a person who, in connection with the promoter, had hatched out the scheme to promote the corporation and have it buy the mine, and afterwards defrauded it as to the price, on which partial payment had been made, sought by bill in their own right to rescind their subscriptions to the stock, and to recover what they had paid, on the ground of the fraud, and, as ancillary relief, to rescind the corporation's contract for the purchase of the mine, to get back what had been paid on it, and to wind up the corporation. The owner of the mine, the promoter, and the company were all made defendants. The company had paid out on the purchase money all the payments

made on the stock subscribed. Plainly, the complainants there asserted direct, purely personal, and primary rights of their own against the corporation, the owner of the mine, and the promoter. They each had a direct, individual, and personal right to rip up and unravel the fraud from beginning to end, regardless of anything the corporation might wish to do, in order to get their money back. The fraud and seasonable offer to rescind destroyed the relation of stockholder, if it ever existed, and tore down any foundation which might otherwise exist of any implied right of any stockholder to interfere with the defrauded party, or to control him in dealing with a direct personal fraud on himself. The purchase of the mine by the corporation was the main spring of the fraudulent contract by which the corporation was brought into being and the complainants became stockholders, and the stock subscription and the corporation's purchase were all parts of one and the same fraud. It is quite clear, in such a case, that the personal, individual rights of the party defrauded could not be controlled or altered in any way by anything the other victims of the fraud might wish to do as to the wrong done them. It was of such a condition of things that Vice Chancellor Wood said:

"The whole thing was obtained by fraud, and the persons who may possibly form the majority of shareholders could not in any way sanction a transaction of that kind. I think in this particular case it is hardly necessary to rely upon that, because having it plainly before me that I have a majority of shareholders independent of those implicated in the fraud supporting the bill, it would be idle to go through the circuitous course of saying that leave must be obtained to file the bill for the company."

Here, there is no majority supporting the bill. Here, the relation of shareholders is undoubted and undisputed. Here, the rights of complainants are purely derivative. Here, the fraud does not go to the existence of the company, or the contract by which complainants became members. The rights of the stockholders, as among themselves, can in no wise be changed, whatever may have been the fraud as to the sale and purchase of the 240 acres of land; for their relations to one another were in no wise affected by it. Complainants here have, in effect, intervened, "not as individuals, but as shareholders, in the assertion of rights common to the shareholders, which the corporation itself has declined to protect." Big Creek Gap Co. v. American Loan & Trust Co. (C. C. A.) 127 Fed. 633; Dickerman v. Northern Trust Co., 176 U. S. 181, 20 Sup. Ct. 311, 44 L. Ed. 423.

Bigelow on Fraud, vol. 2, p. 645, does not sustain the complainants. The doctrine which Bigelow combats, and which we do not at all assert, is that a majority "have no right to use corporate control for the purpose of appropriating the property of the corporation or its avails or income to themselves, or to any other shareholders, to the prejudice of the others." To bring that doctrine into play, the governing body or stockholders whose act is challenged must avail themselves of the corporate control to appropriate property to their own benefit, or to the "exclusion" or "prejudice" of other shareholders. There is no "prejudice" to any shareholder in refusing to sue; he is not deprived of his "rightful share" in any corporate asset, if suit is not to the interest of the corporation, although the result may be to leave some corporate property in the hands of an individual shareholder who has wronged the

corporation. On the case presented in the original bill, the body which it is urged could not ratify was neither interested, nor improperly controlled, or gained anything by their decision which the corporation lost, but only refused to sue, presumably after exercise of judgment on the merits, because it was against corporate interests. The interest which the minority stockholder has the right to call on the governing body and the court to protect is the value of the interest which will inure to the corporation after striking a balance of loss or gain between standing by or rescinding the fraudulent transaction. He has no equity to say to the corporation that the refusal to rescind—leaving corporate property in the hands of a wrongdoer—to that extent "diminishes the value of my shares," and "you must, therefore, at all hazards, increase the value of my shares by getting that property back, though by doing so you may entail far greater loss on the corporation and depreciation in the value of all the shares than if you allowed the unlawful transaction to stand." There is no "exclusion of" or "prejudice" to any stockholder, or depriving him of his "rightful share," when the majority, in the interest of the whole, declines to bring loss upon the corporation in such a case. Equity is perverted when, warped by obedience to a "purely technical rule of law," it allows the individual stockholder to use its powers to harm fellow shareholders, as innocent as himself of any wrong, and equally deserving of protection, in the direction of the common enterprise. Ratification of a wrong is but the exercise of the rights and liberties of the person wronged. It is one of the powers and incidents of ownership. The right may extend to actual as well as constructive fraud. On principle, how can the presence of fraud vel non in the transaction determine the ownership of the thing fraudulently obtained, or who may ratify the fraud? Upon what principle of logic or reason can a disinterested majority, acting fairly, be conceded the right to condone a constructive fraud, and yet be denied the right to condone actual fraud? It is wholly immaterial in ascertaining the owner of a thing wrongfully taken, or who has power to ratify the fraud, whether its possessor was deprived of it by constructive wrong or by actual fraud. The law itself determines in this case. The corporation is the person who was defrauded—the person who, as to matters intra vires, may ratify or condone the wrong done the corporation. There can be no doubt as to this when we consider who the stockholders of a business corporation are, the purpose and law under which they associate, and the inevitable implications which result from such association, as to their power to speak for the corporation. They form their relations to each other and the corporation voluntarily, by contract, and for the financial gain of the body as a whole. They contract to submit to the choice and direction of the majority, within certain limits, as to the redress of wrongs to the entity called the corporation, which equity regards as wrongs to the stockholders, solely because they are the ultimate owners of the property of that entity. The law provides corporate tribunals to determine, among other things, as to the ratification of such wrongs. The stockholders elect the persons who constitute this tribunal, to whose decisions they voluntarily contract in advance to submit. The rights of persons thus associated by contract, as against each other, about a matter purely intra vires, in the

direction of the common agent, in furtherance of a joint purpose, depend upon entirely different considerations from those which govern courts in passing upon the rights of ordinary cestuis que trustent to control one another as to ratification of fraud upon their rights by a trustee. In the latter case the minority cestuis que trustent have several, direct, and independent rights against their trustee, and have no binding contract between the majority and themselves that the majority, when acting fairly and in good faith, shall settle such questions; and the law as to them has not authorized any tribunal other than the courts to intervene, and, when acting fairly, to bind the minority, under any circumstances, to any extent, in the decision of such matters.

Less than 50 years ago the Supreme Court of this state held that the owners of a steamboat, whose crew willfully ran down and sank a flatboat, were not responsible for the wrong. It held, likewise, that a corporation could not commit a libel, or be guilty of malicious prosecution. In applying the doctrine of ultra vires, it held that a charitable corporation which loaned out its funds for investment could not recover the money either under the contract or in an action for money had and received. These rulings largely represented the doctrine prevailing in those days. What court would now think of measuring the rights and liabilities of corporations in that regard by the old decisions? Courts of law and equity have constantly expanded or contracted the application of old and general principles to meet the exigencies of modern corporate development, and in properly adjusting the changed rights and relations born of new conditions. "The sound administration of justice" will be best promoted by equity's so molding its decrees in cases of this kind as not, on the one hand, to give such effect to merely technical consideration of the nature of the artificial person called the corporation, as will improperly hamper the conduct of its business; nor, on the other hand, to enable the governing body to oppress or injure creditors or stockholders who are, in equity, the real owners of the corporate property. Pomeroy's Eq. § 111.

4. On the case made by the original bill it was quite plain that the application to sue was properly denied. It did not appear what was the value of the different undertakings of the Ensley Company, and hence it was not shown that the sale of the lands was for an inadequate consideration, or that it was to the interest of the Land Company to rescind. Vested rights of creditors would have been interfered with, and the corporation put in peril, by ripping up transactions which resulted in the trust deed. It did not appear that the refusal to sue was not the result of the exercise of judgment on the merits. It was only stated that there was a refusal to hear and to sue. It is now shown that the Tennessee Company has paid off the debts of the Land Company, and the property has been reconveyed to it freed from the trust. It is now alleged that "none of the defendants"—which includes the Land Company—ever treated the proposition of the Ensley Company as binding, but that it had been in fact waived or abandoned by mutual consent, and that improvements actually made on the land and industries attracted there, with the exception of a few houses built by respondents, were not due to any effort or investment by the Ensley Company, but were caused by the location of the steel plant. On the case

as now stated the real consideration for the sale of the lands, charged to have been accomplished by deceit practiced by respondents while they exercised the powers of the corporation, was $20,600, at a time when the lands were worth over ten times that sum. It now appears that the directors were informed by one of their own number, when urging before the directors' meeting that suit be brought, that the directors and officers of the Ensley Land Company had "fraudulently acquired the choicest and most valuable parts of the lands of that company, worth over two hundred thousand dollars, for about eighteen thousand dollars," and in causing the conveyances complained of respondents had been actuated in their own interest and for their own benefit. The bill does not profess to state all that took place at the directors' meeting, but it does specifically declare that "the only reason" given by the majority for opposing the suit by the Land Company was that "such suit by the company might do the defendants with whom the directors and stockholders sustained business and personal relations great injury by charging them with having committed a fraud on the company, and that they were unwilling, by reason of their personal relations with defendants, to vote that such a suit be brought against them by the company; that, if any stockholder had a grievance, the courts were open to it." It is further alleged that the application to the other board of directors and stockholders was rejected "for the same reason assigned above."

Under such circumstances is the court authorized to go behind such action of the stockholders and directors, not charged to be interested or acting from selfish motives, as to a matter intra vires, and overturn their decision? It cannot be denied upon the facts stated that it was to the interest of the corporation to bring suit, nor could there be doubt among fair and reasonable men what course fealty to the corporation demanded at the hands of the governing body. Boards of directors occupy fiduciary relations to the stockholders, and are bound to exercise care and diligence proportionate to the importance of the matters committed to their charge. Although equity will not remove a director who is a statutory fiduciary, as it would an ordinary trustee, it will not hesitate in proper cases to enjoin a director, or to set aside acts of misconduct amounting to a breach of trust, which oppress a stockholder or militate against the well-being of the corporation, as well as to hold him personally accountable therefor. Want of proper care must not be confounded with honest mistake of judgment. Denial of request to sue without passing judgment on the merits must not be confused with the exercise of judgment as to the merits of the suit. The decision with which we are here concerned does not involve peculiar skill in art, trade, or business, knowledge of markets, capacity to direct labor or skill or to cope with financial and industrial situations, or the doing of any of the things required to accomplish the mission of the corporation, which, in a qualified sense, are sometimes denominated the "legislative functions" of the corporation, and go to make up what is properly termed "corporate administration." The matter concerns the executive or ministerial, rather than the legislative, function of the corporation. When all disinterested and fair men, upon the facts upon which the directors' act is challenged, would reach the conclusion that

the decision not to sue was improper, and greatly prejudicial to corporate interests, and it appears that the directors have been negligent, or have not deliberated or passed judgment on the merits of the question, and refused to sue for some extraneous reason, or upon a mistaken view of the law, the court cannot refuse to intervene, although the directors may have been honest and disinterested. Gamble v. Q. C. W. Co., 123 N. Y. 99, 25 N. E. 201, 9 L. R. A. 527; Briggs v. Spaulding, 141 U. S. 147, 11 Sup. Ct. 924, 35 L. Ed. 662; Hollins v. Brierfield Coal & Iron Co., 150 U. S. 385, 14 Sup. Ct. 127, 37 L. Ed. 1113; Griffin v. Pringle, 56 Ala. 492; Hun v. Cary, 82 N. Y. 74, 37 Am. Rep. 546; Pomeroy's Eq. Jur. § 1070.

Respondents insist, "where the directors and stockholders have the power to act, and are not adversely interested to the company, nor acting from selfish interest, the motives which led them to decide as they did cannot be inquired into." It is urged that it is improper to inquire into their motives for the same reason which forbids inquiry into the motives of members of the Legislature. The functions of directors and legislators in matters of this kind are unlike. Within the limits of the Constitution the legislator's discretion is absolute and irrevisable. Within the limits of the charter, which stands for the constitution of the corporation, the directors have no unlimited discretion about ratifying a fraud or refusing to redress it. They have no unlimited "power to act," and to bind their constituents, as the legislator has within the limits of the Constitution. They have the undoubted power to pass upon the question of redressing frauds upon the corporation, but it is a qualified authority, in the employment of which they must use diligence to learn the facts, and exercise reasonable judgment upon the merits of the matter. If they act upon such matters negligently, without considering the good of the corporation, and are moved by extraneous considerations to wrong and injurious results, they commit a breach of trust. The directors under no circumstances have the right to gratuitously and capriciously abandon or give away the rights of the corporation, either to a stockholder or to a stranger. Whenever it clearly appears that they have done so, a clear breach of trust is shown, and the courts will disregard such action. The directors have not been vested with power to do such a thing "in any event." It is without the limits of the powers or discretion granted by the charter.

In complaints of this kind the decision of the court will turn mainly, and generally entirely, upon the rightfulness and propriety vel non of the action taken in view of the situation upon which the directors acted. If the situation clearly justifies the action of the directory, or, on the other hand, clearly shows that it was a breach of trust, the motives which inspired them either way, whether good or bad, are entirely immaterial in either case. Right action, though from bad motives, will not be disturbed, "for in equity, as at law, a fraudulent intent is not the subject of judicial cognizance, unless accompanied by wrongful act." So, also, where the action taken is plainly negligent and unjustifiable, good motives will not sustain it; since a breach of trust cannot be upheld in equity by showing that it was committed from good motives. It is only "when the action of itself is lawful" that the case falls within the rule of Oglesby v. Attrill, 105 U. S. 609, 26 L. Ed.

1186, that inquiry will not be indulged as to the motives with which it was done. There are many situations which are not so marked as to clearly point out and prescribe the duty of the governing body, leaving the question whether their action was a proper corporate determination or not to depend upon other considerations. In such cases the dissentient stockholder, to repel the presumption otherwise indulged that the decision was a proper corporate determination, may show that the directors abdicated their function of passing judgment, and neglected to exercise diligence and care in ascertaining the truth as to the corporate matter with which they dealt, and that allowing the decision to stand will work wrong and oppression to the stockholder. In such cases the court must exercise an independent judgment of its own as to the propriety of the decision of the directory; and the dissentient stockholder, in this connection, unquestionably has the right not only to show the real situation with which the governing body dealt, but that in dealing with it it pretermitted the question of corporate interest, and did not pass upon the merits, but, without considering either, acted wrongly under the pressure of other motives. To this end he may show what the directors said, as well as what they did, at the meeting which took the action complained of. Such declarations, of course, are not necessarily binding upon the court, but may, when taken in connection with other facts and circumstances, be given such weight as they deserve in view of all the surrounding circumstances. The amended bill makes it plain that there could be no reasonable room for doubt as to the duty to sue, and, further, that the refusal to sue was not due to the conviction that suit was uncalled for, or not advantageous to corporate interest, but resulted either because the directors were unwilling, for personal reasons, to litigate with those whom it was their duty to bring before the court, or that they were laboring under a mistaken view of law that they had no duty in the premises, and that the rights of stockholders could not, in any event, be affected by their refusal to act. Under these circumstances the refusal to bring the suit was a breach of trust, and does not bind the stockholders, and furnishes no reason why the court should refuse to entertain their bill.

5. It is urged, if the court entertains a bill of this kind at the instance of minority stockholders challenging the action of the directory, as to matters purely intra vires, when the directory is not charged to have been interested or to have acted from selfish motives, it puts it in the power of any dissatisfied stockholder to substitute the court for the board, and embroil the corporation in litigation over the merits of every internal matter about which the stockholders differ, although the directors have properly determined it, and their action be proved to be wise and prudent. To justify refusal to entertain a bill making charges like this, the court would be compelled to hold that a disinterested governing body, not actuated by selfish motives, could not commit a breach of trust as to matters intra vires. This, we have seen, they can do, although honest and disinterested, when they act negligently, and do not exercise common prudence in passing judgment on the matter which they are called upon to decide. If the law were otherwise, disinterested directors, not acting from selfish motives, would be absolute dictators as to all matters intra vires, and there

would be no remedy, although they were negligent, whereby great wrong and oppression were inflicted upon the stockholders. Besides, will it do to say that the directors are not acting from selfish motives when, from considerations of personal regard for wrongdoers, or disinclination to incur their enmity, they pass over the merits of a suit, and decline to bring it, in disregard of their official duty? Moreover, the governing body is under no necessity, unless it chooses to take such burden, to take part in the litigation at large, or to risk the vindication of its decision upon the facts stated by its adversaries, as it necessarily does when it allows the matter to be tested on demurrer to the bill. If the action of the directory is proper, regardless of the merits of the original controversy between the stockholders, and its position has been misstated, the directory, by interposing a proper plea to the whole bill, disclosing the real truth, may confine the litigation to that question alone. The court would ordinarily set the case down for hearing, in the first instance, on that plea, and, if the proof sustained the plea, that would end the litigation. The Land Company has not availed itself of this right. It has answered, in substance, that it knows nothing about the frauds, and can neither admit nor deny them. The answer, of course, cannot be looked to in passing on the demurrers of the other parties. If it could be looked to, it would show a plain case of utter indifference to corporate interest and negligence in the discharge of duty in refusing to bring a suit, when the directors knew nothing about the merits, and the charges, if true, made it the manifest duty and interest of the corporation to sue.

6. The Land Company lost title to its land by the sale under the Warner judgment. Mrs. Warner conveyed to the Ensley Company, which in turn conveyed to Barker and Bowron. The conveyance to them, together with what was done under color of the proceedings of the stockholders' meeting of January 25, 1898, resulted in the trust and legal title in Barker and Bowron. The Tennessee Company, for the Land Company, afterwards paid a large sum of money, which liquidated the debts of the Land Company, and thereupon the trustees conveyed the lands to the Land Company, which now claims and holds them through and under these conveyances. The Land Company for years has acquiesced in the several transactions, availing itself of their benefit, dealt with the trustees, inevitably made some sort of settlement with them, and took title in subordination to them, unquestionably after full knowledge of the facts. The Land Company and all claiming in subordination to it are now estopped to assail these conveyances. "A court of equity does not listen with much satisfaction to the complaint of a company that transactions were illegal, which had its approval, which were essential to its protection and the benefits of which it has received." 113 U. S. 327, 5 Sup. Ct. 525, 28 L. Ed. 1003. Besides, respondents claim and have no estate or interest in this part of the lands, and the rights of the parties could in no way be advanced by setting these transactions aside, or decreeing that the trust has ended as to them, or that respondents held whatever interest they acquired in them in trust. The bill itself shows that the trust has ended as to this part of the lands, and

all the equitable and legal estate is already back in the Land Company.

7. The right of the Land Company to assail the title to the 240 acres of land bought from the company's trustees by Ramsey and McCormack and the Ensley Company, or to hold the trustees to account for other portions not reconveyed, depends upon considerations not applicable to the rest of the lands. Barker and Bowron's conveyances of these 240 acres of land to respondents form no part of the chain of title of the Land Company. It neither took nor holds any of its property in subordination to these conveyances. It occupies no inconsistent attitude in assailing them. The retention of the purchase money while respondents were in control of the Land Company, or their knowledge of the matter, cannot, of course, be imputed to the Land Company, as evidence of ratification or estoppel. It has done nothing, so far as appears by the bill, which shows any intent to ratify the acts of the trustees in this particular, or which estops the corporation from assailing them. These conveyances may be ratified if the majority, upon sufficient consideration, after full knowledge of the facts, deliberately take such action. Until such action, the corporation, within any period short of the bar of the statute of limitations, before inaction with knowledge has built up an estoppel, can assail these conveyances for fraud; and the complainants may assert its rights in this respect if the action of the governing body, in refusing to sue, does not foreclose them, which, as we have seen, it does not, and they have not been guilty of laches.

8. The purpose and motives of the respondents throughout all the stages of these transactions are bitterly assailed both in the bill and in the argument of counsel. It is not to be gainsaid that a positive charge of fraud, though on information and belief, must be accepted as fully on demurrer as though made on positive knowledge. It does not suffice, however, to charge fraud as a mere conclusion of the pleader, but the facts out of which it arises must be stated. Where the acts and transactions upon which are based the bad motives ascribed are fully set forth, the court will look to all that is detailed to determine whether the inference of fraud is well founded, no matter how positively it is charged in general terms. It is not true that there was studied concealment about the whole matter from the inception of the transaction. The situation of the Land Company for some time before the sale under the Warner judgment, in the then condition of the times, must have impressed every one who knew anything of its affairs that something must soon be done to prevent a race of diligence among its creditors, which might start at any time, and result in ruin of the enterprise. The inevitable inference from complainants' bill, which for some reason does not inform the court as to complainants' knowledge on these points, is that the complainants knew at the time of the critical condition of the corporation, though they may have been unacquainted with the details or the proximate amount of its debts. The just inference is that they knew of the sale under the Warner judgment shortly after it occurred. If the title had been taken directly to the Land Company after the sale under the Warner judgment, or when there was redemption from it, as

complainants insist ought to have been done, it would have accomplished no useful purpose, and would only have invited other sales. Complainants, who appear to be men of affairs, would hardly have insisted at either time that it was wise to take the title directly in the name of the Land Company, when there were numerous creditors, some of whose debts were already in judgment, ready to pounce upon the property. In order to extricate the enterprise from its difficulties, it was necessary to put the property, if it could be done, in a situation where individual creditors could not redeem on their own account alone, or to the disadvantage of other creditors, so as to force some common agreement with all. It was manifestly the part of wisdom to induce creditors to consent to put the lands in the hands of trustees, and to wait until they could sell the lands in the ordinary way, rather than to attempt to meet the demands upon the corporation by forced sales at ruinous sacrifice. Ramsey made his proposal at an annual meeting. The publication of notice thereof in a Birmingham paper, though the meeting itself should have been held at Ensley, certainly gave more publicity to the call than if the publication had been made at Ensley, a neighboring, and much smaller, but most closely connected, business town. The bill shows the place of meeting fixed by the by-laws. There must have been a time fixed for the annual meeting, and the law imputes knowledge of this time to every stockholder. Nothing was done beforehand which tended to prevent a general attendance of stockholders at that meeting. On the contrary, there seems to have been a purpose to secure a full attendance. McCormack certainly intended to make his proposal, whatever his secret purpose in making it, at the meeting thus called. The president, at the beginning of the meeting, reported the difficulties of the corporation, and submitted his plan for surmounting them. There was opposition to McCormack's proposition, and, doubtless, discussion of it, since a resolution was adopted concerning it, and 30 shares of stock voted against it. It would have been an act of inconceivable folly on the part of a reasonable man, as Ramsey and his associates must be presumed to be, after he proclaimed in open meeting in the most formal way that he was acting in his own behalf, and setting forth the numerous things he proposed to do on the property for which he made his offer, in order to give value to the rest, afterwards to attempt to falsify his act and plan, and deceive the stockholders as to it, by causing an entry to be made on the minutes that some one else made his proposition, when he was well aware that every one who attended the meeting would know that the statement was false. All these occurrences related to important matters made at a time in the history of the corporation, when they were sure to attract attention among the stockholders.

The fidelity of one of the trustees selected to carry out the scheme is in no wise assailed by the bill, but it is alleged he was an honest man, and thought he was doing what was best for the corporation. It would be strange, if the plot was conceived as far back as stated, that such plotters would have selected an honest trustee to intervene between them and their evil purpose in getting the title in Mrs. Warner and putting it out of her and into the hands of the Ensley

Company. Is it natural, if such was their aim, that they would voluntarily have interposed a stumbling-block to the accomplishment of their designs in the person of an honest trustee, when they could as easily have selected a pliant instrument? The interposition of the Ensley Company as a conduit of title to the trustees, and the purchase of the town site from these trustees, by this same Ensley Company, which, just prior to that, had conveyed the property to these trustees, and that, too, in the face of the fact that a proposition to buy this same property had been made by Ramsey and associates, with whom the stockholders recommended the trustees to trade, was sure to excite and stimulate inquiry as to who promoted the Ensley Company, the purpose for which it was formed, and how the Ensley Company induced the trustees to sell to them the very property which the stockholders recommended the trustees to sell to Ramsey and associates. Any one knowing the facts—and stockholders were sure to know them—would instinctively connect Ramsey and associates in some way with the Ensley Company. The transaction, instead of concealing their identity, tended to divulge it. It seems almost incredible that sensible men, as we must presume respondents to be, would have adopted such a contrivance as holding out any hope of successfully veiling their scheme of obtaining the property for themselves and concealing their identity and interest from the knowledge of the stockholders, if they were actuated in the transaction by the motives and purposes now imputed to them. The subsequent conduct of McCormack and associates is utterly inconsistent with such a theory. About a month after McCormack made his proposal at the adjourned annual meeting, he and Ramsey openly purchased in their own behalf and name 10 acres of land from the trustees in the heart of the town site, including the hotel and other prominent buildings thereon, acting openly in taking possession, and spreading their deed upon the record. Shortly afterwards, they purchased in their own names 10 acres more from the trustees in another part of the town, and again put their deed on record. That part of the bill which sets forth notice of the published meeting at Birmingham makes as part of the bill a copy of the minutes, which contains a notice, signed by the president and secretary, addressed to the stockholders, stating that they would be asked to consider at the annual meeting a plan looking to the sale of the land by the Land Company, and that, as an incident to this, the stockholders would be asked to pass upon the policy of relinquishing the statutory right of redemption, etc. This circular further stated that a plan had been devised for dealing with the company's affairs which it was believed would prove satisfactory, and would undoubtedly redound to the interest of the stockholders, and concluded by urging attendance of all the stockholders, "as matters of vital importance" would be transacted at the meeting. The bill is silent whether this circular was ever issued or not, or whether complainants knew of it at or about that time. The language and posture of this circular copied verbatim upon the minutes, to which every stockholder had the right of access, immediately at the foot of the notice which was published, signed by the officers of the corporation, and addressed to its stockholders, leads to the conclusion

that it was intended for publication along with the formal notice for the meeting, which it is admitted was published, if, indeed, this circular was not in fact issued and published—a point the allegations of the bill do not settle. Whether or not it was published and sent out, its appearance upon the minutes shows the plan of liquidating the affairs of the company was not kept a guarded secret, but openly spread on the minutes at least, before the meeting at which it was expected to present the plan, and more than three weeks before it was actually presented to the assembled stockholders. Is it not a most probable and reasonable presumption, under these circumstances, that the matter had been discussed with creditors, and at least with some of the stockholders, beforehand, and that the steps taken just prior to the meeting were generally known to the creditors, if not to the stockholders generally? It is not certain from the allegations of the bill whether it intends to deny that a resolution was passed, as the minutes show, accepting McCormack's proposition under the name of the Ensley Company. May not the discrepancy in the state of the title, as stated, at the time the meeting was held, be reasonably and fairly accounted for on the presumption that the conveyances to the Ensley Company, and by it to Barker and Bowron, were but advance steps to put in operation the plan already agreed to by creditors, and not thought to be objectionable to the stockholders, in an honest effort to extricate the corporation from its difficulties, and save something to the stockholders? The Ensley Company after getting the Warner title, almost immediately conveyed all the lands it had bought, at about cost, to Barker and Bowron, with whom there had been, evidently, an understanding that the title should be transferred to them, and they would stand seised for the creditors and stockholders. As the law devoted the property to the very trust under which Barker and Bowron acknowledged they held it, the dealing with the Warner title, of itself, neither could nor did harm the corporation.

It is urged there was fraud in using the money of the Tennessee Company in redeeming the lands and getting them into the hands of the trustees. But how? If the Tennessee Company owed the Land Company, as charged, it was proper to use the money of the former company to protect the property of the Land Company in that way. If the Tennessee Company did not owe the money, directors could borrow from it, or might use their own money for such a purpose, without being guilty of the slightest misconduct. It is evident, whosoever's money it was, the Land Company has had an accounting as to it. That is an irresistible inference from the allegations and silence of the amended bill on these points. The correctness of the statement that the Tennessee Company would have come to the rescue and prevented the sale if it had been informed is overthrown by the fact that it did not do so, and allowed the property to remain in the hands of the trustees for some time, to be disposed of by them in meeting its debts. How long, the bill for some reason declines to inform the court.

Shook's statement as to the condition of the title, which was literally incorrect in several particulars at the time he made it to the stockholders, though not substantially erroneous as a general statement of

the condition of its affairs, could hardly have misled or been intended to mislead anybody as to its solvency and the sore straits to which it was reduced. When a meeting of business men is told that it is proposed to relinquish the "statutory right of redemption" in property, the ordinary stockholder understands that his property has been sold, and nothing remains but the right given by the statute to get it back by paying the debt for which it was sold upon the terms prescribed by the statute. There were directors in the several boards of the Land Company during the next four years, who are not charged with complicity in these transactions, who were under duty to protect its interest, who certainly knew of the purchase at the time, and, as the court must suppose, were well acquainted with the value of the property sold. Is it reasonable to suppose that they would remain silent, and take no steps to protect their company, if they believed it had been wronged? McCormack and Ramsey, leaving out all question about the value of the undertakings in behalf of the Ensley Company, paid more for the 240 acres they purchased than the whole 3,700 acres brought under execution sale the year before. The Tennessee Company, which is the largest stockholder in the Land Company, certainly knew of these sales about the time they happened. It was at least watchful of the interest of the Land Company. It paid a large sum of money for it to the trustees, procured a conveyance from them to the Land Company, and for the Land Company, and, by its authority, settled with these trustees, at least for the property then in their hands, and doubtless knew what they had done with other portions not reconveyed. Yet, so far as the bill shows, neither that company nor any of the disinterested members of the boards of directors have, even to this day, made any complaint, or otherwise challenged any of these dealings. Much stress is laid upon the fact that the respondents, in acting as they did, while officers of the Tennessee Company, which was the majority stockholder of the Land Company, breached their trust to it. So far as that phase of the matter is concerned, the Tennessee Company alone can complain, and its attitude, as shown by the bill, for nearly four years prior to its filing, is certainly not one of disapproval or dissent. Whatever be the correct view, these transactions are certainly of no moment now, save as they shed light upon the bona fides of the purchase of the 240 acres.

In the light of all these things, but for the explicit statement that respondents concealed from the stockholders knowledge of the coming of the steel plant, and did not advise the trustees of the peculiar value of the lands sold—the town site—in view of the great increase in price which would naturally take place when the plant was built, the court, giving the conduct of the respondents the benefit of the common presumption in favor of the rectitude of men's intentions, would have no hesitation in saying, on a fair construction of the averments of the bill, that the respondents were not endeavoring to pave the way for their own aggrandizement in these transactions, but were rather honestly striving to extricate the property, as best they could, from its difficulties, and save it for the stockholders, and that in accomplishing that purpose they were either ignorant of the trammels which the law puts upon trustees in dealing with their cestuis que

trustent, or else, having acted openly, and with no bad motive, in the interest of the corporation, relied on their associates to approve what they did. On the positive charge as to the deceit and concealment, it must be held on demurrer that actual fraud was practiced in these purchases; but it is not inconsistent with the facts detailed to presume that the temptation to depart from rectitude came and was yielded to in the interval elapsing between the lodging of the title in Barker and Bowron and the meeting of the stockholders.

Much has been said by counsel on both sides in this connection, as to the right of the court to look to the character of the respondents in determining the motives for their acts. There may be cases where a judge may avail himself of personal knowledge of the high character of litigants, in passing upon the motives of their acts, in cases before him. This is not such a case. The question on demurrer is not whether the respondents are guilty of fraud, but whether, upon the allegations of the bill, fraud has been well charged. On an issue of this sort character sheds no light and can have no influence. Men of high character can commit fraud, and such men, though entirely guiltless, may be charged with fraud.

9. The next important question is whether the complainants have been guilty of laches, and, in that connection, the proper construction of the allegations of the amended bill. Is a stockholder, in a case like this, on an issue of laches between him and a fiduciary alleged to be a possessor mala fide, charged, as a matter of law, with knowledge or notice of the possession of parcels of corporate property by an officer or director, or thereby put under duty to trace how such officer holds the property and how he acquired it, as soon as he knew or should have known of such possession? If he has knowledge that his fiduciary has committed constructive fraud, does that knowledge charge him, without more, with actual knowledge or notice of the fraud or deceit in obtaining title or possession of the property? Some of the English authorities hold that it is no part of a nonmanaging shareholder's duty to look after the management of the corporate property, nor is it sufficient to show that he might have become acquainted with it. It must be shown that he did so. The American authorities generally, and certainly the courts of the United States, hold that "means of knowledge plainly within the reach of stockholders by the exercise of the slightest diligence is, in legal effect, the equivalent of knowledge." There is, however, no presumption of law that an absent stockholder, on an issue of laches between him and his fiduciary, either knew or did not know what was done at a regular or adjourned meeting of stockholders, which he did not attend, or as to the disposition the managers of his corporation have made of parts of corporate property in the conduct of its business. Such issues are to be solved as inferences of fact, in view of the comparative magnitude or insignificance of the transactions complained of, the openness and publicity attending it, the volume and nature of the business of the corporation, the extent of the territory in which its operations are carried on, the place where the transaction occurred, the value of the stockholder's interest in the corporation, his presence or absence from its home, the nature of his own pursuits, and all the surrounding circumstances which throw

light upon the question. With the vast multitude of corporations covering every field of business and industry, and the vast number of stockholders scattered in different parts of the country, at a distance from the operations of the corporation, and the frequent recurrence (sometimes by design and sometimes otherwise) of improper transactions which militate against the interests and rights of minority shareholders, it would not be promotive of justice, when the cestui que trust seeks to call his trustee to account, to hold, as matter of law, that adverse possession of a portion of the corporate property by an officer or agent of the corporation, for a period short of the bar of limitations, of itself charged the stockholder with notice or knowledge of how and when the property was obtained, or imputes to him knowledge of what was done at stockholders' meetings, which he did not attend. Laches is the creature of circumstances. It is inaction when, in good conscience, there should be action. Inactivity, when it is not blamable, is not laches. No one can be charged with negligence in the assertion of his rights unless he knew them, or is blamable for not knowing them. There is no such thing as acquiescence in a wrong unless there is notice or knowledge of that wrong. It must be remembered, in construing the amended bill, that it was intended to repel inferences of fact which the court felt compelled to draw in the particulars pointed in the former opinion. Nevertheless, the amended bill is still silent concerning many important questions of fact then discussed. The amended bill does not tell when complainants first learned of the plan of the president to put the property in the hands of trustees; no intimation is given of the date when the steel plant was erected, or when complainants first learned of the fact. The court is not informed when the Tennessee Company paid off the debts of the Land Company and its property was reconveyed to it, or what took place between the Land Company and its trustees as to the various transactions had by the trustees in disposing of the property which came into their hands. Nothing is stated as to when complainants first learned what took place at the stockholders' meeting of January 25, 1898. The general allegations of ignorance that Shook and McCormack had acquired the Warner judgment, that the sale was not necessitated by pressure of creditors, that the Ensley Company was organized for the benefit of respondents and they were acting adversely, is, by the language of the denials, limited to any period prior to the stockholders' meeting of January 25, 1898. For aught that appears, one of the complainants now before the court may have been one of the holders of the 30 shares of stock which voted against McCormack's proposition. The court is bound to presume that complainants knew of the constructive fraud on the part of the respondents in the purchase of the 240 acres of land at least shortly after these transactions happened. In this respect the amended bill is not materially different from the original bill, save in the statement that no change has taken place which would make it inequitable to rescind.

Giving due weight to the studied silence of the amended bill in the particulars pointed out, in what attitude does it place the complainants as to knowledge or notice of the deceit and concealment, the actual fraud charged, in the dealings with the trustees and stockholders, as

to the purchase of these 240 acres of land? Complainants knew, as must be inferred, long before the bill was filed, of the constructive fraud. They had ascertained who the Ensley Company was. They knew the steel plant had been built, and when; presumably a short time after the sale. They knew there had been a subsequent rise in the values of the property sold. They knew what property had been sold, and how it was situated with reference to the steel plant. The bill, however, avers explicitly that there were no records on the books of the Tennessee Company or of the Land Company which would have disclosed the actual fraud charged, or put the Land Company, or any of its disinterested officers and stockholders, on inquiry. Complainants aver explicitly that they never entertained suspicion of the good faith or rectitude of the defendants in the transactions complained of, but, on the contrary, trusted and confided in them until put upon notice by a speech made by one of the defendants, the substance of which is given, at Ensley, about July, 1901, when they commenced to prosecute inquiry, etc. They aver that they were ignorant of the actual fraud for these reasons. Do the facts admitted by the bill, fairly construed, disprove or overthrow the last assertion? Conceding that the respondents knew of the proceedings at the stockholders' meeting, and that the Ensley Company was in possession of the lands bought by it, and McCormack and Ramsey were in possession of the 20 acres bought by them, and also when the steel plant was erected, does that charge complainants with knowledge that respondents concealed or withheld knowledge of the expected building of the steel plant from their fellow shareholders, or from their trustees when they purchased from them? Certainly the possession of the land did not give notice of the actual fraud. It shows only a constructive fraud. A purchase by a trustee is not necessarily fraudulent in fact or in morals. Complainants might have been willing to waive a fair purchase from their trustees, when they would not have been willing for the purchase to stand, if they had known it was tainted with actual fraud. Certainly the things which complainants knew would, to prudent minds, have suggested inquiry, whether knowledge of the building of the steel plant had been withheld from the stockholders, which would have developed the fact. Complainants did not inquire, and remained in actual ignorance. Are the respondents at fault for not making the inquiry? They were dealing with their trustees. They had a right to presume that they would not be guilty of any actual fraud. They had a right to rely upon that presumption, and not to watch or suspect them. If complainants did not make the inquiries, they would not be blamable, as between themselves and the trustees, where the failure to inquire and consequent ignorance grew out of confidence in the trustees, and the fact that the fraud was concealed as charged. Kilbourn v. Sunderland, 130 U. S. 519, 9 Sup. Ct. 594, 32 L. Ed. 1005; Thompson v. Finch, 22 Beavan, 325; Larzelere v. Starkweather, 38 Mich. 96; Jones v. Smith, 1 Hare, 109. Knowledge of other things which must be imputed to complainants, unaccompanied by the statements here made that there was actual ignorance of the deceits charged, and that suspicion had not been aroused, would have led to the inferences of fact, drawn on demurrer to the original bill, that suspicion had developed inquiry which had been followed

up, and led to the knowledge of the fraud complained of, long before the filing of the bill. If such had been the fact, it would have put complainants, in view of the long delay which has occurred, in the attitude of expectant watchers, waiting to affirm or disavow the transaction as their interest might suggest, speculating upon respondents; an attitude which of itself would require a court to decline relief as regards property under the changing conditions here involved. Complainants, however, explicitly aver that their reliance upon respondents prevented suspicion and lulled inquiry, and that, in consequence, they were actually ignorant of the fraud which it is alleged was concealed, until complainants discovered it shortly before the filing of the bill.

The case, as now presented, is no longer one where complainants have acquiesced, at least as to the actual fraud charged. In reaching this conclusion, the court has not been unmindful that long delay has elapsed before complaint was made; that only the holders of these few shares are asking to set aside transactions which its several boards of directors and vast majority of stockholders have neither assailed, nor shown any disposition to assail, after being invited to do so by this bill, which, with its array of charges, has been pending for many months; nor that it seems strange, in view of the knowledge that must be imputed to complainants in the matters to which we have referred, that complainants did not earlier entertain suspicion and prosecute inquiry which would have long since led to the discovery of the grievances complained of. The court, however, cannot find complainants guilty of laches in these respects without breaking down the principle that the cestui que trust may assume the rectitude of his trustee, and has the moral and legal right to indulge full confidence, without making inquiry, even when he does not understand a transaction, until knowledge, direct or indirect, actually comes home to him who reposes confidence that his trustee has wandered from the paths of rectitude. Until then the law does not require him who gives confidence to watch or suspect him in whom the confidence is reposed. If the confidence is in fact reposed, and the cestui que trust is lulled into fancied security, and therefore does not watch or suspect, and thus remains in actual ignorance, it would assail the usefulness and integrity of the trust relation to absolve the trustee of accountability because the cestui que trust should have suspected the trustee's infidelity, and earlier ascertained the truth, if he had not extended such ample confidence to one whom he had the right to trust implicitly. A trustee, on an issue of good faith with the cestu que trust, cannot be heard to say, in a court of equity, that a cestui que trust, who in fact remained in ignorance of actual fraud because he trusted, would not have been so long ignorant if he had not trusted too much, and was therefore guilty of laches in the measure of confidence extended. A trustee in possession mala fide cannot avail himself of changed circumstances growing up in the interval between the commission of a concealed fraud and its discovery to defeat rescission when the cestui que trust, who remained in actual ignorance by reason of trust in him, acts promptly on discovery.

10. It is objected by the demurrers that complainants do not properly offer to do equity, and restore the status quo, and that the creditors of the Ensley Land Company are not made parties. It appears

from the amended bill that the debts due creditors have been paid by the Tennessee Company. There are, therefore, no longer any creditors to be affected by the decree herein. The bill does not contain a general offer to do equity, or to submit to and abide by such orders as to equity may seem meet. It does, however, allege in a general way that some of the property has been sold to bona fide purchasers, and therefore cannot be restored to the complainants. It prays for an accounting, etc., and concludes, "And complainants hereby offer to allow a credit to the defendants for all sums lawfully expended for said Ensley Land Company, or which inured to its benefit." It is evident from the bill, if complainants prove their case, there must be an accounting. While the bill shows the payment of considerable sums of money inuring to the benefit of the Land Company for which respondents will be entitled to credits, the amounts for which respondents may be debited on account of sales of land to bona fide purchasers does not appear. The prayer to set aside the conveyances and for an accounting, and the offer to allow a credit for all expenditures which inured to the benefit of the Land Company, bind the complainants to all the consequences of rescission and an accounting, and authorize the court, if the state of the accounts require it, to render a decree in favor of the respondents for any balance due them, without a more specific offer of equity, and to make all proper decrees to fully restore the status quo. Goldthwaite v. Day, 149 Mass. 187, 21 N. E. 359; Miller v. L. & N. R. R. Co., 83 Ala. 275, 4 South. 842, 3 Am. St. Rep. 722; Cumberland Coal & Iron Co. v. Sherman et al., 20 Md. 133. At this stage of the proceedings the offer is sufficient.

The special demurrers to so much of the bill as seeks to vacate and annul the sheriff's sale under the Warner judgment, the conveyances to the Ensley Company, its conveyance to Barker and Bowron, their declaration of trust, and the conveyance made by Shook pursuant to the resolution of the stockholders, releasing the right of redemption, etc., are well taken. The other demurrers are not well taken, and will be overruled. A decree may be presented sustaining and overruling the demurrers on the points stated, in conformity with the opinion, giving the respondents 40 days in which to answer.

CAMDEN INTERSTATE RY. CO. v. CITY OF CATLETTSBURG et al.

(Circuit Court, E. D. Kentucky. April 4, 1904.)

1. JURISDICTION OF FEDERAL COURTS—SUIT AGAINST STATE.

A municipal corporation is not an agency of the state in such sense that a suit against it is one against the state within the meaning of the eleventh constitutional amendment, excluding such suits from federal jurisdiction.

2. SAME—ENJOINING PROCEEDINGS IN STATE COURT.

Under Rev. St. U. S. § 720 [U. S. Comp. St. 1901, p. 581], prohibiting federal courts from granting an injunction to stay proceedings in a state

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¶ 1. Federal jurisdiction of suits against state, see note to Tindall v. Wesley, 13 C. C. A. 165.

¶ 2. Federal courts enjoining proceedings in state courts, see notes to Garner v. Second Nat. Bank, 16 C. C. A. 90; Central Trust Co. v. Grantham, 27 C. C. A. 575.

court, a federal court is without jurisdiction to enjoin the further prosecution of criminal proceedings instituted by a city for the violation of an ordinance, although such section does not deprive it of jurisdiction to enjoin threatened proceedings, which have not yet been commenced.

3. EQUITY JURISDICTION—ENJOINING CRIMINAL PROCEEDINGS.
A court of equity has no power to enjoin the institution or prosecution of criminal proceedings, unless they are instituted by a party to a suit already pending before it, and to try the same right that is in issue therein, or to prohibit the invasion of rights of property by the enforcement of an unconstitutional law.

4. SAME.
The grant to a railroad company of the right to construct its road on the streets of a city does not vest it with property rights which render unconstitutional a subsequent law or ordinance enacted in the exercise of the police power of the state to secure the safety of the public by requiring the company to maintain flagmen at street crossings, and the prosecution of criminal proceedings for the enforcement of such a law or ordinance cannot be enjoined by a court of equity.

In Equity. On motion for preliminary injunction and on demurrer to bill.

Brown & Vinson, Thos. R. Brown, and Z. T. Vinson, for plaintiff.
P. K. Malin and H. C. Sullivan, for defendant.

COCHRAN, District Judge. The complainant is a West Virginia corporation owning and operating an electric railroad between Huntington, W. Va., and Ironton, Ohio, which passes in its course through the city of Catlettsburg, a municipal corporation of the fourth class in the state of Kentucky. The defendants are said city and the mayor and the chief of police thereof. The object of the suit is to enjoin the prosecution of proceedings already instituted and threatened to be instituted against complainant in the police court of said city for violation of an ordinance thereof which requires it to keep flagmen at a certain point on Center street, and at the intersection thereof and Division street, and at the intersection of Division and Louisa streets, or, in lieu of flagmen at said intersections, to have the conductor of each car flag it around the curves thereat. The ordinance provides that each day's failure to comply therewith shall be deemed a separate offense, and fixes a fine of $10 for each offense. The complainant moves for a preliminary injunction, and defendants demur to the bill. Each step raises the same questions.

It is urged by the defendants that this court has no jurisdiction of this suit because of the eleventh amendment to the federal Constitution. That amendment is in these words:

"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."

They cite authorities to the effect that a municipal corporation is an agent of the state government for local purposes, and contend, therefore, that a suit against such corporation and its officers is a suit

¶ 3. Restraining criminal prosecutions, see note to Arbuckle v. Blackburn, 51 C. C. A. 133.
See Injunction, vol. 27, Cent. Dig. §§ 178, 179.

against "one of the United States," within the meaning of that amendment. That such a corporation is such an agent is undoubtedly true, but it does not follow therefrom that a suit against it or its officers is such a suit. The most that can be said is that it is a suit against a subdivision of one of said states, not that it is a suit against one of said states itself. This being so, the amendment in question does not deny jurisdiction to the federal courts of the suit, for it denies to them jurisdiction only of suits against "one of the United States," and not against a subdivision thereof. If the federal courts do not, by reason of said amendment, have jurisdiction of suits against municipal corporations, it is hard to understand upon what ground it has been that they have so often taken jurisdiction of suits against them. So far as my research has gone, I have not found a case where it has been urged that federal courts do not have such jurisdiction, much less where it has been so held. The cases cited by counsel for defendants in support of the proposition that municipal corporations are state agencies for local purposes were mostly suits against municipal corporations, and in none of them was it suggested that the suits could not be maintained for want of jurisdiction; on the contrary, in each of them jurisdiction to dispose of them on their merits was exercised. I think it therefore clear that the jurisdiction of this court of this cause is not affected by this consideration.

But this is not the only ground upon which it can be claimed that this court has no jurisdiction, though it is the only one that has been urged. It is certain that it has no jurisdiction to enjoin the further prosecution of the proceedings already instituted and now pending. This is because of section 720, Rev. St. U. S. [U. S. Comp. St. 1901, p. 581], which is in these words:

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

It is well settled that such proceedings as are now pending are proceedings in a court of the state of Kentucky within the meaning of said statutory provision. In the case of Yick Wo v. Crowley (C. C.) 26 Fed. 207, it was held that said section forbade the issuance of an injunction to prevent a police officer of a city from serving warrants of arrest issued by a state court for violation of city ordinances claimed to be in contravention of the fourteenth amendment of the United States Constitution and the treaty with China. Said statutory provision, however, has no relation to such proceedings as are not now pending, but are only threatened. In the case of Rhodes & Jacobs Mfg. Co. v. New Hampshire (C. C.) 70 Fed. 721, Judge Putnam said:

"We are asked to enjoin one of the defendants from proceeding in his official capacity as a justice of a state police court, admittedly a judicial function; and all the other defendants are sought to be restrained in the exercise of their official duties solely and purely with reference to the incidents of proceedings in the justice's court. It is plain that under section 720 of the Revised Statutes the proceedings instituted before this bill was filed and described in it cannot be enjoined by this court. It seems, however, to be

for the most part considered that this section does not apply to proceedings, either criminal or civil, which have not in fact commenced, but which are threatened by state officials. Mr. Justice Bradley, in Live Stock Dealers & Butchers' Ass'n v. Crescent City Live Stock Landing & Slaughter-House Co., 1 Abb. (U. S.) 388, 404, 407, Fed. Cas. No. 8,408, and Mr. Justice Blatchford in Fisk v. R. R. Co., 10 Blatchf. 518, Fed. Cas. No. 4,830. A like distinction seems also to have been made by Judge Sawyer in Yick Wo v. Crowley [C. C.] 26 Fed. 207. Therefore if we had only this statutory provision to consider, we might find no difficulty in going to an injunction against criminal proceedings threatened, but not commenced, when the bill was filed."

But though it cannot be said that this court has no jurisdiction to enjoin the institution of threatened proceedings under said ordinance because of said statutory provision, there is ground upon which it may be urged that it has not such jurisdiction. That ground is that proceedings under said ordinance are criminal proceedings, and a court of equity has no jurisdiction to enjoin the institution or prosecution of such proceedings. There can be no doubt but that such is the nature of such proceedings; and it is equally true that, as a general rule, a court of equity is without jurisdiction to enjoin their institution or prosecution. But to this rule there are two exceptions, and the question arises whether this case comes within either one of them. To determine this question correctly it is essential to understand exactly just what those two exceptions are. And here we will limit our attention to decisions of the Supreme Court of the United States relevant to the matter. The leading case on the subject, though what is said in the opinion therein in relation to the jurisdiction of a court of equity to enjoin criminal proceedings is open to the suggestion that it was obiter, is the case of In re Sawyer, 124 U. S. 200, 8 Sup. Ct. 482, 31 L. Ed. 402. That was a petition by the mayor and councilmen of Lincoln, Neb., for a writ of habeas corpus to release them from imprisonment for contempt of court in disobeying an order of the United States Circuit Court for that state enjoining them from prosecuting proceedings already instituted and then pending to remove the police judge of said city from his office for malfeasance therein. The contempt depended upon the question whether the Circuit Court had jurisdiction to make the order disobeyed. It was held that it did not have such jurisdiction, and the petition was therefore granted. The ground upon which it was held that said court was wanting in such jurisdiction was that a court of equity has no jurisdiction to enjoin proceedings to remove a public officer from his office, and this without regard to the nature of the proceedings. Mr. Justice Gray, who delivered the opinion of the court, suggested that there were several possible views as to their nature, without deciding which was the true one. They might be regarded as criminal or civil, and, if the latter, they might be regarded as judicial or administrative. If regarded as civil judicial proceedings, he held that there was in this an additional reason for holding that the lower court was without jurisdiction to enjoin their prosecution, because of section 720, Rev. St. U. S., heretofore referred to, which prohibits a court of the United States granting a writ of injunction to restrain proceedings in a state court. This reason equally applied if the proceedings were re-

garded as criminal, and therefore judicial, in their character, though no suggestion was made as to this. If, however, the proceedings were regarded as criminal, he held that there was in this consideration a reason also for the lower court being without jurisdiction to make the order which had been disobeyed. And in this connection he stated the law in regard to the right of a court of equity to enjoin criminal proceedings. Seemingly, at least, he recognized but one exception to the general rule on the subject. In the course of his consideration of the subject he said:

"The modern decisions in England by eminent equity judges concur in holding that a court of chancery has no power to restrain criminal proceedings unless they are instituted by a party to a suit already pending before it, and to try the same right that is in issue there."

Mr. Justice Field, who delivered a concurring opinion, had this to say on the subject:

"I concur also in what is said in the opinion of the court as to the want of jurisdiction of a court of equity over criminal proceedings, but do not perceive its application to the present case. The proceedings before the common council were not criminal in the sense to which the principle applies. That body was not a court of justice administering criminal law, and it is only to criminal proceedings in such a tribunal that the authorities cited have reference. In many cases proceedings, criminal in their character, taken by individuals or organized bodies of men, tending, if carried out, to despoil one of his property or other rights, may be enjoined by a court of equity."

I do not understand the last sentence of this quotation to state an additional exception to the rule in question, but to limit it to proceedings in a court of justice criminal in their character.

The case of Reagan v. Farmers' Loan & Trust Co., 154 U. S. 362, 14 Sup. Ct. 1047, 38 L. Ed. 1014, was a suit by the Farmers' Loan & Trust Company, mortgagee of the International & Great Northern Railroad Company, against the Railroad Commission and Attorney General of the state of Texas and said railroad company to cancel and have declared null and void certain rates and tariffs for the transportation of goods by said company which had been fixed by said commission, because unreasonable and unjust, and to restrain said company from putting them into effect, and said commission and Attorney General from instituting proceedings against said company and its officers and agents to enforce payment of penalties prescribed by the law under which said commission acted in fixing said rates for extortion in charging rates in excess thereof and said commission from fixing other rates. It was adjudged that the plaintiff was entitled to all the relief prayed for save in so far as the commission was sought to be enjoined from fixing other rates. The only ground urged as a reason why there was no jurisdiction to grant said relief considered and passed upon by the court was that the suit, in so far as it was against the Railroad Commission and the Attorney General was a suit against the state of Texas, and hence prohibited by the eleventh amendment. It was held that this ground was not well taken, because the suit was not a suit against said state within the meaning of said amendment, and, whether so or not, the sixth section of said law authorized any railroad company or party in interest dissatisfied with the rates fixed by the

Railroad Commission to bring suit against it to raise and have determined the question as to their reasonableness. Nothing was said in the opinion as to whether the proceedings authorized to be instituted to enforce said penalties were criminal proceedings, and, if so, whether the right to enjoin the Railroad Commission and Attorney General from instituting them was affected by this fact, or adjusting the holding that their institution should be enjoined with the general rule in regard to the right to enjoin the institution or prosecution of criminal proceedings as laid down in the Sawyer Case. And it is to be noted that, in addition to liability to such proceedings for charging excess rate, there was also liability to civil suit for damage and penalties at the hand of shippers provided by said law.

The case of Smyth v. Ames, 169 U. S. 542, 18 Sup. Ct. 418, 42 L. Ed. 819, which involved a law of Nebraska, was similar to the Reagan Case save in that the suit was brought by certain stockholders of the railroad company affected by the rates in question, and those rates were fixed by said law, and not by the Railroad Commission. The railroad company was enjoined from making a schedule of rates in accordance with said law, and the Railroad Commission, or "Board of Transportation," as it was called, was enjoined from instituting or prosecuting any proceedings for violation of said law. Here, too, nothing was said in the way of adjusting the position taken that the plaintiffs were entitled to the relief granted with the holding in the Sawyer Case as to the right of a court of equity to enjoin the institution or prosecution of criminal proceedings.

The case of Harkrader v. Wadley, 172 U. S. 148, 19 Sup. Ct. 119, 43 L. Ed. 399, was an appeal from an order of the Circuit Court of the United States for the Western District of Virginia discharging a prisoner from state custody on a writ of habeas corpus. The prisoner was in custody under proceedings against him on an indictment for embezzlement of the assets of a bank. The ground upon which the lower court acted in discharging the prisoner was that prior to the finding of the indictment two suits in equity had been brought in said court by the creditors of said bank, in which a receiver to take charge of the bank and a master to take all necessary accounts had been appointed, and after the finding thereof the commonwealth attorney and other persons engaged in prosecuting it had been enjoined by it from further prosecution thereof. It considered that pending those suits the state court had no jurisdiction to proceed by way of indictment and trial against the prisoner for embezzling the assets of said bank, and for it to so proceed constituted an interference with the federal court in the exercise of its jurisdiction. The Supreme Court reversed the order appealed from. It held that the lower court had no right to enjoin the prosecution of said indictment for three reasons: It was prohibited by section 720, Rev. St. U. S., it was an injunction against the prosecution of criminal proceedings, and it was a suit against the state of Virginia within the meaning of the eleventh amendment. In considering the second reason, the only exception to the general rule that a court of equity has no power to enjoin criminal proceedings referred to was

the one suggested by Mr. Justice Gray, and it was held that the case did not come within that exception.

The case of Fitts v. McGhee, 172 U. S. 516, 19 Sup. Ct. 269, 43 L. Ed. 535, was a suit brought by the receivers of a railroad company against the Attorney General of the state of Alabama to restrain him from instituting or prosecuting criminal proceedings to enforce against the plaintiffs provisions of a state law reducing the tolls which had been exacted of the public by said company for travel over a bridge owned by it on the ground that said legislative enactment was arbitrary, unreasonable, and amounted to a confiscation of said company's property. It was held that the suit could not be maintained. The denial of the relief sought was placed upon two grounds. One was that it was a suit against the state of Alabama, within the meaning of the eleventh amendment. The other was that it was a suit to enjoin the institution and prosecution of criminal proceedings, which a court of equity had no jurisdiction to do. The law reducing the tolls provided a fine for each offense of demanding or receiving a higher rate of toll than that prescribed of $20 to be recoverable before any justice of the peace of the two counties in which the bridge was located. The holding that the plaintiff was not entitled to the relief sought on the latter of said two grounds was based upon the Sawyer Case and that of Harkrader v. Wadley. No reference was made to the two cases of Reagan v. Farmers' Loan & Trust Co. and Smyth v. Ames as bearing upon this point, or attempt made to adjust them to said holding, though they were referred to and distinguished in their bearing upon the question as to whether the suit was one against the state of Alabama. Mr. Justice Harlan, in delivering the opinion of the court, said:

"We are of the opinion that the Circuit Court of the United States sitting in equity was without jurisdiction to enjoin the institution or prosecution of these criminal proceedings commenced in the state court."

And again:

"The plaintiffs state that the toll gatherers in their service had been indicted in a state court for violating the provisions of the act of 1895 in respect of tolls. Let them appear to the indictment, and defend themselves upon the ground that the state statute is repugnant to the Constitution of the United States. The state court is competent to determine the question thus raised, and is under duty to enforce the mandates of the supreme law of the land. * * * And if the question is determined adversely to the defendants in the highest court of the state in which the decision could be had, the judgment may be re-examined by this court upon writ of error. That the defendants may be frequently indicted constitutes no reason why a federal court of equity should assume to interfere with the ordinary course of criminal procedure in a state court."

The last case in which the Supreme Court has had occasion to consider the jurisdiction of a court of equity to enjoin criminal proceedings is the recent one of Davis & Farnum Mfg. Co. v. City of Los Angeles (decided March 2, 1903, and not yet officially reported) 23 Sup. Ct. 498, 47 L. Ed. 778. That case was this: Caroline W. Dobbins made a contract with the Valley Gas & Fuel Company, a California corporation, to build certain gasworks for her, including all things necessary for the manufacture, recovery, and storage of

gas on lands thereafter to be designated. Thereafter said company made a contract with the Davis & Farnum Manufacturing Company, a Massachusetts corporation, to erect on Mrs. Dobbins' premises a water tank and gas holder, one of the things included in said company's contract with her. And thereafter Mrs. Dobbins purchased certain lands in Los Angeles upon which the gasworks were to be built, and which were within the limits wherein it was lawful to erect gasworks according to the then existing ordinances of said city, obtained permission of the board of fire commissioners to erect the gasworks thereon as therein prescribed, and her contractors began to lay the foundation thereof at a cost of upwards of $2,500. Subsequent to this the city amended said ordinances, and included Mrs. Dobbins' property in the prohibited territory for the erection or maintenance of gasworks. It would seem that said ordinances provided criminal proceedings to secure their enforcement, and, the work being continued after the adoption of said amendment, proceedings were instituted against the employés of the gas and fuel company and the manufacturing company upon which they were arrested and the work stopped. Thereupon a bill in equity was filed by said manufacturing company alone against the city to restrain it and its officers from enforcing said ordinances. It was averred that the gasworks were in an uncompleted condition, exposed to the elements, and in danger of being destroyed; that said amending ordinances were adopted at the instigation of a light company that had enjoyed a monopoly of the gas business in said city for 10 years past; that they were unconstitutional, as impairing the obligation of Mrs. Dobbins' contract with the city under the prior ordinances. It was held that the suit could not be maintained. The lower court, by Judge Wellborn, whose opinion may be found in 115 Fed. 537, had likewise so held. He placed his decision solely upon the ground that it was a suit to enjoin the prosecution of criminal proceedings. In his opinion he recognized but one exception to the general rule that a court of equity has no jurisdiction to enjoin such proceedings; that exception being the one stated by Mr. Justice Gray in the Sawyer Case, to wit, where they were instituted by a party to a suit already pending before it, and to try the same right that is in issue there. The Supreme Court considered the case under the same aspect. Mr. Justice Brown said:

"As the only method employed for the enforcement of these ordinances was by criminal proceedings, it follows that the prayer of the bill to enjoin the city from enforcing these ordinances or prevent plaintiff from carrying out its work must be construed as demanding the discontinuance of such criminal proceedings as were already pending and the institution of others of a similar character."

In stating the rule on the subject, Mr. Justice Brown referred to another exception thereto, and seemed to hold that it was implicitly, if not expressly, stated in the Sawyer Case, though there is room for the inference that it was admitted under the influence of the cases of Reagan v. Farmers' Loan & Trust Co. and Smyth v. Ames, and that it was considered that it was not affected by the case of Fitts v. McGhee. That exception was that, where the

criminal proceedings were in the enforcement of a law which was unconstitutional because it invaded rights of property, their threatened institution or prosecution might be enjoined at the instance of the party whose rights of property would thereby be invaded. Mr. Justice Brown said:

"That a court of equity has no general power to enjoin or stay criminal proceedings unless they are instituted by a party to a suit already pending before it, and to try the same right that is in issue there, or to prohibit the invasion of the rights of property by the enforcement of an unconstitutional law, was so fully considered and settled in an elaborate opinion by Mr. Justice Gray (In re Sawyer, 124 U. S. 200 [8 Sup. Ct. 482, 31 L. Ed. 402]) that no further reference to prior authorities is deemed necessary, and we have little more to do than to consider whether there is anything exceptional in the case under consideration to take it out of the general rule."

He stated that the general rule had been applied in Harkrader v. Wadley and Fitts v. McGhee, and as to the latter case he said:

"This was held to be in reality a suit against the state to enjoin the institution of criminal proceedings, and hence within the general rule."

Concerning its application to the case in hand he said:

"Plaintiff seeks to maintain its bill under the exception above noted, wherein, in a few cases, an injunction has been allowed to issue to restrain an invasion of rights of property by the enforcement of an unconstitutional law, where such enforcement would result in irreparable damages to the plaintiff."

Concerning the Reagan Case, which had been cited by plaintiff in support of the admission of such exception, he said that therein, "under a law of Texas giving express authority to a railroad company or other party in interest to bring suit against the Railroad Commission of that state, a bill was sustained against such commission to restrain the enforcement of unreasonable and unjust rates, and in the opinion a few instances were cited where bills were sustained against officers of the state who, under color of an unconstitutional statute, were committing acts of wrong and injury to the rights and property of the plaintiff acquired under a contract with the state." And in justification of the admission of such exception he said:

"It would seem that if there were jurisdiction in a court of equity to enjoin the invasion of property rights through the instrumentality of unconstitutional law, that jurisdiction would be ousted by the fact the state has chosen to assert its power to enforce such law by indictment or other criminal proceedings. Springhead Spinning Co. v. Riley, L. R. 6 Eq. 558."

The ground upon which it was held that the case in hand did not come within the exception, and therefore the plaintiff was not entitled to the relief sought, was that it had no legal interest in the litigation, and there was no lack of complete and adequate remedy at law. It had no contract with the city which had been violated by the ordinances complained of. The contract relied on was a contract with Mrs. Dobbins, to which it was no party, and in which it had no direct interest. And the case was distinguishable, for reasons given, from those in which bills had been sustained by one or more stockholders in a corporation against the corporation, and other parties to restrain the enforcement of an unconstitutional law

against the corporation itself, and also from the Reagan Case, in which it was held that the trustee of bondholders of a railroad corporation could maintain a suit against the State Railway Commission to restrain the enforcement of unreasonable and unjust rates. Besides, it did not appear that the manufacturing company did not have a complete and adequate remedy against its contractor, the gas and fuel company, for all damages which it had sustained by the stoppage of the work. This being so, irrespective of the fact that the case did not come within the exception relied on, and hence was affected by the general rule in relation to enjoining criminal proceedings, plaintiff was not entitled to the relief sought.

The line of cases which we have been considering in extenso must be differentiated from those cases which relate to the question whether a court of equity can enjoin criminal acts. In the former the question is whether it has jurisdiction to enjoin proceedings to punish criminal acts, whereas in the latter it is whether it can enjoin these acts themselves. It is held that criminal acts which amount to an invasion of right of property may be enjoined by a court of equity, notwithstanding they may be punishable criminally. This was one of the questions considered and determined in the case of In re Debs, 158 U. S. 596, 15 Sup. Ct. 909, 39 L. Ed. 1092. Mr. Justice Brewer there said:

"Again, it is objected that it is outside of the jurisdiction of a court of equity to enjoin the commission of crimes. This, as a general proposition, is unquestioned. A chancellor has no criminal jurisdiction. Something more than the threatened commission of an offense against the laws of the land is necessary to call into exercise the injunctive power of the court. There must be some interference, actual or threatened, with property or rights of a pecuniary nature; but when such interferences appear the jurisdiction of a court of equity arises, and is not destroyed by the fact that they are accompanied by or are themselves violations of the criminal laws."

Likewise that line of cases must be distinguished from those which uphold the right of a court of equity to enjoin proceedings to enforce payment of penalties prescribed for nonpayment of taxes or license fees that are illegal on the ground that thereby multiplicity of suits is prevented. Such proceedings are civil in their nature. In the case of Royall v. Virginia, 116 U. S. 572, 6 Sup. Ct. 510, 29 L. Ed. 735, Mr. Justice Matthews said:

"As the sum demanded for the license is a tax, the provision for the punishment of one who pursues his profession without a license is a part of the revenue system of the state, and is a means merely of enforcing payment of the tax itself, or of a penalty for not paying it. It is legally equivalent to a civil action of debt upon the statute, and its substantial character is not changed by calling the default a misdemeanor, and providing for its prosecution by information. The present case therefore stands precisely, so far as the constitutional questions arising in it are affected, as if it were a civil action in which the commonwealth of Virginia was plaintiff, seeking to recover the amount due on account of the tax and penalty."

In the recent case of Southern Express Co. v. Ensley (C. C.) 116 Fed. 756, Judge Jones said:

"A license imposed for revenue is the exercise of the taxing, not the police, power, and prosecutions before the corporate tribunal for doing the business without a license are quasi penal at most. In substance and legal effect they

are civil proceedings. * * * The 'offense' is not a crime. The 'offense' does not violate any law for the preservation of the health, morals, liberty, or peace of the citizens of Ensley. Enjoining prosecutions of the 'offense' here, if there is any law to support it, does not in any wise interfere with the control of the local tribunals over the mass of governmental powers committed to them for the welfare of the people of Ensley under what, for want of a better name, we denominate the police power. It is about ordinances directed solely to that end that many of the authorities are strict in holding that courts of equity must not interfere."

In view of this line of decisions it is not necessary to consider authorities in other jurisdictions bearing upon the question as to when criminal proceedings may and when they may not be enjoined by a court of equity. Perhaps more definiteness is desirable as to what constitutes an invasion of rights of property by the enforcement through criminal proceedings of an unconstitutional law so as to bring it within said exception, and perhaps, also, the decision in the case of Davis & Farnum Manufacturing Company v. City of Los Angeles requires that the case of Fitts v. McGhee should be limited to a holding that plaintiff therein was not entitled to the relief sought upon the ground that it was a suit against the state of Alabama within the meaning of the eleventh amendment. But sufficient can be gathered from them to determine whether or not this court has jurisdiction to enjoin the institution of further proceedings under the ordinances complained of herein.

It is certain that this case does not come within the first exception to the general rule against a court of equity enjoining criminal proceedings. The criminal proceedings complained of herein were not instituted by a party to a suit already pending before this court, and to try the same thing that is in issue there. Does it, then, come within the other exception? Have those proceedings been provided to enforce a law which is unconstitutional because it invades the property rights of complainant? There is no doubt but that the ordinance in enforcement of which those proceedings are provided affected the property of complainant. It imposes a burden of maintaining a flagman at least at one point, and at two other points if it does not see fit to cause the conductor of each car to flag it thereat, and, if it does, it imposes the burden of the delay in the operation of its cars thereby caused. But in so doing does it invade the property rights of complainant, and is it therefore unconstitutional? This depends upon the further question as to whether the Legislature of Kentucky had the power to authorize the city of Catlettsburg to enact such an ordinance. It it did, then said ordinance and the act of said Legislature empowering its enactment, if there is such an act, are not unconstitutional. The complainant, if such is the case, holds its property subject to the rights of said Legislature to impose such a burden upon it, and the imposition thereof cannot, therefore, be an invasion of its property rights. It is averred in the bill that the complainant at and before the passage of said ordinance had the right to operate a line of electric railroad over the streets of the defendant city under a grant so to do upon certain terms and considerations, none of which are set forth, made by it to the Ashland & Catlettsburg Street Railway Company, which grant was subsequently assigned and transferred to complainant by

said company, and it is claimed that by reason of such grant without the reservation of power to impose the burden complained of no such burden could subsequently be imposed upon complainant by authority of the Legislature. But such result does not follow from the fact of such grant without such reservation. Notwithstanding it, by virtue of the police power, the Legislature had the right to impose or authorize the imposition by the defendant of such burden upon the complainant. This is well settled. In the case of N. Y. & N. E. R. R. Co. v. Bristol, 151 U. S. 556, 14 Sup. Ct. 437, 38 L. Ed. 269, where the action of the Railroad Commissioners of Connecticut in pursuance to a law of that state requiring the removal by a railroad company of a grade crossing at a highway in the town of Bristol was upheld. Mr. Chief Justice Fuller said:

"It is likewise thoroughly established in this court that the inhibition of the Constitution of the United States upon the impairment of the obligation of contracts, or the deprivation of property without due process, or of the equal protection of the laws, by the states, are not violated by the legitimate exercise of legislative power in securing the public safety, health, and morals. The governmental power of self-protection cannot be contracted away, nor can the exercise of rights granted, nor the use of property, be withdrawn from the implied liability to governmental regulation in particulars essential to the preservation of the community from injury."

In the case of Chicago, B. & Q. R. Co. v. Chicago, 166 U. S. 254, 17 Sup. Ct. 590, 41 L. Ed. 979, where the right of the city of Chicago to open a new street across a railroad without compensating the company for the additional expense imposed upon it by reason thereof was in question, Mr. Justice Harlan said:

"The plaintiff in error took its charter subject to the power of the state to provide for the safety of the public in so far as the safety of the lives and persons of the people were involved in the operation of the railroad. The company laid the tracks subject to the condition necessarily implied that their use could be so regulated by competent authority as to insure the public safety. And as all property, whether owned by private persons or by corporations, is held subject to the authority of the state to regulate its use in such manner as not to unnecessarily endanger the lives and the personal safety of the people, it is not a condition of the exercise of that authority that the state shall indemnify the owners of property for the damage or injury resulting from its exercise. Property thus damaged or injured is not, within the meaning of the Constitution, taken for public use, nor is the owner deprived of it without due process of law. The requirement that compensation be made for private property taken for public use imposes no restriction upon the inherent power of the state by reasonable regulations to protect the lives and secure the safety of the people."

But, though the position is taken in the bill that the burden complained of could not constitutionally be imposed upon complainant, it has not been seriously urged in the argument of the case. According to that the real contention of complainant is that the Legislature has not undertaken to impose this burden on it by authorizing the defendant city to enact the ordinance by which it has been attempted to be imposed upon it. In other words, its real position is that the defendant city did not have legislative authority to enact the ordinance complained of. It is certain that it must have had such authority in order for the ordinance to be valid. As said by

Mr. Justice Brown in the case of Barnett v. Denison, 145 U. S. 135, 12 Sup. Ct. 819, 36 L. Ed. 652:

"It is the settled doctrine of this court that municipal corporations are merely agents of the state government for local purposes, and possess only such powers as are expressly given, or implied because essential to carry into effect such as are expressly granted."

It is certain, further, that the only powers conferred upon the defendant city which can be construed as giving it authority to pass the obnoxious ordinance are general powers "to pass ordinances not in conflict with the Constitution and the laws of the state or of the United States"; "to prevent and remove nuisances at the cost of the owner or occupants or of the party upon whose ground they exist, and define and declare by ordinance what shall be a nuisance within the limits of the city, and to punish by fine any person for causing or permitting a nuisance"; "to make by-laws and ordinances for the carrying into effect of all the powers herein granted for the government of the city, and do all things properly belonging to the police of incorporated cities"; and to have "the exclusive management and control" of all "public streets, alleys, sidewalks, roads, lanes, avenues, highways, and thoroughfares," "with powers to improve them by original construction, or to reconstruct them as may be prescribed by ordinances"; and specific power to "grant the right of way over the public streets or public grounds of the city to any railroad company or street railroad company on such conditions as to them may seem proper"; to "have a supervising control over the use of the same"; to "regulate the speed of cars and signals and fare on street cars"; to "grant the right of way that may be necessary to gas companies, water companies, electric light companies, telephone companies, or any like companies"; and to "compel railroad companies to erect and maintain gates at any or all street crossings." See Ky. St. 1903, § 3490, subsecs. 1, 7, 25, 33; section 3560. The complainant contends that this is not sufficient to confer power on the defendant city to pass said ordinance, and cites particularly in support of its contention the case of Pittsburgh, C., C. & St. L. R. Co. v. Crown Point (Ind.) 45 N. E. 587, 35 L. R. A. 685, where it was held that a grant to municipal corporations of power to regulate travel upon the streets so as to make their use reasonably safe and to enact ordinances for the protection of health, life, and property was not sufficient to authorize it to pass an ordinance to compel a railroad company at its own expense to keep a watchman and maintain gates where the tracks cross a street, under penalty for failure so to do. On the other hand, defendants cite in support of their contention that such power is ample to warrant the passage of the ordinance, the case of South Cov. & Cin. S. R. Co. v. Berry, 93 Ky. 43, 18 S. W. 1026, 15 L. R. A. 604, 40 Am. St. Rep. 161, where it was held that an ordinance of the city of Newport, Ky., requiring a street railway company to have both a conductor and driver on each of its cars, was authorized by a provision of the charter of the city which conferred upon the council power to pass all ordinances "that may be necessary for the due and effectual administration of right and justice in said city and for the better government thereof,"

and "to cause the removal or abatement of nuisance." In the view which we take of the case we do not find it necessary to pass upon this question thus at issue between the parties hereto, and the reasons put forward in support of their several contentions. It is plain that this is not a case where the rights of property of complainant are invaded or attempted to be invaded by an unconstitutional law sought to be enforced by criminal proceedings, and that, therefore, it does not come within the second exception to the general rule that a court of equity is without jurisdiction to enjoin the prosecution of criminal proceedings put forth by Mr. Justice Brown in the Davis & Farnum Manufacturing Company Case, but is subject to the general rule, and this court is without jurisdiction to grant the relief sought in this case.

Some point is made by complainant that on account of the low fine prescribed by the ordinance for each offense, to wit, $10, it is without remedy to have the serious matter presented by said ordinance disposed of by the higher state courts, and this is urged as a reason why this court should intervene. But this point is not well taken, for it is expressly provided in section 3519, Ky. St. 1903, a part of the charter of municipal corporations to which the defendant city belongs, that:

"Appeals shall be from the judgment of said police court to the circuit court of the county in all cases where the fine is more than twenty dollars. In cases where twenty dollars and less are imposed or authorized under ordinances the legality of such ordinances may be tested by either party by an appeal to the circuit court of the county. Where any judgment shall be rendered from the circuit court of the county as provided for in this section, either the city or the accused may appeal to the superior court or Court of Appeals."

Then it is urged as a reason why this court should taken jurisdiction that the complainant is liable to be subjected to innumerable prosecutions until the validity of the ordinance is finally determined by the highest court of the state. This is true, and to prevent it the complainant may have to temporarily, at least, comply with the ordinance. But as said by Mr. Justice Harlan in the case of Fitts v. McGhee:

"That the defendant may be frequently indicted constitutes no reason why a federal court of equity should assume to interfere with the ordinary course of criminal procedure in a state court."

It follows that the motion for a preliminary injunction must be denied, and the demurrer to the bill sustained.

RUSSELL v. RUSSELL et al.

(Circuit Court, D. New Jersey. April 15, 1904.)

1. RES JUDICATA—MATTERS CONCLUDED BY DECREE.

The questions concluded by a decree in equity, where the cause was appealed, are determined by the opinion of the appellate court. The parties are not concluded as to questions which were left open by such opinion, although they may have been passed on by the court below.

2. SAME.

Complainant brought a suit for the reformation of an antenuptial agreement, and for its specific enforcement as reformed; it being alleged that, as written, it was procured by fraud. The court, on a hearing, dismissed

the bill on the ground that the agreement could not be varied by parol, and also that the evidence was insufficient to show fraud in its procurement. On appeal the decree was affirmed, but the court, in its opinion, stated that it was not necessary to enter upon the question of fraud, because it appeared that complainant had received and retained a partial payment from the executors under the agreement, and was therefore not in a position to repudiate it. *Held*, that the decree in such suit was not a bar to a second suit by complainant to impeach and set aside the agreement, in which she offered to return the amount received and paid it into court.

3. EQUITY—DEFENSE OF LACHES.
A widow will not be held barred by laches from maintaining a suit to set aside an antenuptial agreement for fraud, instituted at once after the unsuccessful termination of a prior suit for its reformation, which was commenced within a year after her husband's death, and where she at all times asserted the invalidity of the agreement.

4. TENDER—NECESSITY AS CONDITION PRECEDENT TO SUIT.
A tender back of a payment made to a widow by her husband's executors is not necessary, as a condition precedent to her right to maintain a suit to set aside an antenuptial agreement, where, in any event, she was entitled to a larger amount from the estate.

5. ANTENUPTIAL AGREEMENTS—VALIDITY—PRESUMPTIONS.
Where the provision made for a wife by an antenuptial agreement is grossly disproportionate to the rights surrendered, the presumption is that the agreement was brought about by fraudulent concealment, and the burden rests upon those who would profit by it to show otherwise.

6. WITNESSES—COMPETENCY—TESTIMONY AS TO TRANSACTIONS WITH DECEDENT.
Rev. St. 858 [U. S. Comp. St. 1901, p. 659], which provides that, in suits by or against executors in which judgment may be rendered for or against them, neither party shall be allowed to testify against the other as to any transaction with or statement by the testator, unless called by the adverse party or the court, does not prevent a widow from giving testimony with respect to the making of an antenuptial agreement in a suit by her to recover her dower estate in the property of her deceased husband, to which his executors are only nominal parties, against whom no judgment could be rendered.

7. ANTENUPTIAL AGREEMENT—VALIDITY—IMPEACHMENT FOR FRAUD.
An antenuptial agreement provided that the intended wife should receive $5,000, within a stated time after her husband's death, in lieu of dower, and in addition to what might be given her by her husband's will. She signed the agreement at his solicitation, without any knowledge of the amount of his property, and on his representation that he would provide liberally for her by his will, and that the amount to be paid her under the agreement would be ample for her until his estate could be settled. He owned real estate which at the time of his death, five years later, was valued at $117,000, and personal property exceeding $100,000 in value, which, under the laws of the state, he could dispose of by will free from any claim on her part. By his will he gave her certain stocks, not exceeding $1,500 in value. *Held* that, in view of the confidential relations existing between the parties, the widow was entitled to have the agreement set aside for fraud, and to recover her dower interest in his realty.

8. SAME—FRAUD—VIOLATION OF PROMISE.
The failure to fulfill an executory promise made to secure the consent of a woman to an antenuptial agreement may constitute a fraud which will invalidate the agreement.

In Equity. On final hearing.

John H. Hazelton, for complainant.

David J. Pancoast and Walter H. Bacon, for respondents.

¶ 5. See Husband and Wife, vol. 26, Cent. Dig. § 165.

ARCHBALD, District Judge.[1] The purpose of this bill is to set aside an antenuptial agreement on the ground of fraud. The complainant, Lottie R. Russell, is the widow of John Russell, late of Leesburg, N. J., deceased, to whom she was married November 30, 1892, and who died July 20, 1897. Mr. Russell was 75 at the time of the marriage, and Mrs. Russell 50, and both had been previously married. Mr. Russell had no children living, but had three grandchildren; and Mrs. Russell had two adult sons, George R. and Grant Brown. By the antenuptial agreement, which was executed November 22d, a few days before the marriage, it was provided that there should be paid to Herschel Mulford, as trustee for Mrs. Russell, out of the estate of her husband, within six months after his decease, the sum of $5,000, which was to be in lieu and satisfaction of dower, and a bar to any claim upon his personal estate, unless some part of it should be given to her by will. Mr. Russell was at the date of this agreement and at the time of his death a man of considerable wealth; having realty estimated at $105,000, and personal estate of about $117,000, or $222,000 in all. It is charged that the agreement was secured by him, not only by concealing from his prospective wife the extent of his property, but by actually misrepresenting its condition and value, and particularly by promising to provide liberally for her in his will, which he failed to do. A will was executed by Mr. Russell February 18, 1896, without the knowledge of his wife, while they were on a pleasure trip in Florida; and by it, in addition to the $5,000 named in the antenuptial settlement, he simply gave her 10 shares of stock in the Glassboro National Bank, of the value of twelve or fifteen hundred dollars. Mrs. Russell was very much disappointed when she found out after his death how little he had left her, and, upon complaint to the others interested in the estate, there was some talk of a liberal increase of it by amicable arrangement, but none was reached. The executors subsequently paid to the trustee $500 of the $5,000 called for by the agreement, and the trustee on December 16, 1897, turned this over to Mrs. Russell, which, after taking the advice of counsel, and being assured that it would not prejudice her, she accepted and receipted on account. Being notified by the trustee, later on, that the rest of the $5,000 was ready for her, but being required to execute a formal release, she declined to accept it; and, conceiving in the end that she had been overreached, on June 2, 1898, she filed a bill in the Court of Chancery of New Jersey to assert her rights. This bill was against the same parties who are respondents here, and, relying in substance on the facts which have been stated, it prayed that the antenuptial agreement should be decreed to be of no effect, and be delivered up to be canceled; that the promise of her husband to make a liberal provision for her should be specifically enforced, by paying to her not less than one-third of the net personal estate, in addition to the value of her dower in the realty; and that the will should be declared to have been in fraud of her rights, and be made null and void so far as it stood in her way. The respondents having answered, the case was heard by Vice Chancellor Grey, who on August

[1] Specially assigned.

16, 1900, filed an opinion in which he advised that the bill be dismissed, and a decree was subsequently entered in accordance therewith. Russell v. Russell, 60 N. J. Eq. 282, 47 Atl. 37.

The case was considered by the vice chancellor as proceeding upon two grounds: First, to reform the antenuptial agreement so as to embody the undertaking by Mr. Russell to provide liberally for the complainant in his will; and, secondly, to set aside the agreement, as induced by misrepresentation and fraud, in order to make way for the claim of dower in the realty. As to the former it was held that the agreement, being in writing and complete in itself, could not be varied by an added term resting in parol, both on account of the established rule in this regard, as well as the fact that, being based on the consideration of marriage, the statute of frauds was an insurmountable bar; and, as to the second, that fraud in inducing the execution of the agreement, as made, was no ground for the specific performance of it, as not made. Recognizing, however, that relief for the complainant must come, if at all, by setting aside the agreement, so as to let her into her dower rights, and proceeding to consider the alleged fraud in its procurement in order to dispose of the whole case, it was pointed out that there was no misrepresentation by Mr. Russell as to its terms, which were perfectly plain and in accordance with what had been previously discussed; that Mrs. Russell took time to consider it, and submitted it to her sons for advice; that there was nothing inconsiderate in its provisions, having regard to the age and relative position of the parties, and the uncertain condition of some of Mr. Russell's property; and that there was no proof that it was executed by Mrs. Russell without full knowledge of the extent and value of his estate, nor any such discrepancy between that which was given her by the antenuptial agreement and will, and her dower rights, which were alone involved (there being an absolute right in the husband, by the laws of New Jersey, to dispose of the whole of his personal estate by will), as to raise the presumption that she was not fairly dealt with. Confirmatory of this view, it was noted that on December 22, 1897, more than four months after the will was proved, Mrs. Russell accepted $500 on account of her portion, and was under treaty to receive and invest the rest of it; the only explanation of this course being that she acted without the advice of counsel, which was not regarded as sufficient to do away with its effect. The fact that in reality she acted upon the advice of counsel was not disclosed.

From the decree so entered against her, Mrs. Russell appealed to the Court of Errors and Appeals, but the decision was affirmed. 63 N. J. Eq. 282, 49 Atl. 1081. On the question whether she was entitled to ingraft upon the antenuptial agreement the parol contract which she asserted that liberal provision should be made by the testator in his will, the same view was taken as by the vice chancellor. But with regard to setting the agreement aside for fraud, the court declared that it was not necessary to express an opinion, Mrs. Russell not being in shape to repudiate the agreement, having accepted $500 under it. "It is entirely settled," says Gummere, J., "that a party to a contract cannot at one and the same time repudiate it, and retain a benefit from its partial execution. In order to entitle him to rescind, he must

first restore what he has received under the contract, and thus put the other party to the agreement in his original position. * * * This the appellant has not done, and consequently does not stand in a position which entitles her to an annulment of the contract, even if it be true, as she alleges, that she was induced to enter into it by fraud on the part of her husband."

This decision was made August 23, 1901, and the present suit was instituted November 15 following; the complainant having meanwhile become a citizen of New York. The question whether the conclusion reached in the one is a bar to the other stands at the threshold of the case, and has first to be disposed of. It is earnestly contended by the respondents that it is, but upon that there is considerable to be said. It is to be noted, in the first place, that, while there was a prayer in the former case to have the antenuptial agreement set aside on account of the fraud alleged to have been practiced upon the complainant, yet, as pointed out by the vice chancellor, this was merely as the basis, and to make way, for the reformation of the agreement, and its specific enforcement in its modified form. Except as so subordinated, there was, in strictness, an inconsistency in the two positions. The complainant was not entitled to have the agreement established and enforced in the shape she contended it ought to be, and at the same time entirely annulled. It is, no doubt, true, however, that the vice chancellor did not stop at this, but, taking the avoidance of the agreement as a matter of independent and alternative relief, passed upon it, and decided adversely to the complainant's rights. If, then, the case stood on his rulings, she would be unquestionably concluded by them. But the appeal removed the case in its entirety to the higher court, and it is the judgment there rendered that must control, which has to be determined by the views expressed by the court in the opinion filed. As said in Larkins v. Lindsay, 205 Pa. 534, 55 Atl. 184:

"A decree in equity is not, like a judgment at law, necessarily conclusive as to every matter which either was or might have been involved in the decision. Regard must be had to the reasons of the chancellor as well as his decree, for, to take the most obvious illustration, the case may have been disposed of on grounds of adequate remedy at law, or other reasons not involving the merits."

Unless, therefore, the rights of the complainant which are now sought to be litigated were directly disposed of in the final judgment rendered, as disclosed by the opinion of the Court of Errors and Appeals, they are not barred. This is squarely ruled in Turley v. Turley, 85 Tenn. 251, 1 S. W. 891, where it was held that a question left open by the opinion of the appellate court, although passed upon by the court below, could be re-examined in a subsequent suit where it was directly raised. It is true that there was a reversal in that case, and not an affirmance, but that is not material. As is there said, the appeal vacated the decree below, and brought up the whole case for review; and, the court of last resort having declined to decide the question subsequently mooted, it was left open for future determination. In this connection, also, the case of Stewart v. Ashtabula, 107 Fed. 857, 47 C. C. A. 21, is instructive. On a previous bill filed by the plaintiff to establish his right to maintain a street railway, it

had been decided that he had failed to comply with the village ordinance which granted him that privilege, and that the village had the right, in consequence, to remove the tracks and ties. But this decision was held not to estop him from maintaining an action for damages for the wrongful conversion of this property after it had been removed, even though an account for such damages might have been ordered by the court, had the plaintiff's right been sustained, and it had been specifically found in the former suit that the tracks and ties, after their removal, had been piled up and held at the order of the plaintiff; this finding not being essential to the decision made.

The ultimate conclusion reached in the former suit, as expressed in the opinion of the Court of Errors and Appeals, must therefore determine how far it is a bar in this. Looking into the opinion, it unquestionably disposes of the complainant's right to reform by parol the antenuptial agreement, and have it specifically enforced. But passing by the question whether a fraud was perpetrated upon her in its procurement, it was held that she was not entitled to raise that issue, because she had accepted $500 of the money given her by the agreement, which she could not retain in affirmance of it, and at the same time move to rescind. The decision so made, to the extent indicated, must be accepted in its entirety, and leaves nothing open that was involved. It cannot be qualified by the suggestion with respect to the $500 that due consideration was not given to the fact that, whichever way the case was decided, the complainant would be entitled to this amount; nor yet that in accepting it she acted under the advice of counsel, which was not disclosed. The latter circumstance, if material, was well known to her, and should have been brought forward as part of her case. She may have been misadvised as to its materiality, but, while that will explain the omission, it does not overcome it. But on the other hand, the decision is not to be carried beyond its terms. The allegation of fraud was not disposed of, because it was not considered necessary to do so, nor whether the complainant, by an offer to return, such as is now made, could qualify herself to reassail the agreement upon that ground. It was simply decided that she was not in a position to do it at that time. It follows, therefore, that the question of fraud is open for consideration, provided it is not made too late, of all of which this court is entitled to judge, regardless of anything that has gone before.

To meet the objection which proved fatal to her former case, the complainant has offered in the present bill to return the $500 she received, and has followed this up by paying the money into court. She has also paid in the dividend of $30, put to her credit by the executors, from the bank stock. It is claimed that this is ineffective at this stage, and after the interval which has elapsed, and particularly without a tender before suit brought. It is the undoubted rule, where fraud in the procurement of a contract is intended to be relied on to avoid it, that the party defrauded must assert his rights with reasonable promptness. The transaction is not void, but voidable, and delay will ordinarily be regarded as a waiver and affirmance. Byard v. Holmes, 33 N. J. Law, 119; Dennis v. Jones, 44 N. J. Eq. 513, 14 Atl. 913, 6 Am. St. Rep. 899; Grymes v. Sanders, 93 U. S. 55, 23 L. Ed. 798. But

circumstances alter cases, and each must be governed by its own. In the present instance it has been the manifest intention of the complainant from the outstart not to abide by the antenuptial agreement as it was written, which it would do violence to her actions not to recognize and uphold. She receipted for the $500 only on the advice of counsel that it would not prejudice her, and refused to take more and sign a release when she found it would. Her former bill was filed within a year of her husband's death, and distinctly asserted the invalidity of the agreement; demanding specific performance of the parol understanding by which it was modified, instead. On the hearing upon it she relied on and gave evidence of the fraud which had been practiced upon her, and, when that suit failed for the reasons specified, she promptly began the one in hand. While, therefore, it may be true, as decided by the Court of Errors and Appeals, that she was not in a position to disaffirm so long as she held on to even a part of that which she obtained under the agreement; yet, outside of that, by the most positive and persistent acts, which could not be misunderstood, she has consistently asserted the invalidity of the agreement as it stood, and manifested her determination not to be bound thereby. Finally, to remove all questions, she now not only offers to return what she received, but has actually paid the money into court, thus surrendering every vestige of benefit from it. If this is not sufficient, she is held to a very rigorous rule. It is true, she made no tender before suit brought; but considering that, whether she wins or loses, considerably more than this will be due her, it does not seem requisite that she should. The rights of the parties can be entirely protected by the final decree. Billings v. Aspen Mining Co., 51 Fed. 338, 2 C. C. A. 252; Thackrah v. Haas, 119 U. S. 499, 7 Sup. Ct. 311, 30 L. Ed. 486; Sloane v. Schiffer, 156 Pa. 59, 27 Atl. 67. If this is in conflict with the local law, which it does not seem to me it necessarily is (Pidcock v. Swift, 51 N. J. Eq. 405, 27 Atl. 470), the case is not one where the state law governs, but is to be disposed of by the court according to its own views of what is equitable and right.

On the question of fraud in the procurement of the agreement, one cannot fail to be impressed with the disproportion between the estate of which the decedent was possessed and that which was secured to the complainant therefrom. Notwithstanding that Mr. Russell was worth nearly a quarter of a million of dollars—$105,000 in real estate, and $117,000 in personalty—all she got for the surrender of her dower rights was $5,000, to be paid her within six months after his death, and such additional remembrance as he might be moved to give her by will. According to the sequel, this proved next to nothing—the 10 shares of bank stock not exceeding $1,500 in value—and, if the respondents' contention be sustained, it did not have in reality to be even that. In passing, therefore, upon the agreement as written, it must be remembered that the whole consideration of the bargain to Mrs. Russell was the $5,000 named. It is idle to argue that this was anything but what was close and narrow. If there was no great disparity in it, why this long and expensive litigation, which might have been amicably avoided, according to the evidence, for a very moderate advance, in order to keep the complainant out of her dower? With-

out stopping to go into an extended demonstration, it is not difficult to figure out a yearly value of over $4,000 from the productive real estate, outside of possible returns from the timber lands, of which the complainant would be entitled to a third; and, holding down to this low estimate, in four years she would equal what she was to get by the agreement, and, if her expectation of life was fulfilled, would far exceed it in the end. No one with knowledge of the facts, or except because of a confidence inspired, would make such a one-sided bargain. No account is taken in this calculation of the personal property, but it is manifest that it cannot be entirely left out of sight. While the complainant could acquire no legal claim upon it by the marriage, as has been already noted, yet it constituted a material part of Mr. Russell's possessions, and contributed to make him the man of wealth which he was. Bearing on future possibilities, as it did, it is a factor to be considered in determining whether the bargain was a fair one; and, with this thrown into the scale, even though no more than as a makeweight, the disparity is materially increased.

The law which governs in such cases is universal and well defined. Kline v. Kline, 57 Pa. 120, 98 Am. Dec. 206; Bierer's Appeal, 92 Pa. 265; Warner's Est., 207 Pa. 580, 57 Atl. 35; Pierce v. Pierce, 71 N. Y. 154, 27 Am. Rep. 22; Taylor v. Taylor, 144 Ill. 436, 33 N. E. 532; Fisher v. Koontz, 110 Iowa, 498, 80 N. W. 551; Spurlock v. Brown, 91 Tenn. 241, 18 S. W. 868. The parties who enter into an antenuptial arrangement stand in such a relation of confidence to each other as to call for the exercise of the highest fairness and good faith. It cannot be expected that either will pry into the money affairs of the other, except possibly in the most general way; or conduct an independent investigation with regard to them. The amenities of the situation forbid it, if nothing else. It is too suggestive of a mercenary motive in the marriage, which should be prompted by mutual affection, to be sanctioned. Each must therefore, of necessity, derive knowledge from the other of his or her property, and both must be frank. No agreement on any other basis will stand, as all the cases attest. Where the bargain is manifestly unfair, as where the provisions made by it on either side are inadequate or grossly disproportioned to the rights surrendered, the presumption is that it was brought about by fraudulent concealment, and the burden is upon those who seek to profit by it to show otherwise, which is as it should be, for the additional reason that the mouth of the one party is usually closed by the death of the other.

But we do not need to rest the case upon presumptions. There is direct evidence of that which preceded and induced the agreement which leads to the same result. So far as this depends on the testimony of the complainant, she is a competent witness, notwithstanding that it relates to a transaction with the respondents' testator, now deceased. She may not be by the state law, but the case falls within the terms of the federal statute, which therefore controls. Potter v. Third National Bank, 102 U. S. 163, 26 L. Ed. 111. The Revised Statutes (section 858 [U. S. Comp. St. 1901, p. 659]) declare that:

"In the courts of the United States no witness shall be excluded * * * in any civil action because he is a party to or interested in the issue to be

tried: provided, that in actions by or against executors, administrators or guardians in which judgment may be rendered for or against them neither party shall be allowed to testify against the other as to any transaction with or statement by the testator, intestate, or ward, unless called to testify thereto by the opposite party, or required to testify thereto by the court."

To the extent that this is a suit against executors, two of the defendants being sued in their representative as well as their individual capacity, it falls within the proviso of the statute, but the other condition of exclusion is not fulfilled. No judgment for or against the executors is asked by the bill, or could be rendered thereon. It is brought to secure the complainant's dower in the lands of her late husband, and is essentially against the heirs and devisees to whom it descended or was left by his will, and not against the executors, except nominally. 7 Encycl. Plead. & Pract. 197; Chapman v. Schroeder, 10 Ga. 321; Campbell's Case, 2 Doug. (Mich.) 141. The personal property being disposable by the testator without accountability, no claim is or could be made against it; and, the estate being solvent, the realty is not needed for payment of debts. Neither are the executors given any duties by the will with respect to it, and if, as it seems, they have intervened in any way, they must be regarded as having done so, not on behalf of the estate, but as agents for those interested therein. 11 Am. & Eng. En. Law (2d Ed.) 1208. The proceeding is therefore distinctly in rem, except so far as the rents and profits which have accrued are concerned; or as compensation may be claimed for lands disposed of by the testator in his lifetime; and even as to this it cannot be said that the general estate in the hands of the executors is involved. The case is like that of Goodwin v. Fox, 129 U. S. 601, 9 Sup. Ct. 367, 32 L. Ed. 805, where, although the plaintiff sued, in terms, as executrix, the defendant was held to be a competent witness; the relief sought being only with regard to her interest in certain land as devisee.

Turning, then, to the facts with regard to the making of the antenuptial agreement in controversy, and bearing in mind that the parties became engaged in August, 1892, and were married November 30 following, the story of how it came to be executed will best be told in the words of Mrs. Russell, taken entire. Being asked to state what took place between herself and Mr. Russell with regard to it, she said:

"He said there was a little matter he wished to speak to me about. This was in the month of October. I said: 'Very well. Go ahead.' He said that in all probability I would outlive him, and that he wanted to provide for me, and he asked me what part of his estate I would be satisfied with at the time of his death. I told him that I didn't know; that I had never thought anything about that. I said: 'I don't really know what you are worth—what you claim to be worth. What would you like to give me?' He said: 'Well, I want to make you satisfied, and I will do so, but I wish you would mention a sum.' I said: 'Well, I can't do that, because I don't know anything about what you are worth.' He said: 'Well, I don't either. My business is in such a condition that I don't know how I am standing, but I want to give you something that will make you independent at the time of my death. I think that would be better for us both.' I said: 'Well, if you think so, what would you like to give me?' He said: 'Well, how would $15,000 suit you—to receive it within six months after my decease?' I said that that would be all right; that I would be satisfied with that. He said: 'As soon as we are married, I shall make my will, and I want to fix you so you will be independent.' I said: 'Very well. That will be satisfactory.' And he said: 'I will give you something in my will, too.' So we talked a

little while, and after a few minutes he said: 'That is rather more than you will need, and I don't think it would be best to give you quite that much. It might put my executors to considerable trouble, and some losses, to raise that amount within six months. How would $10,000 suit for the time, and then I will provide for you in my will?' I said: 'That is all right. That is satisfactory, too, if you think it is best.' Then he said: 'I think it would be better for us to have a writing drawn up—an agreement—and it would be better for you and better for me. Who shall we have to draw it up?' I said: 'Any one you say. I don't know anything about anybody who ought to do it.' He said: 'I have had a good deal of dealings with Potter & Nixon, of Bridgeton, and I think I will go to them, if it suits you.' I said: 'It suits me all right.' That was about all that was said in regard to the matter at that time. Then in a few days he went to Bridgeton, and saw Potter & Nixon, and in a day or two I received an agreement through the mail, and it was drawn for $5,000; but I thought it was a mistake of the lawyers or the typewriter. I didn't think that Mr. Russell had made the change. So I just put it aside and waited till he called, which was in a very short time—a day or two, perhaps. As soon as he came in he said: 'Did you receive an instrument in writing through the mail?' I said I did, and he said: 'So did I.' I said: 'Did you?' He said: 'Yes.' He then said: 'What did you think of the change I made?' I said: 'Did you make that change? I thought it must have been a mistake.' And he said: 'No. If you will sit down, I will tell you why I made it in that way.' So I did, and listened to him. He said that, after considering the matter thoroughly, he thought that that would be sufficient to carry me through till his estate was settled, and said that he would provide liberally for me in his will. He said: 'Perhaps I could leave what I leave you in my will already invested, or I may leave it to you in cash. I will see what is best. I want to fix it so that you will have no trouble with it.' He then asked me: 'What do you think of that arrangement?' I said: 'If you think that is better, I am willing for you to do just what you think is best.' He said: 'I don't want you to think that this $5,000 is all that I intend you to have. You see right here at the bottom I have left a space where I can make a provision for you, and that is why I did it, and had it left open.' He then said: 'Do you think you understand it?' I said: 'I think I do.' He said: 'Well, I will do as I say, and I think it will be the best way to do.' He said: 'Can you trust me?' I said: 'I think I can. If I cannot, we had better stop right here, without going any further. I want to trust my husband.' He said: 'I thank you for your confidence, and you may rest assured that I will do just what I say, and make a liberal provision for you in my will, after we are married, for I don't know who could have a greater claim on what I have than my wife.'"

And again when recalled:

"Did Mr. Russell explain what he meant by 'better for you and better for me,' and, if so, how? A. That I would be provided for until his estate was settled. Q. And what by 'better for me'? A. That he would not always have to come to me to get my signature to papers when he bought or sold anything."

There is little need for comment on this testimony. It speaks for itself, and pointedly shows that while, on the one side, the settlement was treated as a matter of wifely confidence, on the other it was approached in the spirit of bargaining, to get as much and give as little as possible, as though the parties were strangers dealing at arm's length. Not only was there no disclosure by Mr. Russell to his intended wife of the nature and extent of his property, or of the part of it to which she could lay claim, but the references made to it were of a character to raise a doubt. The complainant, thus, if not actually misled by direct intention, was at least left entirely in the dark as the result. But worse than this, there was an expression of future inten-

tion which assumed the form of an absolute undertaking by Mr. Russell, as part of the consideration by which the agreement was induced, the subsequent disregard of which was an unpardonable breach of faith. The representation made with regard to the $5,000 which Mrs. Russell was to receive was that it was but a part, and, as she might well be led to infer, a small part, of his intended bounty to her; his express promise being that she should be otherwise liberally provided for after his death by his will. This was given as a reason for reducing the amount originally proposed to be settled upon her, and was enforced by calling attention to the phrase at the end of the agreement, where the matter had been apparently taken care of, "unless some part thereof be given to her by his will." The promise so made, the testator was bound to fulfill, not as a matter of contract, but as one of conscience and good faith. Not only the relation between the parties, but the confidence expressed by the complainant in his assurances, which he himself invoked, forbade anything less. "Can you trust me?" were his words; and her answer, which was most appropriate: "If I cannot, we had better stop right here." How he could bring himself to feel that he had met this obligation by the niggardly gift of 10 shares of bank stock, when he came to make his will, it is difficult to understand.

Entire corroboration of what Mrs. Russell testifies to is to be found in the deposition of her son Grant Brown, taken in the previous case, and introduced as evidence, without further examination on the subject, in this: He states that he was present when Mr. Russell explained the reason for reducing the amount to $5,000, and heard him promise to provide for his mother liberally in his will; declaring that this was merely to meet her temporary needs, and by no means represented the entire share designed for her in his estate. It is not necessary to go over his testimony in detail, or to refer to it further, except to say that upon it alone the complainant's case would be made out, justifying a decree setting aside the agreement on the ground of bad faith.

It is said, however, that fraud cannot be predicated on the mere failure to fulfill an executory promise, for which Marshman v. Conklin, 21 N. J. Eq. 546, and Lovett v. Taylor, 54 N. J. Eq. 311, 34 Atl. 896, are relied on. But that depends. In the first of the cases cited, a trust in lands was sought to be imposed upon a conveyance absolute on its face, by reason of an alleged parol promise made to the grantor at the time to hold for her benefit after the purpose for which the conveyance was executed had been subserved; and it was held that the misplaced confidence involved could not be considered as a fraud or imposition that would avoid the transaction. But the parties stood in no relation of confidence, and dealt at arm's length; and the case set up in the bill was of an express trust resting in parol, in the face of the statute of frauds, which is materially different from the case in hand. In Lovett v. Taylor, an improvident son, acting on the advice of his sister and her husband and their counsel, voluntarily conveyed his property to his mother, who took it for the purpose of preventing it from being squandered. There was evidence of a verbal promise on her part to reconvey to him in course of time, and a reiterated expression of her inten-

tion to do so, but she died without having fulfilled it. On this showing, it was held by the vice chancellor that no trust resulted by virtue of the promise or intention of the mother, nor could any fraud be charged for failure to subsequently recognize the force of the obligation; the promise having been made in good faith at the time, and not falsely or with no intention of ever observing it. Notwithstanding this conclusion, however, the court did, in the end, give relief permitting the son to assert and enforce the trust against his brother and sister by means of a cross-bill.

But without stopping to discuss the merits of these cases, or particularly quarreling with what they immediately decide, there is abundant authority for the position that the failure to regard an assurance upon which an agreement is executed may, under certain circumstances, amount to a fraud. In the leading case of Church v. Ruland, 64 Pa. 432, a daughter importuned and persuaded her father to leave her all his land by will, on the express and reiterated promise that she, in turn, would leave one-half of it to her sister Charlotte's children when she died. Instead of this, she willed it to the youngest daughter; and it was held that the assurance upon which the will of her father in her favor was procured fastened on her conscience, as the party procuring it, a trust or confidence, the failure to fulfill which was a fraud, creating a trust ex maleficio, which a court of equity would enforce. In Cowperthwaite v. First National Bank, 102 Pa. 397, at a sheriff's sale of the land of the plaintiff's husband a promise was made to the plaintiff, his wife, who, by payment of part of the purchase money, had an interest therein distinct from her dower, that, in case she would allow a consentable sale, the execution creditors would buy in the property, and resell it to her on certain terms; and it was held that the subsequent refusal to recognize the arrangement was such a fraud as converted the purchaser into a trustee. In Smithsonian Institute v. Meech, 169 U. S. 398, 18 Sup. Ct. 396, 42 L. Ed. 793, title to land for which the husband furnished the purchase money was taken in the name of the wife on the distinct understanding and promise by parol that she would dispose of it to the Smithsonian Institute by her will. Having failed to do so, a bill was filed after her death to enforce the obligation, and it was held that she was bound thereby. "If Mrs. Avery," says the court, "had during her lifetime conveyed this property to her sister and brothers, it would have been a fraudulent breach of trust; and the like result follows if, now that she has died without executing a will, her heirs are permitted to take the property which was conveyed to her, not as an advancement, but on an agreement that it should subsequently pass to this plaintiff." It is true that in this case a trust resulted from the payment of the purchase money, and the promise was relied on mainly to rebut the presumption of a gift from the husband to his wife; but at the same time the fraud which would follow a breach of the undertaking on which the title was obtained is recognized, which is the importance of it here.

My conclusion on the whole case, therefore, is that the complainant was overreached in the making of the antenuptial agreement, and is entitled to now have it put out of her way. Laying aside all considerations but the last, there is enough in that alone to justify a decree. By

a most definite and assuring promise, that liberal provision should be made for her by the testator in his will, she was induced to part with her dower rights for the very inadequate sum which he persuaded her to accept. The promise so made was more than the expression of a beneficial intention. It was a direct assurance, inviting confidence, and intended so to do, and removed the transaction from the region of ordinary bargaining to that of conscience and good faith. The subsequent breach was a fraud which relates back and vitiates the agreement which was obtained on the strength of it. The testator could not honestly keep the land, in the face of it, free from the complainant's dower; nor can the respondents, his heirs and devisees, who seek to profit by it after his death. To do so abuses the confidence invited and reposed, which a court of equity will not permit.

Let a decree be drawn avoiding the antenuptial agreement, and establishing the complainant's dower in the lands of which the respondents' testator was seised in his lifetime, and appointing commissioners to set off the same, allowing compensation where that cannot conveniently be done as well as for that which has been aliened, and stating an account of the rents and profits meanwhile by way of damages for the detention, with costs.

In re PEASE.

(District Court, E. D. Michigan, N. D. October 1, 1902.)

1. BANKRUPTCY—LIENS—MORTGAGE FOR BORROWED MONEY.

A mortgage given by an insolvent, subsequently and within four months adjudged a bankrupt, to secure money borrowed at the time for the purpose of preferring certain of his creditors, where the lender knew or had reason to believe that such was his purpose, is void under Bankr. Act July 1, 1898, c. 541, § 67e, 30 Stat. 564 [U. S. Comp. St. 1901, p. 3449].

2. SAME.

A trust company, through its agent and attorney, who was also attorney for large creditors of a country merchant doing business at a distance, made a loan to such merchant, with which he at once paid certain creditors in full, including the clients of the agent, who received the money on their behalf directly from the lender. The loan was secured by a chattel mortgage on the borrower's stock, and on the next day after it was given, in accordance with the previous intention of the lender, it took possession of the stock, and proceeded to sell it out under the mortgage. The borrower was actually insolvent, but no steps were taken by the company or its agent to ascertain his condition. It did not appear that he was a party or consented to the taking possession of his stock, which was not provided for in the mortgage, and there had been no default. He was soon after adjudged a bankrupt. *Held*, that the transaction was evidently not in good faith, in the belief of the bankrupt's solvency, or for the purpose of assisting him to continue his business, but was apparently in the interest of the preferred creditors, and that the mortgage was void under Bankr. Act July 1, 1898, c. 541, § 67e, 30 Stat. 564 [U. S. Comp. St. 1901, p. 3449].

In Bankruptcy.

Perry D. Pease was adjudicated a bankrupt at a time when he was carrying on business in a small town of 600 inhabitants. He had, October 12, 1900, incurred debts to the amount of about $10,000, and estimated his stock in

¶ 1. See Bankruptcy, vol. 6, Cent. Dig. §§ 256, 257, 259, 261.

trade at about the same amount. On that day he borrowed $3,500, giving a mortgage on his stock to a security trust company. The mortgage was secured by a Mr. Chittenden, a lawyer, who, upon the giving of the mortgage, took possession of the stock and proceeded to sell it. Certain creditors of Pease attached the property, and on an inventory the stock was valued at $6,698. This appraisal, added to the goods sold by Mr. Chittenden after he took possession, shows the stock valued at about $7,298, leaving the indebtedness of Pease, above the amount of his stock, at about $2,700. Littman & Hoffstadt, creditors of Pease, had been pressing him for settlement at the time of the negotiation of this mortgage, and out of the proceeds of the mortgage their indebtedness, in the amount of $1,800, was paid. A portion of the money was also used to pay an indebtedness to the debtor's mother-in-law. The testimony of the trustee in bankruptcy was to the effect that sales by a mortgagee reduced the value of the stock that remained after the payment of the mortgage debt about 40 per cent. The testimony of Littman, who had been paid, as to his knowledge of the bankrupt's condition at the time of the payment, was unsatisfactory and contradictory, and was not sustained by the testimony of Chittenden, who negotiated the loan. Chittenden represented the trust company, for whom he had been in the habit of negotiating loans, and at the time he received the proceeds of the loan from the trust company he had notified Littman to be present, that his claim would be paid, and was authorized by him to receive and receipt for the money as his attorney.

Chittenden & Chittenden, for appellant.
Chauncy H. Gage and Searl & Montfort, for appellee.

SWAN, District Judge. The bankrupt's intent to prefer Littman & Hoffstadt and the other creditors, to pay whom he borrowed the $3,500, is conclusively shown by the facts, and was known to the agent of the trust company. Nor is there any question but that the intent and effect of the mortgage was to hinder or delay, if not defraud, his creditors. In re Goldschmidt, 3 Nat. Bankr. R. 168, 169, Fed. Cas. No. 5,520; In re McLam (D. C.) 97 Fed. 922.

The giving of the mortgage, therefore, was an act of bankruptcy, under subdivision 1, § 3, c. 541, Bankr. Act July 1, 1898, 30 Stat. 546, 547 [U. St. Comp. St. 1901, p. 3422], without regard to Pease's financial condition at the time. Insolvency of the debtor is not an element of that subdivision. Pease, being insolvent October 12, 1900, as is conceded, by the payment of Littman & Hoffstadt and his creditors for money borrowed, with the intent to prefer them over his other creditors, violated subdivision 2 of section 3 of the act. The act of the debtor being a preference, his intent is inferable from his act. In re Black & Secor, 1 Nat. Bankr. R. 361. Is the mortgage a lien upon the bankrupt's estate? By subdivision "a," § 67, c. 541, Bankr. Act:

"Claims which for want of record or for other reasons would not have been valid liens as against the claims of the creditors of the bankrupt shall not be liens against his estate."

By subdivision "d," § 67:

"Liens given or accepted in good faith and not in contemplation of or in fraud upon this act, and for a present consideration which have been recorded according to law, if record thereof was necessary in order to impart notice, shall not be affected by this act."

By subdivision "e," § 67:

"All conveyances, transfers, assignments or encumbrances of his property or any part thereof made or given by a bankrupt" within the specified period "with the intent and purpose on his part to hinder, delay or defraud his cred-

itors or any of them shall be null and void as against the creditors of such debtor, except as to purchasers in good faith and for a present fair consideration. * * *"

By subdivision "b," § 67:

"Whenever a creditor is prevented from enforcing his rights as against a lien created or attempted to be created by his debtor, who afterwards becomes a bankrupt, the trustees of the estate of such bankrupt shall be subrogated to and may enforce such rights of such creditors for the benefit of the estate."

It seems clear that these several subdivisions have a common purpose, and should be read together as collectively definitive of the essentials of a valid lien. It follows that no person can be a "purchaser in good faith" of any part of the bankrupt's estate, if title or security was accepted "in contemplation of or in fraud upon" the bankrupt act, or if for any reason it would not have been valid against the claims of creditors of the bankrupt. The propositions that advances may be lawfully made in good faith to a debtor to carry on his business, and that the lender may lawfully take security at the time for such advances without violating the bankrupt act, are beyond denial. "It makes no difference," says the court in Tiffany v. Boatman's Inst., 18 Wall. 375, 21 L. Ed. 868, "that the lender had good reason to believe the borrower to be insolvent, if the loan was made in good faith, without any intention to defraud the provisions of the bankrupt act." This was held in construction of section 35 of the bankrupt act of 1867, 14 Stat. 534 (Rev. St. § 5129), which avoided "any conveyance, transfer or other disposition of the property of an insolvent, if the grantee had reasonable cause to believe the grantor insolvent, and that the conveyance was made to prevent the property coming to the assignee in bankruptcy, or to prevent the same from being distributed under the act, or to defraud the object of, or in any way impair, hinder, impede or delay the operation and effect of, or to evade any of the provisions of this title." These two elements must have concurred in the transaction to avoid the conveyance. It was not enough that the grantor was believed to be insolvent in order to defeat the title of the grantee, but it must also appear that the grantee knew that the conveyance was made with a view to effect any purpose prohibited by the act. If that is shown, it avoids the transfer. Even though a present fair consideration for property transferred to the hindrance, delay of, or in fraud upon creditors, it will not save the conveyance. "A sale may be void for bad faith, though the buyer pays the full value of the property bought." This is the consequence where his purpose is to aid the seller in perpetrating a fraud upon his creditors, and where he buys recklessly, with guilty knowledge. Clements v. Moore, 6 Wall. 312, 18 L. Ed. 786; Cadogen v. Kenneth, 2 Cowp. 432; Walbrun v. Babbitt, 16 Wall. 581 (bottom), 21 L. Ed. 489.

The decisions under the acts of 1841 and 1867 are to the same effect as Tiffany v. Boatman's Inst., 18 Wall. 375, 21 L. Ed. 868, viz., that it is essential to the validity of security for a loan to one adjudged a bankrupt within four months thereafter that the transfer was had "without any intention to defraud the provisions of the bankrupt act."

In Re Butler, 4 Nat. Bankr. R. 308, 120 Fed. 100, the bankrupt borrowed from one Mendell, upon mortgage of his stock in trade,

$1,600 to pay one Cushman, an unsecured creditor, who was pressing for payment. Kimball, a clerk or partner of Cushman's, suggested to the mortgagee the loan to Butler upon security, and to Butler, the bankrupt, that Mendell would probably lend him the money. Mendell made no inquiry into the condition of Butler's affairs, but relied mainly upon the advice of Kimball and Cushman. Judge Lowell held that the money was raised for the express purpose of paying an antecedent debt, and that the intent to prefer the creditor was plainly inferable; that the mortgage was out of the ordinary course of the business of the bankrupt, because he was a retail dealer, doing a business of about $100 a day, and a mortgage of such a trader's full stock is a confession of insolvency—citing Nary v. Merrill, 8 Allen, 451. He dismissed the petition of the mortgagee for payment of his mortgage debt from the proceeds of sale of the property. The case is very like that at bar in its main features. In the latter, however, the attorney for the mortgagee was also attorney for the principal preferred creditor.

In Bucknam v. Goss, 13 N. B. R. 337, Fed. Cas. No. 2,097, Judge Fox held that a mortgage given by one subsequently adjudged a bankrupt in part to prefer the mortgagee as to his claim, and in part to secure a present loan made for the purpose of enabling the debtor to pay another creditor, was entirely void.

In Fox v. Gardner, 21 Wall. 475–480, 22 L. Ed. 685, it is said:

"The right of an insolvent person, before proceedings are commenced against him, to pay a just debt, honestly to sell property for which a just equivalent is received, to borrow money, and give a valid security therefor, are all recognized by the bankrupt act, and all depend upon the same principle. In each case the transaction must be honest, free from all intent to delay or defraud creditors or to give a preference, or to impair the estate. If there is fraud, trickery, or intent to delay or prefer one creditor over others, the transaction cannot stand."

In the case of In re Soudan Mfg. Co., 113 Fed. 804, 51 C. C. A. 476, it was held that under section 67d of the bankrupt act the validity of a mortgage given to secure a present loan of money within four months prior to the borrower's bankruptcy does not depend upon his solvency at the time, or upon notice of his financial condition by the mortgagee, actual or constructive; but to invalidate such a mortgage it must be shown that the borrower was insolvent, that the purpose of the loan was to accomplish unlawful preference or otherwise violate the act, and that the lender knew or was chargeable with knowledge of both of such facts. In that case the mortgage was upheld upon the facts in the case, which did not imply insolvency of the borrower.

In Re Beerman, 7 Am. Bankr. R. 431, 112 Fed. 663, a firm creditor of an insolvent debtor a month before his bankruptcy procured a third person to lend money to pay his debt to the firm upon a mortgage upon the debtor's stock, and a bond of indemnity from the firm against loss, the lender understanding that the money was to go to the firm, and the firm received it. The mortgage was held void under the bankrupt act, since it would enable the creditor to obtain by indirection a preference which he would have been unable to get if he had dealt directly with the debtor. Upon a like state of facts Judge Coxe held a transfer of property by the bankrupt void as a preference. In re Minnie McGee, 5 Am. Bankr. R. 262, 105 Fed. 895.

The validity of a dealing assailed as a preference is determined by its purpose and effect, and not by its form. In Stern, Falk & Co. v. Trust Co., 7 Am. Bankr. R. 305–308, 112 Fed. 501, where the creditors of a bankrupt firm were disallowed because they had refused to surrender proceeds of the bankrupt's estate acquired by collusion with the assignee of the bankrupt, Judge Severens said:

"In respect to the means by which the transfer is effected there is no limitation. However devious the method, if the result is that but for the act the creditor acquires property from the debtor which is subject at law or in equity to be appropriated to the satisfaction of the debtor's obligations, that is a transfer, within the meaning of the act."

Under the act of 1867 it was held that the first clause of the thirty-fifth section of that act, which corresponds to section 60 of the present act, had reference only to transfers of property to pre-existing creditors of the bankrupt, and that a transaction original and complete in itself, founded on the present consideration and had with one having no previous relations with the bankrupt, could only be assailed under the second clause of the thirty-fifth section of the former act, which is the equivalent of section 67 of the present act. Bean v. Brookmire, 1 Dill. 25, Fed. Cas. No. 1,168; Gibson v. Warden, 14 Wall. 244, 20 L. Ed. 797.

By a parity of reasoning it may be that the facts of the case at bar bring it under section 67, subds. "d," "e," and exclude the applicability of section 60, subds. "a," "b," because the Security Trust Company had had no dealings with the bankrupt prior to the loan of October 12, 1900. This, if conceded, would not aid the validity of the mortgage in controversy; for, if good faith is the sole criterion of the validity of a transfer upon a present consideration, that element cannot inhere in it, where the lender knew or had reason to believe that the grantor was insolvent, and that the purpose of the loan was to enable him therewith to defeat any provision of the bankrupt act. "If the vendor's purpose in selling is to defraud his creditors" (and it might be added, "or to hinder or delay them"), "or if it is to work a fraud upon the law by illegal payments, preference, or the like, and the purchaser knows, or has good reason to believe, that such is the purpose of the vendor, then the purchase is void." Darby v. Lucas, 1 Dill. 170, Fed. Cas. No. 3,573.

Under the second clause of section 35 the act of 1867 includes any disposition of property by one insolvent or in contemplation of insolvency if the recipient had reason to believe the grantor to be in either of these conditions, "and that the act was done by him to prevent the property from coming into the hands of his assignee in bankruptcy and from being distributed under the bankrupt law." Gibson v. Warden, 14 Wall. 249, 20 L. Ed. 797. The sixty-seventh section of the act of 1898 is entitled to quite as broad construction to effectuate the purpose of the law as that given to the second clause of section 35 of the prior act. If a volunteer purchaser or incumbrancer of an insolvent's property, having knowledge or means of knowledge of his actual insolvency and of his purpose by the transfer to defeat the provisions of the bankrupt act, is protected as a bona fide purchaser upon the bankruptcy of the grantor within four months, while any unse-

cured creditor who, without reasonable cause to believe the debtor is insolvent, has received part payment upon his claim, must surrender such payment as preferential before he can prove for the balance of his claim, the object of the bankrupt act may easily be thwarted. The creditor has only to obtain a loan to the bankrupt, and receive payment of his full claim from the proceeds.

In Tiffany v. Boatman's Institution, 18 Wall. 375–388, 21 L. Ed. 868, the court upheld the validity of a loan to one Darby, who is described as "a man of large property and large debts," and "of wonderful energy and capacity for business." Darby borrowed the money to take valuable securities out of pledge and to prevent their sacrifice. Neither he nor the lender contemplated any fraud upon creditors. Their redemption was a benefit to creditors. The testimony was in conflict as to Darby's commercial solvency at the time of the loan. The case of Tiffany v. Lucas, 15 Wall. 410, 21 L. Ed. 198, sustained a sale of property by Darby. While these decisions are often cited as holding that good faith is the only test of the validity of a transfer by one subsequently adjudged a bankrupt, and that "it makes no difference that the lender had good reason to believe the borrower insolvent, if the loan was made in good faith without any intent to defeat the provisions of the bankrupt law," they are not authorities for the doctrine that under the act of 1898 one actually insolvent can make any transfer of property, even for a present consideration, to one who knows or had the means of knowing of his financial condition and his purpose to evade the bankrupt act. Under the act of 1867, a person was insolvent who could not pay his debts as they matured. This condition might well consist with the possession of ample property to meet them if an extension of time could be had. For that reason it was held the loan to one known to be commercially insolvent to enable him to avoid bankruptcy was a legitimate transfer if no fraud upon the bankrupt act was intended. Where, however, one's debts exceed the value of his property, there is no reason why one who knows that fact and its necessary consequences to creditors of the borrower, and lends him money upon the security of his property, to be applied in preferring one or more of his creditors or to hinder or delay the insolvent's creditors, should be held a preferred creditor.

One actually insolvent has no equitable interest in what is only nominally his property. The effect of his transfer is to hinder, delay, and defraud his other creditors without the hope or possibility of benefiting himself. The reasons for sustaining a sale or security given by one commercially insolvent in the effort to save his business and avoid bankruptcy have no application to one who has lost everything, and who by a sale or mortgage of his property necessarily withdraws it, in whole or in part, from the reach of creditors. Both lender and borrower are chargeable with knowledge of the obvious effect of the transaction upon unsecured creditors, and with colluding to defeat the bankrupt act, if the insolvent seasonably becomes a bankrupt. Had the Security Trust Company in this case been a pre-existing creditor of Pease its security for its debt would have been indefensible. It is equally so when it ignored the means of knowledge of the grantor's

hopeless insolvency, and knowing that the money was to be used to pay unsecured pre-existing debts. A loan of that character is not sanctioned by the reasoning in either Tiffany v. Boatman's Inst., supra, or Tiffany v. Lucas, 15 Wall. 410–424, 21 L. Ed. 198, in neither of which was the vendor known to be even commercially insolvent. It seems clear from these considerations that, although a present consideration passed to Pease for the mortgage, the avowed purpose and necessary effect of the transaction, under the facts in this case, deny to the mortgagee the character of a purchaser in good faith. The agent and attorney of the Security Trust Company admits that he knew before he went to Ashley that Pease wanted the loan to pay Littman & Hoffstadt (who had been his clients for several years, and had consulted him about their claim against Pease), and other creditors whose claims were long overdue, and that the Security Trust Company knew that Littman & Hoffstadt were to be paid from the loan, yet the proofs show that he made no inquiry into Pease's indebtedness beyond asking him if there were any judgments against him or incumbrance upon his property. Littman had been persistent in pressing Pease for payment, and when told by Pease, about a week before the mortgage was given, that his efforts to borrow money in Ithaca had failed, assured Pease that he would get it for him. Littman denies this, but the facts tend to corroborate Pease. The proofs show that Littman was at Ithaca when the mortgage was executed, having been informed by Chittenden and by Pease that he would get his money that day from the proceeds of the loan. At Littman's suggestion Pease gave Chittenden an order on the Security Trust Company for Littman's claim of $1,842, and that sum was paid to Chittenden at Toledo by the mortgagee, and Chittenden paid it to Littman. The proofs are convincing that the loan was made and the security taken primarily to secure payment of the claim of Chittenden's clients, Littman & Hoffstadt, in the belief founded upon an overvaluation of the stock, and Pease's estimate —which was a mere guess—that he had a margin of $2,000 or $3,000 of assets over his liabilities. This guess, however, was discredited by Pease's express admission, abundantly established by his own testimony and that of Mr. Matthews that he did not know how much he owed. The means for ascertaining the exact amount of his indebtedness were at hand, but were not called for. Mr. Chittenden does not claim that he asked Pease for either his books or his invoices of his stock. Pease kept no books, but that, it seems, was not known to Chittenden. Pease had no difficulty in making up from his invoices of stock a schedule of his creditors and their claims when he filed his petition in bankruptcy, and its correctness has not been questioned. Indeed, the admission of counsel for the mortgagee that he was insolvent when the mortgage was given leaves that fact beyond controversy. It is equally certain that examination of the invoices of his purchases would have disclosed Pease's indebtedness for his stock. This, added to his debts for borrowed money, would have demonstrated, even on Chittenden's estimate of the stock, that he owed more than he could pay. These facts liken this transaction to that condemned in Waldrun v. Babbitt, 16 Wall. 577–582, 21 L. Ed. 489, where the title of a purchaser, who bought, without inquiry as to the vendor's

financial condition, the stock of a country trader, was sought to be defended on the ground that he had paid full value in ignorance of the condition of the seller's business. The purchaser limited his inquiry to the trader's object in selling out and his future purpose. The court held that a sale of that kind imported the seller's fraudulent intent, and put the buyer on inquiry, adding:

"Something more was required than this information of the trader's object and future purpose, which the law raised in the mere fact of a retail merchant selling out his entire stock of goods. If this sort of information could sustain the sale, the provision of the bankrupt law we are considering would be no protection to creditors in Mendelson's situation, and with the purpose he had in view would be likely to give the party with whom he was dealing a plausible reason for his conduct. The presumption of fraud arising from the unusual nature of the sale in this case can only be overcome by proof on the part of the buyer that he took the proper steps to find out the pecuniary condition of the seller. All reasonable means pursued in good faith must be used for this purpose. * * * In choosing to remain ignorant of what the necessities of his case required of him to know, he took the risk of the impeachment of the transaction by the assignee in bankruptcy in case Mendelson should be adjudged a bankrupt within the time limited in the statute."

This duty of inquiry was reiterated in Wager v. Hall, 16 Wall. 584–600, 21 L. Ed. 504.

Neither the Security Trust Company nor its agent and attorney at any time contemplated aiding Pease to continue his business and avoid bankruptcy, as was the purpose of the lender in Tiffany v. Lucas, supra. When Mr. Niles agreed with Chittenden to make the loan, conditioned on the latter's approval, it was agreed between them that Pease should be ousted from possession at once, and a custodian should take charge of the stock. This was done immediately, on Chittenden's telegram, the same day the mortgage was delivered, and without notice to Pease of that purpose or the significance of the presence of Cummings, the custodian sent by Niles, although, as Chittenden admits, Pease had not violated any condition of the mortgage, nor is it claimed that he was informed that the mortgagee in so doing was acting under the insecurity clause of the mortgage. Thereupon, within two or three days after the execution of the mortgage, handbills announcing a chattel mortgage sale of the stock under the order of the Security Trust Company were scattered broadcast by Chittenden's orders, although no installment of the mortgage debt was due. Pease was surprised by these acts. His request for a loan to help him "pull through" had been nominally granted. The lender "kept the word of promise to the ear, but broke it to the hope." The consequences in no degree exculpate him from the charge of violation of the bankrupt act in making a transfer for a purpose, in fraud of the act. He had armed the lender with the power to appropriate his property to the hindrance and delay of his creditors, and must be presumed to have intended the natural consequences of its exercise, although he was not bound to anticipate its abuse. Clarion Bank v. Jones, 21 Wall. 327, 22 L. Ed. 542.

The evidence shows without conflict that the necessary effect of the slaughter of the stock effected by the course pursued and the reckless manner in its disposition of the mortgagee impaired the value of what remained and sacrificed the interests of unsecured creditors

whose only fund it was. There is evidence that no bank would have made the loan as an investment on the security offered. The utmost profit it could have yielded to the lender, had its terms been met by Pease, would have been about $52, the interest on the money to the maturity of the debt. The paucity of that incentive to a loan to an unknown country merchant doing business in a small village distant 130 miles or more from Toledo, and confessedly and obviously unable to pay either his business indebtedness or long-standing debts for borrowed capital, the arbitrary and premature steps deliberately taken against the property, and the relation between the attorney for the lender and the preferred creditors of the bankrupt, are little short of conclusive that the real purpose of the loan was in this circuitous way to obtain the preference for Littman & Hoffstadt, and that accomplished to sacrifice the mortgaged property for payment of its own debt, ignoring alike the terms of the mortgage and the interest of Pease's creditors. The facts throw the burden upon the mortgagee to exculpate itself, and this has not been met. The course taken in the enforcement of the security was not authorized by the mortgage. If, as is claimed by Mr. Chittenden, it was consented to by Pease as a condition precedent to the loan, it is singular it was not embodied in the mortgage. It proves also it was not taken under the insecurity clause. It was not notified to Pease's creditors by the records of the mortgage, and it substituted another security for that evidenced by the instrument and its record. Such substituted security was not a lien for "want of record," under section 67 of the act and the statutes of Michigan. Under the testimony and accepting the recorded mortgage as a measure of the rights of the parties, the action of the mortgagee was a premeditated wrongful conversion of the property, and an intentional disregard of the rights of the mortgagor and his creditors and to their injury. Woods v. Gaar, Scott & Co., 93 Mich. 147, 53 N. W. 14.

While the consequence to Pease's creditors of this action would not defeat the mortgage, if valid, yet they tend to show that the purpose of the lender was not the relief of the mortgagor or the preservation of his business, as he was led to believe, but the contrary. This is further evidenced by the fact that at least $350 of the "expenses" charged to Pease, and apparently allowed as covered by the mortgage, were all incurred, as Mr. Chittenden admits, in contesting the claims of Pease's attaching creditors, and are not proper charges against Pease's estate. There are other "expenses" allowed the mortgagee against the bankrupt's estate quite as open to challenge. These charges also impugn the good faith of the mortgagees, who are responsible for and charged with knowledge of all facts known to Mr. Chittenden, who was their attorney in the transaction, and, though he testifies he was "not retained," acted also for Littman & Hoffstadt. The Security Trust Company knew that Pease intended to pay Littman & Hoffstadt's claim out of the proceeds of the loan—Mr. Chittenden had so informed them—and he knew that the claim was not due, and that its payment would work a preference. He not only shut his eyes to Pease's financial condition, but made no inquiry to learn whether Pease had other property, "because," as he admits, he "was not interested in that." Disregarding the mortgage, and under the alleged anterior agreement

with Pease inconsistent with its provisions, but of no legal efficacy, he practically destroyed the only available fund for creditors—the stock, which he said was worth $8,000—to enforce premature payment of $3,267 by a course which he apparently premeditated when he accepted the loan, but did not disclose until the delivery of the security. His acts and knowledge are those of the mortgagee, who knew not Pease, but committed the conduct and consummation of the loan to him, Rogers v. Palmer, 102 U. S. 263, 26 L. Ed. 164; The Distilled Spirits, 11 Wall. 356, 20 L. Ed. 167; Smith v. Ayer, 101 U. S. 320, 325, 326, 25 L. Ed. 955.

The facts disprove the good faith of the Security Trust Company in the transaction, and the finding of the referee in its favor, holding its debt a secured claim, is reversed, and its mortgage is decreed to be void.

The finding of SWAN, District Judge, was affirmed by the United States Court of Appeals, Sixth Circuit.

STATE TRUST CO. v. KANSAS CITY, P. & G. R. CO. et al. (WESTINGHOUSE AIR BRAKE CO., Intervener).

(Circuit Court, W. D. Missouri, W. D. March 29, 1904.)

No. 2,331.

1. RAILROADS—MORTGAGE FORECLOSURE—CLAIMS ENTITLED TO PREFERENCE.

Where a federal court, in a suit to foreclose a railroad mortgage, in consideration of the previous condition of the mortgagor company exceeded the usual limit of six months, and directed the receivers to pay debts for services rendered or materials and supplies furnished and necessary to the maintenance of the road contracted within a year prior to the receivership, it will not extend such period still further, and give preference over the mortgage to a claim arising more than a year before the suit, unless the equities of the case absolutely demand it; and the fact that the claim is one for equipping cars of the mortgagor with air brakes, required by act of Congress, does not give it any higher equity or right to preference than any other claim for necessary equipment or supplies.

2. FEDERAL COURTS—FOLLOWING STATE DECISIONS—CONSTRUCTION OF STATE STATUTES.

A decision of the Court of Appeals of Missouri as to the construction or effect of a state statute is not binding on a federal court, since the Supreme Court of the state, which is the court of highest jurisdiction, is not concluded thereby, but may, should the same question be presented to it, determine it differently.

3. RAILROADS—SUIT TO FORECLOSE MORTGAGE—WAIVER OF RIGHT TO ASSERT PREFERENTIAL LIEN.

A creditor of a railroad company, who, after the appointment of receivers for the property of the company in a suit to foreclose a mortgage thereon, filed a statement under a state statute for a mechanic's lien for the debt, thereby waived the right to afterward assert an equitable preferential lien in the foreclosure suit, the right to which was dependent on a different state of facts as to the extension of the credit.

¶ 1. Foreclosure of mortgages in federal courts, see note to Seattle L. S. & E. Ry. Co. v. Union Trust Co., 24 C. C. A. 523.

¶ 2. State laws as rules of decision in federal courts, see notes to Griffin v. Overman Wheel Co., 9 C. C. A. 548; Wilson v. Perrin, 11 C. C. A. 71; Hill v. Hite, 29 C. C. A. 553.

See Courts, vol. 13, Cent. Dig. § 957.

In Equity. In the matter of the intervention of the Westinghouse Air Brake Company.

For former opinion, see 128 Fed. 129.

Prior to and on the 1st day of April, 1893, there existed the Kansas City, Pittsburg & Gulf Railroad Company, a Missouri corporation, the Texarkana & Ft. Smith Railway Company, an Arkansas corporation, and the Kansas City, Shreveport & Gulf Railway Company, a corporation of the states of Louisiana and Texas, respectively. The stock of said Texarkana & Ft. Smith Railway Company and the Kansas City, Shreveport & Gulf Railway Company having been largely acquired by the stockholders of the Kansas City, Pittsburg & Gulf Railroad Company with the view of building and operating a continuous line of road from Fairview, in Jackson county, Mo., to the Gulf of Mexico, bonds were issued, of date April 1, 1893, in specific numbers, by the respective corporations, to the State Trust Company of New York, as trustee, for the purpose of raising the necessary funds for the construction and equipment of said continuous line of road; and on the 1st day of April, 1893, a blanket mortgage was placed on said railroad properties in respective amounts aggregating about $23,000,000 in favor of said trust company as trustee. Default having been made in the payment of interest coupons on said bonds, the said State Trust Company on the 6th day of April, 1899, filed its bill in this court against said railroad companies to foreclose said mortgage on the property situate within this jurisdiction. Under this bill Samuel W. Fordyce and Webster Withers, on the 28th day of April, 1899, were appointed receivers of said railroad property of the Kansas City, Pittsburg & Gulf Railroad in this state. Like bills of foreclosure were filed in the United States Circuit Courts in the other states in which the respective corporations were situated, and the said Fordyce and Withers were appointed in these ancillary proceedings as receivers therein. Such proceedings were had under said bills resulting in the foreclosure and sale of said respective properties, under which the Kansas City Southern Railway Company, a Missouri corporation, organized pursuant to the scheme of reorganization, became the purchaser of said properties at the upset price, amounting to $12,500,000, and received a deed therefor. On the 5th day of May, 1899, the Westinghouse Air Brake Company, a corporation of the state of Pennsylvania, filed in the circuit court of Jackson county, Mo., a mechanic's lien on the property of the Kansas City, Pittsburg & Gulf Railroad Company, under the statute of the state of Missouri, to secure an indebtedness on account for air brakes and materials furnished to said last-named railroad company between the 20th day of February, 1897, and the 1st day of April, 1899. On the 15th day of June, 1899, the said Westinghouse Air Brake Company, on its application therefor, was granted leave by this court "to intervene in this cause and file herein its petition for intervention," which was filed on the same date; and on the 8th day of September, 1900, said Westinghouse Air Brake Company filed its amended intervening petition herein, in which it set up a claim on said account against said Kansas City, Pittsburg & Gulf Railroad Company for an equitable lien, preferential in its character to the rights of the mortgagee in said foreclosure proceeding, in which it was alleged that the said material so furnished by said vendor was necessary for the proper equipment and operation of said railroad to keep it a going concern, and that it was understood between said vendor and vendee that the same was to be paid for out of the current earnings in the operation of said railroad not otherwise applied to the expenses of running, operating, and maintaining the railroad; that sufficient funds were earned out of the current income of the railroad to have paid the said indebtedness, but that the same were diverted to the betterment of the railroad property, so as to entitle the intervener to the equitable preferential lien aforesaid; and asking that the same may be declared a lien upon the corpus of the property purchased by said Kansas City Southern Railway Company, and that said lien be enforced, unless otherwise paid by said purchasing company. The bill also, in one paragraph thereof, pleaded the filing of a mechanic's lien aforesaid, and asked for its enforcement against the property so purchased by the Kansas City Southern Railway Company. The issues

on this intervention were referred to E. H. Stiles, master in chancery, to take the proofs and report the evidence, together with his findings on the facts and the law, to this court. The master made his report, finding in favor of the intervener on its mechanic's lien in the sum of $11,271.05; and, further, that, independently of the statutory lien, intervener is entitled to an equitable lien in the sum of $12,316.21. Both parties took exceptions to the findings of the master. On hearing before the court the court held that the bill of intervention was multifarious in asserting in the same bill the equitable lien and the statutory mechanic's lien (128 Fed. 129), and therefore directed that the intervener make its election as to which of said asserted liens it would stand upon for final decree, and to dismiss the bill as to the other claim. Conformably to this direction, the intervener has filed its election in writing herein to stand upon the equitable lien.

Haff & Michaels, for Westinghouse Air Brake Co.
Lathrop, Morrow, Fox & Moore, for Kansas City Southern Ry. Co.

PHILLIPS, District Judge (after stating the facts). The intervener having elected to stand for final decree upon its claim for an equitable lien, the court will not consider or pass upon what it conceives to be some of the vital objections to the validity of the statutory mechanic's lien, but will only discuss and determine the validity of the equitable lien. Paragraph 6 of the decree of this court appointing the receivers provides as follows:

"Said receivers shall be authorized to pay out of any income or revenues which may come to their hands all debts which may have been lawfully contracted by the Kansas City, Pittsburg & Gulf Railway since May 1, 1898, for services rendered to said company by its employés in the operation of its road, including herein the reasonable salaries to its officers, and reasonable compensation for professional services rendered by attorneys; also all debts lawfully contracted during the aforesaid period for materials and supplies furnished to said railway company, and used in the maintenance and operation of its road; and also all traffic balances, if there shall be any due, to connecting carriers. Other claims and demands against said company shall only be paid by the receivers upon orders of court hereafter made, and the court reserves to itself the power to direct the payment of such other demands against said railway as it may deem to be of a preferential nature."

Paragraph 19 of the decree of foreclosure contains the following provision:

"Any such purchaser or purchasers, and his or their successors and assigns, shall enter his or their appearance in this court, and he or they, or any of the parties to this suit, shall have the right to contest any claim, demand, or allowance undetermined at the time of the sale, or which thereafter may arise or be presented, and which would be payable out of the proceeds of the sale hereunder, or by said purchaser or purchasers, his or their successors or assigns, or with which he or they or the property purchased would be chargeable under the terms of this decree; and he or they may appeal from any decision relating to any such claim, demand, or allowance."

It is quite evident from said paragraph 6 that the court did not intend to give priority over the mortgage lien to any and all claims of an asserted equitable character which might be presented against the mortgagor, regardless of the circumstances and the time of their origin. The receivers were authorized to pay out of the income or revenue certain designated debts contracted after May 1, 1898, reserving to the court, by the last clause, the right to determine what other claims and demands against the company should be paid by the receivers. By said paragraph 19, while the purchaser of the road was required to en-

ter its appearance in this court and become a party to the suit, the right was nevertheless reserved to such purchaser "to contest any claim, demand, or allowance undetermined at the time of the sale, or which may thereafter arise or be presented." The first part of paragraph 6 indicates, in a general way, what was the mind of the court respecting the limit of time within which claims should have accrued to authorize their payment. The court was familiar with the history of this railroad, and the character of its burdens, as well as the probable losses that must be sustained by the bondholders whose money had gone into the construction and equipment of the road. The period of 6 months is ordinarily recognized by the federal courts as just and reasonable within which the claim must have accrued to entitle it to preference over the mortgage; and, while it is not an inflexible rule, and the court may reserve to itself the right to allow a longer time when the equities of the case absolutely demand it, there certainly ought to be some special equity to give this particular alleged lienor an extension beyond the 12-months period recognized in paragraph 6. Speaking for myself, who joined with Judge Thayer in making the decree in question, the 12-months period was deemed most liberal to the creditors. And as this court knows that all the claims imposed upon the purchaser of this road have been adjusted upon the 12-months limitation period, it can see no special equity in favor of this intervener, who represents the last unadjusted claim, for according to it, as the master has, a period of 18 months anterior to the appointment of the receivers, even if the claim should be found entitled to the preference asserted.

The principal reason assigned for giving this claim such special distinction is that the air brakes were essential to enable the railroad company to comply with the act of Congress requiring railroads engaged in interstate commerce to equip their trains with the Westinghouse air brake. Aside from the fact that the account in question shows many items which were not air brakes, but were for articles for repairs in and about the cars, and the master has largely cut down the amount claimed, I am unable to perceive why this company, which had the good fortune to get this act through Congress, and secure to itself a monopoly of this entire business, and a special contract from the company obligating it to obtain its supplies from the Westinghouse Company, should stand upon a better footing than the creditor who furnished engines for hauling its trains, or for fuel for propelling the engines, or who furnished ties and rails for the construction of the road. Without these the railroad could not have been operated at all. Railroads had hitherto been operated without the intervener's air brakes, but no railroad was ever operated without an engine, fuel, ties, and rails. Congress itself extended the time to 1900 for railroads to comply with the act without being amenable to the penalties therein provided. In view of the manner in which all other claims have been adjusted under the receivership and the decree of the court, I am unwilling to make any discrimination in favor of this intervener by recognizing its preferential right, if at all, anterior to the 1st day of May, 1898. Nor can this court see any special reason for the claim of the intervener for interest on its claim. No other claim-

ant has been allowed interest on its claim, and the general rule is not to allow such interest. Thomas v. Western Car Company, 149 U. S. 95, 13 Sup. Ct. 824, 37 L. Ed. 663. And so the master has found.

A more serious question confronts the claim of the intervener. As shown by the foregoing statement of facts, and as disclosed on the face of the bill, the intervener, shortly after the appointment of the receivers, filed its claim for the account in question with the clerk of the circuit court of Jackson county, Mo., asserting its right to a statutory mechanic's lien. Counsel for the Kansas City Southern Railway Company, the purchaser under the foreclosure sale, interposes the objection that the state statute giving a mechanic's lien, and the action taken thereunder by the intervener, preclude the assertion of any equitable lien. This contention is predicated in part upon the ruling of the Court of Appeals of this state in Van Frank v. Ehret Warren Mfg. Co., 89 Mo. App. 573, amplified in the case of Van Frank v. Brooks, 93 Mo. App. 412, 67 S. W. 688, in which it is held that, where the claim is one for which a lien is afforded by section 4239, Rev. St. Mo. 1899, relating to liens in favor of contractors, materialmen, etc., against railroad companies, the statutory remedy excludes the equitable one allowing a preference in a foreclosure suit. This ruling is based upon the proposition that the alleged lienor has a complete and adequate remedy at law by the statute, and that, as the statute giving the right of lien against railroad companies was enacted and in force in this state long prior to the introduction into the federal judiciary procedure in railroad foreclosure suits of the right to an equitable preference over the mortgagee, it is a legal remedy afforded which excludes the invocation of the equity doctrine. That court, while recognizing the flexibility of equitable principles to meet constantly occurring novel situations in connection with the development of railroads and railroad mortgages, held that:

"The creation of an equitable remedy for this purpose is not called for when there is already an adequate statutory one in force. Nor could an equitable one be tolerated in that contingency without disregarding the precept that cases are not cognizable in equity when there is a sufficient legal remedy, except in the few instances of concurrent jurisdiction."

The court also recognized the correctness of the rule that when a court of equity, in the exercise of its inherent powers, has jurisdiction to grant particular relief in the particular case, "such jurisdiction is not, in general, lost, or abridged, or affected because the courts of law may have subsequently acquired a jurisdiction to grant either the same or different relief in the same kind of cases and under the same facts or circumstances." But, inasmuch as the legal remedy under the mechanic's lien statute was provided and existed in this state before any court had introduced the doctrine of equitable preference in foreclosure proceedings, the legal remedy "is the older, and therefore precludes the exercise of the latter." Should this ruling of the Court of Appeals be followed by this court? As said by Mr. Justice White, in M., K. & T. Ry. Co. v. McCann, 174 U. S. 586, 19 Sup. Ct. 758, 43 L. Ed. 1093: "The elementary rule is that this court accepts the interpretation of the statute of a state affixed to it by the court of last resort thereof." Were such the construction placed upon the state

statute by the Supreme Court of the state (the court of highest jurisdiction in the state), there would be better ground for holding that it should be followed by this court, for the reason that the rule established by the state court might constitute a rule of property as to railroads operated in the state. Knapp, Stout & Company v. McCaffrey, 177 U. S. 638, 20 Sup. Ct. 824, 44 L. Ed. 921; Williams v. Gaylord, 186 U. S. 157, 163, 165, 22 Sup. Ct. 798, 46 L. Ed. 1102. But it might be that, notwithstanding such construction of the state statute in question, the federal court, in the exercise of its equity jurisdiction, in taking possession of property under a receivership, could nevertheless condition the appointment of receivers upon the requirement that they should recognize and pay certain specified indebtednesses against the corporation. But this question is not before the court. The Court of Appeals of this state in many respects is not the highest court of the state, whose rulings are binding on this court. In M., K. & T. Ry. Co. v. Elliott, 184 U. S. 530, 22 Sup. Ct. 446, 46 L. Ed. 673, it was held that the judgment of the state Court of Appeals in a case within its jurisdiction, not reviewable by the Supreme Court of the state, was so far a judgment by a court of last resort as to authorize the prosecution of a writ of error directly from the Court of Appeals to the Supreme Court of the United States. Under the scheme of the constitutional provision creating the Court of Appeals of the state, the Supreme Court, when a like question comes before it as to the construction and effect of a statute of the state, may give a different construction thereto from that of the Court of Appeals; and the ruling of the Supreme Court would then become the local law as to the effect of the statute. The most to be said of the ruling of the Court of Appeals under consideration is that it is entitled to respect by the federal court in administering law in the state when its construction of the statute comes before the federal court for determination. The ruling of that court may be strengthened by the decisions of other courts in pari materia.

In Farmers' Loan & Trust Company v. Candler (Ga.) 18 S. E. 540, Candler, the claimant, as here, intervened in the foreclosure suit, asserting an equitable preference over the mortgagee. Likewise had he previously undertaken to file a mechanic's lien, which contained a misdescription of the property, invalidating his lien. The court held that, having the right to the lien, or an opportunity to file one, he was not entitled to the equitable lien as against the mortgagee. The court said:

"The scheme of the Code is to give to contractors for building railroads a lien for work done or materials furnished on certain prescribed terms, and the mode of enforcing the lien is also prescribed. It seems to us plain that the object of the Code would be frustrated, and virtually defeated, if a contractor who has secured a lien, but failed to enforce it in the manner prescribed, can abandon that lien, and fall back upon an alleged equitable lien involved in the very same state of facts out of which his legal lien arose, and thereby postpone or defeat a mortgage upon the railroad, duly recorded and foreclosed; this mortgage being of older date than the general judgment which the contractor has obtained for the amount of his debt. We entertain no doubt that the law contemplates that a contractor to whom it gives a legal lien upon a railroad, and who has nothing to do in order to take the benefit of it but to enforce it in the way prescribed, shall have no

other lien, either in addition to it or as a substitute for it. He cannot cover his failure to comply with the statute as to the enforcement of the lien by abandoning that lien and asserting another one, nor can he assert his legal lien otherwise than in the mode prescribed. We need not rule, and do not, whether, if there were no statutory system of liens in behalf of railroad contractors, there would be any equity in favor of the contractor against the mortgage, under the circumstances of this case, or not. But with that system, and the relation to it which this contractor occupies, we deem it perfectly clear that he is restricted to his statutory lien, and must enforce that or none at all."

Independent of the question as to whether or not the statutory prescription for securing liens upon railroad property in the state excludes the establishment of the common-law lien as against the mortgagee whose lien in the case at bar covers all the property of the railroad company, as well as its income in excess of operating expenses, the question arises: Where it appears, both on the face of the bill of intervention and in the intervener's proofs, that after the appointment of the receivers under the foreclosure suit by the mortgagee the intervener filed a mechanic's lien, under the state statute, on the property of the railroad company in this state, on the account in question, can the intervener nevertheless assert an equitable or common-law lien? The only adjudicated case bearing on this question, so far as I am advised, is that of Bankers' & Merchants' Tel. Co. of Indiana v. Bankers' & Merchants' Tel. Co. of New York (C. C.) 27 Fed. 536, where the intervener undertook to file a mechanic's lien under the statute, and also to assert a common-law lien. The master concluded his report as follows: "I report and find that by perfecting his claim for a lien under the statute Mr. Vale waived the right, if he had any, to assert his common-law lien." The Circuit Court, while holding that the claimant did not come within the purview of the statute, said: "In the opinion of the court the petitioner had no lien at common law or in equity." On appeal to the Supreme Court (entitled Vane v. Newcombe, 132 U. S. 220, 238, 10 Sup. Ct. 60, 65, 33 L. Ed. 310), after considering the statute under which the mechanic's lien was asserted, the court said: "A common-law lien and an equitable lien are also claimed. As to the common-law lien the master reported 'that, by perfecting his claim for a lien under the statute, Mr. Vane waived the right he had, if any, to assert his common-law lien.' We concur in this view as to the personal property and earnings of the corporation." It is quite clear from the finding of the master that he based his conclusion on the legal proposition that the filing of the statutory lien was a waiver of the right to invoke a common-law lien. This view of the master was affirmed by the Supreme Court, and it seems to me the conclusion stands to reason. When in possession of all the information respecting the circumstances under which the materials in question were furnished, whether on a general credit looking to the responsibility of the railroad company, with the right under the statute to file a mechanic's lien, or whether it was under a special understanding entitling the vendor to an equitable preferential lien, the vendor, after the court had taken charge of the property for administration under the receivership, filed its statement for a statutory lien on the account, asserting that the materials were sold "pursuant" to a specific written

contract of date January 1, 1896, and that all the items therein were furnished under "one entire contract." This was a proclamation in solemn form by the claimant to the receivers and every creditor of the insolvent company that it abandoned any other assertion of a lien, especially an equitable one, dependent upon a different state of facts. If I read aright the plain language of the Supreme Court in the foregoing case, this act constituted a waiver of any common-law lien. I can see nothing to differentiate that case on principle from the one at bar.

It results that the claim of the intervener to an equitable preference is disallowed.

THE TRADER.

THE CAPITAL CITY.

(District Court, D. Washington, W. D. April 6, 1904.)

1. COLLISION — STEAM VESSELS MEETING — NEGLIGENCE AND VIOLATION OF RULES.

A collision occurred in Puget Sound shortly after dark, off Dash Point, four miles north of Tacoma, between the steamer Capital City, proceeding from Tacoma at a speed of 12 miles, and the British steamer Trader, coming southward at a speed of 5½ miles. The night was dark but calm, with no fog, and the lights could readily be seen. As the Capital City came out past Brown's Point, being then on a crossing course and showing her green light to the Trader, the latter, then a mile distant, gave a signal of two blasts for passing starboard to starboard, which was not answered. The Capital City then swung to the starboard so as to pass a quarter of a mile off Dash Point, and for five minutes the vessels approached each other head on. When half a mile apart the Trader repeated her signal for a starboard passing, which was assented to, but the Capital City proceeded without changing course or speed until immediately before collision, when, without signal, she ported her helm and swung to starboard across the course of the Trader, which immediately reversed, but too late to avoid the collision. *Held*, that both vessels were in fault; the Trader for signaling while the other vessel was coming around the point and before she had settled on her course, and persisting in such signal contrary to the rules while they were approaching head on, and for not sooner stopping and giving alarm signals when the Capital City was seen to be coming on at full speed without changing her course; the Capital City for inattention to the meeting vessel, for failing to act on the signal after acceding to it, and, finally, for taking the contrary course without notice, making the collision inevitable.

2. SAME—ISSUES IN SUIT—CONSOLIDATION OF CAUSES.

The failure of a petition for limitation of liability on account of collision to set out the grounds on which exemption from liability is claimed, as required by admiralty rule 56, when it is intended to contest such liability, cannot be taken advantage of by the adverse parties, where by stipulation such proceedings have been consolidated with cross-suits between the two vessels, in which the question of liability has been put in issue by the pleadings.

3. SAME—FAILURE OF MASTER TO STAND BY AFTER COLLISION—EVIDENCE CONSIDERED.

The failure of the captain of one of two vessels, both of which were seriously injured in a collision, to stand by after the other had been

¶ 1. Signals of meeting vessels, see note to The New York, 30 C. C. A. 630.

beached, or to take off her passengers, was not a violation of Act Sept. 4, 1890, c. 875, 26 Stat. 425 [U. S. Comp. St. 1901, p. 2902], which rendered his vessel liable for the collision, where it was calm and there was little danger to the passengers, and the extent of the injury to his own vessel was unknown, and where, after proceeding to port only four miles distant, he at once gave notice and himself returned with a tug, and all the passengers and crew were safely taken off.

4. SAME—ASSIGNMENT OF CLAIMS—SUIT BY VOLUNTEER.
A mere volunteer to whom claims for damages by collision have been assigned solely for the purpose of suit, and who has no interest therein, has no standing to prosecute such claims in a court of admiralty.

In Admiralty. Cross-libels to recover damages for injuries caused by a collision between the steamboat Capital City, an American vessel, owned by the S. Willey Steamship & Navigation Company, and the steamboat Trader, a British vessel, owned by C. S. Baxter and F. W. Vincent. Hearing on the merits. Both vessels found to be in fault, and damages divided.

This litigation was initiated by a suit in rem in behalf of the S. Willey Steamship & Navigation Company, owner of the steamboat Capital City, against the British steamboat Trader, registered at the port of Victoria, B. C., to recover damages for an injury to the Capital City, and for loss of cargo and baggage of passengers and personal effects of members of her crew, caused by a collision between the two vessels, which occurred on the 28th day of October, 1902, on Puget Sound, off Dash Point, about four miles northward from Tacoma, by which the Capital City was so badly injured that it was necessary to run her on the beach to save the lives of the passengers and crew on board. Said libel was filed the next day after the collision, while the Capital City was sunk, and supposed to be a complete wreck, and the amount of damages claimed was $40,000. After the Trader had been taken into the custody of the United States marshal, her owners appeared as claimants, and filed a petition for limitation of liability in accordance with the laws of the United States, and thereupon the Trader was appraised, and a bond for her appraised value was filed in the case, after which she was released from custody. The Capital City having been raised, and taken to a dock for repairs, an amended libel was filed, in which the amount of damages claimed was reduced to $8,500. On December 29, 1902, the owners of the Trader commenced an independent suit in rem against the Capital City to recover $5,000 damages for alleged injuries to the Trader caused by the collision. On the same day, December 29, 1902, a stipulation, signed in behalf of the respective owners of the two vessels, was filed in the suit of Baxter and Vincent against the Capital City, whereby the parties agreed as follows:

"It is hereby stipulated and agreed by and between the proctors for all parties in interest:

"First. That the causes and matters of all kinds and nature whatsoever in any wise comprised or included in the above-entitled matters shall be consolidated and by the above-entitled court heard as of one case.

"Second. That all evidence taken in any of such causes upon the behalf of any party thereto, whether heretofore appearing or hereafter to appear, shall be considered in all of said causes, and have the same force and effect, as though separately taken in each case.

"Third. That Honorable Samuel D. Bridges be appointed by the judge of the above-entitled court as court commissioner to take evidence therein, and all of the evidence heretofore taken or hereafter to be taken before said commissioner be considered as having been taken in each, every, and all of said causes.

"Fourth. That this stipulation is entered into to avoid costs, expense, and delay, and the same is considered a full and sufficient consideration and cause thereof on behalf of every party hereto, and on behalf of any party or parties hereinafter in any of these causes appearing or making claim.

"Fifth. That any party or parties claiming or pretending to claim to have any interest or right by reason of the collision of the steamers Capital City and Trader out of which the above causes arose may appear in any one of said causes, or either of them, and such appearance shall be considered an appearance in each and all thereof, one appearance only as to all of said causes from this time forth being required, and such intervening parties to have every right by reason of such appearance as though separate appearances were made in all three causes.

"Sixth. That the above-entitled court make its order, forthwith directing a monition to issue in the matter of the limitation of liability, and appointing the said Samuel Bridges as commissioner of said court to take testimony thereunder; and that thereupon the said causes proceed to a final hearing as soon as may be convenient and possible upon the part of the parties hereto.

"Seventh. That this stipulation be filed, and an order be entered accordingly, and that all parties hereafter appearing or intervening in this cause have the benefit hereof, reserving all questions under petition for limitation of liability."

On the 23d day of January, 1903, Francis Rotch appeared in the original suit, in response to the petition for limitation of liability, and filed an intervening libel to recover, on the bond filed by the owners of the Trader, the alleged value of merchandise and baggage, and personal effects of a number of shippers and passengers, and members of the crew, alleged to have been on board the Capital City, and to have been lost or damaged in consequence of the collision, and alleged that the owners thereof had assigned their claims to him.

In accordance with the stipulation above referred to, the several causes were consolidated, and evidence in behalf of each and all of the litigants has been taken and reported to the court by a commissioner appointed for that purpose.

The pleadings upon which the cause has been submitted to the court consist of the amended libel of the S. Willey Steamship & Navigation Company, the answer of Baxter and Vincent to said amended libel, the petition of Baxter and Vincent under the limited liability statutes, a claim in behalf of the original libelant in response to the petition for limitation of liability, a claim in behalf of Francis Rotch in response to said petition for limitation of liability, the libel of Baxter and Vincent against the Capital City, an answer to said libel of the owner of the Capital City, the intervening libel of Francis Rotch, and an answer to said intervening libel of Baxter and Vincent.

In this mass of pleadings there are many repetitions, but the issues are few and simple. Against the Trader, the charge is made that she was solely in fault, because (a) she did not have the regulation lights, or, if her lights were burning, they were so defective and dim as to be invisible until the two steamers approached so near to each other that the collision could not be avoided; (b) the Trader signaled for a starboard passing when the positions and courses of the two vessels were such that they should have passed port side to port side, and no signal to apprise the Capital City of her presence was given by the Trader at the proper time; (c) her commander "did not properly direct the course and movement" of the Trader. This general charge, and the specifications thereof, are all denied. Against the Capital City, it is alleged that she was solely in fault, for the reason that when the two vessels were one mile distant from each other, and in such positions that the Capital City showed only her green light and her masthead light to the Trader, a signal for a starboard passing was given by the Trader, to which the Capital City failed to make response, and later, when the distance between the two vessels was at least one-half of a mile, and the Capital City was still showing her green light, and not her red light, to the Trader, the signal for a starboard passing was repeated by two blasts of the Trader's whistle, to which the Capital City immediately responded by two blasts of her whistle, and when the vessels were very near to each other, and the Capital City running at a high rate of speed—at least 12 knots per hour—said steamer, without giving any warning of intention to change her course, suddenly turned on a port helm, in such a manner as to swing across the bow of the Trader, and the collision occurred, notwithstanding the fact that the Trader's engine was immediately

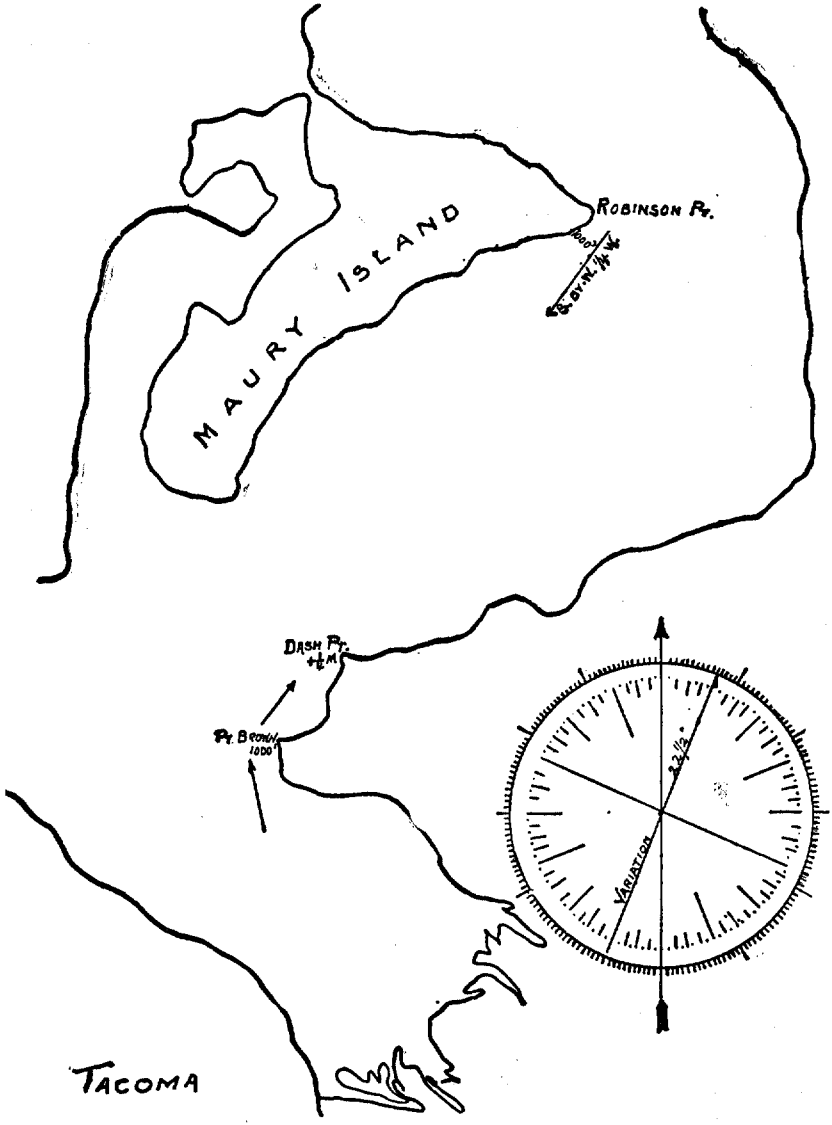
reversed, and commenced working full speed astern. This charge, and the specifications thereof, are also denied. The amounts of the losses alleged in the intervening libel of Rotch, and the several assignments to him, were put in issue by the answer to said libel.

As part of the proceedings under the petition for limitation of liability, the court appointed a commissioner to whom all claims against the Trader for damages growing out of said collision should be presented, and directed said commissioner to take evidence to prove such claims as might be presented, and to report to the court the amount of each of such claims. Said commissioner has made a report containing a schedule of claims for merchandise lost or damaged, amounting in the aggregate to $419,61, and a schedule of claims for the personal effects of employés of the Capital City, amounting in the aggregate to $410.50, and it appears from said report that the amounts claimed as set forth in said schedules were not contested, but were admitted. Said commissioner's report also shows that the claim of the S. Willey Steamship & Navigation Company, amounting to $8,500, was also presented, and it was not contested. The commissioner, however, did not assume to make any findings as to the liability of either of the parties with respect to said claims.

Richard Saxe Jones and George C. Israel, for libelant.
J. M. Ashton, for claimants.
Richard Saxe Jones, for intervening libelant.

HANFORD, District Judge (after stating the facts as above). From the evidence, I find the facts of the case to be as follows: The place of the collision was about four miles north of Tacoma, and one-fourth of a mile off shore, opposite the south side of Dash Point. There was ample room for the two vessels to have passed each other in safety, there being proximately three miles of open water between the shore of the mainland and Maury Island, and the vessels were not embarrassed by the presence of other craft. The time of the collision was about 6:20 p. m., October 28, 1902. The sky was overcast and cloudy, so that it was quite dark; otherwise it was a fine evening—that is to say, it was calm, and there was no fog or rain to obstruct the vision. The Trader was going to Tacoma, carrying a cargo of salted fish in boxes. She passed Point Robinson at about 5:30 p. m., and was then so far out towards midchannel that another steamer, going northward to Seattle, passed between her and Point Robinson. At that time the captain relieved the mate and took sole control of her movements, and changed her course so as to head south by west a quarter west by her compass. The distance from Point Robinson to Dash Point is proximately five miles, the tide was ebbing, and the Trader's speed was about 5½ statute miles per hour. At that rate of speed, with the tide against her, and on that course, in the 50 minutes which intervened between the time of passing Point Robinson and the time of the collision, the Trader would have crossed Puget Sound on an oblique line, and would have come to the place of the collision above indicated, which is proximately one-quarter of a mile off the southerly side of Dash Point.

The accompanying outline map is an accurate representation of the shore lines and points referred to and the course of the Trader, indicated by an arrow 1,000 feet off Point Robinson, and shows proximately the location of the collision, indicated by a cross one-fourth of a mile off Dash Point, and proximately the courses of the Capital City before and after turning Brown's Point.



The Capital City is a passenger steamboat, and was employed on a route between Seattle, Tacoma, and Olympia. Compared with the Trader, she is a fast boat, her ordinary speed being 12½ miles per hour. She left Tacoma at 6 p. m. on her run northward to Seattle, and passed Brown's Point 15 minutes later, and then steered a course to the place of the collision above indicated, so that for a period of about 5 minutes the two steamers were on opposite courses, and approaching each other head on, or nearly so. Each of them carried the regulation masthead light and side lights, all of their lights were burning brightly,

and the three lights of each were visible to the other vessel from the time that the Capital City changed her course after turning Brown's Point, but until she changed her course only her masthead light and green light would show to the Trader. The captain of the Trader saw the masthead light and the green light of the Capital City as soon as she came out past Brown's Point, and immediately, the vessels then being distant one mile from each other, blew two blasts of the Trader's whistle, which is the signal for passing starboard to starboard, and to that signal the Capital City made no response. About two minutes afterwards, when the vessels were approaching head on, as above indicated, and showing all their lights to each other, the captain of the Trader persisted in his purpose, and repeated the signal for a starboard passing, to which the Capital City assented by an immediate response, giving two blasts of her whistle, and continued on her course, running full speed until the two vessels were very close to each other, when her captain, without having sounded an alarm, and without giving any signal other than the response to the Trader's whistle as above mentioned, changed her helm to hard aport, so that she turned quickly to starboard in a manner to bring her port side across the bow of the Trader. The captain of the Trader noticed the movement as soon as the Capital City commenced to turn, and immediately gave the signal to his engineer to reverse and work the engine full speed astern, and said order was instantly obeyed. Eitner the reversing of her engine or a change of her helm caused the Trader to swing to port, so that when the two vessels came together they were both turning inshore. The Trader's bow cut into the port side of the Capital City, about 30 feet abaft her stem, at an angle of about 45 degrees from the line of her keel. One of the broken timbers of the Capital City penetrated the hull of the Trader on the starboard side of her bow below the water line. Both vessels were seriously injured by the heavy jar of the impact and by the crushing of their timbers. The Capital City took in water rapidly, so that the fire in her furnace was extinguished before she struck the beach on Dash Point, less than 10 minutes after the collision. The only opening made in the hull of the Trader was partly choked by the timber which made it, so that she did not take in water to such an extent as to prevent her from completing the run to Tacoma, which she did after the Capital City had been run upon the beach. On arrival at Tacoma her captain reported the disaster, and during the evening the passenger steamer Flyer went to the relief of the Capital City and took off all of her passengers. Previous to that being done, however, the captain had returned with a steam tug to render any assistance possible.

In arriving at a conclusion with respect to the facts of the case, I have been guided mainly by the evidence of unimpeached witnesses, and by the indisputable facts with respect to the time and place of the collision. I have been obliged to reject as untrue the testimony given by the captain of the Trader, to the effect that only the green light of the Capital City was visible to him when he blew the second signal for a starboard passing. It is a peculiar feature of this case that the two captains agree in their testimony with respect to the course steered by the Capital City. Her captain puts her on a course from Brown's

Point which would show only her green light to the Trader, and the captain of that vessel swears that the Capital City did show only her green light, until she turned immediately preceding the collision. Nevertheless, the results prove the contrary, for it is certain that, when the two steamers first came into positions to be visible from each other, the Trader was off Dash Point and the Capital City was turning Brown's Point, and it is certain that she came around that point and ran to the place where the Trader struck her, and she was stranded on Dash Point; therefore she must have run nearly a straight course from Brown's Point towards Dash Point, until she turned to starboard, only a few seconds before she was struck; whereas, if she was on a course N. ⅝ W., as her captain testified, or on any course which would conceal her red light from the Trader, as she was going northward, she would have pointed across the Sound, more in the direction of the center of Maury Island than towards the place where the collision occurred, and, keeping in mind the superior speed of the Capital City, it is obvious that if she pointed to the westward sufficiently to conceal her red light from the Trader she would have made way out towards the middle of the stream so far, before she turned to starboard, that the collision could not have happened so quickly after that error as all the evidence proves, and, if the testimony of the captain of the Trader is true in respect to his own promptness in reversing and commencing to work her engine full speed astern, the collision would have been avoided.

The testimony of the captain of the Capital City is muddled and contradictory, and inconsistent with well-established facts. He claims to have been in the pilot house, and on watch from the time his steamer left Tacoma; that he heard only one signal from the Trader; that he responded to that signal, notwithstanding the fact that he was unable to see the Trader's lights, or to locate her position, until the vessels were so near to each other that the collision could not be avoided; that at first he saw only her red light, which was four points off the Capital City's port bow; and that the two vessels were in that position (that is to say, very near to each other, and the Trader bearing four points off the Capital City's port bow, and showing only her red light) when he put his helm hard aport. He attempts to excuse himself for not seeing the Trader's lights by saying that it was raining and the weather was thick, and yet he claims that he did see the lights on Point Robinson, more than five miles distant. He pretends, also, that at the time of answering the signal he gave an order to the man who was steering the Capital City to change her course one point to port, and that he does not know now, and did not at the time observe, whether said order was obeyed or not; and, further, it appears by his testimony that he was first apprised of danger by hearing some one—he does not know who—say, "There is going to be a collision." He did not then give any signal to his engineer, and attempts to excuse that failure by saying that he was standing in the pilot house in a position where he could not reach the handle of the engine-room signal bell. If this is a true exposure of his conduct, we have an instance of a captain of a passenger steamboat, running in the nighttime at a high rate of speed, placing himself in a position where he could not communicate with his engineer, and remaining in that position after hearing a passing signal from a

steamer which he did not see nor locate, although the signal was in fact given by a steamer in dangerous proximity, when nothing intervened to obstruct his vision, and, after giving an order to his helmsman to change the course of his vessel, taking no heed to see whether the order was obeyed or not. The culmination of his extraordinary proceedings is in swearing, as a witness in this case, that when he arrived at Brown's Point he put the Capital City on a course N.⅝W., then changed the course one point more to West, and, with that steering, fetched the Trader's red light four points off the port bow of his own vessel.

It is entirely plain to me that the collision could not have happened, under the circumstances which existed, without the concurrence of negligence and mismanagement on the part of both captains. The collision did occur as a consequence of the obstinancy of a British captain in disregarding the plain mandate of the law that two steamers on opposite courses, approaching each other head to head, shall each give way sufficiently to pass each other port side to port side. The first signal for a starboard passing was given when the Capital City was at least one mile distant from the Trader, and when she was turning a point, and in this there was a violation of law—the passing signal should not be given by one vessel until the course of the other vessel has been ascertained. His error in signaling prematurely gave the captain no right whatever to insist upon passing on the starboard side, when the conditions were such as to require adherence to the rule requiring both vessels to give way to starboard so as to pass on the port side. The Capital City carried good lights, and it is reasonably certain that the captain of the Trader saw her red light before repeating the signal for a starboard passing; therefore an inexcusable fault on his part was committed in repeating that signal, and steering a course to pass on the starboard hand. If he did not see the Capital City's red light at the time of repeating the signal, he certainly was not attending to his business, and was guilty of a fault as serious as the other. The conduct of the Capital City in running at a high rate of speed so as to meet the Trader head on after she had signaled, without responding to the signal, was a sufficient indication of danger to make it the imperative duty of the captain of the Trader to stop his vessel and sound an alarm, and his failure to do so was another violation of law, and a serious fault.

The charge made against the Trader, that she did not have the regulation lights, or that, if she did have lights, they were defective, is shown to be untrue by ample evidence. The errors committed by the captain of the Capital City are glaring and inexcusable. He knew that his vessel was running at a high rate of speed, and that for safety it was necessary for him to keep a vigilant lookout, and especially so when turning Brown's Point. He either neglected that important duty, or actually saw the lights of the Trader when she was one mile distant, and made no timely effort to keep out of her way. His failure to see the Trader, if he did not see her in ample time, and his failure to keep out of her way, constitute the first fault of which I find him guilty. Having assented to the Trader's second signal for a starboard passing, he was bound to act accordingly, and should have changed the course of the Capital City by going to port, so as

to give ample room to pass clear. If he had done so, the collision would not have occurred, and his failure in this respect constitutes the second fault of which I find him guilty. If the Capital City had continued on a straight course, the Trader might have given way so as to have passed in safety; therefore the act of the captain of the Capital City in turning to starboard, suddenly, without having indicated his intention to do so by any signal, made the collision inevitable, and that act constitutes the third fault of which I find him guilty. And his failure to stop and sound an alarm when the trader gave a wrong signal for passing constitutes the fourth fault of which I find him guilty. The captain's own testimony is sufficient to condemn his seamanship, and put upon the Capital City responsibility for the collision, and I do not have to rest my decision upon the testimony of witnesses who appear to be under suspicion. I will say, however, in passing, that the man who was in the pilot house with the captain, and who steered the Capital City, and who was called first as a witness for the libelant, and afterwards was recalled as a witness for the Trader, appears to me to have been just as incompetent in the position of helmsman as he is untrustworthy as a witness. He does not know starboard from port. I am justified in saying so by the contradictions in his testimony. It is impossible to ascertain from his evidence whether he changed the helm so as to turn the vessel to starboard, or to port, after the signals were exchanged. The following quotation is taken from the cross-examination of said witness when he was giving his evidence in behalf of the libelant:

"Q. Did you get any order from the captain, from Capt. Edwards, as soon as you saw the Trader? A. He took the wheel himself to throw her hard over, and tried to clear the boat, and the other boat turned right around and hit us. Q. Oh, I see. Then, as soon as you saw the Trader, you put your helm hard aport? A. The helm hard astarboard. Q. You put your helm hard astarboard when you saw the Trader; is that right? A. I mean hard aport, to try to get away from her again, to make a starboard passing. Q. I want to know just what you do mean. When you first saw the Trader, did you put your helm hard astarboard or hard aport? A. Put the helm hard astarboard —I mean hard aport—to try to get away from him; we were making a starboard passing. Q. Then when you put your helm hard aport— A. Hard astarboard. Q. Hard astarboard. Then as a matter of fact you put your helm hard astarboard, did you? A. Yes, sir. Q. Who told you to do that? A. Well, the captain took the wheel then himself. Q. He took the lever? A. Yes, sir. Q. Well, he did not change the course any after he took it, did he? A. Well, he put the wheel hard astarboard. Q. You put it hard astarboard, and then he took the lever? A. Yes, sir. Q. Now, Mr. Simdars, why did the captain take the lever away from you? A. Well, he seen there was going to be a collision, and he tried to get out the best way he could. He took it himself to try to get out of it. Q. Did not he take your lever away from you because he told you to put your helm hard aport and you put it hard astarboard, as you testified? A. No, sir. Q. What did he say to you when he took the lever away from you? A. He did not say anything; he just— I let him have the wheel, and he took the wheel and done the best he could to try to get away from her."

In the light of such testimony, given by one of the most important witnesses for the libelant, the conclusion that the Capital City was in control of a blunderer is unavoidable, and it is useless to conjecture as to whether it was the helmsman, or the captain himself, who blundered.

The proctor for the libelant and intervening libelant has unreasona-

ably insisted upon a decree in favor of his clients for full damages on merely technical grounds, taking the position that the petition for limitation of liability filed in behalf of the owners of the Trader amounts to a confession that the Trader was in fault and liable to an amount exceeding her value, and that they should be precluded from contesting liability by reason of their failure to observe the requirements of admiralty rule 56, which prescribes that in proceedings under the limited liability statute, if the owner or owners of a vessel elect to contest his or their liability, or the liability of the vessel, independently of the limitation of liability claimed, the facts or circumstances by reason of which exemption from liability is claimed shall be stated "in his or their libel or petition." It is true that the petition for limitation of liability is defective, and if the proceedings were merely such as are contemplated by the admiralty rules, in which the issues are to be ascertained from statements of the owner's petition or libel and an answer thereto, it would be entirely fair for the court to deny the right of the petitioners to claim exemption, because their petition does not set forth the facts and circumstances relied upon as grounds for complete exemption. In this case, however, the issues which the court must adjudicate are set forth in the several pleadings which I have enumerated, and by the stipulation of the parties the several causes have been consolidated, and the court is required to adjudicate the entire controversy, and every branch of it. It is my opinion that the libelant, by said stipulation, waived whatever technical rights might otherwise have been based upon exceptions to the sufficiency of the petition for limitation of liability. In the first pleading filed by the libelant, an issue was tendered with respect to the fault of the Trader, and by the answer an issue was joined, and the same issue was raised by the libel against the Capital City, and the answer thereto, and evidence has been submitted in behalf of both parties bearing upon that issue, and from consideration of all the evidence the court has reached the conclusion, above indicated, that the collision and all consequential damages were caused by faults of the respective captains in the management of both vessels, and that the entire damages should be divided equally.

In the argument, but not in the pleadings, the Trader is charged with failure to render assistance in rescuing the passengers and crew of the Capital City, and it is insisted that under the act of Congress of September 4, 1890, c. 875, § 1, 26 U. S. Stat. 425 [U. S. Comp. St. 1901, p. 2902], the collision must be deemed to have been caused by the wrongful act, neglect, or fault of the Trader. I find, however, that she did stand by until the Capital City was beached, and then proceeded to Tacoma, and her captain was prompt in reporting the disaster, and procured a steamtug to go to the relief of the Capital City, and returned to her with said tug. Considering the comparative safety of the people on the Capital City after she was beached, and the unknown extent of the damages to the Trader, it would have been imprudent to have attempted to take the passengers on board the Trader. Therefore the statute cited is not applicable to this case.

The intervening libelant has no standing in a court of admiralty, for the reason that the evidence proves affirmatively that he has no interest in any of the matters in controversy. He paid nothing to either of the

owners of merchandise or baggage alleged to have been lost or damaged, and the several assignments of claims alleged in his libel were intended to give only color of a right to sue for damages. Courts of admiralty do not encourage litigation by mere volunteers. The Prussia (D. C.) 100 Fed. 486; Minturn v. Alexandre (D. C.) 5 Fed. 119; Fretz v. Bull, 12 How. 468, 13 L. Ed. 1068. I direct that the decree herein shall contain a sentence that said intervening libelant take nothing.

From consideration of the evidence, the court finds that the Trader was seriously injured by the collision, and that $2,500 is a reasonable estimate of the damages for said injury. The total amount of damages caused by the collision, with interest thereon, computed at the rate of 6 per cent. per annum, from the 1st day of January, 1903, to the 1st day of April, 1904, amounts to the sum of $11,825, and the amount for which the Trader is liable, after deducting $2,500 and interest thereon, amounts to the sum of $3,225, to which will be added one-half of all the taxable costs; and by the decree it will be directed that the owners of the Trader pay into court said amount plus one-half of the taxable costs, out of which will be paid the total amount of the taxable costs, and the residue will be paid to the libelant.

BIRD v. TERRY.

(Circuit Court, D. Washington, W. D. February 28, 1903.)

No. 773.

1. INDIANS—ALLOTMENT OF LANDS IN SEVERALTY—RIGHTS CONVEYED BY PATENT UNDER TREATY.

A treaty made in 1854 between the United States and the Puyallup and other bands of Indians provided for the allotment and conveyance in severalty of land to Indians who were heads of families upon certain conditions as to residence and cultivation, and with certain restrictions as to alienation, subject to which the land was to be theirs for a permanent home for themselves and their families and inheritable by their heirs. *Held*, that a patent to an Indian under such treaty for lands previously allotted to him, which recited the terms of the grant, conveyed to him a vested estate, which could not be taken away or affected by any subsequent action of the executive department of the government so long as he complied with the conditions.

2. SAME—RIGHTS FOLLOWING CITIZENSHIP—PROTECTION OF PROPERTY RIGHTS.

An Indian, who, by practicing the habits of civilized life, and living on and cultivating land allotted to him in severalty, has become under the law a citizen of the United States, is entitled to all the rights of other citizens, and may prosecute and defend suits in any court of competent jurisdiction, state or federal, in respect to his property rights, and his ownership and use of land which has been patented to him under a treaty are matters not subject to the decision or control of either Congress or the executive branch of the government.

In Equity. The following is the agreed statement of facts:

It is hereby stipulated and agreed by and between Messrs. Reid & Meade, solicitors for complainant, George Bird, and Edward E. Cushman, Assistant United States Attorney, and attorney for defendant, Frank Terry, that the following are material facts which could be proven under the issues, and that they are hereby stipulated to be the controlling facts in this case. It is fur-

ther stipulated and agreed that upon this statement of facts this cause is submitted to the court for judgment, and that by submitting the case upon the said agreed statement of facts neither complainant nor defendant waive any right to review or appeal from said judgment; all of which rights are expressly reserved the same as though said case had been regularly submitted and tried upon evidence taken.

(1) That on the 26th day of December, 1854, a treaty was concluded and signed between the Puyallup and other bands of Indians on the one part and the United States on the other part, and was thereafter duly ratified and confirmed by the President and Senate of the United States. Said treaty is found in Act Dec. 26, 1854 (10 Stat. 1132).

(2) That on and prior to the 17th day of January, 1881, said George Bird was a member of the Puyallup tribe of Indians, and was one of the members entitled to an assignment of lands under the provisions of said treaty, and that on said day an allotment of land was made to complainant, under the provisions of said treaty, by an instrument in writing in the following words:

"No. 50. Department of the Interior,
"Office of Indian Affairs,
"January 17th, 1881.

"This is to certify, that Teow-away, or George Bird, a member of the Puyallup tribe of Indians, having expressed a desire to adopt habits of settled industry, and to receive an allotment of lands for the purposes of cultivation, as provided for in the 6th article of the treaty with said tribe, concluded December 26th, 1854 (Vol. 10, page 1133), is entitled to ——— acres of land, and that he has selected for such purposes the N. E. ¼ of S. W. ¼ of Sec. 12 in township 20, north of range 3 east of the Willamette Meridian, in Washington Territory, containing forty acres.

"The said Teow-away, or George Bird, is entitled to and may take immediate possession of said land and occupy the same, and the United States guarantees such possession, and will hold the title thereto in trust for the exclusive use and benefit of himself and his heirs so long as such occupancy shall continue.

"This certificate is not assignable except to the United States, or to other members of the tribe under such rules and regulations as may be hereafter prescribed by the Secretary of the Interior, and the said Teow-away, or George Bird, is expressly prohibited from assigning or attempting to assign the same, and from selling or transferring the said land or disposing of the same, or any interest therein, to any person or persons whomsoever (except as above named) under penalty of an entire forfeiture thereof.

"E. M. Marble, Acting Commissioner."

(3) That said George Bird availed himself of the privilege thus offered, and accepted said assignment, and located upon said land as a permanent home, and cleared and cultivated said land, and built a dwelling house and other improvements thereon.

(4) That on the 30th day of January, 1886, under the provisions of said treaty, the United States executed and delivered to said Bird a patent for said land (and some additional land), which said patent is in the words and figures following, to wit:

"The United States of America, to All to Whom these Presents Shall Come, Greeting:

"Whereas, by the sixth article of the treaty, concluded on the twenty-sixth day of December, Anno Domini one thousand eight hundred and fifty-four, between Isaac I. Stevens, governor and superintendent of Indian Affairs of Washington Territory, on the part of the United States, and the chiefs, headmen, and delegates of the Nisqually, Puyallup, Steilacoom, Squawksin, S'Homanish, Stehchass, T'Peeksin, Squiatl, and Sa-heh-wamish tribes and bands of Indians, it is provided that the President, at his discretion, cause the whole or any portion of the lands hereby reserved, or of such other land as may be selected in lieu thereof, to be surveyed into lots, and assign the same to such individuals or families as are willing to avail themselves of the privilege, and will locate on the same as a permanent home, on the same terms and subject

to the same regulations as are provided in the sixth article of the treaty with the Omahas, so far as the same may be applicable;

"And whereas, there has been deposited in the General Land Office of the United States an order bearing date January 20th, 1886, from the Secretary of the Interior, accompanied by a return dated October 30th, 1884, from the Office of Indian Affairs, with a list approved October 23rd, 1884, by the President of the United States, showing the names of members of the Puyallup band of Indians who have made selections of land in accordance with the provisions of said treaties, in which lists the following tracts of land have been designated as the selection of Teo-away, or George Bird, the head of a family consisting of himself and Mary, viz.: The southwest quarter of the northwest quarter of section fifteen (40.00 acres), the southeast quarter of the northeast quarter and the northeast quarter of the southeast quarter of section sixteen (80.00 acres), in township twenty-one north, and the northeast quarter of the southwest quarter of section twelve (40.00 acres), in township twenty, north of range three east of the Willamette Meridian, Washington Territory, containing in the aggregate one hundred and sixty acres:

"Now know ye, that the United States of America, in consideration of the premises and in accordance with the direction of the President of the United States under the aforesaid sixth article of the treaty of the sixteenth day of March, Anno Domini one thousand eight hundred and fifty-four, with the Omaha Indians, has given and granted, and by these presents does give and grant, unto the said Teo-away, or George Bird, as the head of the family as aforesaid, and to his heirs, the tracts of land above described, but with the stipulation contained in the said sixth article of the treaty with the Omaha Indians, that the said tracts shall not be alienated or leased for a longer term than two years, and shall be exempt from levy, sale or forfeiture, which conditions shall continue in force until a state constitution embracing such lands within its boundaries shall have been formed and the legislature of the state shall remove the restrictions, and no state legislature shall remove the restrictions without the consent of Congress.

"To have and to hold the said tracts of land, with the appurtenances, unto the said Teo-away, or George Bird, as the head of the family as aforesaid, and to his heirs forever, with the stipulation aforesaid.

"In testimony whereof, I, Grover Cleveland, President of the United States, have caused these letters to be made patent, and the seal of the general land office to be hereunto affixed.

"Given under my hand at the city of Washington, this thirtieth day of January, in the year of our Lord, one thousand eight hundred and eighty-six, and of the Independence of the United States the one hundred and tenth.

"By the President: Grover Cleveland,

"S. W. Clark, By M. McKean, Secretary.

"R."

(5) That at all times after the making of said assignment and the issuance of said patent said Bird voluntarily took up, within the limits of the United States, and upon the lands in said patent described, his residence, separate and apart from any tribe of Indians, save as qualified by paragraph 9 hereof, and adopted the habits of civilized life, and has at all times since the issuing of said patent continued to exercise habits of civilization within the county of Pierce and state of Washington, and has at all such times continued to occupy and till a portion of the land thus assigned and patented to him.

(6) That on and prior to the 17th day of January, 1881, said George Bird and one Mary Bird were husband and wife, and were residing on the land in said patent described, and that said Mary Bird is the "Mary" mentioned in said patent as a member of complainant's family. That said Mary Bird died on or about the 15th day of August, 1887, and left her surviving two sons, Joseph Winyer and Henry Winyer, who had been born to said Mary Bird by marriage to a former husband. That said sons were the only surviving issue of said Mary Bird. That said Mary Bird was born of Indian parents, and the father of said Joseph and Henry Winyer was an Indian. That said Joseph married a full-blood Indian woman, and one Frank Winyer is the issue of said marriage. That thereafter the mother of said Frank died, and

said Joseph then married Sallie Winyer, an Indian woman. That said Joseph died while he was the husband of Sallie, and after the death of Mary Bird. That said Sallie has since died, and one Mary Charley and said Frank Winyer are now the heirs of said Joseph Winyer.

(7) That said Joseph Winyer and Henry Winyer were never members of complainant's family, and they each received assignments of land upon said reservation at the time complainant was awarded the assignment of land hereinbefore described.

(8) That said Bird has leased said land in said assignment and patent described to one Frank Albert for a period of time less than two years, and for a full and fair consideration paid by said Albert to said Bird.

(9) That the defendant, Frank Terry, is superintendent of the Puyallup Indian School, and agent of the Puyallup Indian reservation, occupied by allottees of the Puyallup Indian Tribe, in which reservation are included the lands in said patent described; and that as such agent it is his duty to perform such duties, not inconsistent with law, as may be prescribed by the President, Secretary of the Interior, or Commissioner of Indian Affairs. Section 2058, Rev. St.

(10) That under the act of Congress of March 3, 1893 (27 Stat. 633, c. 209), and under the instructions and regulations of the President of the United States, Secretary of the Interior, and Commissioner of Indian Affairs, the Puyallup Indian Commissioners ascertained, found, and determined that George Bird was the owner of one-half of said land, that Henry Winyer was the owner of one-fourth thereof, that Sallie Winyer was the owner of one-eighth thereof, and that Frank Winyer was the owner of one-eighth thereof. That said Puyallup Indian Commissioners did not ascertain, find, or determine said ownership by or through any proceeding in any court, but arrived at said determination after making such investigation as they could among the Indians. That this finding and determination of the Puyallup Indian Commissioners was, on July 1, 1896, approved, and said ownership confirmed accordingly, by the Secretary of the Interior.

(11) That certain rules and regulations have been adopted and promulgated by the Secretary of the Interior and Commissioner of Indian Affairs regarding the leasing by Indian allottees of allotted lands, which said rules and regulations are applicable to the Puyallup Indian reservation and the lands in question. That among other regulations it is provided that all leases shall be submitted to and approved by the Secretary of the Interior, and that all rental money shall be paid to the Indian agent for distribution to the parties found to be the owners by the said Puyallup Indian Commissioners; and it is further made the duty of the Indian agent to exclude, eject, and oust from any such allotted lands tenants or lessees refusing to comply with the aforesaid regulations.

(12) That the lease made by said Bird to said Albert was made without complying, and without any attempt on the part of either to comply, with the foregoing rules and regulations. That the said agent has never consented to the occupancy of said land by said lessee, Albert, or to his residence or presence on said reservation. Said Bird claims the right to lease said land for a period less than two years without the intervention of said Secretary of the Interior, Indian agent, or other person. That the only reason why said Bird is unwilling to execute a lease before said Indian agent and in accordance with the foregoing rules and regulations is that he claims to be the sole owner of the whole of said lands, and entitled to all the rents and profits thereof, and that said Secretary of the Interior and Indian agent claim that under said treaty, patent, law, and findings of said Puyallup Indian Commissioners the said Bird is only the owner of a one-half interest in said land, and is only entitled to one-half of the rents and profits thereof. If the rental money falling due under said lease or under any lease made by said Bird comes into the hands of said Indian agent, he will forthwith pay to said Henry Winyer, Frank Winyer, and Mary Charley one-half thereof.

(13) That said Terry will, unless restrained by this court, eject and remove said Frank Albert, or any other lessee or tenant of the complainant under any lease, unless made in conformity with the foregoing rules and regulations. That said land so leased by said Bird to said Albert is of great value, to wit,

of the value of ten thousand dollars, and that, if said Terry is permitted to evict said Albert therefrom, the complainant will thereafter be unable to induce any person to lease said premises directly from him. That complainant is an old man, and unable, from his age, to cultivate said land, and, if he is thus prevented and hindered from leasing said land, its value will be largely lost to complainant.

(14) That heretofore said George Bird instituted a suit in the superior court of the state of Washington for the county of Pierce against Henry, Frank, and Sallie Winyer to determine the ownership of said tract of land. That said superior court is and was a court of general law and equity jurisdiction. That due service of process was made upon each of said defendants, and they thereafter appeared in said suit by their attorney, and fully litigated therein their said rights and claim to ownership of said land. That said superior court held and adjudged that the said Bird owned but a one-half interest in said land, and that said Winyers owned a one-half interest therein. That thereupon said Bird appealed said case to the Supreme Court of the state of Washington, the highest court of said state to which said case could be appealed. That said case was duly argued before and presented to said court by counsel for the respective parties. That after due hearing and consideration the said Supreme Court reversed the order of the superior court, and held and decided that said Winyers had no right, title, or interest in or to said land. That said Sallie Winyer died after the decision of said case by said Supreme Court. Said case is reported in 24 Wash., at page 269, 64 Pac. 178. Said case has never been appealed.

(15) That the Secretary of the Interior, Superintendent of Indian Affairs, and said Terry maintain that said state courts have and had no jurisdiction to determine the issues between said Bird and said Winyers, for the reason that the said land, the subject-matter of said suit, is and was allotted land on an Indian reservation.

(16) Paragraphs 2 and 6 of the treaty with the Puyallups and other Indian tribes made on December 26, 1854 (10 Stat. 1132), are hereby referred to and made a part of this statement of facts; article 6 of the treaty with the Omahas, made March 16, 1854 (10 Stat. 1043), is hereby referred to and made a part of this statement of facts; that the act of Congress of February 8, 1887 (24 Stat. 390, c. 119), is hereby referred to and made a part of this statement of facts; the act of the Legislature of the state of Washington of March 22, 1890 (Laws 1889–1890, p. 499), is hereby referred to and made a part of this statement of facts; the act of Congress of March 3, 1893 (27 Stat. 633, c. 209), is hereby referred to and made a part of this statement of facts; section 4621, 1 Ballinger's Ann Codes & St. of the state of Washington is hereby referred to and made a part of this agreed statement of facts; that section 3 of the act of Congress of February 28, 1891 (26 Stat. 794, c. 383), is hereby referred to and made a part of this agreed statement of facts; the act of Congress of August 15, 1894 (28 Stat. 305, c. 290), is hereby referred to and made a part of this statement of facts; the act of June 7, 1897 (30 Stat. 85, c. 3), is hereby referred to and made a part of this statement of facts; the act of Congress of May 31, 1900 (31 Stat. 229, c. 598), is hereby referred to and made a part of this statement of facts; the act of Congress of August 15, 1894 (28 Stat. 286, c. 290), and more especially that part thereof found at page 305, is hereby referred to and made a part of this statement of facts. And it is hereby by both parties hereto asked and prayed that the court, upon the foregoing agreed statement of facts, adjudge and determine the rights of the parties hereto, and construe, in so far as it is necessary in so determining, the effect of the laws herein cited and referred to.

Ried & Meade, for complainant.
E. E. Cushman, Asst. U. S. Atty., for defendant.

HANFORD, District Judge. It is my opinion that the patent issued by the United States government to the plaintiff, George Bird, is not a meaningless or deceitful document, which conveys no estate to the grantee, and I hold that it must be regarded and construed as a

bona fide and valid instrument, effective to fulfill the promise made to the grantee named therein as one of the Indians concerned in the treaty made by Gov. Stevens in the year 1854. By the treaty, Bird, as the head of a family, was entitled to have the quantity of land which the patent conveys allotted to him in severalty as a permanent home for himself and family, upon condition that he and the family should occupy and cultivate the same; and by the treaty he was promised not only the right to occupy and cultivate the land, but that the right should be exclusive, and inheritable by his heirs. The estate which the government promised to convey was not an absolute fee-simple estate, but was limited, so that he could not alienate the same without the consent of the state Legislature and of Congress, and the estate was defeasible in this: that it was subject to forfeiture if the allottee became a rover, and failed to occupy the land as a home. The patent by plain and positive words conveys to Bird the rights and the title which the treaty promised, and the grantee has in good faith accepted the land and the patent, and by erecting a dwelling upon the land and preparing a part of it for tillage, and by making his home thereon, and actual occupancy and cultivation of the land, he has fulfilled the conditions which entitle him to all the rights and benefits which the patent purports to convey to him. George Bird, although an Indian, has also, by adopting and practicing the habits of civilized life, and residing upon and cultivating the land allotted to him, fulfilled the conditions which, under laws enacted by Congress, entitle him to all the rights, privileges, and immunities of citizenship. He is a citizen of the United States, and entitled, equally with other citizens, to make a lawful use of his own property, and to prosecute and defend in the courts of this state and in the courts of the United States actions affecting his legal rights with respect to property, and to make contracts, not prohibited by law, including leases of the land in question for terms not exceeding two years. Having a complete vested estate in the land, and being endowed with the rights of citizenship, George Bird is under the protection of the guaranties of the Constitution of the United States, so that neither Congress nor the executive branch of the government can divest him of his property, nor deny to him the equal protection of the laws in a manner which would violate the constitutional rights of any other citizen. He cannot be prohibited from submitting for adjudication to the courts of this state disputed questions with respect to his ownership of the land conveyed by the patent, nor required to abide by the decision of any commission or agent of the executive branch of the government not authorized by law to exercise the judicial powers of the government, which takes from him and gives to others a part of the land which he and his family alone are entitled to possess, nor be subjected to the control of government functionaries in the matter of leasing his lands for a term not exceeding the time limit specified in his patent.

The several propositions above stated lead me to the conclusion that the heirs of Mary Bird, the deceased wife of George Bird, who are not his heirs, nor members of his family, have no right to nor interest in any part of the land conveyed by the patent, and that the agents of

the Interior Department cannot rightfully exercise any authority or control in the matter of leasing the land or receiving the rent, and that the decision of the Supreme Court of the state of Washington in the case of Bird v. Winyer, 24 Wash. 269, 64 Pac. 178, was a lawful adjudication by a court of competent jurisdiction of the questions which were at issue in that case between Bird and the heirs of his deceased wife.

Let a decree be entered in favor of the complainant, declaring him to be entitled to the exclusive possession of the 160 acres of land described in his complaint, and every part of it, and that the heirs of his deceased wife have no interest therein, nor right to possession of any part of it, and let an injunction issue against the defendant, Terry, forbidding him from molesting the plaintiff or his tenants in their occupation and use of the land, and from receiving any part of the rent for the same.

In re CONGDON.

(District Court, D. Minnesota, Sixth Division. January 4, 1904.)

1. BANKRUPTCY — GENERAL ASSIGNMENT — ALLOWANCE FOR SERVICES OF ASSIGNEE.

A general assignment, procured from an insolvent by the attorney for the assignee, which resulted in no advantage to the estate, but rather in detriment, is, not only in law but in fact, a fraud on the bankruptcy law, and no allowance will be made by the court of bankruptcy to the assignee for services rendered by himself or his attorney.

In Bankruptcy. On certificate from referee.

The following is the referee's certificate:

I, Ole J. Vaule, the referee in bankruptcy in charge of this proceeding, do certify as follows:

November 20, 1903, the above-named Darius H. Congdon was adjudicated bankrupt, and December 5, 1903, Thomas P. Jumper was appointed trustee of his estate in bankruptcy. October 13, 1903, the bankrupt made to the said Thomas P. Jumper a general assignment of all his property for the benefit of all his creditors, under what might probably be called a common-law deed of assignment. December 5, 1903, Thomas P. Jumper filed his account as assignee under said deed, and asked that he be credited with the following items:

Cash paid for insurance	$70 00
Cash paid for rent of store	40 00
Attorney fees due Morphy, Ewing & Bradford, for services rendered	85 00
Personal services	25 00

By an order of December 8, 1903, I allowed the items of $70 paid for insurance and $40 paid for store rent, but disallowed the items of $85 attorney fees and $25 for personal services, and Thomas P. Jumper, being aggrieved thereby, filed his petition December 21, 1903, for the review of said order by the judge.

The facts leading up to and connected with the assignment are as follows: Shortly prior to October 31, 1903, the bankrupt, being financially embarrassed, had made arrangements with his attorney, Henry Funkley, to go through bankruptcy, and the only or main reason why his petition in bankruptcy had not been filed before this date was that the attorney had not had time to make out the necessary papers. On the 13th of October, 1903, John M. Bradford, one of the attorneys of Thomas P. Jumper, came to the store of the bankrupt, at Blackduck, and requested the bankrupt to give a deed of assignment. The bankrupt told him he had decided to go through bankruptcy, but Mr. Bradford insisted that it was much better for the bankrupt to make an assignment, that

the assignee would leave the bankrupt in possession of the store at a salary of $50 or $60 per month, and that the creditors would furnish him with new goods, as they might be needed, and extend the time of payment. On the strength of these representations the deed of assignment was obtained. The bankrupt was in possession of the store, as he had been before, but the new goods that were promised were not forthcoming, and all that Mr. Jumper did as assignee was to take out a policy of insurance, pay a month's store rent, and write the bankrupt a few letters for money.

It is needless to say that a retail store of general merchandise cannot be kept going in the regular course of trade unless the stock is from time to time replenished. Mr. Jumper is the credit man of George R. Newell & Co., and there is no question but that he could have supplied the bankrupt with the necessary goods, had he been so disposed. The agreement to leave the bankrupt in the possession and control of the business at a salary, and to furnish him with new goods, seems to me, under the circumstances of the case, to be so unbusinesslike and unreasonable that it could never have been intended to be kept, but that it was simply used to induce the bankrupt to make the deed of assignment. The deed itself is also peculiar. It provides that the assignee shall not be liable for "any wrongful acts of any agent by him appointed to carry out said trust." He does everything in this line through agents. He has the selection of them, and, if he is not to be liable for their misdeeds, the creditors have poor protection. While it does not appear how soon the petition in bankruptcy would have been filed, had not the assignee interfered, it is apparent that on account of this interference much valuable time has been lost to this estate. Assignments have generally been considered frauds on the bankruptcy law, and for that reason no compensation has been allowed either the assignee or his attorney for their services; the interests of both being in conflict with the provisions of the bankruptcy law. Collier on Bankruptcy (4th Ed.) 464; In re Gutwillig, 1 Am. Bankr. Rep. 78, 90 Fed. 475. But see Randolph v. Scruggs, 10 Am. Bankr. Rep. 1, 190 U. S. 533, 23 Sup. Ct. 710, 47 L. Ed. 1165. However, the assignee has quite generally been reimbursed for actual expenses wisely and necessarily incurred for the benefit of the estate, where such reimbursement would not result in duplication of charges. But it has also been held that, inasmuch as the assignee must know that his position is in conflict with the scheme and purpose of the bankruptcy law, he should not be allowed any disbursements incurred by him prior to the filing of the petition in bankruptcy. In re Gladding Co., 9 Am. Bankr. Rep. 171. The decision by the referee in this case was affirmed by Judge Brown, of New York, and the case is now on appeal before the Circuit Court of Appeals. See Summers v. Abbott, 10 Am. Bankr. Rep. 254, note, 122 Fed. 36, 58 C. C. A. 352.

In the case last cited, the assignee under a common-law deed of assignment took possession of a large stock of merchandise. He sold part of it at retail and the balance in bulk. He spent about one month in the management of the estate, and realized for the estate in cash over $40,000. Under these circumstances the Circuit Court of Appeals of this circuit held: "While an assignment for the benefit of creditors, executed within the four-months period, is an act of bankruptcy, yet, if honestly made for the purpose of applying all the property of the assignor to the payment of his debts, the assignee, who accepts the trust in good faith and executes it intelligently, successfully, and honestly, is entitled, upon turning over the proceeds of the sale of property to the trustee in bankruptcy or his assignors, to be paid a fair and reasonable compensation for his services and those of his attorneys." But in the case at bar the assignee acted neither "intelligently" nor "successfully," and I fail to see how he could have acted in good faith. In the Summers Case the court said (page 269, 10 Am. Bankr. Rep., page 40, 122 Fed., and page 356, 58 C. C. A.): "To prevent misapprehension, it is proper to say that this case has none of the odious features about it that sometimes crop out in cases where insolvents make deeds of assignment for the professed benefit of their creditors, but which are in fact made to embarrass and defraud them, and where the assignee is a willing instrument of the fraudulent debtors. In such cases, according to an old and well-settled principle, quite independent of the bankrupt act, neither the assignee nor his attorney is entitled to any compensation for their services out of the fraud."

It seems to me, that in the case at bar the assignment was a fraud on the bankrupt act (Act July 1, 1898, c. 541, 30 Stat. 544 [U. S. Comp. St. 1901, p. 3418]), not only in law, but in fact. From their relation with Mr. Congdon, the assignee and his attorney must have known that bankruptcy was inevitable, and that they were doing the estate only damage. As between the attorney and his clients, $85 for his expenses and trouble in going to Blackduck is no doubt reasonable; but the amount should, in my opinion, not be saddled upon the estate in bankruptcy simply because the attorney was ingenious enough to procure a deed of assignment. On the strength of the Summers Case the procurement of deeds of assignment has become an industry to be guarded against. I enclose herewith the assignee's account (with a copy of the deed attached), my order thereon, the petition for review, and the evidence.

John M. Bradford, for assignee.

LOCHREN, District Judge. For the reasons stated by the referee, his decision is in all things affirmed.

EMPIRE STATE CATTLE CO. et al. v. ATCHISON, T. & S. F. RY. CO. MINNESOTA & D. CATTLE CO. v. SAME.

(Circuit Court, D. Kansas, First Division. April 2, 1904.)

Nos. 8,155, 8,157.

1. CARRIERS—ACTION FOR INJURY TO PROPERTY IN SHIPMENT—PLEADING.
In an action against a railroad company to recover damages for an alleged violation of duty as a common carrier, plaintiff is not required to plead or prove the written contract under which his shipment was made, which, if relied on by defendant, is a matter of defense.

On Motions by Defendant to Require Plaintiffs to Amend Their Petitions.

Botsford, Deatherage & Young and R. E. Ball, for plaintiffs.
A. A. Hurd, for defendant.

POLLOCK, District Judge. The above actions are brought by plaintiffs to recover damages from defendant railway company, alleged to have been sustained by plaintiffs in the shipment of cattle over the defendant's line of railway during the flood of last year in the Kaw river. The petitions filed by plaintiffs declare upon a violation of defendant's duty as a common carrier for hire. A motion by defendant company has been interposed in each case, requiring plaintiffs to amend their petition by stating whether the contracts of shipment of the cattle mentioned in said petition were in writing or oral, and, if said contracts were in writing, that plaintiffs be required to attach a copy or copies thereof to said petitions, in order that the defendant may be fully advised as to the terms and conditions upon which said shipments of cattle were made, the destination of same, and the route, if any, agreed upon by the terms of such contracts. That contracts for shipment of the cattle were entered into between the parties, and that such contracts are in writing and in the possession of plaintiffs, was admitted by counsel for plaintiffs in the oral argument of this motion. The question is, should the court, by its order,

require the plaintiffs to set forth and declare upon such written contracts?

Counsel for plaintiffs contend their actions are in form ex delicto, and that they are not required by the rules of pleading to rely upon or set forth the contracts, if any exist, between the parties to the action. Counsel for defendant contends, in the absence of a direction from Congress, the practice adopted and followed by the state courts of this state under the Code must control. This latter contention I think correct. The common-law forms of action are, by provision of the Code, expressly abolished. All a plaintiff is required to do in pleading under the Code is to state the facts constituting his cause of action in plain and concise language, without repetition. It is no concern of the pleader, under the Code of this state, whether the facts constituting his cause of action form a cause of action which at the common law would be denominated ex delicto or ex contractu, or both in one; but the settlement of this contention does not, in my judgment, settle the question under consideration. I do not find the Supreme Court of this state to have ruled upon the precise question under consideration here, and no authoritative decision of that court is cited by counsel. The exact question, in my judgment, is, admitting a contract of shipment between the parties, in writing, to exist, and in the possession of plaintiffs, as was admitted at the oral argument, must the plaintiffs plead and prove such contracts, as a part of their case, or is such contract a matter of defense to the carrier? Upon investigation of this subject, I find the precise question to have been passed upon by the Court of Appeals for this circuit in Southern Pacific Company v. Arnett, 111 Fed. 849, 50 C. C. A. 17. In that case, Judge Thayer, in delivering the opinion of the court, says:

"A special contract, when exacted by a carrier, is a defensive weapon to be made use of by the carrier when sued by the shipper for any alleged dereliction of duty against which it was designed to afford protection."

Upon authority of that case, controlling here, the motion will be overruled.

FROST & ADAMS v. SALTONSTALL, Collector.

(Circuit Court, D. Massachusetts. November 12, 1887.)

No. 2,892.

1. CUSTOMS DUTIES—PROTEST—TIMELINESS—HOLIDAYS.

Notice was posted in a customhouse that it would be closed June 17th —a holiday observed by local custom, but not established by law. Certain importers, having notice of the closing of the customhouse on that day, which was the tenth day after the liquidation of their entry, filed a protest on the day following. *Held*, that the protest was filed in accordance with the requirements of section 2931, Rev. St., providing that protests shall be made "within ten days after the ascertainment and liquidation of the duties."

At Law. Action to recover excessive duties.

This action was brought by Frost & Adams, importers, against Leverett Saltonstall, collector of customs at the port of Boston, to recover excessive duties which had been paid under protest. The entry in question was liqui-

dated June 7, 1887, but the importers did not file their protest with the collector until June 18th. The customhouse, however, was closed on June 17th, in celebration of Bunker Hill day, which, it appeared, was not a holiday established, but a local one observed in Boston and vicinity in accordance with a long-standing custom. The importers contended that, as June 17th was not a legal holiday, the collector had no right to close the customhouse on that day, and that the protest might be filed on the following day, the 18th, and yet satisfy the requirements of section 2931, Rev. St., where it is provided that protests shall be made to the collector in writing "within ten days after the ascertainment and liquidation of the duties by the proper officers of the customs." Note Shefer v. Magone (C. C.) 47 Fed. 872.

On appeal to the Secretary of the Treasury in accordance with said section 2931, it was decided, June 28, 1887, that the protest was not in time; the following language being used in the secretary's letter to the collector:

"It appears from your report that the entry of the merchandise in question was liquidated on the 7th instant, while the protest and appeal were not lodged until the 18th instant, more than ten days after the date of liquidation. The department must therefore decline to entertain the appeal. The claim of the appellants that the protest should be considered as filed in time because the customhouse was closed on the 17th of June, the tenth day after liquidation, cannot be allowed, inasmuch as it has been invariably held by the Department (see T. D. 7,858) that the ten days prescribed by section 2931 of the Revised Statutes include Sundays and holidays; and, besides, it is not understood that any legal authority existed for closing the customhouse on said date."

The importers thereupon brought suit against the collector, setting forth in their declaration that they had filed with the defendant a "due and timely" protest in writing, and the following motion was entered in their behalf:

"And now comes the plaintiff, and makes a motion that the protest per steamship Pavonia, mentioned in the second item of the bill of particulars, as filed June 18, 1887, may be adjudged to have been filed in accordance with the requirements of section 2931 of the Revised Statutes of the United States. * * *"

At the trial of the case the plaintiff's counsel testified that he had called at the customhouse on June 16th, and there found notice posted that it would be closed to business on the day following. It was argued that, if the collector might properly close the customhouse on one day, he might close it for 10 days or more, and thus entirely defeat the importers' rights.

Charles P. Searle, for importers.
T. H. Talbot, Asst. U. S. Atty.

COLT, Circuit Judge. At the close of the argument the court ruled that this notice furnished a good excuse for not filing a protest June 17th, and made a protest filed on the 18th valid.

Motion allowed, and judgment entered for the plaintiff.

PRICE & HART v. T. J. ELLIS & CO.

(Circuit Court, E. D. Arkansas, W. D. April 11, 1904.)

No. 5,265.

1. REMOVAL OF CAUSES—AMOUNT IN DISPUTE—COUNTERCLAIM.

Where the defendant in an action by a nonresident in a state court to recover a sum less than $2,000 files a counterclaim by which he seeks to recover a sum greater than $2,000, the cause is removable by the plaintiff at or before the time he is required to plead to such counterclaim.

¶ 1. See Removal of Causes, vol. 42, Cent. Dig. § 131.

On Motion to Remand to State Court.

N. W. Norton, Baldy Vinson, and Metcalf & Metcalf, for plaintiff.

Wells, Williamson & Cotham and W. S. & F. L. McCain, for defendants.

TRIEBER, District Judge. The only question involved in this motion to remand is whether the plaintiff, who is a nonresident of the state, and who has instituted an action at law in the state court against a residen of this state to recover a sum of money not exceeding $2,000, can remove the cause to a national court when the defendant filed with his answer denying the plaintiff's demand a counterclaim by which he seeks to recover from the plaintiff a judgment for more than $2,000, exclusive of interest and costs. The question has never been authoritatively settled by the decision of any court whose judgment is conclusive on this court. Neither the Supreme Court nor the Circuit Court of Appeals for this (the eighth) circuit has ever passed upon it directly, nor has any other federal appellate court ever determined that question, except the Circuit Court of Appeals for the Fifth Circuit, in Waco Hardware Co. v. Michigan Stove Co., 91 Fed. 289, 33 C. C. A. 511. West v. Aurora City, 6 Wall. 139, 18 L. Ed. 819, has been frequently cited by some of the courts as a case in point, but that case is inapplicable to the acts of Congress now in force, as the removal in that case was sought to be made under the provisions of the judiciary act of 1789 (1 Stat. 79), digested as the first subdivision of section 629, Rev. St. U. S., which has been repealed or superseded by the act of March 3, 1875 (18 Stat. 470), and the act of March 3, 1887, as corrected by the act of August 13, 1888 (25 Stat. 433; U. S. Comp. St. 1901, p. 509). The act of 1789, construed by the court in West v. Aurora City, limited the right of removal to a defendant who had not submitted himself to the jurisdiction of the state court, except to enter his appearance for the purpose of removing the case. The chief justice, who delivered the opinion of the court in that case, said:

"And it [the right to remove] is given only to a defendant who promptly avails himself of the right at the time of appearance by declining to plead and filing his petition for removal."

Waco Hardware Co. v. Michigan Stove Co., supra, while no doubt a binding authority on the Circuit Courts of the United States held within the Fifth Circuit, has no such effect on this court, although entitled to the highest consideration. The decision of that case is based solely on what was decided in West v. Aurora City, and, as that case construed an act of Congress different from those now in force, it has no application to causes arising under the present acts. The acts of Congress now in force regulating the removal of causes from a state to a national court contain no such restrictions as did the act of 1789. A defendant now may plead or answer in the state court, and still remove the cause, if the facts otherwise authorize a removal, provided he files his petition and bond for removal at or before the time he is, by the laws of the state or the rules of the court in which the action is pending, required to plead. Brisenden v. Chamberlain (C. C.) 53 Fed. 307; Champlain Constr. Co. v. O'Brien (C. C.) 104 Fed. 930; Sidway v. Missouri, etc., Co. (C. C.) 116 Fed. 381.

The decisions of the Circuit Courts of the United States on this question are quite numerous, but unfortunately so conflicting that the only aid they afford is the reasoning of the different judges who decided them. In this the Eighth Circuit we find four cases reported in which this question was in some shape before the Circuit Courts for determination. Carson & Rand Lumber Co. v. Holtzclaw (C. C.) 39 Fed. 578, decided by Judge Thayer; Bennett v. Devine (C. C.) 45 Fed. 705, decided by Judge Shiras; Lee v. Continental Ins. Co. (C. C.) 74 Fed. 424, decided by Judge Adams; and McKown v. Kansas & T. Coal Co. (C. C.) 105 Fed. 657, decided by Judge Rogers. A careful examination of these cases shows that the only one in which the facts were identical with those in the case at bar is Carson & Rand Lumber Co. v. Holtzclaw, and there Judge Thayer held that the cause was removable under the acts of Congress now in force. In Lee v. Continental Ins. Co., the statutes of Utah, in a court of which state the action was pending, made it obligatory on the defendant to set up his counterclaim in the same action, or be forever afterward prohibited from maintaining an action against the plaintiff therefor. But the learned judge, in delivering his opinion, took occasion to express his views on this subject regardless of the Utah statute, and reached the same conclusion as that expressed by Judge Thayer in Carson & Rand Lumber Co. v. Holtzclaw, supra. Judge Adams thus states his conclusions:

"There is a contradiction of opinion, independent of such legislation as is found in the statute of Utah, with respect to the question whether the amount involved in an asserted counterclaim against a cause of action shall or may be considered in determining the jurisdiction of federal courts. Opinions of very eminent judges and courts are found on either side of the question, and as a new question it would be somewhat difficult to determine it, based simply on the decided cases. However, my inclination is to adopt the conclusion that the amount involved in a counterclaim is a part of the subject-matter in dispute, within the meaning of the act of Congress, conferring jurisdiction upon the federal court; and that inclination is strongly fortified in the case at bar by the terms of the Utah statute."

In Bennett v. Devine, decided by Judge Shiras, the cause was sought to be removed by the original defendant, who was sued for $1,950 only, but filed a counterclaim to recover $3,000, and it was held that it could not be removed upon the ground, as stated by the learned judge, that:

"So far as the counterclaim is concerned, the party seeking the removal is the plaintiff therein, and the right of removal does not exist in favor of a plaintiff, or a party who has voluntarily invoked the jurisdiction of the state court."

In this case the removal was made by the original plaintiff, who became the defendant in the counterclaim.

In McKown v. Kansas & T. Coal Co., decided by Judge Rogers, the facts were like those in Bennett v. Devine. The removal was sought to be made by the original defendant, who became the plaintiff in a counterclaim, and, the right to remove being limited to the defendant, the cause was properly remanded.

That the defendant who files a counterclaim becomes, as to the counterclaim, a plaintiff, under the statute of Arkansas, and the original plaintiff becomes the defendant, has been fully determined by the court of last resort of that state in Heer Dry Goods Co. v. Shaffer, 51 Ark.

368, 11 S. W. 517. In that case an action at law had been instituted by the plaintiff to recover a sum of money from the defendant. The defendant, with his answer, denying the indebtedness alleged in the complaint, pleaded a set-off and counterclaim, the correctness of which was verified by the oath of the defendant. The plaintiff filed no reply to this set-off, but dismissed his original action. The defendant thereupon demanded judgment on his counterclaim, which was granted by the court without any other proof than the verified account filed therewith. Upon appeal to the Supreme Court that court held:

"But a set-off is a cross-claim for money by the defendant, and must be a cause of action arising upon contract, or ascertained by the decision of a court. The answer which sets it up must state facts which constitute a cause of action against the plaintiff, and its sufficiency is governed by the same rules that would apply to the complaint if the defendant had sued the plaintiff. The plaintiff can reply to it, denying each allegation setting up the set-off, and alleging any new matter not inconsistent with the complaint, constituting a defense. If he fails to do so, every material allegation of the answer constituting the set-off, except as to value or amount of damages, is taken as true. If he dismisses his action, or fails to appear, the defendant can prosecute his set-off to judgment. So in every respect it is essentially a cross-action, in which the relation of the parties in the original action is reversed, and the defendant is plaintiff, and vice versa." 51 Ark. 370, 11 S. W. 518.

Cases decided by the Circuit Courts in circuits other than the Eighth, in which the right of removal in cases like this was sustained, are Clarkson v. Manson (C. C.) 4 Fed. 257, decided by Judge Blatchford, afterwards one of the justices of the Supreme Court; and Walcott v. Watson (C. C.) 46 Fed. 529. Cases, although not direct in point, yet applicable by analogy, are Lovell v. Cragin, 136 U. S. 130, 10 Sup. Ct. 1024, 34 L. Ed. 372, and Block v. Darling, 140 U. S. 234, 11 Sup. Ct. 832, 35 L. Ed. 476. In both of these actions the court was called upon to determine its jurisdiction on appeal and writ of error in relation to the amounts involved. In the first case it was sought to dismiss the appeal upon the ground that the amount involved was not sufficient to give that court jurisdiction, as it did not exceed $5,000. The decree appealed from was for $4,830.64, but the cross-bill of appellant, which had been dismissed by the court below, claimed a decree in behalf of the original defendant for a greater sum than $5,000, and it was held that:

"When the matter set up in a cross-bill is directly responsive to the averments in the bill, and is directly connected with the transactions which are set up in the bill as the gravamen of the plaintiff's case, the amount claimed in the cross-bill may be taken into consideration in determining the jurisdiction of this court on appeal from a decree on the bill."

In Block v. Darling it was held:

"Where, in an action for the recovery of a money demand, a counterclaim of the defendant exceeding $5,000 is entirely disallowed, and judgment rendered for the plaintiff on his claim, this court has jurisdiction of the writ of error sued out by the defendant without regard to the amount of plaintiff's judgment."

While, under the laws of this state, a defendant is not compelled to set up his counterclaim in that action, but may maintain a separate suit thereon, he has the right to do so, and, as determined by the highest court of the state, it thereupon becomes "in every respect a cross-action, with the parties reversed." There is no reason why

a nonresident thus involuntarily made a party defendant in an action in which judgment for more than $2,000, exclusive of interest and costs, is demanded and can be rendered against him should be deprived of his right to remove the cause to a national tribunal, if he so elects. It is true, he selected the state court as the forum in which to litigate his cause of action when he instituted the suit originally, but, as his claim for which he instituted that suit did not exceed in value the sum of $2,000, exclusive of interest and costs, he had no choice in the selection of the forum, for that was the only court which had jurisdiction of the subject-matter. It was the filing of the counterclaim alone which gave him the right of election, and, if he avails himself of this privilege within the time prescribed by the statute, "at or before the time he is required by the laws of the state or the rules of the court to answer or plead," which can only be done after the filing of the counterclaim, and which must be done "on or before the calling of the cause for trial" (section 5736, Sandell's & H. Digest of Statutes of Arkansas), I can conceive of no substantial reason why he should not be entitled to remove the same. Thus, in Powers v. Chesapeake & Ohio Ry. Co., 169 U. S. 92, 18 Sup. Ct. 264, 42 L. Ed. 673, it was held that:

"An action not removable from a state court by reason of joinder as defendants of citizens of the same state as plaintiff may, upon a subsequent discontinuance in that court by the plaintiff against the resident defendants, making the action for the first time a removable one by reason of diverse citizenship of the parties, be removed by the defendant upon a petition filed immediately after such discontinuance, and before taking any other steps in defense of the action."

Mr. Justice Gray, in delivering the opinion of the court in that case, says:

"The reasonable construction of the act of Congress, and the only one which will prevent the right of removal, to which the statute declares the party to be entitled, from being defeated by circumstances wholly beyond his control, is to hold that the incidental provision as to the time must, when necessary to carry out the purposes of the statute, yield to the principal enactment as to the right; and to consider the statute as, in intention and effect, permitting and requiring the defendant to file a petition for removal as soon as the action assumes the shape of a removable case in the court in which it was brought."

This excerpt applies with great force to the facts in this case. See, also, Jones v. Mosher, 107 Fed. 651, 46 C. C. A. 471. Had the defendants instituted an original action against the plaintiffs on their counterclaim, the cause would clearly have been removable, and it was the filing of the counterclaim, although a suit was then pending between the parties, which brought the cause within the terms of the statutes regulating removals of causes from the state to the national courts. The petition for removal in this case was filed by the plaintiffs, who became defendants in the cross-action, and were nonresidents of this state, as soon as the facts necessary to confer jurisdiction on this court were made a part of the record, and within the time they were required by the laws of this state to file a reply, and this was the first opportunity they had to elect one of the two forums in which to try their case. Before that time no right of election existed, and, of course, they could exercise none.

The motion to remand is overruled.

TEGARDEN v. LE MARCHEL.

(Circuit Court, W. D. Arkansas, Harrison Division. April 11, 1904.)

1. EJECTMENT—EQUITABLE DEFENSE IN FEDERAL COURT.
   In an action of ejectment in a federal court, the defendant cannot set up an equitable title to defeat the legal title by impeaching a patent from the United States, and this rule is not affected by a state statute under which such defense would be permissible.
2. SAME—LIMITATION.
   Limitation cannot begin to run against an action of ejectment in a federal court prior to the time when the patent for the land under which plaintiff claims was issued by the United States.
3. SAME—ACTION BY PATENTEE—CLAIM FOR IMPROVEMENTS MADE BEFORE ISSUANCE OF PATENT.
   A state statute giving a defendant in ejectment the right to recover the value of improvements made by him in good faith under color of title cannot be applied in a case in which the plaintiff claims under a patent issued by the United States after the improvements were made, since the power of the United States to dispose of its public lands is absolute, and the right of its grantee to possession on receiving the legal title cannot be obstructed or affected by any claim made under a law of the state.

Action in Ejectment. On demurrer to answer.

Seawell & Seawell, for plaintiff.
J. C. Floyd, S. W. Wood, and G. J. Crump, for defendant.

ROGERS, District Judge. The plaintiff brought his suit in ejectment in the usual form, and under the act of March 5, 1875, found in Sand. & H. Dig. §§ 2578–2582, inclusive, stated such facts as show a prima facie title in himself to the land in controversy. They are, in substance, as follows: William Goodall in his lifetime entered the land in controversy, and shortly afterwards died, leaving certain heirs at law, who had conveyed all their title to the property to the plaintiff. After such conveyance was made, a patent for these lands was issued, on the 27th of May, 1903, to William Goodall, in lieu of one bearing date July 1, 1850, which latter patent misdescribed the land, and copies of said deeds and patent are attached as exhibits to the complaint, as the statute required. Plaintiff also claims title by virtue of a tax deed, which, for the purposes of this demurrer, need not be noticed. The defendant answered in five counts. A general demurrer was interposed to each count in the answer. The first count in the answer expressly admits possession, and then denies that such possession is unlawful, and then denies that plaintiff is entitled to possession as alleged, and then proceeds to set forth the reasons why the plaintiff is not entitled to possession; the facts stated being in the nature of an equitable defense based upon a homestead entry of the same land by the defendant on the 28th of December, 1893. It then alleges, in substance, that this defendant's homestead entry had been canceled by the fraudulent conduct of Goodall, by the procurement of fraudulent affidavits to the effect that Goodall had entered the land, and that other and different lands had been patented to said Goodall, whereby he procured the General Land Office to cancel the defendant's homestead entry, and procured the patent exhibited with the complaint

to be issued to Goodall's heirs, which representations, the defendant alleges, are false and fraudulent, and that the said Goodall had never, in point of fact, entered the land in controversy, never had possession thereof, nor had any claim, right, title, or interest in the same, and that the procurement of the issuance of said patent was a fraud both on the United States and on the defendant, and that the plaintiff, by virtue of his patent, has no right or title whatever to said land.

It will be observed that the defendant first denies that his possession is unlawful. That denial is simply a conclusion of law, and presents no issue. Keith v. Freeman, 43 Ark. 297. He then denies that the plaintiff is entitled to the possession of the same. The demurrer concedes this denial to be true, and, if the denial stood alone, the demurrer should be overruled on that ground; but the answer continues, and sets out the reasons why he is not entitled to the possession, and those reasons are in the nature of an equitable defense, and the general denial that the plaintiff is entitled to the possession must be construed in connection with the equitable matters set up in the same answer, and which constitute the facts upon which the defendant relies for defeating plaintiff's right to the possession.

The question therefore arises whether or not, in the federal courts, a defendant in ejectment may set up an equitable title to defeat a legal cause of action. This question has been settled over and over again by the Supreme Court of the United States. In Gibson v. Choteau, 13 Wall. 102, 20 L. Ed. 534, the court say:

"In the federal courts, where the distinction between legal and equitable proceedings is strictly maintained, and remedies afforded by law and equity are separately pursued, the action of ejectment can only be sustained upon the possession by the plaintiff of the legal title. For the enforcement of equitable rights, however clear, distinct equitable proceedings must be instituted. The patent is the instrument which, under the laws of Congress, passes the title of the United States. It is the government conveyance. If other parties possess equities superior to those of the patentee, upon which the patent issued, a court of equity will, upon proper proceedings, enforce such equities by compelling a transfer of the legal title, or enjoining its enforcement, or canceling the patent. But in the action of ejectment in the federal courts the legal title must prevail, and the patent, when regular on its face, is conclusive evidence of the title."

Johnson v. Towsley, 13 Wall. 73, 20 L. Ed. 485; Moore v. Robbins, 96 U. S. 530, 24 L. Ed. 848; Smelting Co. v. Kemp, 104 U. S. 636, 26 L. Ed. 875.

The principle here decided is conclusive against the sufficiency of the first count in the answer, and the demurrer as to that count must be sustained. I have not overlooked the fact that, under the statutes of Arkansas (Sand. & H. Dig. § 2574), provision is made for maintaining ejectment upon equitable titles. This class of state statutes, however, has no force in the United States courts, where proceedings in law and equity are kept distinct. Gibson v. Choteau, 13 Wall. 102, 20 L. Ed. 534.

The second count in the answer simply pleads the statute of limitations. The plaintiff, in his complaint, alleges that he rests his claim upon a patent issued by the United States, May 27, 1903, for the land in controversy; and a copy of that patent to William Goodall and his heirs, together with a deed from his heirs, is set forth as an exhibit to

the complaint. No exceptions are filed to the exhibits. It is true that the demurrer does not reach the exhibits. Percifull v. Platt, 36 Ark. 456. But inasmuch as the patent is conclusive evidence of the legal title in the person to whom it was issued, it is clear and conclusive, in a suit in ejectment, that no statute of limitations could begin to run until the patent itself was issued. The reason for this is that until the patent was issued the legal title was in the government of the United States, and, the legal title being in the United States, the statute does not run against the United States. It is obvious therefore that the statute of limitations in this case cannot avail the defendant. But the question arises whether or not that question can be raised by the demurrer. The demurrer itself admits that the defendant has been "in the actual, open, notorious, adverse possession of said land, claiming to be the owner thereof, holding the same under color of title, as set forth in paragraph No. 1 of this answer, for more than seven years next preceding the bringing of the suit by the plaintiff herein." Paragraph 1 of the answer sets up an equitable defense under a homestead entry which has been canceled, and, being canceled, of course, could not constitute color of title. Moreover, it has appeared that, if all the facts set forth in paragraph 1 were taken to be true, they could not avail the defendant in a suit in ejectment, but that his rights, if he should have any under the equitable defense set up, are to be enforced in a court of equity. His holding open, notorious, actual, adverse possession of said land, claiming to be the owner thereof under the canceled homestead entry, for seven years, would be no defense at all to the action, because during all that period, until the patent was issued, the legal title was in the United States. There is no denial in any of the counts of the answer that the patent was issued on the day stated in the complaint. The plaintiff's cause of action, therefore, arose on that day. It could not arise any earlier than that, because, as stated, in the federal courts the action of ejectment can only be maintained upon the legal title, and the government did not part with the legal title until it issued the patent, and the statute therefore did not begin to run until the patent was issued. Simmons v. Ogle, 105 U. S. 271, 26 L. Ed. 1087; Gibson v. Choteau, 13 Wall. 93, 20 L. Ed. 534; Nichols v. Counsel, 51 Ark. 27, 9 S. W. 305, 14 Am. St. Rep. 20.

The same observations which have been made to the second count are equally applicable to the third, and the demurrer to each of said counts (i. e., the second and third) must be sustained.

The fourth count in the answer alleges facts which, if true, would defeat plaintiff's title under the tax deed. But if plaintiff's tax deed is void, still he is entitled to recover, as the pleadings now stand, under his patent; and therefore the facts stated, which, if true, vitiate the tax deed, do not constitute any defense to plaintiff's suit in ejectment based on the patent.

It is not necessary to pass on the question as to whether the land was subject to taxation, but see Witherspoon v. Duncan, 4 Wall. 210, 18 L. Ed. 339. The demurrer to the fourth paragraph must be sustained.

The fifth count in the answer attempts to set up facts which, if true, would ordinarily entitle defendant to a judgment for improvements

under sections 2590–2591, Sand. & H. Dig. The count is bad for failure to show that the defendant held under color of title, as the statute prescribes. It is not necessary to decide whether defendant's entry of the land under the homestead law, if the facts relative thereto were properly alleged, would constitute color of title. In Wirth v. Branson, 98 U. S. 121, 25 L. Ed. 86, it is held:

"The rule is well settled, by a long course of decisions, that when public lands have been surveyed and placed in the market, or otherwise opened to private acquisition, a person who complies with all the requisites necessary to entitle him to a patent in a particular lot or tract is to be regarded as the equitable owner thereof, and the land is no longer open to location. The public faith has become pledged to him, and any subsequent grant of the same land to another party is void, unless the first location or entry be vacated and set aside. This was laid down as a principle in the case of Lytle et al. v. State of Arkansas et al., 9 How. 314 [13 L. Ed. 153], and has ever since been adhered to. See Stark v. Starr, 6 Wall. 402 [18 L. Ed. 925]. Subsequent cases which have seemed to be in conflict with these have been distinguished from them by the fact that something remained to be done by the claimant to entitle him to a patent, such as the payment of the price, the payment of the fees of surveying, or the like. The proper distinctions on the subject are so fully stated in the case of Stark v. Starr, supra, Frisbie v. Whitney, 9 Wall. 187 [19 L. Ed. 668], the Yosemite Valley Case, 15 Wall. 77 [21 L. Ed. 82]. Railway Company v. McShane, 22 Wall. 444 [22 L. Ed. 747], and Shepley et al. v. Cowen et al., 91 U. S. 330 [23 L. Ed. 424], that it would be supererogation to go over the subject again."

The real question, it seems to me, as to this count in the answer, is as to whether the statute referred to above, providing for the assessment of improvements made on land held in good faith under color of title, has any application at all to a case where the improvements are made on land the legal title to which is in the United States. I am not aware that there is any decision on the precise point, but I think the question is settled on principle in a number of cases. In Gibson v. Choteau, 13 Wall., at pages 99, 100, 20 L. Ed. 534, the court said:

"With respect to the public domain, the Constitution vests in Congress the power of disposition and of making all needful rules and regulations. That power is subject to no limitations. Congress has the absolute right to prescribe the times, the conditions, and the mode of transferring this property, or any part of it, and to designate the persons to whom the transfer shall be made. No state legislation can interfere with this right or embarrass its exercise, and, to prevent the possibility of any attempted interference with it, a provision has been usually inserted in the compacts by which new states have been admitted into the Union that such interference with the primary disposal of the soil of the United States shall never be made. Such provision was inserted in the act admitting Missouri, and it is embodied in the present Constitution, with the further clause that the Legislature shall also not interfere 'with any regulation that Congress may find necessary for securing the title in such soil to the bona fide purchasers.' The same principle which forbids any state legislation interfering with the power of Congress to dispose of the public property of the United States also forbids any legislation depriving the grantees of the United States of the possession and enjoyment of the property granted by reason of any delay in the transfer of the title after the initiation of proceedings for its acquisition. The consummation of the title is not a matter which the grantees can control, but one which rests entirely with the government. With the legal title, when transferred, goes the right to possess and enjoy the land; and it would amount to a denial of the power of disposal in Congress if these benefits, which should follow upon the acquisition of that title, could be forfeited because they were not asserted before that title was issued."

And at page 103, 13 Wall., 20 L. Ed. 534, the court also said:

"But neither in a separate suit in a federal court, nor in an answer to an action of ejectment in a state court, can the mere occupation of the demanded premises by plaintiffs or defendants for the period prescribed by the statute of limitations of the state be held to constitute a sufficient equity in their favor to control the legal title subsequently conveyed to others by the patent of the United States, without trenching upon the power of Congress in the disposition of the public lands. That power cannot be defeated or obstructed by any occupation of the premises before the issue of the patent, under state legislation, in whatever form or tribunal such occupation be asserted."

I am therefore of the opinion that the statute above referred to, providing for the assessment for improvements, has no application to a case like this, and the demurrer to the fifth count must also be sustained.

CAMPBELL & ZELL CO. v. AMERICAN SURETY CO.

(Circuit Court, D. Massachusetts. March 11, 1904.)

No. 1,397.

1. CORPORATIONS—ACTIONS BY—PROOF OF INCORPORATION.
   The burden rests upon a plaintiff suing as a corporation to prove its corporate existence, but such fact is sufficiently proved for the purposes of a case by the production of the bond sued on, which was executed by defendant, and contains a recital that plaintiff is a corporation.

2. SAME—PROOF OF IDENTITY.
   That a corporation plaintiff is the identical one to which a bond sued on was executed may be inferred from the identity of name, unless it is shown that there are others of the same name.

3. ATTACHMENT—BOND FOR DISCHARGE—PARTY ENTITLED TO SUE.
   An action was brought in the name of a receiver appointed in another state for a corporation of such state. The declaration contained one count setting out a contract between the defendant and such corporation made prior to the receivership. The court having determined that the receiver could not maintain an action thereon, the declaration was amended by substituting the corporation as plaintiff, and on that count alone judgment was rendered against the defendant, but in favor of the corporation, and not of the receiver. *Held*, that a bond given previously by the defendant to obtain the discharge of an attachment in the suit, although running to the receiver, created a contract with the corporation, on which it could maintain an action against the surety in its own name, the record having been such as to advise the surety from the beginning that the corporation was the real party in interest, so that its obligation must be construed in the light of such fact.

4. SAME—LIABILITY OF SURETY—AMENDMENT OF DECLARATION SUBSTITUTING NEW PLAINTIFF.
   The surety on a bond given for the discharge of an attachment in an action brought by a foreign receiver for a corporation is presumed to know that the declaration is amendable at common law by substituting the corporation as plaintiff, and such an amendment does not affect its liability.

5. JUDGMENT—BURDEN OF PROVING PAYMENT.
   Where, under the pleadings, the burden rests on a plaintiff to prove that a judgment pleaded is unpaid, such burden is met by proving the rendition of the judgment, the presumption being, in the absence of other proof, that it has not been paid.

At Law. On trial to the court.

Mahoney, Crowell & Sullivan, for plaintiff.
Lougee & Robinson, for defendant.

PUTNAM, Circuit Judge. The questions involved in this case are technical, and somewhat difficult, as to which the court is liable to err. But the difficulty is not the fault of the law. The plaintiff had a clear, straight path given it, which, if pursued, would have left no doubt. While it is clear it might have brought a suit in its own name, and taken a bond to itself, so that there would now be no question, it brought suit in the name of a foreign receiver, although, according to the rules of law which have been settled from the beginning of our judicial system, a receiver appointed in one state has no more authority in another state than a police judge or a police officer of one state has a right to come to another and arrest criminals or preside at trials. Of course, this remark is confined to an ordinary receiver, and does not apply to a statutory receiver, in whom the title vests, and who becomes the statutory successor of the corporation.

The first question arises on the pleadings of the defendant with reference to the name of the principal corporation, combined with a question as to its existence. The defendant says that the plaintiff is bound to prove its existence, and also bound to prove that it is the corporation of which the receiver was appointed in the state of Maryland, which receiver initiated these proceedings. It seems that the true name of the corporation is the Campbell & Zell Company of Baltimore City, while, in the proceedings before us, it is described simply as the Campbell & Zell Company. So far as the existence of the corporation is concerned, on the pleadings, and according to our practice, the burden rests on the plaintiff. It proves this by producing the bond sued in this case, which describes it as a corporation. This makes out a prima facie case. It is not necessary to prove the existence of a corporation by the production of records. For ordinary purposes the de facto existence of a corporation may be proved by admissions of the adverse party, and this is sufficient. Here we have the description in the bond of the plaintiff as a corporation, and therefore its existence is admitted by the defendant under its seal.

Then, as to the identity of the corporation: If the defendant here could show that there were two Campbell & Zell corporations, special proof might be required on the part of the plaintiff that this is the corporation of which Mr. Homer was made receiver. The court is of the opinion that, as the case stands, the identity is proven.

The facts of the case are, briefly, as follows: As already stated, the local court in Maryland appointed Mr. Homer receiver of the Campbell & Zell Company of Baltimore City. At a term of the superior court for the county of Essex, in Massachusetts, held on the first Monday of December, 1902, Homer brought suit against the Barr Pumping Engine Company. In his writ and declaration he described himself as follows: "Charles C. Homer, of the state of Maryland, receiver of the Campbell & Zell Company, a corpo-

ration established under the laws of the state of Maryland." Then followed several counts; all, except one, of a doubtful character. They may be construed as alleging a promise to Homer as receiver. If all the counts were of that indefinite character, this suit would fail, because there would be nothing on the record to inform the American Surety Company that it was giving an obligation to protect any kind of a claim except on promises made to Homer as receiver. Therefore defendant could not be held for a judgment on promises made to the present plaintiff. There was, however, a count which set out the facts specifically, and alleged a contract made between the Barr Pumping Engine Company and the Campbell & Zell Company, and an obligation to pay by the Barr Pumping Engine Company to the Campbell & Zell Company, which, according to the dates alleged, preceded the appointment of Homer as receiver.

The judgment in the state court followed that count, and was in favor of the Campbell & Zell Company, and not of Homer, as receiver. The law, as settled, applies, that, where there is one good count, claiming sufficient to warrant the judgment, the judgment must stand, even though all the other counts are bad. So that the case stands as though the declaration in the suit in the state court showed that Homer, although the nominal plaintiff, was really suing in behalf of the Campbell & Zell Company, and on a contract made with it. This appears on the face of the papers, which the American Surety Company was bound to inform itself about, and which we may presume it did inform itself about, when it gave the bond in suit. Therefore the true condition was shown at the outset, and, as we will find, whatever was afterwards done was entirely consistent with the facts as they thus appeared, and only contributed to give full effect thereto. That proposition must be kept firmly in mind, and the dates also.

At that stage of the case the Barr Pumping Engine Company, desiring to release an attachment of its property, gave a bond for that purpose. In that bond the American Surety Company, the present defendant, became surety. Nevertheless, we must look at the four corners of the obligation of suretyship to learn its proper construction. Guaranty Co. v. Press Brick Co., 191 U. S. 416, 24 Sup. Ct. 142, 48 L. Ed. 242. This is not a new rule. In Bowman v. Read, 2 Wall. 591, 603, 17 L. Ed. 812, the court says:

"Sureties are as much bound by the true intent and meaning of their contracts which they voluntarily subscribe as principals. They are bound in the manner, to the extent, and under the circumstances as they existed when the contract was executed."

This bond, if it is severed into parts, contains some expressions which might require the court to construe it strictly as a contract between the American Surety Company and Homer, as receiver; but we must look at all the expressions found in it, and at what was contained in the plaintiff's declaration in the state court; and, looking at these, we find it clear that the parties understood that the Campbell & Zell Company had the real interest, and that Homer was simply a go-between. Of this, the American Surety Company

had knowledge when it executed the obligation in suit, so that in executing it the surety company subjected itself to all such future steps as might be taken by the courts in working out the substance as shown on the face of the papers.

Assuming that the original suit had been brought in the state of Maryland by Homer, as receiver of the Campbell & Zell Company, in his name as such receiver, and had there proceeded to judgment in his name as such receiver, and that afterwards the receivership had been discharged, and by order of court the original condition had been restored, then, undoubtedly, in working out the substantial rights of the Campbell & Zell Company appearing on the face of the papers, supplementary suits could properly have been brought in its name, and judgments taken accordingly, in the Maryland courts; and all rights to the bond, both in equity and in law, would have vested in it. That is a settled rule, and it goes quite as far as we are required to go in order to maintain the suit now before us, under existing circumstances.

It appears that, suit having been brought in the way in which we have described in the state court, and that court having determined, as it should have determined, that it could not be prosecuted in the name of the receiver, therefore, in accordance with the settled practice, not only in Massachusetts, but in the federal courts, the writ and declaration were amended, and Homer, the nominal plaintiff, disappeared, the Campbell & Zell Company appeared in his place, and judgment was rendered in its favor. This case turns on that fact. The surety company says that it did not contract with the Campbell & Zell Company, but with Homer, as receiver. Nevertheless, as we have said, the substantial parties to the litigation appeared on the face of the papers, and were always known to the surety company; and they must be presumed to have contracted in reference to what thus appeared.

Reference has been made to Revised Laws of Massachusetts of 1902, c. 173, §§ 48, 121, with reference to amendments. Section 121 provides for notice to parties interested in case of certain amendments, and, further, that, if notice has been given, the action of the court allowing the amendment shall be conclusive. No such notice was given here. But this statute does not reach this case, in which the amendment was made in accordance with the rules of the common law. In Chapman v. Barney, 129 U. S. 677, 9 Sup. Ct. 426, 32 L. Ed. 800, an action was brought in the name of the United States Express Company, declaring it to be a corporation. It was, however, not a corporation, but a joint-stock association, organized under and by virtue of the laws of a state which authorized such association to bring suit in the name of the president. Thereupon the Circuit Court permitted an amendment at common law bringing in "Barney, president of the United States Express Company," which amendment the Supreme Court approved. In Fenton v. Lord, 128 Mass. 466, where suit had proceeded in name of the wife to and including verdict, she was allowed to amend by joining her husband as plaintiff. In the same way, in East Tennessee Land Company v. Leeson, 178 Mass. 206, 59 N. E. 639, exactly the same amendment as at bar

was allowed, apparently under the rules of the common law. Therefore, in the case at bar, this was a common-law amendment, based upon matter appearing on the face of the papers and of the bond in suit. We regard the amendment as not at all a substantial matter, and as merely one of form. The American Surety Company must be assumed to have known that the declaration was thus amendable, because the decisions to which we have referred in the Supreme Court of the United States and in 128 Mass. were made long before this bond was given. What our decision would be in case the rule admitting amendments of this class had been changed in actual practice after the bond was given we need not consider. So far as we have gone, this case is with the plaintiff.

This leaves only one question; that is, the condition arising out of the fact that the plaintiff has not offered any proof showing that the judgment obtained in the state court was not paid. At common law, in suits on bonds with a condition, the burden of proving payment depends on the pleadings. The plaintiff alleges that the judgment was not paid. The answer contains a general denial, and, of course, puts that allegation in issue; so that, on the state of the pleadings, the burden rests apparently on the plaintiff to prove nonpayment. That burden, of course, is easily met by the rule that a debt incurred is ordinarily presumed not to have been paid. In the absence of proof, we will rest on the usual presumption. If that fails the plaintiff, it is his own fault, because he could have relieved the court of this difficulty, and offered proof that payment had not been made.

Judgment for the plaintiff for the amount claimed and costs.

In re DANN.

(District Court, N. D. Illinois. April 1, 1904.)

No. 9,701.

1. BANKRUPTCY—INVENTOR'S RIGHTS BEFORE PATENT—TRANSFER.

A bankrupt's incorporeal interest in an alleged invention pending application for a patent does not pass to his trustee in bankruptcy under Bankr. Act July 1, 1898, c. 541, § 70a, cl. 2, 30 Stat. 566 [U. S. Comp. St. 1901, p. 3451], declaring that the bankrupt's interest in patents, patent rights, etc., shall be vested in the trustee by operation of law as of the date he was adjudged a bankrupt, since the words "interest in patents, patent rights," etc., should be construed as referring to rights acquired under a patent to a third party.

2. SAME—"PROPERTY."

Bankr. Act July 1, 1898, c. 541, § 70a, cl. 2, 30 Stat. 566 [U. S. Comp. St. 1901, p. 3451], expressly provides for a transfer of the bankrupt's interest in patents, patent rights, copyrights, and trade-marks, and clause 5 provides for the surrender of all property which, prior to the filing of the petition, the bankrupt could by any means have transferred. *Held*, that since no mention is made in clause 2 of the incorporeal interest of an inventor in an article conceived prior to the allowance of a patent, such interest should not be treated as "property," within clause 5, though Rev. St. § 4895 [U. S. Comp. St. 1901, p. 3385], permits the inventor to transfer the same, and authorizes the issuance of a patent to the transferee.

On review of ruling by the referee that the bankrupt's interest and claims under pending application for a patent vested in the trustee

under Act July 1, 1898, c. 541, § 70, 30 Stat. 565 [U. S. Comp. St. 1901, p. 3451].

Raymond & Barnett, for bankrupt.
Thos. S. Hogan, for trustee.
Thos. M. Turner, for petitioning creditors.

SEAMAN, District Judge. The question certified, as stated by the referee, is this: "Can a bankrupt be compelled to assign to the receiver or to the trustee all of his rights, title, and interest in, to, and under applications pending in the Patent Office for letters patent upon alleged invention?" The solution is not free from difficulty, but I am constrained to the opinion that the alleged interest of the bankrupt is not within either of the provisions of Act July 1, 1898, c. 541, § 70, 30 Stat. 565 [U. S. Comp. St. 1901, p. 3451], and does not pass to the trustee in bankruptcy. The opinion of the referee rests the ruling in favor of the trustee upon section 70a, cl. 2, 30 Stat. 566 [U. S. Comp. St. 1901, p. 3451], which declares that the bankrupt's "interests in patents, patent rights, copyrights and trade-marks" shall be so "vested by operation of law" as "of the date he was adjudged a bankrupt," and upholds the contention on behalf of the trustee that the interest in a pending application is within the statutory intent and meaning of the term "patent right," as therein used. This view impresses me as untenable for the reasons well stated in the opinion of Judge Shiras in Re McDonnell (D. C.) 101 Fed. 239. The term is one of frequent and distinctive use, both in statutes and in common parlance, and under the established rules for its construction must be taken in its "natural, plain, obvious, and ordinary signification." Suth. on Stat. Const. § 229. As commonly used in various state statutes regulating transactions thereunder which have received judicial construction, the term "patent rights" has been limited, for obvious reasons, to such as "the patentee or his assignee (or licensee) possesses in the property created by the application of a patented discovery" (Patterson v. Kentucky, 97 U. S. 501, 506, 24 L. Ed. 1115); while in common parlance it is applied to rights derived under patents. As used in this statute, following the words "interests in patents," I concur in the definition given by Judge Shiras, as "intended to indicate rights acquired under a patent to a third party, such as a license or manufacturing right." The term is in no sense applicable to the incorporeal interest of an inventor in an alleged invention for which no patent has issued, though application is pending. It would be a misnomer if employed in the latter sense, for no right to a patent exists except as provided by statute and upon allowance thereunder. Without such allowance of an application, the applicant has no interest which can be denominated a "patent right," whatever may be his interest in the invention claimed. Remarks arguendo in Fisher v. Cushman, 43 C. C. A. 381, 387, 103 Fed. 860, 51 L. R. A. 292, are cited by the referee (and in the briefs) as opposed to the ruling in the McDonnell Case. I do not so regard their import, and the dicta referred to impresses me as instructive only upon the inquiry of property right which remains to be considered.

The question of difficulty, as I view the case, is whether the alleged interest of the bankrupt may not be reached under the terms of section 70a (5), as "property which prior to the filing of the petition he could by any means have transferred or which might have been levied upon or sold under judicial process against him." That the invention may be transferred before patent is well recognized (Cammeyer v. Newton, 94 U. S. 225, 226, 24 L. Ed. 72), and section 4895, Rev. St. (3 U. S. Comp. St. 1901, p. 3385), authorizes issue of the patent to the assignee in such case. So the test of the applicability of this clause (5) is whether the interest in the alleged invention, pending application for a patent, constitutes "property" within the statutory meaning. This term is one of wide general signification, but, as found in the clause in question, I am satisfied that the rule above cited in reference to words in common and distinctive use is not applicable; nor are the dictionary definitions cited on the one side and the other safe guides for its interpretation. Fisher v. Cushman, supra. As thus found, "it is not to be construed in any loose, popular sense, but with regard to the limitations which the law (in question) attaches to it." Id. The special nature of the right of an inventor to his own invention is well recognized as having no substantial value in the absence of statutory provision for patent monopoly. While he "had at all times the right to enjoy the fruits of his own ingenuity, in every lawful form of which its use was susceptible, yet before the enactment of the statute he had not the power of preventing others from participating in that enjoyment to the same extent with himself; so that, however the world might derive benefit from his labors, no profit ensued to himself." Patterson v. Kentucky, 97 U. S. 501, 507, 24 L. Ed. 1115, quoting with approval Jordan v. Overseers, etc., 4 Ohio, 295. All that is primarily secured by the patent is "the exclusive right in the discovery," and it then stands as only "an incorporeal right, or, in the language of Lord Mansfield in Miller v. Taylor, 4 Burr, 2303, 'a property in notion' having 'no corporeal tangible substance.'" Patterson v. Kentucky, 97 U. S. 506, 24 L. Ed. 1115. It is true that this incorporeal right is named as the property of the inventor before patent issues in Jones v. Sewall, Fed. Cas. No. 7,495, and in Rathbone v. Orr, Fed. Cas. No. 11,585; but both these definitions must be qualified by that above cited in the ruling case upon the subject. The substantial property right of exclusive use is created alone by the patent, while the inventor has at the utmost a mere inchoate right to that end, which is of no avail unless a patent is granted. Gayler v. Wilder, 10 How. 477, 493, 13 L. Ed. 504. In the well-considered case of Gillett v. Bate, 86 N. Y. 87, 94, the opinion speaks in reference to this inchoate right of the inventor that it is "at least doubtful whether it has the characteristics of property, so as to justify a compulsory transfer by the inventor." An invention is the product of original thought, and its elements are (1) the mental conception, and (2) the application of the thought in form to produce practical result. 1 Robinson on Pat. §§ 77, 78. This conception surely has no attribute of property which can subject it to compulsory transfer before a patent is applied for to secure the wanting attribute of monopoly in its use; and

I am doubtful, to say the least, whether the further action of the inventor in prosecuting an application for a patent creates property interest which would pass to the trustee under the general terms of this clause, irrespective of the effect of the preceding specification. In Fisher v. Cushman, supra, the question involved was whether a liquor license passed under this clause. By way of illustration the opinion suggests "as an extreme case" the completion of an invention by a bankrupt, after depleting his estate in experimenting to that end, with no act needed for procuring a patent except the making of an application, and it is thereupon said: "We cannot concede that there are any authorities of so precise a character as would prevent a court of bankruptcy from realizing capital thus locked up." While I am not prepared to concur in this intimation, it is sufficient to remark that no such phase appears in the case at bar, and that my conclusions do not rest upon the abstract meaning of the word "property" as found in clause 5, but upon the limitations placed thereon through clause 2. As stated by Judge Jenkins (In re Rouse, Hazard & Co., 91 Fed. 96, 100, 33 C. C. A. 356, 360), the principle of construction is elementary that "specific provisions relating to a particular subject" must "govern in respect to that subject as against general provisions contained in the same act." The bankruptcy act of July 1, 1898, c. 541, § 70a, cl. 2, 30 Stat. 566 [U. S. Comp. St. 1901, p. 3451], thus provides specifically for vesting in the trustee the interest of the bankrupt in patents and patent rights, and the presumption arises therefrom, when followed by clause 5 in reference to general property, that it was so provided in recognition of the distinction of this class of interests from the general classification of property, as pointed out in the foregoing citations. Under the rule of interpretation referred to, I am of opinion that the interest of the bankrupt in the alleged invention cannot be reached through the general terms of clause 5, in the face of this specific provision for patent interests; thus concurring in the view expressed by the referee thereupon. The fact that no mention is made in clause 2 of the interest which the inventor may have prior to the allowance of a patent, and that it is therefore treated as excluded from that provision, cannot disturb the application of the rule. The exclusion so found must be deemed intentional, having the peculiar interest of invention in mind, and that intention cannot be evaded without violating the principle on which the rule is founded. With the patent predicated solely on the invention rights, rejected from the general property clause, no construction is justified to extend that clause over the inchoate (and inferior) right represented in the patent.

The question certified must be answered in the negative, and the petition of the trustee denied accordingly. It is so ordered.

UNITED STATES v. LAKE.

(District Court, E. D. Arkansas, W. D. April 27, 1904.)

1. BANKRUPTCY—SCHEDULES—FALSE OATH—INDICTMENT—MATERIALITY.
Where an indictment against the president of a bankrupt corporation for making a false oath to its schedules alleged that the corporation was adjudged a bankrupt; that defendant, as its president, in compliance with the bankruptcy law, did file in the bankruptcy proceeding with the referee the schedules required by law, subscribed and sworn to by him as president, etc.; that defendant stated on his oath that such schedules contained a true and complete statement of all the corporation's property; and that the statement that the bankrupt corporation had then on hand only the sum of $100, which was all the money the corporation then and there had—was false, such indictment followed the strict language of Bankr. Act July 1, 1898, c. 541, § 29, 30 Stat. 554 [U. S. Comp. St. 1901, p. 3433], and sufficiently showed the materiality of the false statement, without an express averment thereof.

2. SAME—DESCRIPTION OF ASSETS.
In an indictment against the president of a bankrupt corporation for making a false oath to its schedules, a description of the assets charged to have been fraudulently and knowingly omitted from such schedules as "one hundred and fifty thousand dollars in lawful money of the United States" was sufficiently specific.

3. SAME—BANKRUPT ACT—CONSTRUCTION—CONCEALMENT OF ASSETS—PERSONS LIABLE.
Bankr. Act July 1, 1898, c. 541, § 29, par. "b," cl. 1, 30 Stat. 554 [U. S. Comp. St. 1901, p. 3433], providing that a person shall be punished by imprisonment on conviction of having knowingly and fraudulently concealed, while a bankrupt or after his discharge, from his trustee, any of the property belonging to his estate in bankruptcy, must be strictly construed, and does not include officers of a corporation declared a bankrupt; the term "bankrupt" being defined by section 1, par. 4, to include a person against whom an involuntary petition, or an application to set a composition aside, or to revoke a discharge has been filed, or who has filed a voluntary petition, or has been adjudged a bankrupt.

4. PERJURY—INDICTMENT—WILLFULNESS.
In a prosecution for perjury in violation of Rev. St. § 5392 [U. S. Comp. St. 1901, p. 3653], providing that every person who, having taken an oath before a competent officer, in any case in which a law of the United States authorizes an oath to be administered, that he will testify truly, willfully states any material matter which he does not believe to be true, is guilty of perjury, an indictment failing to charge that defendant took an oath, alleged to be false, "willfully," was fatally defective.

On Demurrer to Indictment.

William G. Whipple, U. S. Atty.
Campbell & Stevenson, for defendant.

TRIEBER, District Judge. The indictment in this case contains six counts. The first, fourth, fifth, and sixth are based upon section 29b (2) of the bankruptcy act (Act July 1, 1898, c. 541, 30 Stat. 554 [U. S. Comp. St. 1901, p. 3433]), and charge the defendant with making a false oath to the schedule of assets of the Alphin & Lake Cotton Company, a bankrupt corporation of which the defendant was president. These counts are all identical, except that the first count charges a concealment of $150,000 in lawful money, and each of the other counts above mentioned charges a concealment of certain choses in

action, describing them as "a debt due from certain designated persons to the bankrupt corporation for money had and received." The material facts charged in the first count, of which the other counts above mentioned are practically copies, except as to the amount and description of the property concealed, are as follows:

"That the Alphin & Lake Cotton Company, a corporation created and organized under the laws of the state of Arkansas, was heretofore, on the 20th day of February, A. D. 1903, adjudicated a bankrupt by the bankrupt court of the United States for the said district and division, and Edward H. Lake, late of said district and division, on the 5th day of May, A. D. 1903, in the said district and division, and within the jurisdiction of this court, did then and there, in compliance with the bankrupt law of the United States, file in the bankruptcy proceedings aforesaid, with Patrick C. Dooley, the referee in bankruptcy duly appointed by said bankrupt court, a certain schedule as required by said law, which schedule was signed 'Alphin & Lake Cotton Company, by Edward H. Lake, President,' of which schedule the following is a copy, to wit."

And then follows the schedule of assets, and the oath prescribed by law, and then the indictment proceeds as follows:

"That the said schedule was by the said defendant then and there subscribed and sworn to before one James H. Stevenson, then and there a notary public of the state of Arkansas, duly appointed, commissioned, and acting, and duly authorized as such to administer oaths in such cases, whereby and wherein the said defendant did then and there knowingly and fraudulently falsely state that the Alphin & Lake Cotton Company, in which said corporation the said defendant then and there held stock, and of which he was then and there the president, had then and there on hand only the sum of one hundred dollars ($100.00), which was all the money the said corporation then and there possessed, and did then and there further state that the said schedule was a statement of all the property and assets of the said company, both real and personal; whereas, in truth and in fact, the said corporation then and there had on hand, and in its possession and under its control, more than one hundred dollars ($100), to wit, the sum of one hundred and fifty thousand dollars ($150,000) lawful money of the United States, and whereas, in truth and in fact, the said schedule did not contain a statement of all the property of the said company, both real and personal, but said company did then and there have further assets not mentioned in said schedule, to wit, property and assets of the value of one hundred and fifty thousand dollars ($150,000) lawful money of the United States, as said defendant then and there well knew. Said defendant then and there thereby knowingly and fraudulently made a false oath and account in relation to a proceeding in bankruptcy, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America."

The demurrer challenges the sufficiency of these counts upon two grounds: First, because they fail to allege that the omissions from the schedules mentioned in each of the counts are "material"; and, second, that the description of the assets omitted from the schedules, to wit, $150,000 in lawful money, in one count, and the choses in action of $50,000 and choses in action for very large sums mentioned in the other counts, is not sufficiently specific to apprise the defendant precisely what he is called upon to defend.

As to the allegations of materiality, that is unnecessary, when the facts stated in the indictment are sufficiently full to show the materiality of the acts of omission. The statement in the indictment that the matters sworn to by the defendant, and which are alleged to have been false, are material, may be essential when the allegations in the

indictment are not so specific as to show their materiality; but, when the allegations of the indictment show the materiality of the alleged false statements made under oath, the court will determine that fact, and the allegation of the pleader that the statements were material would be but a conclusion of law and wholly superfluous. State v. Hayward, 1 Nott & McC. 553. The indictment in this case alleges the adjudication as a bankrupt of the corporation; that the defendant, as its president, did, in compliance with the provisions of the bankruptcy law file in the bankruptcy proceeding with the referee in bankruptcy the schedules required by law, subscribed and sworn to by him as president before a duly commissioned and acting notary public of the state of Arkansas, authorized as such to administer oaths; that the defendant stated upon his oath that said schedules contained a true and complete statement of all the property and estate of said corporation, both real and personal, etc.; and that the statement that the bankrupt corporation had then and there on hand only the sum of $100, and which was all the money the said corporation then and there had, was false, etc.

As the bankruptcy act requires such schedules to be filed by the bankrupt, or, if a corporation, by one of its officers, the materiality of the alleged false statement is apparent, and an allegation by the pleader that it is material can do nothing to aid, nor can its omission detract from, its effect in any way. The bankruptcy law (section 29) does not require an allegation of materiality; and as the indictment follows the language of the statute strictly, and tells the facts with sufficient accuracy to enable the defendant, in case of an acquittal or conviction, to plead, in case of an additional indictment being returned against him, a former acquittal or conviction, it is clearly sufficient. United States v. Gooding, 12 Wheat. 460, 6 L. Ed. 693; Cannon v. United States, 116 U. S. 55, 6 Sup. Ct. 278, 29 L. Ed. 561; Ledbetter v. United States, 170 U. S. 612, 18 Sup. Ct. 774, 42 L. Ed. 1162; Milstead v. Commonwealth (Ky.) 51 S. W. 451; State v. Byrd, 28 S. C. 18, 4 S. E. 793, 13 Am. St. Rep. 660. In United States v. Staats, 8 How. 41, 12 L. Ed. 979, the defendant was indicted for an offense which the statute declared to be a felony, and it was urged that, as the indictment failed to charge that the act of the defendant was committed feloniously, for that reason the indictment was defective; but the court held that, as the statute did not require the act to be done feloniously, it was unnecessary to charge it in the indictment.

Nor is it necessary to describe the assets charged to have been fraudulently and knowingly omitted from the schedules by the defendant with greater particularity than has been done. The description in the first count is "one hundred and fifty thousand dollars in lawful money of the United States," and in the other counts it describes the choses in action, giving the amount and the parties from whom they are due. This description is sufficient to notify the defendant what proof he will be required to meet, and enable him to plead a former acquittal or conviction in case he is called upon to answer a new indictment for the same offense. Rex v. Hepper, Ryan & M. 210, cited by counsel, is not in point. In that case the indictment merely charged that "the schedule did not contain a full, true, and perfect

account of all debts owing to him at that time," without specifying what debts owing to him had been omitted. The court properly held that the indictment was defective. Had the indictment in this case failed to charge that he omitted one hundred and fifty thousand dollars in lawful money of the United States, the contention of the defendant would have been sustained, and Rex v. Hepper would have been in point. The demurrer to these four counts is, therefore, overruled.

The demurrer to the second count is sustained. That count charges a concealment of assets, under section 29b (1) of the bankrupt act; but this section only applies to the bankrupt, and not to others, even if officers of the bankrupt corporation. The language of the statute is:

"Concealed while a bankrupt or after his discharge from his trustee any of the property belonging to his estate in bankruptcy."

As this is a criminal statute, it must be strictly construed. The defendant is not a bankrupt. The act itself defines the meaning of the word "bankrupt." It says:

"'Bankrupt' shall include a person against whom an involuntary petition or an application to set a composition aside or to revoke a discharge has been filed, or who has filed a voluntary petition or who has been adjudged a bankrupt." Section 1 (4), 30 Stat. 541 [U. S. Comp. St. 1901, p. 3418].

It does not include officers or agents of a corporation. In defining the word "person," the act does include officers, as well as all persons who are participants in the forbidden acts, and the agents, officers, and members of the board of directors or trustees, or other similar controlling bodies or corporations. Section 1 (19) of the bankruptcy act. No doubt, it was an oversight on the part of Congress not to include officers of corporations, who are the only persons who can file the schedules of assets and verify them by their oaths; but the courts are powerless to remedy the omissions of Congress.

The third count is for perjury, under section 5392, Rev. St. [U. S. Comp. St. 1901, p. 3653], based upon the same facts as set out in the first count. The defect in that count is the omission to charge that the defendant took the oath alleged to be false "willfully." This is a fatal omission, and for this reason the demurrer to that count must also be sustained. United States v. Dennee, 3 Woods, 39, Fed. Cas. No. 14,947; United States v. Edwards (C. C.) 43 Fed. 67.

The order of the court is that the demurrer to the second and third counts be sustained, and that to the first, fourth, fifth, and sixth counts be overruled.

In re ADLER.

(District Court, W. D. Tennessee. March 10, 1904.)

1. BANKRUPTCY—ORDER REQUIRING BANKRUPT TO PAY OVER MONEY—SUFFICIENCY OF SHOWING.

To warrant an order requiring a bankrupt to pay over a sum of money to his trustee under penalty of punishment for contempt as against his denial that he has such sum in his possession or under his control, such fact must clearly appear. That he has defrauded his creditors, or that he has failed in his examination to satisfactorily account for the value

of property which he should have had if statements made to commercial agencies prior to his bankruptcy were true, is not sufficient ground for such an order.

2. SAME—PROCEDURE.

Proceedings to require a bankrupt to pay over money or surrender property to his trustee should ordinarily be by motion for a rule on him to show cause, and should be justified by the facts brought out in the examination of himself and other witnesses in the regular course of the proceedings. Unless under exceptional circumstances, where it is necessary to bring before the court facts not appearing in the examination, or new parties, a formal petition and pleadings as in a suit in equity are unnecessary, and an expense which should not be permitted by the court; nor should the court or referee entertain such proceedings at all unless there is sufficient in the evidence, taken in the regular course of the proceedings, to warrant the order sought prima facie.

In Bankruptcy. On review of order of referee.

J. W. Apperson, for trustee.

L. Lehman, for bankrupt.

HAMMOND, J. This is a petition to review the action of the referee in directing the bankrupt to show cause why he should not be compelled to pay over to the trustee in bankruptcy the sum of $7,000, which it was alleged he had in his possession or under his control. The trustee filed a petition setting forth, in substance, that the bankrupt some nine months before his bankruptcy had made a report to the commercial agencies showing that he had on hand a stock of goods of the value of $9,000, and that subsequently, and more recently before his bankruptcy, he had purchased other invoices of goods which ran the aggregate of his purchases to a considerably larger sum. The petition then sets out the debts which he had paid, and the more or less accurately estimated expenses of his business, and by a simple sum in arithmetic calculates that he should still have on hand about $7,000. The prayer of the petition was that he should be required to show cause why he should not be compelled to pay this money over to the trustee by a peremptory order to that effect, to be followed, of course, by contempt proceedings to enforce the order. This petition was demurred to by the bankrupt, the demurrer overruled, and an order to show cause issued and served upon the bankrupt according to its prayer. From that order of the referee this petition for review was filed.

The question presented by counsel at first related solely to the sufficiency of the demurrer, but the court passed that question as quite immaterial in the attitude of the record, and inquired of counsel for the trustee whether or not the proof showed that the bankrupt had this money in his possession or under his control, to which answer was made that it was only shown by a necessary inference to be drawn from the facts proven in the record. The petition of the trustee was predicated of the disclosures brought out by the examination of the bankrupt and the proof of certain witnesses concerning his affairs. This examination shows substantially what is alleged in the petition—that the bankrupt had made the reports stated to the commercial agencies, and that he had expended the sums of money that were mentioned in the examination, and, according to his state-

ment, other sums not so definitely shown, and in his examination he gave as an excuse for not having more money on hand that he had wasted it in gambling on the horse races by buying pools at the pool-room on the other side of the river in Arkansas, kept for the use of those participating in this city in such gambling enterprises. The creditors undertook to prove that the bankrupt had never been seen in this pollroom, and, from such facts and circumstances, that this story of losing the money on the races was untrue. In a general way, it may be said that the proof shows that as late as November before the filing of the petition of the bankrupt in January he had on deposit in the banks some $400 in money, and at one time he drew out of the bank as much as $1,400 of money. The bankrupt explains his affairs by saying that the statements that he made to the commercial agencies were untrue, that they were exaggerated for the purpose of making a good showing for his credit, that he kept no books of account except a scratcher to show to whom he had sold goods on a credit, that his accounts with his creditors were simply kept by placing his invoices on a file wire, that he kept only a small store or shop, and that his business did not amount to anything like the sums of money indicated by the creditors. There is no more conclusive proof than this as to the possession of the money, and it is not claimed by counsel that any more conclusive proof is available, but only that it is a necessary implication from these facts that the bankrupt is concealing the money and withholding it from his trustee.

The court does not think that this is at all a necessary presumption, and is of the opinion that upon such proof it is not within the powers of the bankruptcy court to direct the bankrupt to pay the money into court under the penalties for contempt. Such a construction of the bankrupt law would be only to revive the long since abolished process of imprisonment for debt, which is both obsolete and unconstitutional. The court has no doubt of the power of the court, where it reasonably appears that the bankrupt has the money in his possession or under his control, to compel him to pay it over; but that fact must appear by something more substantial than mere presumptions or inferences taken from such circumstances as those which have been proven in this case. To invoke that power requires something like incontestible proof as against the bankrupt's denial that he has the money. The fact that he accounts falsely for his dissipation of the money, the fact that he does not satisfactorily disclose his uses of it, the fact that he evades the exhibition of his conduct in the premises, may indicate that he has defrauded his creditors, that he has dealt falsely with them, that he has egregiously perjured himself and forsworn the truth, and may invoke other remedies under the statute; but not this of a peremptory order to pay the money to the trustee, and punishment by contempt for a failure to do so. That remedy applies only to a fund which can be designated and traced into his possession, so that it is, in a legal sense, a tangible fund on which the court can lay its hands; and it cannot be made to apply to some intangible money supposed to be kept in his possession which he can be forced to pay by raising or procuring the money to meet the orders of the court. No doubt many bankrupts could be made, under

the coercion of imprisonment, to find the money with which to meet such a demand; but the law does not proceed upon the theory of thus compelling a bankrupt to pay his creditors that which he owes them. It would be in substance and in fact a mere revival of the discarded remedy of imprisonment for debt. Therefore, unless the court can see that the bankrupt is in possession of the money, and withholding it wrongfully, it will not make such an order as that which is applied for in this case. The bankrupt may be indicted under the criminal features of the act, his discharge may be refused, he may be compelled by contempt proceedings to answer questions which he evades and refuses to answer, and to disclose the rights of action that may belong to the trustee by reason of his dealings with others; and thus in many ways he may be compelled to give the fullest statement of his affairs; but, no matter how fraudulent his conduct may be, the creditors cannot resort to this method of compelling him to pay his debts, when there is not sufficient proof that he is concealing money or other property in actual possession or control.

The court wishes to take this occasion to protest against the growing habit in the bankruptcy cases of lumbering up the record with petitions and litigation growing out of them that is expensive, and an unnecessary tax upon the assets of a bankruptcy estate. The creditors and their trustee in bankruptcy, by the ordinary process of the examination of the bankrupt, and the power to compel all witnesses who have any knowledge of his affairs to come before the referee and be examined in relation thereto, have ample procedure for disclosing all the facts in relation to the bankrupt's affairs which would furnish a foundation for an order on him to pay money into court, or to surrender property in his possession to the trustee. He is in a certain sense ever present in court to answer such demands, and all that is necessary is a simple motion for a rule upon him to show cause against the order that is required, and petitions for that purpose are wholly unnecessary. Here we have, without the least necessity for it, such a petition, with a demurrer for repugnancy and other technical objections, and all the expenses incident to such a litigation as if it were a formal bill in equity; and it seems to be the habit to proceed by petition in almost every controversy that arises in the bankruptcy proceedings, thus incurring an unnecessary expense. It may sometimes be necessary to file a formal petition, as it is sometimes necessary in equitable proceedings; but such a method is rarely essential, and should never be resorted to unless the purpose is to bring into the notice of the court some outside matter that does not appear by the ordinary record, or some outside party who is not bound or ready to take notice of the proceedings in bankruptcy; and a simple notice and rule to show cause, and oftentimes a mere affidavit, is all that is necessary to accomplish everything that could be accomplished by a formal and expensive petition. Therefore the court has concluded in this case to disregard the demurrer to this petition, treating it as an unnecessary pleading in any event, but amply sufficient to do that which a simple motion or rule to show cause would just as effectually accomplish. The court does not wish to establish the precedent that the trustee may not, if necessary, proceed in a matter like

this by petition, and therefore it might overrule this demurrer; but it is not necessary to dispose of the case upon its merits to send it back to the referee for a formal answer to this petition, and a possible return of it here upon a petition for review upon exceptions which may be taken to that answer, thus injecting into a bankruptcy proceeding—unnecessarily, the court must insist—a formal suit as expensive and formidable as a regular bill in equity. If the trustee has not been able, through the ordinary procedure of an examination of the bankrupt and the witnesses in the bankruptcy proceedings, to show that the bankrupt has in his possession money or property that he ought to be directed to turn over to his trustee, the court will not allow a new litigation to be initiated and carried on by this petition for the purpose of making such a showing on any such mere presumptions as those that are contained in this petition.

Therefore the order of the court will be that this demurrer be overruled, but that the petition shall be dismissed, because it appears from the record of the proceedings in bankruptcy that there is no foundation in any of the disclosures made about the bankrupt's affairs for any rule upon him by petition or otherwise requiring him to show cause why an order should not be made upon him to surrender money or other property to the trustee in bankruptcy. It will be time enough to issue such a rule when the trustee shall show, by the examination of the bankrupt, or witnesses who know the facts, that this bankrupt has in his possession a fund of $7,000 which he should be required to turn over to the trustee, and it is not at all necessary that we shall inaugurate any proceedings by petition or otherwise for that purpose. The ordinary power of examination is amply sufficient for it, and the rule, as the record now stands, will be refused.

Ordered accordingly.

CHRISTIE-STREET COMMISSION CO. v. UNITED STATES.

(Circuit Court, W. D. Missouri, W. D. April 25, 1904.)

No. 2,731.

1. TAXES—PAYMENT UNDER DURESS—RECOVERY—TORT—JURISDICTION.
The amended petition alleging that the tax sought to be recovered was exacted by threats and paid under duress, the action is for damages sounding in tort. *Held*, therefore, that the action is excepted from the jurisdiction of the Circuit Court, in the first instance, by section 1 of the act of March 3, 1887, c. 359, 24 Stat. 505 [U. S. Comp. St. 1901, p. 752].

2. SAME.
The case of Dooley v. United States, 21 Sup. Ct. 762, 182 U. S. 222, 45 L. Ed. 1074, differentiated, as that was controlled by the construction placed upon section 8, art. 1, of the federal Constitution. As such, the action was founded on the Constitution, and conferred jurisdiction on the Circuit Court under the act of 1887.

3. SAME—LIMITATIONS.
The amended petition, as did the original, disclosing the fact that the plaintiff appealed to the Commissioner of Internal Revenue for redress, under section 3226, Rev. St. U. S. [U. S. Comp. St. 1901, p. 2088], *held*, that the action is subject to the period of limitations imposed by sections 3226 and 3227 of said statutes.

4. SAME.

In such case the running of the statute of limitations is not suspended during the pendency of the appeal before the Commissioner of Internal Revenue.

5. SAME—ESTOPPEL.

Statements made by ministerial or departmental officers of the government to the claimant pending such appeal, to the effect that the claim would be allowed, or had been certified favorably to the auditing office, constitute no estoppel against the government, so as to avoid the operation of the statute of limitations.

(Syllabus by the Court.)

Harkless, Crysler & Histed, for plaintiff.
Wm. Warner, U. S. Atty.

PHILIPS, District Judge. In its amended petition the plaintiff seeks to escape from the ruling of this court (126 Fed. 991) on the original petition that, the tax having been voluntarily paid, no action to recover the same could be maintained at common law, by now alleging that the tax was paid under duress; i. e., by threatening the company with sequestration of its property, interruption of its business, and with criminal prosecution of its officers. This conceded, the exaction of the tax was not only unlawful, but tortious, and subjected the collector, as a tort feasor, to an action of trespass vi et armis. In its legal essence, it is an action for damages, sounding in tort, simple and pure. Nothing else can be made out of it, unless the court should disregard all recognized distinctions between actions ex contractu and actions ex delicto, and actions on the case and actions in trespass vi et armis. As such, it is expressly excepted from the jurisdiction of this court, in the first instance, by the second section of the act of March 3, 1887, c. 359, 24 Stat. 505 [U. S. Comp. St. 1901, p. 753], relied on by plaintiff.

In the opinion of this court on the original petition, it was tentatively stated that it might be inferred from the discussion of Mr. Justice Brown in Dooley v. United States, 182 U. S. 222, 21 Sup. Ct. 762, 45 L. Ed. 1074, that this action might be instituted in the first instance in the United States court. On further examination, I am of opinion that the question discussed and uppermost in the mind of the court in that case was whether or not duties could be collected on merchandise imported from the United States into Porto Rico, and vice versa, after the ratification of the treaty between the United States and Spain. It is manifest that the decision of the case was controlled by section 8, art. 1, of the federal Constitution, providing that "all duties, imposts and excises shall be uniform throughout the United States." The action was therefore founded upon the Constitution, and was not, like the case at bar, a simple action sounding in tort for the recovery of an illegal tax coerced by the threats and duress of the ministerial officer. It was not in the mind of the court in the Dooley Case to overrule that long and unbroken line of decisions holding that the government does not subject itself to suits for the torts, misfeasances, or malfeasances of its officers, as indicated by the following cases, which have never been overruled: Gibbons v. United States, 8 Wall. 275, 19 L. Ed. 453; Morgan v. United States, 14 Wall. 534, 20

L. Ed. 738; United States v. Savings Bank, 104 U. S. 728–733, 26 L. Ed. 908; Hill v. United States, 149 U. S. 593, 13 Sup. Ct. 1011, 37 L. Ed. 862; Langford v. United States, 101 U. S. 342, 345, 25 L. Ed. 1010; Schillinger v. United States, 155 U. S. 163, 168, 15 Sup. Ct. 85, 39 L. Ed. 108; United States v. Lynah, 188 U. S. 445, 23 Sup. Ct. 349, 47 L. Ed. 539; Cheatham et al. v. United States, 92 U. S. 88, 23 L. Ed. 561; Kings County Savings Institution v. Blair, 116 U. S. 200, 6 Sup. Ct. 353, 29 L. Ed. 657.

The amended petition, as did the original, shows that the plaintiff elected not to sue the collector for the tort, but sought redress from the government directly under the provisions of section 3226, Rev. St. U. S. (carried forward in U. S. Comp. St. 1901, p. 2088), by appealing to the commissioner of internal revenue to obtain restitution. Accordingly, it is averred that the petitioner filed its written application with said commissioner in October, 1899. This remedy in this class of cases is specifically provided for by said section, and the course prescribed is exclusive, and must be pursued, and is subject to all the conditions and limitations therein imposed. Cheatham et al. v. United States, 92 U. S. 88, 89, 23 L. Ed. 561; United States v. Bank, 104 U. S. 733, 734, 26 L. Ed. 908; Snyder v. Marks, 109 U. S. 193, 3 Sup. Ct. 157, 27 L. Ed. 901; Commissioners, etc., v. Buckner et al. (C. C.) 48 Fed. 533.

As this suit was not brought until November 14, 1902, it is barred by the statute of limitations. Sections 3226, 3227, Rev. St. [U. S. Comp. St. 1901, pp. 2088, 2089]. See opinion herein, 126 Fed. 995, 996; Commissioners, etc., v. Buckner et al. (C. C.) 48 Fed. 535.

Nor is the position tenable that the running of the statute of limitations in question was suspended during the pendency of the appeal before the Commissioner of Internal Revenue. United States v. Utz, 80 Fed. 849, 26 C. C. A. 184. While that was an action based on an express contract, and was therefore clearly within the provision of the act of 1887 conferring jurisdiction on the United States court in such action, in which the six-years limitation applies, it is direct authority against the contention of the plaintiff that the running of the statute is suspended while such claim is being considered by one of the departments of the government. Indeed, as applied to the case at bar, the provision of section 3226, Rev. St. U. S., is too explicit to admit of debate. The only exception made to the two-years limitation therein prescribed is in the proviso "that if such decision is delayed more than six months from the date of such appeal, then the said suit may be brought, without first having a decision of the commissioner at any time within the period limited in the next section"; that is, section 3227, which declares that:

"No suit or proceeding for the recovery of any internal tax alleged to have been erroneously or illegally assessed or collected, or of any penalty alleged to have been collected without authority or of any sum alleged to have been excessive, or in any manner wrongfully collected, shall be maintained in any court, unless the same is brought within two years next after the cause of action accrued."

The plaintiff seeks in the amended petition to escape from this dilemma by pleading, in effect, that its counsel was led to believe, by

the statements of some one representing the government, that the claim would be allowed when certain evidence and exhibits were furnished by petitioner, and that finally some representative of the Internal Revenue Department stated that the claim had been certified to the auditing department. If this plea has any office in legal procedure, it is that of an estoppel. If it could obtain in a suit against the government, the statement, as made in the petition, would be bad. It should state what officer made such representation, so that the court could say whether he was in a position to bind his principal. And in the second place, the plaintiff could not be justified in accepting such statement when the records of the commissioner's office, which is a public record, would show officially whether or not such final action had been taken, and when an inquiry and examination at the auditor's office would have developed the truth. But aside from this, the government would be in a sorry plight if the neglects, the careless speeches, and self-excusing or self-serving statements of its ministerial officers or agents could create waivers and estoppels in suits by and against the government. It has been the recognized doctrine since the foundation of the government that "it does not undertake to guaranty to any person the fidelity of any of the officers or agents whom it employs, since that would involve it, in all its operations, in endless embarrassments and difficulties and losses, which would be subversive of the public interests." United States v. Kirkpatrick, 9 Wheat. 720, 6 L. Ed. 199; Dox v. Postmaster General, 1 Pet. 318, 7 L. Ed. 160. As said by Mr. Justice Miller in Gibbons v. United States, supra, "No government has ever held itself liable to individuals for the misfeasance, laches, or unauthorized exercise of power by its officers and agents." See, also, Hart v. United States, 95 U. S. 318, 24 L. Ed. 479, in which Mr. Justice Waite said, "The government is not responsible for the laches or the wrongful acts of its officers."

Out of this doctrine has grown the rule that no officer of the government is authorized to waive the statute of limitations imposed in favor of the government. Accordingly, Mr. Justice Harlan, in Finn v. United States, 123 U. S. 227, 8 Sup. Ct. 82, 31 L. Ed. 128, said:

"The general rule that limitation does not operate by its own force as a bar, but is a defense, and that the party making such a defense must plead that statute if he wishes the benefit of its provisions, has no application to suits in the Court of Claims against the United States. An individual may waive such a defense either expressly or by failing to plead the statute, but the government has not expressly or by implication conferred authority upon any of its officers to waive the limitation imposed by the statute upon suits against the United States in the Court of Claims."

And since the Circuit Courts have acquired no greater right in this respect by the enabling act of 1887, the same rule applies to suits instituted in the Circuit Court.

The demurrer to the amended petition is sustained.

In re REINHART.

(District Court, S. D. Georgia, W. D. October 21, 1902.)

1. BANKRUPTCY—EXEMPTIONS—LAW OF GEORGIA.
The law of Georgia permits a debtor to take either the statutory homestead exemption or that given by the constitution of 1877, but not both; and further provides (Code, § 2865) that he may supplement his exemption by adding to the amount already set apart, which is less than the whole amount allowed, a sufficiency to make his exemption equal to such amount. *Held*, that a court of bankruptcy had power, under Bankr. Act 1898, to permit a bankrupt who had been granted the statutory exemption prior to his bankruptcy, but in property which at the date of his bankruptcy was of little value, to supplement the same up to the full value of that allowed by the statute from any property or funds of the estate, but that he could not be allowed the constitutional exemption.

2. EXEMPTION—WAIVER—LAW OF GEORGIA.
Under the law of Georgia, the head of a family has no power to waive his statutory homestead exemption in favor of a creditor, such power of waiver having relation solely to the exemption provided by the constitution of 1877.

In Bankruptcy. On review of referee's decision approving the action of the trustee in setting apart property to the bankrupt as a homestead exemption.

S. A. Crump and W. B. Gerry, for bankrupt.
Herman Brasch and E. P. Johnson, for objectors.

SPEER, District Judge. The applicant for homestead exemption in this case is J. V. Reinhart. He conducted a small business in fruit and similar produce, but, failing in business, was adjudged a bankrupt, and now seeks such homestead exemption out of the proceeds of his estate as will be allowed by the law of Georgia and the bankruptcy act. The trustee set apart to the bankrupt certain personal property as an exemption, under article 9, § 1, of the constitution of the state of Georgia. This permits an exemption to the head of a family, in real estate or personalty, or both, to the value in the aggregate of $1,600. Code Ga. § 5912. This action of the trustee was objected to by certain creditors before the referee in bankruptcy. L. L. Bishop and Simmons and Bishop objected on the ground that the bankrupt had been granted by the ordinary of Bibb county, on March 22, 1900, the statutory exemption under the law, which existed previously to the adoption of the constitution of 1877, which provides for the constitutional exemption of the larger amount above adverted to. Adams and Johnson, also creditors, objected upon the ground that they hold four promissory notes, amounting in the aggregate to $105.12, in which notes the bankrupt waived his right to the homestead exemption. Notwithstanding these objections, the referee approved the exemption, and his decision is presented to this court for review.

After considering the arguments of counsel and the authorities relating to this question, we do not feel at liberty to approve the finding

of the referee in its entirety, but, by a liberal construction of the statutes and decisions on this subject, we yet feel justified in affording some measure of relief to this unfortunate man and his helpless family. It is not denied that previously to his application to the bankruptcy court for the constitutional exemption Reinhart, as a head of a family, had obtained from the ordinary the statutory exemption. This consisted of a one-third reversionary interest in a small tract of land, a bedstead, bedding, a little household furniture, a small gray horse, a cow, and a few other articles of trivial value. It appears from the evidence that the horse is dead, and that certain other articles are worn out or lost. It is safe to conclude that the remnants of this exemption are paltry, if not wholly worthless. While this is true, it was yet the statutory exemption. The law of the state is that "one entitled to a homestead may take the statutory or the constitutional homestead at option, but cannot take both. The two are distinct, and where one has been taken it cannot be supplemented by the other." This announcement was made for the supreme court of the state by the late Chief Justice Warner. Johnson v. Roberts, 63 Ga. 167. It has not been departed from, and is entitled to all the weight of authority ascribed by the profession and the bench to the declarations of that famous jurist. The same principle is expressed in the statutory provisions of the state on this subject. Code, § 2854. It follows that the constitutional exemption in the form as allowed by the trustee and approved by the referee must be denied, and the applicant must be restricted to his statutory exemption. It is at this point, however, that the liberal provisions of the bankruptcy law relative to homestead exemptions for unfortunate and distressed debtors will afford this applicant relief. While he must be content with his statutory exemption, popularly called the "pony homestead," we think that the trustee may allow him its full equivalent out of the values in his hands. It has long been the policy of the state to allow to the head of a family of slender means the benefit of this exemption. The first act upon the subject was adopted in 1822, and the provisions defining its extent may be found in section 2866 of the Code. The property which may be set apart may consist of 50 acres of agricultural land and five additional acres for each child under the age of 16. If the land is not suitable for agricultural purposes, and is located in a city, town, or village, it may be set apart to an amount not exceeding $500 in value. It exempts also a farm horse or mule, or a yoke of oxen, a cow and calf, 10 head of hogs, and $50 worth of provisions, and $5 worth additional for each child. It also includes a considerable amount of provender and forage, a one-horse wagon, household and kitchen furniture, a loom, a spinning wheel, two pairs of cards, 100 pounds of lint cotton, tools of trade of the applicant and his wife, the equipment and arms of a militia soldier and trooper's horse, wearing apparel, a family Bible, religious works, school books, family portraits, library of a professional man not to exceed $300 in value, and a sewing machine. Such are the provisions of this admirable law. But few of the articles enumerated have been set apart to the applicant by the ordinary. But under another benignant provision of our law he may supplement his

homestead. This is found in section 2865 of the Code, which provides:

"It shall be the right of the applicant to supplement his exemption by adding to the amount already set apart, which is less than the whole amount of the exemption allowed by the constitution and laws of the state, a sufficiency to make his exemption equal to the whole amount by resorting to the methods for setting apart and valuation of the exemptions provided in this article."

Now, we may not in the bankruptcy court adopt the machinery provided by the state law, yet in proper cases we are authorized to exercise the somewhat elastic and flexible powers of a court of equity, and, in view of the manifest purpose of congress to afford the relief of a homestead exemption to persons who are in the situation of the applicant here, is it not competent for the court to direct the trustee to set apart, so far as may be possible, a sufficiency of the assets of the bankrupt to make his homestead equivalent in value and in benefits to himself and his family to that statutory homestead provided by the law of the state above quoted? It is true that in the case of Mitchell v. Wolfe, 70 Ga. 625, the supreme court of this state held that where one had obtained an exemption of personalty he could not afterwards increase it by having other personalty set apart. An examination, however, of that decision discloses that the homestead there obtained was under the constitution of 1868. Vested rights had accrued in parties objecting to the supplemental proceedings, and the constitution of 1868 afforded no provision for supplementing the homestead it created. The homestead under consideration here was created by the statutes of the state, and section 2865 of the Code above quoted, which embodies the acts of 1878–89, is explicit in the rights it grants, to supplement the other exemptions permitted by the laws of the state. Pate v. Fertilizing Co., 54 Ga. 520, was decided in 1875 before the provision for a supplementary homestead was enacted.

In view of these considerations, this cause will be remanded to the referee, with instructions to that officer to direct the trustee to set apart of the funds in his hands for the benefit of the bankrupt a fair equivalent of the homestead provided by section 2866 of the Code of Georgia, so far as that is practicable.

With regard to the other objection, that the homestead should not be allowed because certain creditors hold waiver notes, it is sufficient to say that the head of a family in Georgia has no power or authority to waive the statutory homestead for the benefit of a creditor; the power of waiver relating exclusively to the constitutional homestead provided by the organic law of 1877.

DALY v. BUSK TUNNEL RY. CO.

(Circuit Court of Appeals, Eighth Circuit. March 17, 1904.)

No. 1,963.

1. CONTRACT FOR MAKING TUNNEL—CONSTRUCTION—RIGHT TO CHANGE DIMENSIONS.

A contract for the construction of a railway tunnel through a mountain nearly two miles in length fixed the dimensions of the tunnel and the price per lineal foot to be paid the contractor for excavating the same. It contained the further provision: "(6) It is understood and agreed that the railway company shall have the right to make such changes in the amount, dimensions or character of the work to be done, as in the opinion of the chief engineer the interests of said work or of the company may require; * * *. Any increase in the amount of work to be done, that may be caused by such changes, shall be paid for at the same rate as similar work is herein contracted to be paid for." Printed specifications attached to the contract contained a provision that "the right is reserved to vary the standard dimensions of the tunnel should the engineer deem it advisable, but the end area shall not thereby be increased." *Held*, that the latter provision was not intended to prohibit the company absolutely from enlarging the end area or cross-section of the tunnel, but, when construed in connection with the provision of the contract proper, meant that it should not be so enlarged as to require the removal of more material for the contract price per lineal foot, and that if so enlarged the contractor should be entitled to extra pay; that such changes, therefore, were not a variation from the contract which would release the surety on the contractor's bond from liability, though made without his knowledge or consent.

2. SAME—CONFLICTING PROVISIONS.

In case of a conflict between the provisions of a contract for the construction of a tunnel and those of printed specifications attached thereto which were prepared previously for general use in connection with such contracts and not with reference to that particular contract, those of the contract itself must control.

3. SETTLEMENT—IMPEACHMENT FOR MISTAKE—FAILURE TO DRAW PROPER INFERENCE FROM KNOWN FACTS.

A surety on the bond of a contractor for work, who settled a demand made on him for his principal's default after long negotiation, in which he was represented by an attorney, cannot impeach such settlement for mistake of fact in that the other party had, in violation of the contract, paid to the contractor as the work progressed the greater part of the 10 per cent. on the amounts due on monthly estimates, which the contract provided should be reserved until the completion of the work, of which fact he was ignorant when the settlement was made, where it is shown that all the facts were freely furnished to his attorney, including statements showing the total value of the work done by the contractor, and the total amount paid him, from which the inference was obvious that such payments included a large part of the reserved percentage.

4. SAME—SURETY—DUTY OF OPPOSING PARTY IN NEGOTIATIONS.

In negotiations for the settlement of a disputed demand, the fact that one of the parties is a surety does not require the other party to call his special attention to the bearing of facts known to both, or the inferences to be drawn therefrom.

5. SAME—CONSIDERATION.

The law favors the compromise of doubtful claims, and the avoidance of litigation is a sufficient consideration to support such agreements, even though it eventually appears that if the demand had been litigated no recovery could have been had.

¶ 5. See Compromise and Settlement, vol. 10, Cent. Dig. § 40.

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

This action was brought by Margaret P. Daly, as executrix of Marcus Daly, deceased, the plaintiff in error, against the Busk Tunnel Railway Company, the defendant in error (hereinafter termed the "Tunnel Company"), to recover the sum of $22,500 which had been paid by the plaintiff's intestate to the Tunnel Company on October 28, 1895. The grounds on which the plaintiff predicated her right to recover were these: She alleged, in substance, that on July 21, 1890, the Tunnel Company entered into a contract with one Michael H. Keefe by virtue of which he undertook to construct for the Tunnel Company a tunnel underneath the crest of the Rocky Mountains between the stations of Busk and Ivanhoe, on the line of the Colorado Midland Railway; that on July 25, 1890, her intestate became a surety on the bond of said Keefe in the sum of $100,000, conditioned that Keefe would "well and truly keep and perform each and all of the terms and conditions of said contract on his part to be kept and performed"; that Keefe began the work of construction after the execution of the contract and bond, and prosecuted it until July 22, 1893, when he abandoned the work, leaving the tunnel unfinished; that during the progress of the work the height and width of the tunnel were increased above the height and width called for by the contract and specifications, such alteration in the height and width being made by agreement between Keefe and the Tunnel Company without the knowledge of the surety; also that the contract provided that 10 per cent. of the monthly estimates of work done by the contractor should be withheld from him until the final completion and acceptance of the work, and that, in violation of this provision of the contract, the Tunnel Company, without the knowledge of the surety, paid Keefe $61,000 of the sum of money which it should have retained until the completion of the work. It was then averred, in substance, that, after Keefe had abandoned the work, the Tunnel Company made a claim against the plaintiff's intestate, who was one of the sureties on his bond, in the sum of $100,000, claiming that it had sustained damages to that amount in consequence of Keefe's failure to execute the contract, and that, to induce the surety to compromise and pay said claim or a part thereof, the Tunnel Company "falsely represented [to him] that it had in all things kept and performed the conditions of said contract by it to be kept and performed," although it well knew that it had entered into an agreement with Keefe whereby material alterations had been made in the terms of the contract between itself and Keefe; and that, relying upon such representations as were made by the Tunnel Company, and believing that he was liable upon the contract for the damages which the Tunnel Company had sustained by reason of the failure of said Keefe to complete the tunnel, and being ignorant that any alterations had been made in the terms of the agreement in the respects heretofore stated, he was induced to pay to the Tunnel Company, by way of settlement and compromise of his liability on the bond, the sum of $22,500, for which amount the plaintiff below prayed judgment. At the conclusion of the trial in the lower court the plaintiff and the defendant each asked the court to direct a verdict in their favor. The plaintiff's motion to this effect was overruled, while the defendant's motion was granted, whereupon a verdict and judgment was rendered in its favor. The case has been brought to this court for review on a writ of error which was sued out by the plaintiff below.

T. J. Walsh (John H. Knaebel and Ernest Knaebel, on the brief), for plaintiff in error.

Lucius M. Cuthbert (Henry T. Rogers, Daniel B. Ellis, and Pierpont Fuller, on the brief), for defendant in error.

Before SANBORN, THAYER, and HOOK, Circuit Judges.

THAYER, Circuit Judge, after stating the case as above, delivered the opinion of the court.

In view of the foregoing statement, it will be observed that the case at bar is prosecuted upon the theory that, when the plaintiff's intestate

paid the sum of $22,500 by way of compromise and settlement of his liability as a surety on the bond of Keefe, he had in fact been released from all liability thereon by reason of the action of the Tunnel Company in enlarging to a certain extent the bore of the tunnel by agreement with Keefe, and also by reason of its action in paying to the contractor the sum of $61,000, which, under the terms of the contract, it should have retained until the completion of the work. It is claimed that these acts constituted material alterations in the terms of the contract, which the surety promised should be faithfully performed according to its terms, and not otherwise; that he was ignorant of these alterations at the time he made the settlement and compromised his supposed liability; that it was the duty of the Tunnel Company to have advised him of its action in the matters aforesaid before negotiating a settlement, and that, as it did not do so, the money which it received may be recovered as money paid under a mistake of fact.

The first question to be considered, therefore, is whether any such change was made in the height or width of the tunnel as operated to release the surety on the bond of the contractor, assuming such change of dimensions to have been made without the knowledge of the surety. The contract, which was prepared by the attorneys of the Tunnel Company with especial reference to the work which was to be done by Keefe, was typewritten, and signed by both of the contracting parties. Annexed to this contract, and referred to therein as a part thereof, were certain printed specifications, which were not drawn, at the time the contract was made, with especial reference to the construction of the tunnel in controversy, which is commonly called the "Busk Tunnel," but had been prepared some time before that tunnel was projected, and were kept on hand by the engineers of the Tunnel Company for general use in connection with whatever construction work they might have occasion to do. The printed specifications in question, which were annexed to the contract, related to railway construction generally, and to various kinds of work which Keefe did not undertake to do and was not expected to do. These printed specifications, under the heading "Tunnel," contained the following clause:

"The floor will be flat, and excavated to six (6) inches below grade. The roof will be a gothic arch described with a radius of ten and one half (10½) feet from a line ten (10) feet above grade. The side walls will be vertical to a height of ten (10) feet and parallel to and seven (7) feet six inches from the center line. The total height of tunnel from floor to center of roof will be twenty (20) feet six (6) inches."

Farther on in the specifications, under the same heading, is found the following clause:

"Bills or claims for extra work must be rendered within thirty (30) days after it has been done, and in all cases not later than the end of the next succeeding month. The right is reserved to vary the standard dimensions of the tunnel should the engineer deem it advisable; but the end area shall not thereby be increased. The price per lineal foot of tunnel will include the haul of materials and deposits in embankments at each end of tunnel as directed by the engineer."

The contract proper, and by this is meant the typewritten part, which was prepared with special reference to the work which the contractor was to do, contained the following provisions:

"(6) It is understood and agreed that the railway company shall have the right to make such changes in the amount, dimensions or character of the

work to be done, as in the opinion of the chief engineer the interests of said work or of the company may require; * * *. Any increase in the amount of work to be done, that may be caused by such changes, shall be paid for at the same rate as similar work is herein contracted to be paid for; and if such work is not similar to that herein contracted for, it shall be paid for as extra work at prices to be agreed upon between the chief engineer and contractor prior to the commencement of said extra work, but if the contractor and chief engineer are unable to agree upon a price for said work, then the railway company may enter into contract with any other party or parties for its execution, the same as if this contract had never existed.

"(7) In consideration of the faithful performance of the covenants and agreements made by the contractor, the railway company hereby covenants and agrees to pay or cause to be paid to the contractor, his executor or administrator, the rates and prices hereinafter named, to-wit: * * * Excavation: Earth, twenty-five cents—Per Cubic Yard. Excavation: Loose Rock, Forty-five cents (45c)—Per cubic Yard. Excavation Solid Rock, One Dollar and thirty cents ($1.30) per cubic yard. Tunnel Excavation, Sixty-two dollars and fifty cents ($62.50) per lineal foot. For tunneling enlargement to receive timber,—Two Dollars & fifty cents ($2.50) per cu. yard."

The evidence shows that after about 1,000 feet of the tunnel had been constructed, counting the construction at both ends, the contractor was permitted by the engineer in charge of the work to make the height of the tunnel 21 feet, instead of 20 feet 6 inches, as called for by the specifications, and he was paid for the extra amount of excavation thus occasioned at the rate of $2.50 per cubic yard for all extra material that was removed. This change in height was allowed, as it seems, mainly for the accommodation of the contractor. He found it quite difficult, in blasting, to make the floor of the tunnel smooth and exactly 20 feet and 6 inches below the center of the roof of the tunnel at all places. In the process of blasting, "hummocks," as they are termed, would be left in the floor, projecting up into the ballast, which was required to be six inches in depth below grade. These hummocks projecting up into the ballast had the effect of lessening the elasticity of the track, and they could only be removed by the contractor with small blasts of powder, which work occasioned some difficulty and expense. To overcome the difficulty the contractor was permitted to excavate 12 inches below grade instead of 6, so as to avoid the hummocks and the cost of removing them, and he appears to have availed himself of this privilege with alacrity so as to avoid expense. The evidence further discloses, without any substantial controversy, that while the side walls of the tunnel were required to be 7 feet and 6 inches distant from the center line of the track, making the tunnel 15 feet wide between the inside faces of the timber which supported the side walls and the arch, yet it was in fact made about two and three-eighths inches (2⅜) wider for the greater part of its length, and for the following reasons: The work had been in progress for some time when it was discovered that, if the wall plates were set exactly 15 feet apart in the first instance, the pressure of the mountain, and the blasting which was being done within the tunnel, had a tendency to crowd them inward a short distance, leaving the tunnel a little less than 15 feet wide in the clear; and, as it was necessary that the tunnel should be that wide to insure the safe passage of trains, and as the contract called for that width, the contractor was compelled at times to go back over his work, and, by removing rock and débris back of the timbers, press them back into place.

To overcome this difficulty it was agreed by the contractor and the engineer in charge that the wall plates might be set $15^{2}/_{10}$ feet apart in the first instance, so as to make good the shrinkage in width which was incident to the pressure and blasting, thereby leaving the tunnel 15 feet wide between the inside faces of the timber which supported the side walls. The contractor appears to have availed himself of this privilege very readily, as, by setting the wall plates $15^{2}/_{10}$ feet apart in the first instance instead of 15 feet, it relieved him of considerable trouble and expense. These are the alleged changes in the height and width of the tunnel which the plaintiff below relied upon to relieve the surety of his liability upon the bond.

It is insisted, in behalf of the plaintiff in error, that the words "end area" as used in the specifications, means the superficies of an end of the bore of the tunnel, and that it can mean nothing else; that the alterations aforesaid in the height and width of the tunnel increased its "end area" and the solid contents of the bore of the tunnel, contrary to the letter of the specifications, and for that reason the surety was released, the changes having been made without his knowledge, although such changes appear upon this record to have been to the advantage of the contractor rather than to his disadvantage. On the other hand, the Tunnel Company contends that by its agreement with the contractor it expressly reserved the power "to make such changes in the amount, dimensions or character of the work" as were in fact made; that this clause of the contract does not in fact conflict with the inhibition contained in the specifications against increasing the "end area," and that, if there is an irreconcilable conflict between the contract and the specifications, the latter must give way to the former, because the contract was prepared with especial reference to the work in question, while the specifications were not so prepared; and that the contract, rather than the specifications, must accordingly be taken as expressing the true intent of the parties. It is further claimed by the Tunnel Company that as the work of excavating the tunnel was to be paid for at the rate of $62.50 per lineal foot, and as a cross-section, 1 foot in thickness, of the tunnel as projected, contained 9.91 cubic yards of material, as shown by the blue prints which were prepared by the company's engineer, and in pursuance of which bids for doing the work were invited and the contract with Keefe was entered into, the provision in the specifications against increasing the "end area" simply means that the contractor should not be compelled to move more than 9.91 cubic yards of material in excavating 1 lineal foot of the tunnel, and that if, by reason of necessary changes in the bore, he was required at any time to move more than that amount of material, he should be paid therefor as for extra work at the contract rate. In other words, it is said that this clause of the specifications was not intended to deprive the Tunnel Company of the power reserved to itself in the contract to make such changes in the bore of the tunnel as it found necessary to make, but rather to protect the contractor and insure him adequate compensation for his work if such changes necessitated the excavation of more than 9.91 cubic yards of material in advancing the tunnel 1 foot.

With reference to these contentions, it is to be observed that the changes in the height and width of the tunnel did not in fact increase

its "end area," if these words are taken literally, because the change was not made until work at each end had proceeded some distance, and the end areas do not appear to have been altered. These words, however, should not be read literally. The last observation is made for the purpose of showing that the words "end area" admit of some latitude of construction, and that the contract, considered as a whole, must receive a reasonable interpretation, having reference to the situation of the parties when it was made, and the character and magnitude of the enterprise to which it related, as well as the uncertainty concerning the difficulties that might be encountered as the work progressed. We entertain no doubt that the Tunnel Company intended to reserve the power to make such reasonable changes in the bore of the tunnel as the necessities of the work might require. Indeed, we can scarcely conceive that a company engaged in constructing a tunnel nearly two miles in length through a high mountain, and being at the time ignorant of the character of the materials and the obstructions which it might encounter, would deliberately agree that the size of the bore should not be increased even a few inches. It is customary, so far as we have observed, for companies which are engaged in the prosecution of such great enterprises as the one in hand to reserve a large power of control over the work, as well as the right to make such reasonable changes in the original plans for doing the same as the circumstances of the case may demand; but, whether customary or not, the power in question was reserved by the Tunnel Company in the clearest language by the contract which it entered into with Keefe, the provision being that it should "have the right to make such changes in the amount, dimensions or character of the work to be done as in the opinion of the chief engineer the interests of said work or of the company may require." And we can scarcely conceive that after having its attention directed to this subject, and after reserving this power, it intended to relinquish it by the provision contained in the specifications against increasing the "end area," as it did do if that clause is understood to prohibit a change in the bore of the tunnel to any extent that would enlarge its cubical contents. For these reasons we are of opinion that the clause found in the specifications against increasing the "end area" does not mean that the Tunnel Company should not enlarge the dimensions of the bore of the tunnel to any extent, but that it means rather, as the Tunnel Company claims, that the bore of the tunnel should not be so enlarged as to compel the contractor, in driving it 1 lineal foot, to excavate more than 9.91 cubic yards of material for the sum of $62.50, and that, if so enlarged as to require the removal of a greater quantity of material, he should receive extra pay.

If the foregoing is not the true interpretation of the clause found in the specifications against increasing the "end area," and if the language employed means necessarily that the bore of the tunnel should not be enlarged to any extent, then we should be of opinion that the clause in question is in conflict with the provision of the contract heretofore quoted, and is controlled thereby. It is one of the fundamental rules for the construction of agreements that, when a contract is prepared on a printed form, words in writing prevail over words in print. This is upon the theory that words in writing express the actual and

final intent of the parties, and that clauses in conflict therewith which may be found in print were probably overlooked, and should not be given the same weight as words in writing that were consciously employed by the contracting parties. Hernandez v. Sun Mutual Life Ins. Co., 6 Blatchf. 317, 12 Fed. Cas. 34, 37; Duffield v. Hue, 129 Pa. 74, 18 Atl. 566, 568; Chadsey v. Guion, 97 N. Y. 333, 339; Bishop on Contracts, § 413; Am. & Eng. Ency. of Law (2d Ed.) vol. 17, p. 21. We think the reasons upon which this rule of interpretation is founded are applicable to the case in hand. The contract proper, that is, the typewritten part, was prepared with especial reference to the construction of the Busk Tunnel, and no other. Every clause which it contains must be presumed to have passed under the scrutiny of the contracting parties, and to express their real purpose. The specifications, on the other hand, were not so prepared, but were kept in stock in the engineer's office for his convenience, to be attached, when occasion required, to contracts for whatever work he might have occasion to let. It is reasonable to presume that they were not carefully revised and re-read on all occasions when they were appended to a contract, but that they were sometimes annexed without revision, on the assumption that they were not substantially in conflict therewith. Particular clauses found in an instrument of that kind should not, in our judgment, be accorded the same weight in arriving at the intention of the contracting parties as stipulations found in the contract itself, provided they are at variance. And this is so, we think, although the contract may contain a clause declaring that a paper attached thereto forms a part thereof. We accordingly conclude that the changes which were made in the height and width of the tunnel were made in pursuance of an authority reserved to the engineer in charge of the work to make such changes, and that they did not operate, as claimed, to release the surety from his liability on the contractor's bond.

This brings us to a consideration of the question whether the surety was released from his obligation on the bond because reserved percentages to the amount of $61,000 were paid to the contractor in advance of the completion of the tunnel. The contract provided, in substance, that approximate estimates of the value of the work done should be made on or about the last day of each month, and that the amount of said estimates, less 10 per cent., should be paid to the contractor, and that the reserve percentage should be withheld by the Tunnel Company until the final completion and acceptance of the work; also that the contractor should be subject to the laws of the state of Colorado regarding liens for labor or materials furnished for the work, and should protect or indemnify the Tunnel Company against all claims upon it or liens upon the premises for labor or materials furnished, and that the Tunnel Company might, whenever it deemed proper and expedient to do so, pay to the laborer or other persons employed by the contractor, or who had furnished materials for said work, out of any moneys due for any monthly or other estimates, any sums due for labor, services, or materials under the contract, and might charge the payments to the contractor as so much paid on his contract. As early as February 21, 1891, Keefe, the contractor, appears to have become involved in debt for labor and materials furnished in constructing the tunnel, which he was

unable to pay. He applied to the Tunnel Company for relief, and on that occasion, and three others between that date and June 6, 1893, he was paid, on account of the reserved percentages, various sums amounting in the aggregate to $61,000. These payments, as it is claimed, having been made contrary to the terms of the contract, released the surety. We are satisfied, however, that the plaintiff's intestate was chargeable with knowledge that these payments had been made to Keefe before he compromised his liability on the bond by the payment of $22,500 on October 28, 1895. The testimony shows that when the plaintiff's intestate was called upon to discharge his liability on the bond, after Keefe had abandoned the work, and as early as the month of May, 1894, he employed a capable attorney residing at Denver, Colo., to examine into the merits of the claim and protect his interests, and that he later gave his attorney full authority to represent him in negotiating a settlement. The Tunnel Company was represented by an attorney who also resided in Denver. From that time forward until October 28, 1895, negotiations looking to a compromise were in progress between the two attorneys, and they seem to have been conducted with great deliberation. In the meantime all the information relating to the controversy which was called for by counsel who represented the plaintiff's intestate was promptly furnished by the Tunnel Company without reservation, and without any apparent effort to conceal any material fact or circumstance relating to its dealings with the contractor. Indeed, counsel for the plaintiff's intestate who conducted these negotiations exonerates the attorney of the Tunnel Company from all charges of fraud or the suppression of material facts, by the admission, made under oath, that the negotiations looking to a settlement were conducted with entire good faith on both sides. As early as July 2, 1894, the attorney who represented the plaintiff's intestate was furnished with a statement of account between the Tunnel Company and the contractor, which showed that the contractor had been paid by the Tunnel Company $647,259.64 on account of work done. On August 24, 1895, he was handed a letter and a statement which showed that the value of the work done by the contractor up to July 21, 1893, when he abandoned the contract, amounted to $662,923.60 at contract rates, and that the work thereafter done by the Tunnel Company to finish the tunnel amounted in value to $77,771.85. A letter written by the same attorney to the plaintiff's intestate of date October 10, 1895, shows conclusively that he understood and advised his client at that time that the Tunnel Company had paid Keefe in all the sum of $647,259.64, and that it only owed him, when he abandoned the work, the sum of $17,783.96. Knowing, as he did, that the total value of the work which had been done by Keefe, estimated at the contract price, was $662,923.60, and that he had been paid something over $647,000, he must have been aware that the greater part of the reserved percentages had already been paid to the contractor. Moreover, it is shown by the testimony that the various receipts which were given by the contractor for money paid to him out of the reserved percentages were handed to an accountant whom the attorney for plaintiff's intestate had employed to examine the various statements and vouchers relating to the construction of the tunnel, and that these receipts thus placed in the hands of the accountant

showed on their face out of what fund and on what account the payments in question had been made. It is manifest, we think, that, if the compromise was made while plaintiff's intestate was ignorant of the fact that Keefe had received $61,000 out of the reserved percentages, such ignorance was due to a failure on his part, or that of his agent, to draw a proper inference of fact from facts which were communicated; and, where one pays money to settle threatened litigation under such circumstances, it cannot be said that he pays it under a mistake of fact. He pays it rather with a knowledge of facts which the law imputes.

The case has been argued in this court by learned counsel for the plaintiff in error upon the theory, apparently, that it was the duty of the attorney who represented the Tunnel Company to specially invite the attention of the opposite party to the fact that the greater part of the reserved percentages had been paid, and that such was his duty, because the claim was against a surety, and for that reason involved the exercise of the highest degree of good faith. Conceding, for the purposes of the present case, that a higher degree of good faith was requisite than in ordinary cases, because the rights of a surety were involved, we cannot accede to the proposition that an obligation rested on the attorney for the Tunnel Company to invite special attention to the fact that the reserved percentages had been in great part paid. It was sufficient, we think, to advise the opposite party what was the total sum earned by Keefe, and how much of the sum earned had in fact been paid. He was dealing with a competent attorney who had been employed by the surety to attend to his interests, who was doubtless well acquainted with the provisions of the contract between Keefe and the Tunnel Company, and fully qualified to decide whether the right to recover against his client had been impaired by the payments that had been made, the extent of which he well knew. Although he represented a surety, he was not wholly absolved from the duty of making inquiries or deductions from facts within his knowledge, nor was he privileged to rely blindly on such information as the opposite party saw fit to communicate, without seeking other information that might be of advantage to his client. It is most probable, we think, that the attorney for the Tunnel Company regarded the payments that had been made to the contractor as payments which it had the right to make under the provisions of the contract reserving to it the right to discharge claims for labor, services, and materials which might become a lien on the tunnel, and it may be that he was right in that view of the case, although no opinion need be expressed on that question. For, whether that view is right or wrong, he communicated enough facts to the opposing party to bring the question sharply to his attention, and he was not required to go further. The law favors the compromise of doubtful claims, and the avoidance of litigation is a sufficient consideration to support such agreements, even though it eventually appears that, if the demand had been litigated, no recovery could have been had. It will not suffer them to be set aside on slight grounds. Cleaveland v. Richardson, 132 U. S. 318, 10 Sup. Ct. 100, 33 L. Ed. 384; Hager v. Thompson et al., 1 Black, 80, 94, 17 L. Ed. 41; Graham v. Meyer, 99 N. Y. 611, 1 N. E. 143; Swem v. Green, 9 Colo. 358, 364, 12 Pac. 202;

Brooks v. Hall, 36 Kan. 697, 14 Pac. 236; Grandin v. Grandin, 49 N. J. Law, 508, 514, 515, 9 Atl. 756, 60 Am. Rep. 642. In the present instance it is certainly true that there was sufficient doubt of the ability of the plaintiff's intestate to make a successful defense against the claim, which was preferred against him by the Tunnel Company, to sustain an agreement of compromise, and, as it was made without the semblance of fraud, and without the suppression of any facts within the knowledge of the Tunnel Company which it was bound to disclose, we think it should be upheld.

The judgment below is accordingly affirmed.

CHICAGO, M. & ST. P. RY. CO. v. VOELKER.

(Circuit Court of Appeals, Eighth Circuit. March 26, 1904.)

No. 1,842.

1. RAILROADS—AUTOMATIC COUPLERS—STATUTES—CONSTRUCTION.
   Act March 2, 1893, c. 196, 27 Stat. 531 [3 U. S. Comp. St. 1901, p. 3174], provides that after January 1, 1898, it shall be unlawful for any common carrier, engaged in interstate commerce by railroad, to haul or permit to be hauled or used on its line any car used in moving interstate traffic not equipped with couplers "coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars." Code Iowa 1897, §§ 2097, 2080, declares that after the same date no corporation operating a railroad shall have upon such railroad in that state any car that is not equipped with "automatic couplers so constructed as to enable any person to couple or uncouple them without going between them." *Held*, that the test to be applied by both of said acts, viz., whether the person operating the coupler is required to go between the ends of the cars, applies to the act of coupling as well as that of uncoupling, and that the act of Congress forbids the use of a coupler which requires the operator to go between the ends of the cars to prepare the coupler for the impact.

2. ACT OF COUPLING CARS.
   The preparation of the coupler for the impact is not distinct from the act of coupling. The preparation and the impact are connected and indispensable parts of the larger act, which is regulated by the statute, and the performance of which is intended to be relieved from unnecessary risk and danger.

3. STATUTES—CONSTRUCTION.
   Statutes, the purpose of which is the protection of the lives and limbs of men, are so construed as to prevent the mischief and advance the remedy, so far as the words fairly permit.

4. STATUTES—INTERPRETATION.
   Punctuation is a minor, and not a controlling, element in interpretation, and courts will disregard the punctuation of a statute, or repunctuate it, if need be, to give effect to what otherwise appears to be its purpose and true meaning.

5. DEFECTIVE CAR COUPLERS—ACTIONABLE NEGLIGENCE.
   Where an automatic car coupler had been permitted to become and remain defective so that the lever would not lift the pin from the socket and the knuckle could not be drawn open by leaning toward the coupler and using one hand, but required the presence of the operator's entire body between the ends of the cars and between the drawbars, and the use of both of his hands, such coupler did not satisfy Act March 2, 1893, c. 196, 27 Stat. 531 [3 U. S. Comp. St. 1901, p. 3174], or Code Iowa 1897, §§ 2097, 2080, requiring the use of automatic car couplers not requir-

ing the presence of any person between the ends of the cars in order to operate the same; and the use of such defective coupler constituted actionable negligence.

6. INTERSTATE TRAFFIC—TEMPORARY SUSPENSION OF TRANSIT.
A shipment, originating in one state and being moved to a point in another state, is impressed with the character of interstate traffic, which will follow the shipment until the actual transit ceases. A car used in moving such shipment remains subject to Act March 2, 1893, c. 196, 27 Stat. 531 [U. S. Comp. St. 1901, p. 3174], until its use in moving the shipment is ended, notwithstanding the transit may be temporarily, but not indefinitely, suspended; and this, whether the ultimate destination of the shipment be near to or remote from the point of suspension.

7. PETITION—OBJECTIONS AT TRIAL—VARIANCE—APPEAL.
Where, in an action for wrongful death of a switchman by reason of an alleged defective coupler attached to a car used in moving traffic, defendant offered no objection to evidence which, without conflict, established the interstate character of the commerce in which defendant was engaged and of the traffic being moved by the car in question, and in excepting to the instructions applying Act March 2, 1893, c. 196, 27 Stat. 531 [U. S. Comp. St. 1901, p. 3174], to the case, defendant did not place its exceptions on the ground that the petition did not state a case arising within interstate commerce, such objection was not available on appeal.

8. AUTOMATIC COUPLERS—WHERE DEFECTIVE NO ASSUMPTION OF RISK.
Under Act Cong. March 2, 1893, c. 196, § 8, 27 Stat. 532 [3 U. S. Comp. St. 1901, p. 3176] providing that any employé of an interstate carrier who may be injured by any car in use contrary to the provisions requiring the use of automatic couplers shall not be deemed thereby to have assumed the risk, though he continue in the employment of such carrier after the unlawful use of such car, etc., has been brought to his knowledge, a switchman engaged in handling a freight car having a defective coupler, on a track principally used for handling freight trains, though sometimes used to handle cars in need of repairs, did not assume the risk arising from the defect in the coupler; the car not having been marked or isolated as one in bad repair, and its movement at the time not being with a view to its isolation or repair.

9. CONCURRING ACTS OF NEGLIGENCE—INSTRUCTIONS.
Where a right of recovery was rested upon each of two separate and concurring acts of negligence, it was the right of each party to have the jury correctly instructed respecting each act of negligence, the same as if the right of recovery rested upon it alone; and, if there was material error in the instructions given or refused respecting either charge of negligence, the verdict, where general, cannot stand.

10. CUSTOM TO KICK CARS WITHOUT NOTICE TO FIELDMAN—ASSUMPTION OF RISK.
Where it was the general and uniform custom in a railroad yard to kick cars down to a fieldman without giving him notice or warning, a fieldman who was aware of such custom and remained in that service assumed the risk of injury arising from the observance of the custom.

In Error to the Circuit Court of the United States for the Northern District of Iowa.

For opinion below, see 116 Fed. 867.

This was an action to recover damages for the death of Emil Voelker, occurring while he was engaged in coupling cars at Dubuque, Iowa, in the service of the railway company. After describing defendant company as a Wisconsin corporation "engaged in operating a line of railway through the

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¶ 8. Assumption of risks incident to employment, see note to Chesapeake & O. R. Co. v. Hennessey, 38 C. C. A. 314.

¶ 10. See Master and Servant, vol. 34, Cent. Dig. § 596.

state of Iowa," and having upon one of its yard tracks at Dubuque "a loaded car, which was to form a part of a train then being made up * * * for early movement," and after describing Voelker as a car coupler and fieldman in the switching crew which was making up this train, the petition charged two acts of negligence on the part of the company as proximate causes of Voelker's death: (1) "Defendant negligently permitted the coupler on the northerly end of said car to become and remain inoperative and defective in that the link connecting the lever and the pin was loose, broken, and disconnected, so that the pin and coupler could not be operated by means of the lever, and the said coupler was so old, worn, and rickety that the pin could not be raised because of the tumbler pressing and resting against the frame of the coupler, thus making it necessary, in order to operate the coupler, to go between the cars, insert the hand in the coupler, push the tumbler away from the frame, and then raise the tumbler and pull the knuckle open. * * * Defendant knew, or by the exercise of ordinary diligence could and should have known, of the defective and inoperative condition of the coupler aforesaid, before the death of said Voelker, and in time to have remedied the same." (2) "The general practice recognized and known by defendant, then and many years prior thereto in force, was for car couplers to go between the cars and open the knuckles whenever the same could not be operated by means of the lever." Voelker accordingly went between this and another car, which were separated a few feet, "to open the knuckle, in order that the coupling might be made by impact; and while thus engaged, and unaware of the danger to which he was exposed, said switching crew, while acting within the scope of their employment, and knowing that said Emil Voelker went between said cars to couple the same, negligently caused two or more other cars to be kicked with great force * * * against the cars between which said Emil Voelker was thus occupied, * * * without signal from him, although the general practice then and long prior thereto required that said cars be not moved while he was thus occupied between the cars, without signal from him."

Defendant's answer denied the statements of the petition other than those relating to the citizenship of the parties, charged that Voelker's death was the result of his own contributory negligence, and alleged that the track where he was injured was prior to and all during his service used to set out and handle thereon cars having some defect in them and needing repairs, as well as other cars not defective; that this was known to him, or could have been ascertained by the exercise of ordinary care; that with this knowledge or means of knowledge he remained in the company's service, and continued to work on that track without objection or complaint, and therefore assumed the risk of meeting and working with defective cars at that place.

At the trial these facts were established: The car in question was loaded with coal, and was brought by defendant over its line of railroad from a station thereon in the state of Illinois, and reached defendant's yards at Dubuque, Iowa, about 5 o'clock in the afternoon. About 8 o'clock the next morning, when the injury to Voelker occurred, the car was on a freight track principally or largely used in receiving incoming freight trains and making up outgoing freight trains. A switching crew, in which Voelker was acting as car coupler and fieldman, was then engaged in shifting about and coupling this coal car and several other loaded cars. While Voelker was between the coal car and another car separated by a distance of about 10 feet, and was engaged in adjusting the coupler on the coal car so that it would couple automatically upon impact, the two cars came together, catching him between the drawbars, and crushed him to death. He was 29 years old, and had been in defendant's service as brakeman and switchman 8 years. In respect of several other matters the evidence was conflicting. The jury returned a verdict for plaintiff, on which judgment was rendered, to reverse which the railroad company prosecutes this writ of error.

W. J. Knight and H. H. Field, for plaintiff in error.

H. C. Kenline and J. J. McCarthy (R. P. Roedell, on the brief), for defendant in error.

George Crane, Asst. U. S. Atty., amicus curiæ.

Before SANBORN, THAYER, and VAN DEVANTER, Circuit Judges.

VAN DEVANTER, Circuit Judge, after stating the case as above, delivered the opinion of the court.

It is entirely clear that the trial proceeded upon the theory that plaintiff's petition charged two acts of negligence on the part of the railway company as proximate causes of Voelker's death: First, permitting the coupler upon the coal car to become inoperative and defective; and, second, kicking or sending other cars against the cars between which Voelker was engaged without a signal from him, and contrary to a general and established practice. Each party, without objection from the other, introduced evidence bearing directly upon each charge of negligence, and not otherwise relevant to the issues. The court also instructed the jury upon this theory. The contention on behalf of the railway company that the case was tried upon the theory that the petition charged the negligent kicking or sending of other cars against those between which Voelker was engaged as the sole proximate cause of the injury is not supported by the record, but is refuted by it. The evidence relating to the condition of the coupler on the coal car was conflicting, but substantial evidence was produced by plaintiff to the effect that it was equipped with a coupler known as "Hein No. 1," which originally, and when in good condition, could be prepared for coupling and would couple automatically by impact, without the necessity of any one going between the ends of the cars in the sense of putting the body entirely between them, but that at the time of the injury to Voelker this coupler had become so defective and inoperative that when the knuckle thereof was closed it was necessary for some one to go completely between the cars to open it, and thereby prepare the coupler for the impact; that this condition of the coupler had existed for such a length of time as to charge the railway company with notice; and that at the time of the injury the knuckle was closed, and, in the discharge of his duty as a switchman, Voelker was entirely between the ends of the cars engaged in preparing the coupler for the impact by opening the knuckle, a task made difficult by the defective and inoperative condition of the coupler. In view of this evidence, and the established facts shown in the statement before made, the court, in substance, said to the jury that it would be assumed that they would find from the evidence that defendant was a common carrier engaged in interstate commerce by railroad, and that the coal car was being used by defendant on its line of railroad in moving interstate traffic, and then instructed them that the branch of the case resting upon the condition of the coupler was controlled by the act of Congress of March 2, 1893, c. 196, 27 Stat. 531, 3 U. S. Comp. St. 1901, p. 3174, relating to safety appliances to be provided and maintained by such common carriers. This is assigned as error, and in support of the assignment it is urged: First. That the act of Congress does not forbid the use of a car having an automatic coupler "to prepare which for the impact" it is necessary to go between the ends of the cars, but is satisfied with a coupler which, when so prepared, will couple automatically by impact; that

the terms of the congressional act are such "that the test of a man going between the ends of the cars is applied to uncoupling only, and that no such test is applied to coupling"; and that plaintiff's petition and the evidence show Voelker "was not attempting to make a coupling," but was simply opening the knuckle of the coupler, the defect in which, if it were defective, did not prevent it from coupling automatically by impact when open, but merely rendered it more difficult to open the knuckle or prepare the coupler for the impact. Second. That there is no evidence but that the car had reached its destination, or that it was intended to be thereafter used in moving interstate traffic. And, third, that plaintiff's petition does not allege that defendant was a common carrier engaged in interstate commerce by railroad, or that the coal car was being used on defendant's line of railroad in moving interstate traffic, and therefore does not state a case controlled by the act of Congress.

The first section of the safety appliance act of Congress of March 2, 1893, requires "every common carrier engaged in interstate commerce by railroad" to equip its engines and trains used in moving interstate traffic with a system of train brakes which will enable the engineer to control the speed of the train. The second section declares:

"That on and after the first day of January, eighteen hundred and ninety-eight, it shall be unlawful for any such common carrier to haul or permit to be hauled or used on its line any car used in moving interstate traffic not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars."

A statute of Iowa enacted April 6, 1892 (sections 2097, 2080, Code 1897), declares:

"After January 1, 1898, no corporation, company or person, operating a railroad, or any transportation company using or leasing cars, shall have upon such railroad in this state any car that is not equipped with such safety automatic coupler," namely: "with automatic couplers so constructed as to enable any person to couple or uncouple them without going between them."

While there is some difference in the words by which these statutes describe the type of coupler with which each requires cars coming within its operation to be equipped, we think both apply the test of whether the person operating the coupler is required to go between the ends of the cars to the act of coupling as well as to that of uncoupling. The risks and dangers which attended the old link and pin system when couplings and uncouplings were effected by going between the cars were such a menace to the lives and limbs of those employed in that branch of the railroad service, and these risks and dangers inhered so largely in the act of going between the cars, whether in the act of coupling or uncoupling, that there can be no doubt of the purpose of the congressional enactment as well as of that of the state to obviate and prevent this act of exposure, which the invention and use of automatic couplers had demonstrated to be wholly, or at least largely, unnecessary. The state statute plainly and without uncertainty calls for "automatic couplers so constructed as to enable any person to couple or uncouple them without going between them." If there be uncertainty in the congressional act, it is obviated by merely inserting a comma after the word "uncoupled" in that portion of the act which

calls for "couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars." The concluding phrase then literally applies to both the coupling and uncoupling. Punctuation is a minor, and not a controlling, element in interpretation, and courts will disregard the punctuation of a statute, or re-punctuate it, if need be, to give effect to what otherwise appears to be its purpose and true meaning. Hammock v. Loan & Trust Co., 105 U. S. 77, 84, 26 L. Ed. 1111; United States v. Lacher, 134 U. S. 624, 628, 10 Sup. Ct. 625, 33 L. Ed. 1080; United States v. Oregon, etc., Railroad, 164 U. S. 526, 541, 17 Sup. Ct. 165, 41 L. Ed. 541; Ford v. Delta, etc., Co., 164 U. S. 662, 674, 17 Sup. Ct. 230, 41 L. Ed. 590; Stephens v. Cherokee Nation, 174 U. S. 445, 480, 19 Sup. Ct. 722, 43 L. Ed. 1041; Sutherland, Statutory Construction, § 232. Obviously, the purpose of this statute is the protection of the lives and limbs of men, and such statutes, when the words fairly permit, are so construed as to prevent the mischief and advance the remedy. The mischief to be prevented rested quite as much in the act of coupling as in the act of uncoupling. Science had offered, and practical use had approved, a remedy applicable not alone to the act of uncoupling, but also to that of coupling. The two statutes, federal and state, seem to have been enacted in pursuance of a common purpose to afford a remedy as broad as the mischief, and to remove the source or cause of the latter through the compulsory adoption and use of a new system of coupling and uncoupling which dispensed with the necessity of any one going between, or at least entirely between, the cars.

The contention that the preparation of the coupler for the impact is distinct from the act of coupling is a mistaken attempt to separate a part of an act from the whole. The preparation of the coupler and the impact are not isolated acts, but connected and indispensable parts of the larger act, which is regulated by these statutes, and the performance of which is intended to be relieved of unnecessary risk and danger.

Counsel for the railroad company deny, and opposing counsel affirm, the existence at the time of the enactment of this legislation of any automatic coupler which could be prepared for the impact or coupling by manipulating a lever or otherwise, without placing any portion of the body between the ends of the cars. The real situation then existing, if shown by evidence produced at the trial, or by something of which judicial notice could be taken, might have an important bearing upon the true meaning of these statutes in respect of the extent to which it was intended to dispense with the necessity of going between the cars; but no evidence upon this point was presented by either party, and counsel have not attempted to call our attention to anything which sustains either of their opposing assertions. An examination of public documents, possibly within the range of judicial notice, tends to confirm the assertion of counsel for plaintiff that such couplers were in existence and in actual use at that time, but we think a determination of this question is not necessary to a decision of this case. There is no doubt under the evidence but that this "Hein No. 1" coupler, when in reasonably good condition, is operated in

this manner: The switchman, by depressing with one hand a lever at the corner of the car, lifts the pin from the socket in the coupler, and, leaning toward the coupler, readily draws the knuckle open with the other hand, an act which is performed in a brief space of time, with slight exertion, and without placing the body completely between the ends of the cars. Plaintiff's petition complains, not of the type of coupler with which this car was equipped, but that defendant negligently permitted it to become and remain so defective and out of repair that it could not be operated in the usual manner; that the pin could not be lifted by means of the lever; and that it was necessary "to go between the cars, insert the hand in the coupler, push the tumbler away from the frame, and then raise the tumbler and pull the knuckle open." In their brief, counsel for plaintiff concede that, if the coupler is operative and in good condition, "this is a reasonably safe method of making the coupling," and that whether this coupler, when in such condition, fully conforms to the congressional or state statute "is not a vital question in this case." For the present purposes it will therefore be assumed—a decision upon the question being unnecessary—that this coupler, if in reasonably good condition, satisfied both statutes. But the evidence produced by plaintiff tended to show that the coupler was not in reasonably good condition; that it had been permitted to become and remain defective and inoperative; that the lever would not lift the pin from the socket; that the knuckle could not be drawn open by leaning toward the coupler and using one hand, but to open it required the presence between the ends of the cars, and between the drawbars, of the entire body of the person attempting it, and also the use of both hands, considerable strength, and more than the usual time; all of which greatly increased the risk and added to the danger of the undertaking. If this was the true condition of the coupler at the time of the injury, it did not satisfy either statute, and its use was violative of one or the other of them, and constituted actionable negligence.

Whether the violation was of the congressional act or of the state statute depended upon whether defendant was a common carrier engaged in interstate commerce by railroad, and was using the car in question on its line of railroad in moving interstate traffic. We think there was evidence that the carriage or movement of the coal with which the car in question was loaded had not terminated, and that the coal was still actually in transit. The evidence contains no suggestion that the car had reached the end of its journey, or that it was to remain indefinitely or for any considerable time on the track where it was at the time of the injury, or that the coal was to be unloaded there. The inference to be reasonably drawn from the evidence is that the car was then about to actively continue the journey toward the ultimate destination of the coal which it was carrying. Whether that was near by or remote is not material, because the shipment had originated in another state, and was already impressed with the character of interstate traffic, which would follow it at least until the actual transit ceased. Defendant was clearly shown to be a common carrier engaged in interstate commerce by railroad, and to be using the car mentioned on its line of railroad in moving interstate traffic,

and therefore the branch of the case relating to the condition of the coupler is controlled by the act of Congress, and not by the state statute. Plaintiff's petition states clearly enough that defendant was a common carrier engaged in commerce by railroad, and that it was using this car on its line of railroad in moving traffic. As stated, the case falls short of coming within the act of Congress only in that the petition does not allege the interstate character of the commerce in which defendant was engaged, or of the traffic which the car was moving. But, whether the case stated is controlled by the act of Congress or the state statute, it is one of actionable negligence, the right and measure of recovery for which are the same in either event, and are to be ascertained and enforced by the same rules. Other allegations bring the case equally within the jurisdiction of the Circuit Court, whether the violation was of one statute or of the other. Defendant offered no objection to the evidence, which without conflict established, as before shown, the interstate character of the commerce in which defendant was engaged, and of the traffic being moved by the car mentioned; nor does it appear that in excepting to the instructions by which the court applied the act of Congress to this branch of the case, defendant put its exception upon the ground that the petition did not state a case arising in interstate commerce. Plaintiff was entitled to be seasonably apprised of the objection if it were intended to be relied upon, and doubtless the court would have permitted an amendment of the petition, as it is manifest the defendant was not misled or surprised by the variance. Under the circumstances the petition may well be considered as having been amended to conform to the facts proved. Code Iowa 1897, §§ 3597, 3600; Rev. St. U. S. § 954 [U. S. Comp. St. 1901, p. 696]; Roberts v. Graham, 6 Wall. 578, 581, 18 L. Ed. 791; Nashua Savings Bank v. Anglo-American, etc., Co., 189 U. S. 221, 231, 23 Sup. Ct. 517, 47 L. Ed. 782; Haley v. Kilpatrick, 44 C. C. A. 102, 104, 104 Fed. 647. We are of opinion that no error was committed in instructing the jury that the branch of the case resting upon the condition of the coupler was controlled by the act of Congress.

It is assigned as error that the court, in effect, instructed the jury to disregard the defense of assumption of risk based upon the allegation, in defendant's answer, that the track on which the coal car was standing was used "to set out and handle thereon * * * cars having some defect in them and needing repairs, as well as other cars not defective," and that this was known to Voelker, or could have been ascertained by him by the exercise of ordinary care. The allegation is not that this was a hospital track, specially designed or used for isolating or holding cars in need of repair or for repairing them, or that the car in question was being moved with a view to its isolation or repair. Section 8 of the controlling act of Congress declares:

"That any employee of any such common carrier who may be injured by any locomotive, car, or train in use contrary to the provision of this act shall not be deemed thereby to have assumed the risk thereby occasioned, although continuing in the employment of such carrier after the unlawful use of such locomotive, car, or train had been brought to his knowledge."

The evidence, without any substantial conflict, showed that this track was principally used in actively handling freight trains and freight cars; that incoming trains were received thereon and the cars distributed therefrom; that outgoing trains were made up thereon and dispatched therefrom; that incoming trains sometimes brought thereon cars in need of repair, and in some instances such cars were temporarily transferred thereto from other tracks; that there was in the yards at Dubuque a hospital track specially designed and used for isolating and holding cars in need of repair; that the practice was to inspect the cars of incoming trains, and to mark those found in need of repair, commonly termed "bad order" cars, in such manner as to indicate their condition, preparatory to their proper disposition, and as a warning to those handling them; and that at the time of the injury this car had not been marked or isolated as in bad order. There was no evidence that Voelker was engaged in moving the car as one in bad order, with a view to its isolation or repair. Of this evidence it is sufficient to say that, working under such circumstances with a car in use contrary to the congressional act does not, in the presence of section 8, amount to an assumption of the risk arising therefrom, and the court very properly instructed the jury to that effect.

As shown in the statement before made, plaintiff's petition rested the right of recovery upon two acts of negligence on the part of defendant, and, as stated in the brief of counsel for plaintiff: "The case was tried to the jury upon the theory that the injury was the result of two concurring or proximate causes: (1) The defective and nonautomatic coupler; and (2) the negligent kicking down of the second cut of cars." It was therefore the right of each party to have the jury correctly instructed respecting each of the claimed acts of negligence the same as if the right of recovery rested upon it alone; and, if there was material error in the instructions given or refused respecting either charge of negligence, the verdict, being general, cannot stand.

The principal allegations constituting plaintiff's second charge of negligence were: First, the existence of a practice in defendant's yards at Dubuque, long recognized by defendant, and amounting to a general custom, requiring, when a car coupler, also called "fieldman," is engaged between two cars in preparing them for coupling, that other cars be not moved against those between which he is engaged without a signal from him; and, second, the kicking or sending of other cars forcibly against those between which Voelker was engaged, without a signal from him, and with knowledge of his exposed position between the cars. The evidence shows that the coal car before mentioned was standing on a freight track distant about 800 feet from a switch which connected it with the main track; that the switching crew, with an engine and 12 or 13 cars, approached the switch from along the main track, and there kicked 8 or 9 of the cars onto the freight track with sufficient force to send them along that track to or near the coal car; that Voelker accompanied the moving cars, riding thereon, for the purpose of controlling their speed and of effecting a coupling between them and the coal car; that the switching crew then kicked 2 of the remaining cars down the main track, then kicked the other 2 cars onto the freight track with sufficient

force to send them along that track to or near the cars first kicked thereon, and then followed the 2 cars sent down the main track. It was the theory of plaintiff's evidence that the cars last kicked onto the freight track moved along that track to the point reached by the cars first kicked thereon, and struck them with such force as to move them against the standing cars and cause the injury to Voelker, who was then between the cars, and engaged in opening the knuckle of the coupler on the coal car, as before stated. Whether the second set of cars actually reached those first sent along the freight track was, however, the subject of conflicting evidence, as was also Voelker's knowledge of the intention to send a second set of cars along that track. The switching crew did not know of Voelker's position between the cars, or that there was occasion for him to go between them. He gave no signal to the switching crew indicating that there was occasion for him to go between the cars, and no effort was made by them to apprise him of the approach of the second set of cars, excepting as it was claimed that he was informed, before leaving the switch, of the intended sending of a second set of cars along the freight track. While the switch and standing cars were widely separated, the view between them was unobstructed, so that Voelker and the switching crew could each have ascertained the movements of the other with little effort. It was important, therefore, to know whether it was Voelker's duty to take the precaution necessary to avoid injury from an exposed position between the cars and the movement of other cars, or whether it was the duty of the switching crew to take this precaution. While the evidence respecting the practice in switching cars and the duties to be performed by those engaged therein was conflicting, that produced by defendant, including the testimony of the yardmaster and of the foreman of the switching crew under whom Voelker was employed, tended to show that the practice long established, generally followed, and effective during Voelker's employment, was that this duty rested upon the car coupler, and not upon the switching crew. The custom is stated by one of the witnesses in this manner:

"Where the cars are kicked onto a track, and a man rides down the first cut, and goes into the field, and other cars are kicked in on the same track, it is not customary or a usual thing for the men who are kicking the cars in to wait before kicking in a second cut, to see where the man is who rode the first cut down. It is not customary for persons kicking in cars in that way to hold up or refrain from kicking them in, after one set of cars is kicked in, until they can see the man in the front, unless they get a signal from him or something. The man who rides down the first string is called the 'fieldman,' and he is understood to take care of himself—look out for himself. These were automatic couplers on these cars. The fieldman sets the couplers so if they come together they will catch. When he goes in, and finds he can't couple, and he understands other cars may come down the track, his duty is to step out. He don't need to give any signal—step out of the way. He would give no signal to the men who were kicking in the cars on the other end, because it wouldn't be necessary. You couldn't stop the cars, kicking them in there. It don't make any difference for that coupling he would let it go. It would be coupled up afterwards."

Another witness put it this way:

"Q. It wouldn't be customary to be looking for that [position of fieldman]? A. No, sir. When we switch cars we always kick one cut in, and the field-

man looks out for them, and keeps on kicking until you get the track filled up. Q. And then you would kick in cut after cut without looking to the fieldman at all? A. Yes, sir. * * * Q. The fieldman, as I understand it, is supposed to look out for himself? A. Yes, sir. Q. By the Court: Is there a difference between the action when a switchman or fieldman is in for the purpose of coupling up the cars? A. If the fieldman ain't got all the couplings made, you get hold with your engine, and couple them all up."

As applicable to this state of the evidence bearing upon the second charge of negligence, defendant requested the court to charge the jury as follows:

"If, while Voelker was working in the yards, it was the general and uniform custom to kick cars down to the fieldman without giving him any notice or warning, and Voelker continued in the service, such custom being practiced or acted on, he took the risks arising from this manner of kicking cars, and no recovery can be had because of injury to him caused thereby."

"If, while Voelker was working in the yard, it was the general and uniform custom to kick cars down to a fieldman, so called, without giving him any notice or warning, and Voelker was acting as fieldman, and cars were kicked down to him without giving him notice or warning, and he remained working in the yard while this custom or practice was observed, there can be no recovery for any injury done him because of the kicking of cars to him without giving notice or warning that it was to be done."

The court refused to so instruct the jury, and gave no other instruction upon the subject. We regard these requests as substantially the same, and think one of them should have been granted. The rejection of both was error. Each is in terms carefully confined to the charge of negligence in kicking or sending down the second set of cars, and each requires that the custom should have been general and uniform, and that Voelker should have continued in the service while the custom was being observed. If it was general and uniform, and was observed during his continuance in the service, it was manifestly within not merely his means of knowledge, but his actual knowledge. He was an experienced railroad employé, and was familiar with this branch of that service, having been in defendant's employ as a brakeman and switchman for a period of eight years. He therefore understood the dangers incident to the observance of such a custom. There can be no claim, under the evidence, that the injury was willfully or wantonly inflicted. Nor was the custom an unreasonable one. Whether or not there was occasion to go between the cars, and thus assume a position of exposure to injury from the movement of other cars, would be known to the fieldman, but not to the switching crew. His position would also enable him to judge of the character and probable duration of the exposure better than could be done by others. He would be primarily in a place of safety, would know that the work in which he was engaged was, in a larger sense, that of moving cars and making up trains, and, being in control of his movements, would not assume a position of danger without some volition of his own. If, in the presence and during the observance of a general and uniform custom of the character stated, Voelker continued in the service of defendant, he assumed the risk of injury arising from its observance.

The judgment is reversed, with a direction to grant a new trial.

BOGEN & TRUMMEL v. PROTTER.

(Circuit Court of Appeals, Sixth Circuit. May 4, 1904.)

No. 1,266.

1. BANKRUPTCY—ACTS OF BANKRUPTCY—SUFFERING PREFERENCE THROUGH LEGAL PROCEEDINGS.

A debtor who does not pay a lawful debt when due, upon which the creditor obtains a judgment against him and levies on his property, "suffers and permits" the creditor to obtain a preference, through legal proceedings, within the meaning of Bankr. Act July 1, 1898, c. 541, § 3, subd. 3, cl. "a," 30 Stat. 546, 547 [U. S. Comp. St. 1901, p. 3422], which, if he is insolvent, and unless he discharges the preference at least five days before the time for sale under the levy, constitutes an act of bankruptcy.

2. SAME—BURDEN OF PROVING SOLVENCY—FAILURE TO PRODUCE BOOKS.

Under Bankr. Act July 1, 1898, c. 541, § 3d, 30 Stat. 546, 547 [U. S. Comp. St. 1901, p. 3422], which requires a person charged with bankruptcy, who denies his insolvency, to appear for examination "with his books, papers and accounts," a merchant is required to produce such books, invoices, etc., as should properly be kept in his business, and which are necessary to show the amount of his assets and liabilities, and his failure to do so, without satisfactory explanation, casts upon him the burden of proving his solvency.

3. SAME—EVIDENCE ON ISSUE OF INSOLVENCY.

Where a portion of the stock of goods of an alleged bankrupt was destroyed by fire shortly before the filing of the petition, and his insurance thereon was unadjusted, it was competent on the issue of insolvency to show the value of his stock before the fire as well as that remaining, and evidence was admissible to contradict or impeach his own estimates or appraisals.

In Error to the District Court of the United States for the Northern District of Ohio.

In Bankruptcy.

Squire, Sanders & Dempsey, White, Johnson, McCaslin & Cannon, and Amos Burt Thompson, for plaintiffs in error.

R. A. Castner and L. F. McGrath, for defendant in error.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

RICHARDS, Circuit Judge, delivered the opinion of the court.

This was a petition filed by the plaintiffs in error against the defendant in error, Jacob Protter, asking that he be adjudged a bankrupt on the ground that, in violation of subdivision 3 of section 3, clause "a," Bankruptcy Act, he had, while insolvent, "suffered or permitted certain creditors to obtain a preference through legal proceedings." Act July 1, 1898, c. 541, 30 Stat. 546, 547 [U. S. Comp. St. 1901, p. 3422]. Protter answered, admitting that judgments had been rendered and executions levied as averred, but denying that thereby he violated the provision mentioned. He also denied he was insolvent, and demanded a jury trial. Upon the trial he appeared for examination, but failed to produce some of the books, papers, and accounts called for by the petitioners. The court declined to hold that for this failure the burden of proving his solvency rested upon him, and, having excluded sub-

¶ 1. See Bankruptcy, vol. 6, Cent. Dig. § 82.

stantially all the testimony offered by the petitioners, directed a verdict for the defendant, on the ground that the evidence did not prove insolvency. The case is here upon certain assignments of error.

1. For some years prior to July 4, 1902, Protter was engaged in the umbrella business in Cleveland, Ohio. His liabilities at that time amounted to about $22,000, and he had insurance policies aggregating $35,000 on his stock of goods. On that day there was a fire in his store, and thereafter he practically did no business. On August 30th he made out proofs of loss, based upon an appraisement made by Hower, an insurance adjuster, and others, in which he claimed his entire loss by fire was $18,476.95. The insurance companies rejected these proofs upon a number of grounds, and up to the time of the trial below no amended proofs had been filed. There were conferences between Protter and his attorneys and the attorneys representing certain of his creditors, at which Protter offered to pay 40 cents on the dollar, the creditors demanding 50 cents, so no agreement was reached. In October two judgments were rendered against him, one in a suit brought by the Wheeler & Wilson Manufacturing Company, the other in one brought by the Rest-Henner-Smith Company, upon which executions issued and levies were made, the property being advertised for sale in the first case on October 25th, and in the second on October 27th. On October 24th the petition praying that Protter be adjudged a bankrupt was filed. It is insisted that, under the circumstances, Protter did not "suffer or permit" these creditors to obtain a preference through the judgments and levies mentioned; that he cannot be said to "suffer or permit" that which he could not prevent; that, to come within the meaning of the law, he must have consciously and voluntarily co-operated with the creditors in "obtaining" the preference. But it was held in the case of Wilson v. Nelson, 183 U. S. 191, 198, 22 Sup. Ct. 74, 77, 46 L. Ed. 147, that "the act of 1898 makes the result obtained by the creditor, and not the specific intent of the debtor, the essential fact." A debtor who does not pay a lawful debt when due, and stands by while his creditor secures a judgment against him and levies upon his property, certainly "suffers and permits" such judgment to be taken, levy made, and preference thereby obtained. The debtor still has the privilege of avoiding the act of bankruptcy by discharging the preference at least five days before the time set for sale. But Protter did not take advantage of this, so the only question in his case is whether he was insolvent at the time he committed the act of bankruptcy.

2. We have quoted the words of subdivision 3 defining the act of bankruptcy charged against Protter. Clause "d" of the same section provides:

"Whenever a person against whom a petition has been filed as hereinbefore provided under the second and third subdivisions of this section takes issue with and denies the allegation of his insolvency, it shall be his duty to appear in court on the hearing, with his books, papers and accounts, and submit to an examination, and give testimony as to all matters tending to establish solvency or insolvency, and in case of his failure to so attend and submit to examination the burden of proving his solvency shall rest upon him."

Protter's assets at the time he committed the act of bankruptcy consisted of his notes and bills receivable (put at $2,436.78), the goods on hand after the fire, and his claim against the insurance companies.

The last two items, the value of his goods on hand after the fire and his loss and damage by the fire, should equal the value of his goods before the fire. To ascertain, therefore, his financial condition, and determine whether he was solvent or not, it was necessary to know the amount and value of the goods he had on hand at the time of the fire, and to do this it was necessary to have the last inventory taken before the fire, with the books showing the purchases and sales since. Under the above provision of the bankruptcy act it was Protter's duty to appear in court "with his books, papers and accounts." The books, papers, and accounts referred to are those material in determining an alleged bankrupt's financial condition. Protter appeared, but he did not produce the books and records which would disclose the amount and value of the goods he had in his store at the time of the fire. He testified that an inventory of his stock was made in December, 1901, showing the goods then on hand were worth about $43,000, but he did not produce this. All he had was what he claimed was a summary of it copied into a small book. Lacking the inventory, he might have supported his statement as to its result by producing his books for the preceding years, but he did not do so. All of the books for 1899 and 1900 were missing, and the ledger, cashbook, salesbook, and checkbook for 1901. Not only were these books missing, but also the more important books for the six months of 1902 preceding the fire—the salesbook, shipping book, cashbook, and ledger. No wonder that Hower, the insurance adjuster employed by Protter, stated on the stand that, with the data he had at hand, it was impossible to determine the amount of the goods totally destroyed! With these books missing, it was impossible to ascertain Protter's financial condition. The law expects a merchant charged with bankruptcy to support his statements by his books, which speak for themselves. If he submits to examination and produces his books, and his insolvency does not appear, the burden is upon the petitioners to make the proof; but if he fails to appear for examination, or fails to produce his books, the burden is upon him to prove his solvency. In this case the testimony showed the salesbook for 1902 was on hand just before the fire. It disappeared after the fire, although it was not burned up. So with the other books. No satisfactory explanation of their disappearance was furnished. It is not sufficient for an alleged bankrupt, when called upon to produce his books, to say, "I don't know where they are." It is his business to know where they are. They are the only proper proof of his financial condition. He must not only keep proper books of account, but preserve them, and produce them when called upon. He fails to do so at his peril. The court should have held that under the circumstances the burden of proving his solvency rested upon Protter.

3. The inventory on which Protter's proof of loss was based was made by Hower, an insurance adjuster, Wise, a clerk of Protter, and two others. Hower wrote down the items, which were called out by Wise. The quantities were given by Wise, the prices by Protter. Where the goods were in the original bolt or package, the yardage on the tag was taken. If the bolt had been broken, the quantity was estimated by counting the folds. In this way the appraisers estimated the goods on hand to be worth $22,864.08, sound value. The damage to

them was arbitrarily placed at 65 per cent., or $14,849.95. The goods totally destroyed were estimated at $3,180. Hower stated that it was entirely impossible to determine the value of the goods totally destroyed. They had no data to go back to—no inventory of the goods. All they had to depend on was the information given them by Protter as to what was stored where the fire was the worst and the contents of the shelves totally burned. Protter objected to placing the value of the goods totally destroyed at $3,180, and urged a higher figure, but Hower and Protter's lawyer both insisted that no larger claim for goods totally destroyed should be made until additional proof was secured. If he could furnish further proof, the claim in that regard could be amended. Shortly after the Protter appraisement, and while the goods remained undisturbed, an appraisement was made by the fire marshal and four men of experience—Lowe, Lemmers, Bruce, and Sommers. Lowe had been in the umbrella business 13 years. This appraisement began about July 30th. The appraisers had the benefit of the inventory made by Protter's appraisers. Lowe testified there was no evidence of a big fire. There were three rooms in the building—a front room, used as an office and salesroom; a middle room, used as a stockroom; and a rear room, used as a workshop. The bulk of the stock was in the middle room. There was evidence of fire in four or five places in the room. The stock for the most part was in cases and covered up, so was not badly damaged. The appraisers were engaged nine days. They found the items set out in the former appraisement, but the quantities were not the same. There was a shortage in the yardage. They would find an original bolt of silk marked "105 yds." on the tag, and on measuring it would find only 55 or 60 yards. In at least a third of the cases the tags had been torn off. As the result of the appraisement, the sound value of the goods found was placed at $9,015.26, and the actual value at $7,706.16, leaving $1,310.10 as the loss and damage under the policies. Before Lowe's examination was concluded, he was stopped by the court virtually taking the position that testimony which tended to impeach the correctness of the appraisement made by Protter, or to show there could not have been on hand at the time of the fire the amount of goods Protter claimed was on hand, was incompetent. Thus the witness was not permitted to answer the question: "And in how many cases did you find the yardage incorrect in the Protter inventory?" The court took the view that all testimony given by Lowe went to an issue which would have to be tried somewhere else, namely, the amount Protter should recover on his policies; that the fact of holding policies in solvent insurance companies to the amount of $35,000 raised a presumption that that was valid insurance, and that whatever assets he had when the fire occurred were prima facie covered by that insurance. Accordingly, the court refused to permit the other appraisers, who, along with Lowe, had gone over Protter's stock of goods after the fire, to testify, and, having thus excluded the evidence impeaching Protter's statement and inventory, directed a verdict for the defendant, on the ground there was no proof of his insolvency. We think the court was palpably wrong in excluding the testimony offered and in directing a verdict for the defendant. Because Protter failed to produce his inventory and books, it did not follow that his verbal statement of the

amount of goods he had on hand at the time of the fire was conclusive. His own appraisers first contradicted his statement, and impeached the alleged inventory on which it was based, by making out a proof of loss, which placed the sound value of the goods on hand at the time of the fire at $26,000, instead of $43,000. The claim against the insurance companies based upon this appraisal amounted to about $18,000. It was undoubtedly true, as the court suggested, that, having ascertained the value of the goods on hand before the fire, the presumption was that the policies, being in solvent companies, would make good the loss. But conceding this, the question remained to be determined by the jury, "What was the value of the stock on hand at the time of the fire?" The proper proofs of this, to wit, the inventory and books, were not produced, and in their absence it was necessary to resort to other testimony. The method which Protter himself employed in preparing his proof of loss was an appraisement which would not only ascertain the goods on hand and their value, but serve as a basis for an estimate both of the damage to them and of the amount and value of the goods totally destroyed. Certainly it cannot be contended that because Protter had policies aggregating $35,000, and a fire took place in his store, therefore it must be presumed that his claim against the insurance companies amounted to the face of the policies. The policies were merely contracts to make good whatever loss or damage he might suffer by fire, not exceeding $35,000. His claim must be measured and limited by the extent of his loss and damage, and this obviously by the value of the goods on hand when the fire broke out. If he only had $15,000 worth of goods on hand, he could not be damaged to any greater extent. It was therefore entirely competent to introduce testimony tending to show that he never had on hand at the time of the fire $26,000 worth of goods. Taking the character of the goods he dealt in, and which he described, it was competent to show that there was not space enough in his store to hold $43,000 worth of such goods. It was further proper to show that Protter's appraisement was wrong, if not fraudulent; that the quantities were overstated; that, instead of having on hand after the fire $22,000 worth of goods, he only had $9,000 worth. The court therefore erred in excluding the testimony referred to.

4. Protter stated that his accounts and bills receivable amounted to $2,436.78. Lowe and the appraisers who worked with him ascertained the goods on hand, after the fire, to be worth (sound value) $9,015.26, and Protter's appraisers placed the value of the goods totally destroyed at $3,180.00. These amounts aggregated $14,632.04, and it was conceded that Protter's liabilities amounted to $22,000. In view of this, we think it was for the jury to determine whether Protter was insolvent or not. The court erred in taking the case from the jury and directing a verdict for the defendant.

The judgment of the court below is reversed.

ALDEN SPEARE'S SONS CO. v. HUBINGER.

(Circuit Court of Appeals, Eighth Circuit. March 28, 1904.)

No. 1,978.

1. SALES—BREACH OF CONTRACT—DAMAGES—MARKET VALUE—SALE OF GOODS—REASONABLE TIME.

   Where, on a breach of a contract of sale, the seller elects to sell the property at public sale for the purpose of establishing its market value, the sale, in order to be effective for that purpose, must be made within a reasonable period after the buyer has broken his contract, and the seller must exercise good faith and reasonable diligence to sell the goods for the best price obtainable.

2. SAME—INSTRUCTIONS.

   Where, after breach of a contract for the sale of starch on July 1, 1900, the seller did not sell the starch for the purpose of establishing its market value, until March, 1901, an instruction submitting the question whether the sale had been made within a reasonable time, so as to be binding on the buyer in an action for breach of contract, that the seller was required to use diligence to sell it at the best possible advantage, within a reasonable time after notice to the buyer, and that it was for the jury to say under all the circumstances whether the sale was made within a reasonable time, and that the fact that the buyer had some one representing him at the sale could not be held to be an acquiescence in it, was proper.

3. SAME—CONTRACTS—PARTIES.

   Where in an action for breach of a contract for the sale of starch the issue whether the starch was purchased by H. individually or by a corporation of which he was the president was properly submitted to the jury, which was left at full liberty to determine the question according to the evidence, as they saw fit, a statement of the judge in his charge that he thought that neither of the parties was satisfied with a telephone communication between H. and plaintiff's agent, during which H. gave the order, and that a letter written on behalf of the corporation the next day, confirming the purchase, really formed the contract, was not error.

In Error to the Circuit Court of the United States for the Southern District of Iowa.

This case was tried in the lower court on a complaint filed by the Alden Speare's Sons Company, the plaintiff in error, which contained the following allegations: "On or about January 5, 1900, plaintiff sold to defendant ten car loads of wheat starch at the agreed price of 5½ cents per pound f. o. b. Indianapolis, Indiana, to be shipped on or before and after July 1, 1900, to J. C. Hubinger Company, Indianapolis, Indiana, as ordered by defendant. Said ten car loads of starch to aggregate 381,710 pounds, and was of the value of $20,994.05. Upon the sale of the said ten car loads of starch to defendant, plaintiff purchased of the Crystal Springs Manufacturing Company, for the purpose of meeting its obligations to defendant, the aforesaid ten car loads of starch. Defendant refused and declined to accept and receive the said ten car loads of starch, and on or about the ——— day of ———, 1900, notified the plaintiff in writing not to ship said ten car loads of starch, and that he did not want and would not receive and accept same. On or about the 16th day of March, 1901, plaintiff, after due notice to defendant thereof at No. 369 Atlantic street, in the city of Boston, in the state of Massachusetts, sold the aforesaid ten car loads of starch at public sale, upon and for defendant's account, to the Liberty Oil Company at the price of four cents per pound, the best offer received therefor, for the sum of $15,268.40. The cost of transporting the said ten car loads of starch to Indianapolis, Indiana, would have been one-fourth cent per pound, or a total of $954.27. There is due plaintiff from defendant the sum of $4,771.38 together with 6 per cent. interest from March 16, 1901. Wherefore plaintiff demands judgment against the defendant for the sum of $4,771.38, together with 6 per cent. interest from date until paid,

and costs of suit." The defendant, by his answer, averred, in substance, that the starch in question was ordered by the J. C. Hubinger Company, a corporation, and not by J. C. Hubinger individually; that on February 24, 1900, the defendant and the said J. C. Hubinger Company notified plaintiff to make no further shipments of starch, and cancel the order; that subsequently, on or about April 20, 1900, they again notified the plaintiff that they did not desire any further shipments of starch under the aforesaid order, and that personal notice was given to the plaintiff's agent in Chicago on or about the dates last aforesaid that the J. C. Hubinger Company would not be able to take the starch; that the plaintiff, when thus notified to cancel the order, made no objection to the cancellation, and gave no notice that it would insist upon the fulfillment of the order; that long afterwards, and on or about July 28, 1900, the plaintiff and the defendant settled certain litigation which was pending between them in the courts of Iowa, and that at said settlement no notice was given to the defendant that the plaintiff had a claim against the defendant or the J. C. Hubinger Company growing out of the cancellation of the aforesaid order; that thereafter, on March 16, 1901, the plaintiff caused ten car loads of starch, which it claimed to have sold to the defendant, to be resold on account of the defendant; that no proper or sufficient notice of the sale was given to the defendant; and that the sale was not made in good faith, or in such a manner as to bind the defendant. The case was tried to the jury on the aforesaid issues, and resulted in a verdict in favor of the defendant below, who is also the defendant in error here.

W. J. Roberts (Almon W. Bulkley and Bulkley, Gray & More, on the brief), for plaintiff in error.

John E. Craig and Theodore A. Craig (James C. Davis, on the brief), for defendant in error.

Before SANBORN, THAYER, and HOOK, Circuit Judges.

THAYER, Circuit Judge, after stating the case as above, delivered the opinion of the court.

It will be observed that the complaint on which the case was tried failed to show the market value of the starch at the time and place of delivery. Neither did it contain an allegation that there had been a decline in the market value of the commodity intermediate the sale and the time of delivery, nor an express allegation that the plaintiff had sustained damage. The action seems to have been brought on the theory that it was sufficient to allege that at the sale made in Boston in March, 1901, nearly nine months after the time of delivery specified in the contract, the starch did not bring as much as the contract price, and that this allegation alone entitled the plaintiff to recover the difference between the contract price and the price for which it had been sold. Counsel for the plaintiff in error concede that the damages recoverable for the breach of a contract of sale is the difference between the contract price and the actual market value of the commodity at the time and place of delivery. They contend, however, that when a contract of sale is broken the vendor may sell the article for the purpose of establishing its market value; that the market value may be proven in this way as well as by the testimony of witnesses, and that the sum bid for the starch at the public sale in Boston in March, 1901, was prima facie evidence of its value when the contract was broken, and that it showed a decline in the market value, and consequent damage.

Assuming, without deciding, that there might have been a recovery of substantial damages although it was not expressly alleged that the market value of the starch at the time and place of delivery was less

than the contract price, and although it was not expressly alleged that the plaintiff had sustained damage; and assuming farther that a vendor of merchandise, if the vendee declines to accept it, may cause the same to be sold for the purpose of establishing its market value—still, when property is thus sold by the vendor to establish its market value, the sale must be made within a reasonable period after the vendee has broken his contract, and in making the sale the vendor must exercise good faith, and do whatever may be done in the exercise of reasonable diligence to make the property sold bring the best price. Moore v. Potter, 155 N. Y. 481, 487, 50 N. E. 271, 63 Am. St. Rep. 692; Tripp v. Forsaith Mach. Co., 69 N. H. 233, 45 Atl. 746; Brownlee v. Bolton, 44 Mich. 221, 6 N. W. 657; McCombs v. McKennan, 2 Watts & S. 216, 37 Am. Dec. 505; Mechem on Sales, § 1650. In the case in hand it was the function of the jury to decide whether the starch in question was sold by the plaintiff company within such a reasonable period of time after July 1, 1900, and under such circumstances, as would warrant them in finding that the price bid at the sale was the fair market price of the starch at that time and nine months previously—that is to say, when the contract was broken. This question was in fact submitted to the jury. With reference to this phase of the case the trial court charged the jury as follows:

"Now, then, what is a reasonable time, so far as this case is concerned, is at least a question of fact for you, gentlemen. Here is a starch manufactured, it seems, from flour; possibly some other ingredients; I do not know as to that. They must offer it upon the markets if it is already manufactured. They must use diligence to sell it at the best possible advantage, and, if they intend to make a public outcry, and if it is sold at such a sale as that, within a reasonable time, they must give Mr. Hubinger notice that they intend to hold him for the difference between the contract price and what it sells for, so that he can do what to him seems proper to protect himself. The evidence is without conflict that there was no notice given until some time the next March. Now, that is a question for you to say, under all the circumstances, was that within a reasonable time? And, if not, then this auction sale in this building in the city of Boston would in no wise be binding upon Mr. Hubinger. The fact that he had some one there representing him will not be an acquiescence in it, because he would have a right to see what was going on; and if you find that that was an unreasonably long time after this contract had been canceled, then that auction sale would in no wise be binding upon Mr. Hubinger in fixing the amount of damages."

This instruction is criticised as having been erroneous. It is said that, if the sale of the starch was made within a reasonable time after the defendant had declined to accept it, the price which it brought was conclusive evidence of its market value at the time of the breach, and that, although the vendor may have suffered an unreasonable time to elapse before exposing it to public sale, yet the price bid for it at the sale was at least prima facie evidence of its value during the preceding nine months, and that the trial court erred in not instructing the jury to that effect. We are unable to assent to that view. If a vendor resorts to the expedient of selling property which the vendee has declined to accept, for the purpose of establishing its market value and the amount of his damages, he should do so within a reasonable period after the contract is broken. When the vendor retains the property sold for months after the vendee has declined to accept it, and then exposes it to sale, the law will hardly indulge in the presumption that

the value of the article has remained stationary in the meantime, and that the price realized is a fair test of the value of the article at the time of the breach. We are of opinion, therefore, that the trial court was right in directing the jury that the price which was bid for the starch in Boston in 1901 would not be binding on the defendant in fixing the amount of the damages, provided the jury found that the sale was not made within a reasonable time after July 1, 1900. The plaintiff company made no attempt to show that it had sustained damage otherwise than by proving that at the public sale in March, 1901, the starch had been sold to the highest bidder at 4 cents per pound, which was 1½ cents per pound less than the contract price. It seems to have relied for a recovery exclusively upon this evidence, and as the jury, acting under the instruction above quoted, most likely found that the sale was not made within a reasonable period, and was not binding upon the defendant for the purpose of fixing the amount of the plaintiff's damages, there was in fact no evidence before the jury which would have warranted them in finding that the plaintiff company had sustained any substantial damage such as could be recovered from the defendant.

The pleadings in the case presented another issue of fact, namely, whether the contract for the sale of the starch was made by Hubinger individually or with the J. C. Hubinger Company, and it is claimed that the trial court practically withdrew this issue from the jury by directing them that the contract was made with the company, and not with Hubinger. The record discloses that the order for the starch was first communicated over the telephone by Hubinger in person to the plaintiff's agent in Chicago, Ill., on January 5 or 6, 1900. At the conclusion of the message there was some difficulty with the wires, but Hubinger was understood to say that he would write to the agent that night. A letter was written that night or the following morning, and mailed at Keokuk, Iowa, where Hubinger resided, and where the J. C. Hubinger Company was also located and engaged in business. This letter was as follows:

"Keokuk, Iowa, Jan. 6, 1900.

"Alden Speare's Sons Co., Chicago, Ill.—Gentlemen: * * * You can book our order for 10 cars of wheat starch to be delivered between now and July 1st., allowing us 60 days time on each car, which time is the dating that we have to allow on our bills.

"I was adding this clause when phoning you in Chicago, but was cut off, so thought you might not have caught that part of the conversation. It is understood of course that the starch is to be thin boiling pure wheat starch and first class in every respect.

"Very truly, J. C. Hubinger Co."

At the commencement of his charge, in reviewing, in a general way, the circumstances under which the contract was made, the trial judge remarked casually, "So I think it is fair to say that, in view of the fact that neither of the parties were satisfied with the telephone talk, that this letter of the next day really forms the contract." Afterwards, however, the question whether the contract was made with Hubinger individually or with the Hubinger corporation, of which he was president, was submitted to the jury in the following language:

"It is claimed by the defendant that this contract was made by the Hubinger Company, a corporation. If that is true, then in no event can there be any

recovery by the plaintiff in this case. Mr. Horr, the representative of the plaintiff, says he understood, not only from past dealings, but from this conversation on the telephone on the 5th of January, that it was Mr. Hubinger as an individual. The letter here would indicate that it was done by the corporation. One of the letters of cancellation, or which is offered and contended to be a cancellation, on the 24th of February, is likewise signed by the corporation. The second letter of April 20th is signed by Mr. Hubinger as an individual. So that is one question of fact you gentlemen will determine—with whom was this contract made by the plaintiff, with the Hubinger corporation or with Mr. Hubinger as an individual? Because it makes no difference who they are in this corporation. So far as we know, Mr. Hubinger may or may not have owned all the stock. He may or may not have been the controlling officer. But if by the corporation, he, as an individual, under the laws of Iowa, would not be responsible for the corporation; at all events so far as this case is concerned. So you will determine that in your own mind, and if you find that it was by Mr. Hubinger as an individual then you will consider the case without reference to that question. If you find it was by the Hubinger corporation, your verdict will be for the defendant."

It is manifest, therefore, that the question whether the contract for the sale of the starch was made with the defendant as an individual or with the corporation of which he was president was submitted to the jury, and there seems to be no substantial basis for the contention that this issue was withdrawn from their consideration. The remark that was made by the trial judge at the commencement of the charge amounted to no more than an expression of opinion, but, as the jury were subsequently left to determine the issue as they thought proper, the plaintiff company has no just ground for complaint, since a trial judge is always at liberty to express his opinion on any issue of fact which arises in a case, provided the jury is ultimately left at full liberty to determine it.

After a careful examination of the record and the briefs, we have reached the conclusion that the jury must have found either that the plaintiff company had not sustained any damage in consequence of the alleged breach of the contract, or that the contract was in fact made with the J. C. Hubinger Company, and not with the defendant. The verdict can be accounted for, we think, on no other ground, and in our judgment these issues were properly submitted to the jury. The plaintiff company did not ask the trial judge to declare that it was, in any event, entitled to recover nominal damages, nor is this court asked to reverse the judgment below for that reason.

Under these circumstances no sufficient reasons exist for the reversal of the judgment below, and it is accordingly affirmed.

CECIL v. AMERICAN SHEET STEEL CO.

(Circuit Court of Appeals, Sixth Circuit. May 5, 1904.)

No. 1,231.

1. MASTER AND SERVANT—MINES—TIMBERS—DUTY TO FURNISH—STATUTES.
Rev. St. Ohio 1892, § 6871, requires the owner or operator of every coal mine to keep a supply of timber constantly on hand, and to deliver the same to the working place of the miner, and declares that no miner shall be held responsible for accidents which may occur in the mine where the provisions of such section are not complied with. *Held* that,

since the act did not define the degree of care required of the mine owner in providing timber, such care must be determined by the principles of the common law.

2. SAME—INJURIES TO MINER—FALLING ROCK—DEFECTIVE TIMBERS.
Where a miner was struck by a rock falling from the roof of the mine by reason of the alleged insufficiency of a timber cap furnished to support the roof, plaintiff, in order to recover, was not required to establish demonstratively that the stone would not have fallen, except for the defective condition of the cap, but was only required to introduce proof, direct and circumstantial, sufficient to show that the stone would probably not have fallen, except for the breaking of the defective cap.

3. SAME—PROXIMATE CAUSE—QUESTION FOR JURY.
In an action by a miner injured by the falling of a stone from the roof, whether the alleged defectiveness of a pillar cap furnished to support the roof was the proximate cause of the accident *held* a question for the jury.

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

This suit was instituted in the court of common pleas for Tuscarawas county, Ohio, to recover damages for a personal injury suffered by plaintiff in error while in the employment of the defendant in error as a coal miner. The action was removed into the Circuit Court of the United States for the Eastern Division of the Northern District of Ohio, held at Cleveland. On the trial of the case, and when all the evidence was in, the court, on motion, directed a verdict for defendant, on which judgment was entered. Exceptions were duly taken, and, to revise the judgment, the case is brought to this court on writ of error.

The work in which the plaintiff was engaged at the time of the accident which caused the injury was that of removing or mining pillars of coal left in branch or side entries to the main entry of what is called a "drift mine" belonging to defendant. As side entries were made or driven, in the progress of the work, large pillars or blocks of coal were left to support the slate or soapstone roof of the entries left by mining and removing the coal on all sides of these pillars. When finally these entries were extended as far as the coal justified, and it was determined to abandon them, the pillars of coal were mined and removed. The plaintiff was engaged in mining one of these pillars, and had been engaged in that particular work for two weeks. While doing this work, it was the miner's duty to prop and support the roof of stone or slate by timber posts placed in an upright position, with a cap piece fixed against the roof. These posts were about 4 inches in diameter, with caps 6 inches wide, 18 inches long, and about 1½ inches thick. These timbers were sent to the miners in the entries, and each miner did his own propping. The miner was furnished with the usual miner's lamp, of about three candle power. On the day of the accident, plaintiff had, on going into the mine, examined or "sounded" the roof in the usual way, and placed in position, as usual, three posts, with caps, from timber furnished and placed conveniently close by the master. After proceeding two hours or more with the work, a piece or slip of stone fell from the roof above, where the mining had just been done, striking plaintiff, and inflicting serious injury. This slip or block of stone weighed about 500 pounds, was 3 feet long, 8 inches wide, and 8 inches thick in the middle, from which it sloped towards the ends, at which it was wedge-shaped.

The plaintiff's case is stated in the petition as follows:

"That, as a part of his duties as such coal miner, he was required to, and did, perform the work of taking out pillars or posts of coal between rooms in said coal mine; and he was also required to keep the roof of said coal mine, at or near where he was working, propped with posts, or timbers and caps, so that said roof would not fall in, thereby endangering the life or limbs of himself or other employés of the defendant.

"Plaintiff further says that it was the duty of the defendant at all times

to furnish plaintiff, at his working place in said coal mine, with good, sound, and substantial timbers and caps, with which to keep said roof propped in a safe and sufficient manner, but the defendant, disregarding its said duties in the premises, at the time hereinafter stated, wrongfully, carelessly, and negligently failed to furnish plaintiff with good, sound, substantial timbers and caps, as it was bound to do, and avers that one of the caps furnished by the defendant to plaintiff, to be used in propping the roof at or near where plaintiff was working in said mine, and so used by the plaintiff, was unsound, rotten, and defective, and wholly unfit for the purposes for which the same was intended, as defendant well knew.

"Plaintiff further avers that on or about the 11th day of November, 1901, while so engaged as a coal miner in said defendant's said mine, said rotten and defective cap broke and gave way, and caused the roof of said coal mine, at and near where plaintiff was at the time working, to fall in, by reason whereof a large stone, with slate, etc., fell on plaintiff, striking plaintiff on his back, and on the spinal column thereof, fracturing the vertebra of plaintiff's spinal column, by reason whereof plaintiff's spinal column and nervous system has been permanently injured, and plaintiff has ever since been sick, lame, and diseased.

"Plaintiff avers that said injuries were caused without any fault or neglect on his part, but wholly on account of the carelessness and negligence of the defendant; that plaintiff had no knowledge whatever that said cap was unsound or defective or rotten; that he used all the timbers and caps furnished him at the time by the defendant to prop said roof; and that, before using the same, he used ordinary care to determine whether the same was sound and fit for the purpose intended."

There was evidence to show that the posts and caps were properly set, in the usual way. About four or five inches of one end of the stone slip which fell rested on the end of the post cap, as appeared by the opening in the roof left by the falling stone. The evidence tended to show that the piece of the cap which broke off was five or six inches long, and was defective, "by being wormy," and was somewhat decayed from exposure to weather, or, as the witnesses say, was "brash wood," and was partly rotten. The break in the cap was a square break across the grain.

The view of the learned judge below appears in the peremptory instruction to the jury, which, taken from the record, is as follows:

"It must be shown, as a part of the plaintiff's case on this theory, that this rock would not have fallen, except for the rottenness of this cap. Now, that is not shown. It is guessed at. It is surmised. But there is the evidence that it was supported by the coal under it, and that, when the coal was removed, it fell, and that it was of certain dimensions and weight. It would be extremely improbable that a board four inches long was destined to support a 500-pound stone of those dimensions. And under the consideration of the testimony, that there is an insufficient amount to show that the condition of the board that broke was the proximate cause of this accident, I cannot escape from the first conclusion that I came to—that it is not shown in such a way but what the court will be bound to set aside a verdict, if the jury said that was the occasion of the accident. And therefore a verdict is directed for the defendant."

Section 6871 of the Revised Statutes of Ohio of 1892, cited as having a material bearing on the case, is as follows:

"The owner, agent or operator of every coal mine shall keep a supply of timber constantly on hand and shall deliver the same to the working place of the miner and no miner shall be held responsible for accidents which may occur in the mine where the provisions of this section have not been complied with by the owner, agent or operator thereof."

Foran, McTighe & Gage and T. H. Loller, for plaintiff in error.

E. K. Wilcox, for defendant in error.

Before LURTON and RICHARDS, Circuit Judges, and CLARK, District Judge.

CLARK, District Judge, after making the foregoing statement, delivered the opinion of the court.

After this somewhat full statement of the case, it does not seem to require extended discussion. It is very clear that this statute imposes on the owner or operator of a coal mine the duty to keep constantly on hand a sufficient supply of timber, without undertaking to declare or define the degree of care which the mine owner or operator must exercise in that regard. The degree of care, therefore, which must be exercised, is left to be determined on common-law principles, and this statute may therefore be put aside without further discussion.

As will appear from the comments of the court below in giving a peremptory instruction for defendant, the ruling was based upon two grounds; the first being that it was necessary for plaintiff to show "that this rock would not have fallen, except for the rottenness of this cap," and, second, that the breaking of the board was not shown to have been the proximate cause of the accident.

In regard to the first proposition, the remark of the court was: "Now, that is not shown. It is guessed at. It is surmised." It is not altogether clear, in view of this language, what was the extent and character of the evidence which it was thought would be necessary to establish a prima facie right to recover. If it had been regarded as legally permissible for the plaintiff to establish by testimony reasonable grounds of presumption or probability as to the cause of the accident, and for the jury to infer from such evidence, direct and circumstantial, that the slip of stone would probably not have fallen, except for the breaking of the defective timber, and that the breaking of the timber support was therefore a proximate cause of the accident, it is very difficult to conceive that it would not at once have been recognized that the question was one of fact, and, as such, required submission to the jury for determination. The view, if entertained, that the plaintiff must, in order to recover, show positively that "this rock would not have fallen, except for the rottenness of this cap," was to require an impossibility. In the very nature of the case, it could never be established demonstratively that the stone would not have fallen, except for the rotten condition of the cap. The case could be determined and disposed of only on the reasonable and stronger probabilities of the situation in the light of all the attending circumstances and conditions. The question was largely one of opinion, based on such justifiable inferences as might be drawn upon reasonable grounds from the facts found by the jury, so far as these were disputed. Such conclusions as might be reached were conclusions of fact, however, and not of law. The issue was one of fact, to be disposed of in a practical and substantial way, and not on the purely speculative theory whether the stone slip might have become loose, and might have fallen, regardless of the fact that the post cap was rotten, or if it had been sound. The proposition that the breaking of the defective timber was the proximate cause of the falling of the stone and of the accident was necessary for the plaintiff to establish, not demonstratively or conclusively, so as to exclude doubt or denial, but probably, and this probability should, on the whole of the evidence, outweigh, by a fair preponderance, the evidence in favor of any other view or probability. Just what caused the stone to fall is

a question which admits of only an answer in its nature a probability, and involving, in its last analysis, to an extent, matter of opinion. There was certainly evidence tending to show that the breaking of the supporting cap timber caused or permitted the stone to fall.

One of the witnesses in the case (Opphill, a miner of 20 years' experience) was required by the court to express an opinion as to the cause of the falling of the stone, as will appear in the following questions and answers:

"Q. And where was that stone before it fell, with reference to this cap which you say broke? A. Up in the roof. Q. Was any portion of that stone over the piece before it fell? A. It was about half. Q. By the Court: Half of the stone? A. No; just the edge. Q. Just the edge of the stone was over the cap? A. Yes, sir. Q. The rest of the stone was not supported at all? A. I couldn't tell that. Q. There was nothing there to support it, was there? A. No, sir; I don't suppose there would be. Q. Now, what do you say, Mr. Opphill? Did the stone break the cap, or the cap break and let the stone fall? A. *The cap broke and let the stone fall.* Q. What broke the cap? A. The stone, I reckon. Q. And just one edge of that stone—not more than four inches—could be over that cap, and the rest of that whole big stone was outside? A. Yes, sir. Q. Can you tell us what proportion of the weight of that stone would rest upon that cap, before it fell, from the position which you say it occupied? A. You mean the weight of the rock? Q. By the Court: How much of the weight of the rock was on this piece of cap before the stone fell? If it weighed 500 pounds, how much weight of that 500 pounds was on the cap? A. Just the edge of it. Q. How much of the weight would be on that cap? A. I couldn't tell."

So, too, in the testimony of plaintiff, Cecil, the following questions and answers occur:

"Q. Now, you may state what happened, if anything, as you were there working? A. *The timber broke and let the roof cave in on me. The cap broke.* Q. By the Court: What timber? A. The cap on top of the post."

Besides this, there were all the particular circumstances of the situation for consideration, such as the extent to which the stone slip projected over on the edge of the supporting cap or board, and the weight which a board or timber of that thickness, if sound, would probably have supported, and the extent to which this support would have tended to prevent the falling of the stone, the distance to which the stone had been cut away from the prop, and other like circumstances.

In view of the entire evidence found in this record, we know of no doctrine or principle which would sustain the view that, as matter of law, the testimony was insufficient to go to the jury upon the question as to whether the stone slip would have fallen, except for the defective condition of the post cap. We think this was a question of fact on which the plaintiff was entitled to go to the jury.

In the case of Choctaw, Oklahoma, etc., R. R. Co. v. Holloway, 191 U. S. 334, 24 Sup. Ct. 102, 48 L. Ed. 207, the testimony showed that an engine was being run backward at night by the engineer and fireman, when, on coming upon a trestle, the engine collided with a horse upon the trestle and was derailed, and the fireman caught between the tank and engine, and seriously injured. The engine was not equipped with brakes. There was evidence that the engine could have been stopped more quickly with brakes than without them. One ground on which the charge of negligence was founded was the fact that, when the engineer

discovered the horse, he applied the brakes on the tender successfully, but this was without effect on the engine, which was forced, with its weight and momentum, against the tank or tender. In disposing of the ground on which the defense rested, the court, by Mr. Justice Peckham, said:

"It is insisted, however, on the part of the defendant, that the court erred in not holding that the absence of brakes on the engine was not the proximate cause of the injury, that the presence of the horse on the trestle was the proximate cause of derailing the tender and engine, and that the company was not guilty of any negligence by reason of which the horse came upon the trestle. We think this claim is unfounded, and that the proximate cause of the injury, within the meaning of the law, was the absence of the brakes on the engine. At any rate, there was evidence which made it a question for the jury to say whether the accident would have happened if there had been brakes on the engine, in good order and fit for use. It may be assumed that there was no negligence on the part of the defendant, by reason of which the horse came upon the trestle, and that it was not, therefore, responsible for any damage of which the horse was the sole and proximate cause. We think one proximate cause of the accident was the absence of the engine brakes. The purpose of a brake is to stop the engine more promptly than can be done without it, and, if there had been a brake on the engine, it *would, if used, have probably prevented the accident.* At any rate, there was evidence to that effect. The absence of a brake, which, if present, would have prevented the accident, was therefore a proximate cause thereof."

To same effect is the opinion of this court in Postal Tel. Co. v. Zopfi, 73 Fed. 609, 19 C. C. A. 605.

As will be perceived, it was adjudged that the proximate cause of the accident was a question for the jury, in the consideration of which the jury might infer that, "if there had been a brake on the engine, it would, if used, have *probably prevented* the accident." (Italics in all quotations ours.) In respect of both points, the ruling is, in principle, opposed to the views expressed by the court below on facts similar, in substantial effect and bearing, to those found in this record. In relation to these points, the case of Mexican Cent. Ry. Co. v. Murray, 102 Fed. 264, 42 C. C. A. 334, is also instructive.

It is well settled, and not denied, that, in a case like this, where the servant does the constructive work on an appliance, such as these props, for his own safety, the master's duty is to exercise reasonable care to furnish sound and suitable material and timber for the work, and to make reasonable and proper inspection in that regard. Mexican Cent. Ry. Co. v. Murray, 102 Fed. 264; 42 C. C. A. 334; Texas & Pacific Railway v. Archibald, 170 U. S. 665, 18 Sup. Ct. 777, 42 L. Ed. 1188, and cases cited.

In the court below, the point whether the defect, if one, was latent or patent, seems to have entirely escaped attention. This is an embarrassing difficulty in the case. Of course, if the defect in the post cap was patent, or such as should have been discovered by reasonable and ordinary inspection, the master would be liable; otherwise not. A brash or defective condition of the timber might be discovered after it was broken across the grain, and thus exposed, which would not be previously discoverable by ordinary and reasonable inspection. It is impossible to deal safely or intelligently with this phase of the case, although the question is suggested by what is found in the record. The

point can be properly considered and disposed of on a new trial only.

The argument for defendant in error is, in part, devoted to an effort to show that the contributory negligence of the plaintiff was so conclusively and plainly evident as to make it a question of law for the court, and it is sought to sustain the ruling in the case on that ground. This defense, however, if relied on, obviously presents an issue of fact to be submitted to the jury.

Our conclusion being that there was error in the withdrawal of the case from the jury, it results that the judgment is reversed, and the case remanded, with directions to set aside the verdict and award a new trial.

HUNTZICKER v. ILLINOIS CENT. R. CO.

(Circuit Court of Appeals, Sixth Circuit. May 9, 1904.)

No. 1,267.

1. MASTER AND SERVANT—FELLOW SERVANT—EMPLOYMENT.

Deceased, a young man, desiring railroad employment, applied to defendant's trainmaster, with whom it was agreed that deceased should go on the road, and learn by observation and practice the duties of a flagman, to which end the trainmaster gave him a permit, directed to defendant's freight conductors, to allow him to ride on freight trains in the district, and acquire familiarity with the business. Deceased was instructed in the duties of a flagman, and performed such duties under the direction and control of the conductors of the trains until on the day of his death, as he was traveling on a freight train to his trainmaster's station to be examined, he was killed, while asleep (with the conductor's assent) in the caboose, by a rear end collision. *Held*, that deceased, while engaged in such work, was a servant of defendant, and a fellow servant of those by whose negligence he was killed.

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

Bell, Terry & Bell, for plaintiff in error.

Fentress & Cooper and Cooper, Hirsh & Cooper, for defendant in error.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

SEVERENS, Circuit Judge. The plaintiff's intestate, Fred Fereday, a young man desiring employment in the train service of the defendant, applied to the trainmaster on one of its divisions therefor, and, it appearing that he had not had sufficient experience to qualify him for the service, it was agreed that he should go upon the road and learn by observation and practice what the duties of a flagman were, and gain the necessary experience to qualify him. To this end the trainmaster gave him the following permit:

"Fulton, Ky., May 14, 1902.

"Freight Conductors, Fulton District:

"Allow the bearer, Fred Fereday, to learn the duties of flagman on Fulton District. Good thirty days. O. M. Sewall, Trainmaster."

¶ 1. Who are fellow servants, see notes to Northern Pac. R. Co. v. Smith, 8 C. C. A. 668; Canadian Pac. Ry. Co. v. Johnston, 9 C. C. A. 596; Flippin v. Kimball, 31 C. C. A. 286.

Thereupon Fereday, using the permit, went upon various freight trains moving over the road, seeking to acquire familiarity with the business. He observed and inquired about the methods of the business, and was instructed therein, and participated in the performance of the duties of flagman under the direction and control of the conductor of the train. On June 3, 1902, Fereday having expressed a desire to be examined in respect to his proficiency, the trainmaster indicated that if he would come to his office he would examine him. A message to that effect was delivered to Fereday, who thereupon left the train on which he then was, and took another freight train moving to the destination where the trainmaster's office was located. On this train he used his permit, and continued his pursuit of information, and to some extent his practice of executing a flagman's duties. While on the way, being tired, he obtained the conductor's consent that he lie down in the caboose and sleep awhile. This he did, and while he was asleep a train coming up from behind negligently ran into the caboose, crushing it, and killing him instantly. Upon proof of these facts by the plaintiff, and of which there was no dispute, counsel for the defendant moved for a peremptory instruction by the court that the jury should find for the defendant, upon the ground, as we gather, that Fereday was a fellow servant with those by whose negligence he was killed. The request was granted, and a verdict was rendered for the defendant, and judgment accordingly.

The decisive question in the case is whether Fereday was a servant of the defendant at the time he was killed. If he was, he was a fellow servant with those whose negligence caused his death, and the defendant would not be liable. Oakes v. Mase, 165 U. S. 363, 17 Sup. Ct. 345, 41 L. Ed. 746; New England R. R. Co. v. Conroy, 175 U. S. 323, 20 Sup. Ct. 85, 44 L. Ed. 181. If he was a mere licensee, in the enjoyment of a privilege accorded him by the defendant, he was not a fellow servant, and the plaintiff was entitled to recover. As there was no controversy over the facts, the question became one of law, and the court performed a duty of its own in deciding it. The agreement between the parties, reduced to its elements, was that the defendant was to furnish the plaintiff the facilities for qualifying himself for the duties of a flagman; that is to say, it was to give him instruction and transportation over its road; not such transportation as is due to a passenger, but such as is ordinarily incident to the operation of freight trains by men in that service. In consideration of this, Fereday was to perform such elementary and simple service as he was capable of under the direction of the conductors of trains. If this were doubtful, the subsequent conduct of the parties confirms the construction of the contract above stated. As there was no contract for his ultimate employment as a flagman, the defendant would receive and did receive no other consideration for the privileges granted to Fereday than such services as he would render while in the enjoyment of them. It is quite true that he was not obliged to continue his relation to the company for any definite length of time or continuously during the time for which the privileges were granted; but while he did avail himself of them and was receiving the benefit he was under a duty to perform the service ex-

pected of him. Probably the service was not of much value, but, such as it was, it necessarily brought him into association and co-operation with the other servants employed in moving the trains. The rule applicable to the relation of fellow servants rests upon the idea of such voluntary association and co-operation and the assumption of the risk arising therefrom. He was enjoying the privilege and rendering the service at the time when he lost his life. We have no doubt of the correctness of the proposition contended for by counsel for the plaintiff that one who, for his own purposes, and by consent of another, assists that other in facilitating the discharge of a duty owed to himself, cannot be regarded as a servant of the other. Holmes v. N. E. Ry. Co., Law Rep. 4 Exch. 254; Wright v. London & N. W. Ry. Co., L. R. 2 B. 252. The Wright Case, which is especially relied on for the plaintiff, has always been regarded as an authority of great weight, having been decided in the Court of Appeal, consisting of Lord Coleridge, C. J., James, Mellish, and Baggally, L. JJ., and Cleasby, B., who also participated in the Holmes Case. In that case the consignee of a heifer, with the consent of the company, and for the purpose of saving delay, assisted the company's servants in shunting the car in which the heifer was shipped upon a side track for delivery, and while doing this was injured by the negligence of the company's servants. It was held that he was not a servant of the company, and was not affected by the rule applicable to fellow servants. The decision turned upon the fact that the plaintiff was engaged in furthering his own interest by hastening the unloading of the animal. This was also the ground on which the Holmes Case was decided. That doctrine rests upon the ground of the interest of the party in the ultimate object and result of that which the party does, and not an interest which he has in the mere doing of it. In all cases of service done for hire the workman has an interest in doing his work, because his wages depend upon it; but he has no interest in the result of his work. On the other hand, the party who, in his own interest, assists in, or even himself wholly performs, a duty of the other, takes no account of his own endeavor as one of service, and expects no reward from the other party for it. He regards only his own advantage in having it accomplished. This distinction, though sometimes said to be acute, is yet clear enough, and runs through all the cases which have traced to its origin the line of demarcation between a service rendered to another in an employment, and one which, though helpful to another, is performed for the purpose of promoting one's own interests. There are cases which hold that it is not even necessary that one volunteering to assist the servants of their employer should have the expectation of reward, if he has no interest in having the thing done, in order to constitute him a fellow servant. These cases go upon the ground that the party joined the servants, and was doing what he did in the assumed relation of a servant, and consequently took the risk of the negligence of his fellow servants. Degg v. Midland Ry. Co., 1 Hurls. & Norm. 773, is a leading case of this class, where a bystander volunteered to assist the company's servants in moving a turntable, and was injured by their negligence. It was held he could not recover. A similar case is Potter v. Faulkner, 3 B. & S. 800. But

that class of cases is not quite pertinent here, except that they mark the distinction on which the Holmes and Wright Cases, supra, were decided.

Applying the controlling principles which we have indicated to the present case, it seems clear that Fereday at the time of his death was a servant of the defendant. He was enjoying the privilege for which he served. He was under the control of the defendant, and the company would undoubtedly have been responsible for the manner in which he performed his service; and, what is more important, under the test above stated he had no interest whatever, other than that which any servant has in the result of his service, in the consequences of the discharge of his duties. We are therefore of opinion that the court did not err in its direction to the jury.

The judgment must be affirmed, with costs.

O'HARA v. UNITED STATES.

(Circuit Court of Appeals, Sixth Circuit. May 4, 1904.)

No. 1,265.

1. USE OF MAILS—SCHEME TO DEFRAUD—INDICTMENT.

In a prosecution for using the mails in furtherance of a scheme to defraud, in violation of Rev. St. § 5480, as amended by Act March 2, 1889, c. 393, 25 Stat. 873 [U. S. Comp. St. 1901, p. 3696], it is sufficient to charge that the defendants, having devised or intending to devise a scheme to defraud, to be executed by the use of the mails, did, in the execution of such fraudulent scheme, deposit for transmission a letter in some post office.

2. SAME—TIME.

Where an indictment charged that on May 21, 1902, defendants devised a scheme to defraud, described in detail, and in conclusion alleged that defendants did then and there, in the execution of such scheme, place in the mails at C. a letter, a copy of which was set out, which letter was dated on May 21, 1902, and addressed to H., one of the persons it was averred the scheme was devised to defraud, was sufficiently definite as to time, though there was an averment in the body of the indictment that defendants intended to obtain from H. and others, between January 1, 1902, and May 23, 1902, large sums of money, etc., since such allegation, being nonessential, might be rejected as surplusage.

3. SAME—EXECUTION OF SCHEME—IMPOSSIBILITY.

In a prosecution for using the mails with intent to defraud, in furtherance of a scheme devised by defendant, as an alleged turf commissioner, to pay large returns for money to be used in betting on horse races, the fact that the scheme was impossible of execution on its face was immaterial.

4. SAME—GAMBLING TRANSACTION—ILLEGALITY.

In a prosecution for using the mails in furtherance of a scheme to defraud by the paying of large returns for money to be used in betting on horse races, the fact that such scheme involved a gambling transac-

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¶ 4. Nonmailable matter in furtherance of fraud, see note to Timmons v. United States, 30 C. C. A. 86.

tion forbidden by the laws of the state where it was devised and where defendants resided was immaterial.

5. SAME—CRIMINAL LAW—WITNESSES—NUMBER—LIMITATION.
Under Rev. St. § 878 [U. S. Comp. St. 1901, p. 668], authorizing the court in a criminal case to direct witnesses to be subpœnaed for defendant at the government's expense under certain circumstances, it was within the discretion of the trial court to limit the number of defendant's witnesses to be so subpœnaed to four on each particular point named in defendant's præcipe.

6. SAME—ARRAIGNMENT—PLEA.
Where defendant was arraigned and pleaded "not guilty," but thereafter obtained leave to withdraw his plea and file a motion to quash the indictment and a demurrer thereto, which was thereafter overruled, whereupon he went to trial, the withdrawal of the plea of not guilty was provisional only, and it was not material that a plea of "not guilty" should be again entered of record.

7. SAME—VARIANCE.
In a prosecution for using the mails in the furtherance of a scheme to defraud, alleged to have been devised on May 21, 1901, evidence of similar transactions occurring prior to such date was properly admitted as showing the nature of the scheme in which defendant was engaged in executing when he mailed the letter to the person specified in the indictment.

8. SAME—EVIDENCE.
In a prosecution for using the mails with intent to defraud, loose sheets of paper containing figures with reference to defendant's business, which he could not identify or explain, not appearing to be either original records or copies thereof, were properly excluded.

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

The plaintiff in error was indicted and convicted of violating section 5480 of the Revised Statutes of the United States, as amended by Act March 2, 1889, c. 393, 25 Stat. 873 [U. S. Comp. St. 1901, p. 3696], which reads as follows: "If any person having devised or intending to devise any scheme or artifice to defraud * * * to be effected by either opening or intending to open correspondence or communication with any person, whether resident within or outside the United States, by means of the post office establishment of the United States, or by inciting such other person or any person to open communication with the person so devising or intending, shall, in and for executing such scheme or artifice, or attempting so to do, place or cause to be placed, any letter, packet, writing, circular, pamphlet, or advertisement in any postoffice * * * such person so misusing the postoffice establishment shall upon conviction, be punishable," etc.

The indictment was in three counts. The first count charged:

"That W. W. O'Hara and Thomas H. Walker, * * * on, to wit, the twenty-first day of May, in the year of our Lord one thousand nine hundred and two, in the county of Hamilton, in the state of Ohio, in the Circuit and Western Division of the District aforesaid, and within the jurisdiction of this court, did then and there unlawfully, knowingly, and fraudulently devise a scheme and artifice to defraud Henry Hildebrant, P. B. Middleton, Harry O. Thompson, and various other persons to these grand jurors unknown, which said scheme and artifice to defraud was to be effected by opening and intending to open correspondence with said Henry Hildebrant, P. B. Middleton, Harry O. Thompson, and said various other persons to these grand jurors unknown, by means of the post-office establishment of the United States, which said misuse of the post-office establishment of the United States was then and there a part of said scheme and artifice to defraud, which said scheme and artifice to defraud was in substance as follows, to wit:

"That they, the said W. W. O'Hara and Thomas H. Walker, * * * intended to falsify, pretend, and state, in and through certain circulars and

letters sent and delivered through the post-office establishment of the United States as aforesaid, that the said W. W. O'Hara, who had offices in the Union Trust Building, Cincinnati, Ohio, was a 'turf commissioner,' and had expert professional handicappers operating in connection with his commission house, and that by reason of his experience and knowledge in the race-horse world, and his system of placing bets upon the various races that were being conducted throughout the United States, all risk of loss was practically eliminated, and, by reason of the manner in which he was to conduct the business of 'turf commissioner' as aforesaid, he would be able to earn for his customers the large dividends and profits that he was from week to week to give to the investors who intrusted their money in his hands; that, with the money received from his numerous customers and investors in the United States, pools would be formed the first of every week; that twenty-five per cent. of the winnings was to be deducted for the services of the commissioner, and the net earnings of each week were to be sent to his customers as aforesaid; that never more than twenty-five per cent. of the money sent by each customer was to be hazarded upon any race at any one time, and that the principal of the investors or customers was always to be kept intact and returned to the said investors or customers upon demand, and that the dividends to be paid and promised to be paid were always to be paid from earnings or profits derived from winnings upon the races or bets made upon race horses.

"The grand jurors further present that said W. W. O'Hara and Thomas H. Walker * * * intended to obtain from said Henry Hildebrant, P. B. Middleton, Harry O. Thompson, and the various other persons to these grand jurors unknown, between the dates of January 1, 1902, and May 23, 1902, large sums of money, to wit, more than $200,000, on the representation that they would use the same in betting upon races or upon race horses.

"In truth and in fact, however, the grand jurors aver that said W. W. O'Hara and Thomas H. Walker * * * did not intend to use the money so received from the said Henry Hildebrant, P. B. Middleton, Harry O. Thompson, and said various other persons to these grand jurors unknown, in betting upon races or upon race horses; that they did not intend to have in their employ professional handicappers, or persons experienced in the racing business; that they did not intend to invest the money so received as they represented as aforesaid, to wit, in betting upon races or upon race horses; but the said W. W. O'Hara and Thomas H. Walker * * * did intend to pay out each week to their customers, or persons who had intrusted money to them to be invested in their pretended scheme as aforesaid, a portion of said large sum of money (the amount is to these grand jurors unknown), which they were to pretend and state were the net profits or earnings of the money received and invested in their pretended scheme as aforesaid, and were to appropriate and convert to their own use a large amount of the money received from the victims of said scheme, the exact amount being unknown to these grand jurors; and at no time after the receipt of the money from Henry Hildebrant, P. B. Middleton, Harry O. Thompson, and said various other persons to these grand jurors unknown, was the principal to be received from these parties, as aforesaid, to be kept intact, so that it could be returned to them upon demand, as they were to promise they would do.

"And the grand jurors aforesaid, upon their oaths and affirmations, do further present that said Henry Hildebrant, P. B. Middleton, Harry O. Thompson, and said various other persons to these grand jurors unknown, by reason of the false and fraudulent acts as aforesaid, and in the use of the mails as aforesaid, were to be defrauded out of the money placed in the hands of the said W. W. O'Hara, Thomas H. Walker, in large sums, to wit, to the amount of more than $200,000.

"And the grand jurors aforesaid, upon their oaths and affirmations, do further present that said W. W. O'Hara and Thomas H. Walker * * * did carry out said scheme to defraud above outlined, thereby defrauding said various persons out of large sums of money, and did unlawfully, wrongfully, and willfully, then and there, in further execution of said scheme and artifice to defraud, and in the misuse of the post-office establishment of the Unit-

ed States as aforesaid, place and cause to be placed in the post office at Cincinnati, for mailing and delivery, a letter addressed to Henry Hildebrant, Washington C. H. O., which said letter was in the words and figures following, to wit:

"'Office of W. W. O'Hara, Turf Commissioner, Union Trust Building, Fourth and Walnut Streets.

"'Cincinnati, O., May 21, 1902.

"'Mr. Henry Hildebrant, Wash. C. H. O.: The dividend for week ending May 17, 1902, is $3.00 on each $100. Enclosed find money order for $9.00, less exchange on your investment of $300.

"'Respectfully, W. W. O'Hara.'

—Contrary to the form of the statute in such cause made and provided, and against the peace and dignity of the United States of America."

The second and third counts describe the scheme to defraud in similar language, but the second charges that the scheme was devised on May 19, 1902, and on that day, to carry it out, a letter (which is set out in full) was mailed to P. B. Middleton; while the third charges that the scheme was devised May 21, 1902, and on that day, to carry it out, a letter (which is set out in full) was mailed to Harry O. Thompson. There was a general verdict of guilty. Motions in arrest of judgment and for a new trial having been overruled, the plaintiff in error was sentenced to imprisonment in the penitentiary. There are 96 assignments of error.

Shay & Cogan and Thos. H. Darby, for plaintiff in error.

Sherman T. McPherson, U. S. Atty., and Edward P. Moulinier, Asst. U. S. Atty.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

RICHARDS, Circuit Judge, after making the foregoing statement, delivered the opinion of the court.

1. By the motion to quash and a demurrer, a number of objections were made to the indictment: That it is indefinite and repugnant in its averments as to time; that it does not charge the offense directly, but only by intendment and argumentation; that the scheme to defraud was one impossible of performance, and therefore not within the contemplation of the law; and that the things the defendants pretended they would do were forbidden by the laws of Ohio, and therefore the defendants cannot be punished for not doing them. The form of the indictment might have been improved, but a defect in matter of form only is immaterial. Rev. St. § 1025 [U. S. Comp. St. 1901, p. 720]. As Mr. Justice Brown said:

"While the rules of criminal pleading require that the accused shall be fully apprised of the charge made against him, it should, after all, be borne in mind that the object of criminal proceedings is to convict the guilty, as well as to shield the innocent, and no impracticable standards of particularity should be set up whereby the government may be entrapped into making allegations which it would be impossible to prove." Evans v. U. S., 153 U. S. 584, 590, 14 Sup. Ct. 934, 38 L. Ed. 830.

It is sufficient, under section 5480 [U. S. Comp. St. 1901, p. 3696], to charge that the defendants, having devised or intending to devise a scheme to defraud, to be effected by the use of the mails, did, in the execution of this fraudulent scheme, deposit for transmission a letter in some post office. The offense is the misuse of the mails—the deposit of a letter in the execution of a scheme to defraud. Weeber

v. U. S. (C. C.) 62 Fed. 740; Durland v. U. S., 161 U. S. 306, 315, 16 Sup. Ct. 508, 40 L. Ed. 709.

In the first count it is charged that the defendants, on May 21, 1902, devised a scheme to defraud. This scheme is described in detail, and in conclusion it is alleged that the defendants did "then and there," in execution of this scheme, place in the mails at Cincinnati a letter, a copy of which is given. The letter is dated May 21, 1902, and addressed to Hildebrant, one of the persons it is averred the scheme was devised to defraud. It is clear the pleader intended to charge that the scheme was devised on the day the letter was dated and mailed. In the body of the indictment there is the averment that the defendants intended to obtain from Hildebrant and others, between January 1, 1902, and May 23, 1902, large sums of money, namely, more than $200,000, on the representation that they would use it in betting upon horse races. The claim is that this paragraph vitiates the indictment for repugnancy, because the scheme devised on May 21, 1902, could not be carried into execution between January 1, 1902, and May 23, 1902. But this paragraph is not connected by averment with the scheme to defraud described in detail. It stands alone, is inessential, and may be rejected as surplusage. Lehman v. U. S. (C. C. A.) 127 Fed. 41, 45. Doubtless the pleader, although aware that the defendants had been operating the scheme from January, hesitated to charge that they devised the scheme in January for the purpose of defrauding Hildebrant, whom at that time they did not know and could not have in mind. Out of abundance of caution, he charged that the scheme to defraud Hildebrant was devised the day they wrote and mailed him the letter.

There is no merit in the objection that the indictment does not charge the offense in positive terms. The intention to make false and fraudulent representations by means of circulars and letters transmitted through the mails, and thus obtain money from the credulous, constituted the scheme itself.

The objection that on its face the scheme was impossible of execution, and therefore should have deceived no one, is without merit. Weeber v. U. S. (C. C.) 62 Fed. 741. Schemes to defraud depend for success not on what men can do, but upon what they may be made to believe, and the credulity of mankind remains yet unmeasured.

Finally, it is urged the scheme involved a gambling transaction forbidden by the laws of Ohio, and that the defendants ought not to be prosecuted for not carrying it out. It is not charged that the race tracks were in Ohio, and it is not clear that the betting had to be done in Ohio. But, however this may be, the defendants were not prosecuted for failing to bet on races, but for using the mails in executing a scheme to despoil the public. The betting was but a pretense. If they had bet the money, they would be in no better plight, for they could not have bet it so as to enable them to redeem their promises. They knew this from the start.

2. It is claimed that the trial court erred in limiting the number of the defendant's witnesses to be subpœnaed at the government's expense to four upon each particular point named in the defendant's præcipe. This was within the discretion of the court, under section

878, Rev. St. U. S. [U. S. Comp. St. 1901, p. 668], and violated no fundamental right under the Constitution. Crumpton v. U. S., 138 U. S. 361, 364, 11 Sup. Ct. 355, 34 L. Ed. 958; U. S. v. Van Duzee, 140 U. S. 173, 177, 11 Sup. Ct. 758, 35 L. Ed. 399; Goldsby v. U. S., 160 U. S. 70, 73, 16 Sup. Ct. 216, 40 L. Ed. 343.

3. The record shows that the defendant was arraigned and pleaded "not guilty," but afterwards, on leave granted, he withdrew this plea to file the motion to quash and the demurrer. They being overruled, he went to trial, the record not showing whether he again pleaded "not guilty." An Ohio case (Hanson v. State, 43 Ohio St. 376, 1 N. E. 136) is relied on as holding that a record is fatally defective which does not show an arraignment on the indictment before trial. But this record does show such an arraignment. He did plead "not guilty." That plea was only withdrawn for the purpose of filing the motion and demurrer. The order shows that it was not finally withdrawn, but only formally for the special purpose. These having been overruled, he was remitted to his plea of "not guilty." Nothing was left except to plead "guilty" or go to trial. Naturally, he did the latter.

4. Eight witnesses were permitted, over the objection of the defendant, to testify to transactions with him prior to May 21, 1902, when it was alleged the scheme was devised. It is urged a variance is shown because these persons were not named in the indictment; and, besides, that their testimony should have been excluded. The record does not show that the question of variance was presented to the court below. If they had been entrapped before May 21, 1902, evidently the scheme devised on that day was not intended for them, and the grand jury could not properly have included their names as persons whom the scheme of May 21, 1902, was devised to defraud. Their testimony was objected to on the ground that it was not responsive to the allegations of the indictment, and it was admitted because it was introduced and tended to prove the fraudulent character of the scheme which the defendant was operating. The court rightly refused to limit the government to the precise time when the indictment averred the scheme was devised to defraud the person to whom the letter was mailed. A like scheme had been in operation for months. The scheme charged in the indictment was but a continuation of this. It was entirely proper to introduce evidence of its character as reflecting upon the nature of the scheme the defendant was engaged in executing when he mailed the letter in question.

5. The court refused to permit the defense to introduce in evidence a number of loose sheets of paper, containing figures about horse races, which the defendant, who was on the stand, could not identify or explain. These papers did not appear to be original records, or copies of original records, and they were rejected on this ground. We think the court was right in excluding them. They were not properly connected with O'Hara's transactions in carrying out the scheme under consideration. In no way were they identified as records or copies of records of his transactions.

These are the only assignments of error which, in our opinion, merit consideration.

The judgment is affirmed.

HENNESSY BROS. & EVANS CO. v. MEMPHIS NAT. BANK.

(Circuit Court of Appeals, Sixth Circuit. May 4, 1904.)

No. 1,246.

1. BANKS—OVERDRAFTS—NOTES.
An overdraft allowed by a bank is a loan due on demand, and hence, where a demand note is given therefor, a suit may be maintained thereon to the same extent as could have been maintained on the overdraft thereby segregated from the account.

2. CORPORATIONS—ACTS OF OFFICERS—NOTES—EXECUTION.
A building corporation opened an office in a city in a foreign state, where it was conducting large building operations, and placed the same in charge of its assistant secretary, who opened a bank account in defendant's bank in the name of the corporation through which the latter's financial transactions at that place were accomplished. The account becoming overdrawn, such officer executed demand notes in the name of the corporation to the bank therefor, whereupon the amounts were credited in the corporation's bankbook, and the book was delivered to the officer, whose accounts were periodically checked up by the corporation, and no objections to the accounts were made. *Held*, that the corporation was liable on the notes, though no express authority to the officer executing them to do so was shown, and he subsequently became a defaulter to the corporation for a large sum.

3. SAME—INTEREST.
Where an overdraft was settled by the execution of a note payable on demand, the amount due bore interest from the date of the settlement.

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

W. A. Percy and T. K. Riddick, for plaintiffs in error.
Carroll, McKellar, Bullington & Biggs, for defendant in error.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

SEVERENS, Circuit Judge. There are counterwrits of error in this case, on which each party prays for the reversal of the judgment rendered by the court below, and there are bills of exceptions taken by each. But the errors complained of on each side relate to one controversy, and may be considered together.

Hennessy Bros. & Evans Company, a building corporation organized under the laws of Illinois, and located at Chicago, entered into large contracts during the year 1900 for building in the city of Memphis, Tenn., involving the employment of several hundred thousand dollars, and sent its assistant secretary, John D. Evans, who had executed the contracts in its behalf, to Memphis, to superintend its business there. On account, as we must suppose, of the frequently recurring financial necessities of his company at Memphis, Evans, in its behalf, and with its knowledge and assent, opened an account with the Memphis National Bank in November of that year. On December 26, 1900, the account of the company was overdrawn, and, to cover the overdraft, he gave to the bank a note, payable on demand, for $4,500, and signed in the company's name "by John D. Evans Asst. Secy.," the entire amount of which was placed by the bank to the credit of the company in its account. In April, 1901, the account being again overdrawn,

Evans gave the bank another note payable in 30 days, for $2,000, signed in the same way, and the proceeds were put to the credit of the company in its account. This last note was renewed three times; the last renewal having been made July 17, 1901, by a note for the same amount payable on demand. The company had a passbook in which the account was frequently balanced by the bank and returned to the company. The entries in the passbook showed the credits of the $4,500 and of the proceeds of the $2,000 note as of the dates when the notes were given. This account, consisting of debits and credits, continued from November, 1900, to September, 1901, at about which time John D. Evans disappeared; being, as was alleged by the company, a defaulter to it for a considerable sum, which it was claimed was obtained by him by checks on the company's account with the bank, which was thereby overdrawn. Later other officers of the company settled with the bank for the overdraft then appearing, but refused to acknowledge or pay the notes of $4,500 and $2,000, respectively, upon the ground that they had been given by Evans without authority. It appeared upon the trial that from time to time the president and secretary of the company, who had general charge of its finances, went from Chicago to the Memphis office, and "checked up" Evans' financial transactions, including those with the bank. But the company gave evidence tending to show that the passbook above mentioned was not produced to them, and that it was not seen by them until after the disappearance of Evans. But they knew that Evans had it in his possession. They also knew that, during the running of the account, overdrafts had occurred at several times, and they made no objection to the making of such overdrafts. Some other facts appear in the course of this opinion, but it is believed that those most material have now been stated.

The bank brings this suit to recover the amount of the two notes above mentioned, and adds the common counts, on which it claims that, if it cannot recover upon the notes themselves, it may be allowed to recover the amounts which they represent as having passed to the credit of the company, of which it had the avails, as money had and received. As to the notes, the company pleaded that they were never authorized, and, as to the other counts, it pleaded the general issue. Upon the trial, the making of the notes having been proved in the circumstances already stated, the defendant called as witnesses the president and other officers of the company, who gave general evidence denying that Evans was authorized to sign the notes for the company, and denying that the company ever had knowledge of the making and using said notes until after the disappearance of Evans, and that it had never ratified them. Assuming that an issue was thus established upon the evidence, the court permitted the parties to go into evidence in respect to the question as to whether the defendant had received benefit from the overdrafts which the notes represented, and, if so, how much. A prolonged inquiry was entered upon for the purpose of ascertaining what debts of the company had been paid by checks made by Evans on the bank, a considerable number of which were traced to the company's creditors. At the close of the testimony the plaintiff asked for an instruction that a verdict should be rendered for the

plaintiff for the amount of the notes, with interest. This request was refused, and the plaintiff excepted. The court, in its instruction to the jury, left open for their determination the question whether the giving of the notes by Evans was authorized or not, and, if not, then the question to what extent the defendant had been benefited by the credit given on account of them, in determining which the defendant could only be charged with what it actually got, and not with that which Evans appropriated to his own use. The jury rendered a verdict for the plaintiff for $6,008.00. Several rulings were made by the court in taking evidence and in its charge to the jury, which are complained of by the defendant, and are made grounds for its assignments of error on its writ.

In view of those facts about which there was no conflict in the testimony, we think the plaintiff was entitled to the instruction which it asked. There was no legal ground on which the contention that the notes in suit were not obligatory upon the defendant, or, what amounts to the same thing, that it was not bound for the credit which it got on the occasions when they were given, could rest. An overdraft allowed is a loan due on demand, and may be sued for as such. Thomas v. International Bank, 46 Ill. App. 461; Franklin Bank v. Byram, 39 Me. 489, 63 Am. Dec. 643. Of precisely the same character is the obligation of a note given, payable on demand, to cover it, to the extent that the overdraft is thereby segregated from the account. With respect to the note for $2,000, it appears that a part of that amount was to pay an overdraft, and the balance to provide funds to check against. These funds were checked against and withdrawn by the man in charge of the account, and apparently, so far as the bank could see or know, for the company's business. The notes served every purpose which would have been subserved if the company had made equivalent deposits on those dates. The bank required the overdrafts to be paid, and, instead of cash, it took those notes. The authority which the company intrusted to Evans, or the exercise of which it repeatedly sanctioned, was sufficiently extensive to cover his dealings with the bank, including the giving of the notes. We are inclined to think that his general authority, coupled with that which was given him to open an account and transact the business of his company with the bank, was sufficient to justify his covering of the overdrafts which he had made in the company's behalf, and of which the company had the benefit. If he had made the company's note, and negotiated it with the bank, professedly for the company's business, and secured a loan of money thereon, which he used in the company's business, could it be doubted that the company would be bound by his act? We think not. If his use of the proceeds was that of paying an overdraft owing by the company, would not that be devoting it to the company's business? But there could be no distinction between such a transaction as that which occurred and that supposed, except in mere form, on which the law would lay no stress. But it was indisputably proved that the company knew that overdrafts were occurring. It took no precautions to prevent them, or to provide for their settlement. It must have known that they had been provided for in some way, and must be if they occurred again. The only reasonable inference is that it was intended by the

company to leave the duty of attending to such contingencies to their superintendent, who was in charge of the account.

There is another feature of the case, however. The company kept a passbook, which was periodically balanced by the bank and returned to the company; that is, it was returned to its superintendent, who had his office there, and was the person who conducted the business to which the book had relation. The credits obtained by the notes were shown by the book. If the company had any reason to suppose that those credits were obtained for its own remittances to Evans, an examination of its own books when it was "checking up" Evans would have immediately disclosed that it had not made such remittances. And it may be remarked in this connection that it is not now contended that such remittances were made, or that there were any remittances of which these could have been parcels. A comparison of the books of the company with those of the agent would detect such a fact if it existed. But it is urged that Evans was a rogue, and was contriving in his own interest to put some of the money he should get from the bank on the credit of his company to his own uses, and that therefore the information given by the passbook should not be imputed to his principal. The rule of law thus invoked is not applicable. It is applicable when the agent leaves his place as agent, and, in derogation of the rights of his principal, concocts and carries into effect some scheme of his own for his private advantage, and where the other party knows or has good reason to believe that the agent is acting falsely. But there is no reason here for charging the bank with notice of any wrongful purpose of the company's agent. It returned the balanced passbook to the person put in place by the company to receive and examine it, and take steps to correct anything objectionable which the book indicated. The bank had the right to expect that the company would do its duty in this regard, and the company is affected by notice of the contents of the passbook to the same extent as if the agent had been an honest one. It was so held by this court in First National Bank of Evansville v. Fourth National Bank of Louisville, 16 U. S. App. 1, 56 Fed. 967, 6 C. C. A. 183. And see Leather Manufacturers' Bank v. Morgan, 117 U. S. 96, 6 Sup. Ct. 657, 29 L. Ed. 811; First National Bank v. Allen, 100 Ala. 482, 14 South. 335, 27 L. R. A. 426, 46 Am. St. Rep. 80. This contention of the defendant runs counter, as, indeed, does its entire defense, to the settled rule that, when one of two persons is to suffer by the act of an agent intrusted by his principal with the appearance of authority to do the act, that one shall take the burden whose agent committed the wrong. We think this is a plain case for the application of that doctrine. It seems to fit the undoubted facts, and we can see no valid reason why the consequences of the dishonest conduct of the agent toward his principal should be shifted from the company to the bank, which appears to have acted in good faith. If the controlling facts of the case were in doubt or open to fair dispute, the case should have gone to the jury under a proper submission of the issues by the court. But they were not, and the case should be dealt with accordingly, as was done in Myers v. Bank, 193 Pa. 1, 44 Atl. 280, 74 Am. St. Rep. 672. It is true that

there is a sweeping denial of the authority of Evans, but that amounts to nothing in the face of the actual facts.

With respect to the matter of interest, an overdraft running without any interest or adjustment does not draw interest, upon the principle that applies to open accounts generally. But it is held that when it has been demanded, or an account therefor has been rendered, it would carry interest. Casey v. Carver, 42 Ill. 225.

As there must be a new trial, and the questions raised upon the other writ are not likely to be presented in the same way, we forbear to consider them.

The judgment will be reversed on the writ of error taken by the Memphis National Bank, with costs.

CHAMBERS v. AMERICAN TIN PLATE CO.

(Circuit Court of Appeals, Sixth Circuit. May 4, 1904.)

No. 1,243.

1. MASTER AND SERVANT—INJURIES TO SERVANT—SCAFFOLDING—CONSTRUCTION—DUTY OF MASTER.

Where defendant, engaged in the construction of a building, undertook to erect scaffolding for the use of bricklayers, and, to accomplish this, employed a boss carpenter, who, with his servants, negligently constructed the same with light and insufficient materials, by reason of which one of the bricklayers was injured, defendant was liable therefor.

In Error to the Circuit Court of the United States for the Northern District of Ohio.

Action for personal injuries sustained by the plaintiff, while in the defendant's employ, by the fall of a scaffolding on which he was standing when laying brick in a wall of a building in course of construction. Upon the conclusion of the plaintiff's evidence, Wing, District Judge, instructed the jury to return a verdict for the defendant.

Chas. Fillus and Murray & Koonce, for plaintiff in error.

T. H. Gilmer and E. K. Wilcox, for defendant in error.

Before LURTON and RICHARDS, Circuit Judges, and CLARK, District Judge.

LURTON, Circuit Judge. The defendant was erecting for its own use a large brick mill. It supplied the materials and hired masons and carpenters by the day, and the work was carried on under the general direction of a superintendent. A scaffolding was constructed out of material furnished by the defendants for the use of the masons in the prosecution of their work. This scaffold fell while the plaintiff was standing thereon engaged in laying brick. The petition charges that the fall was due to defective and unfit materials and also to negligent construction. The falling of a staging or scaffold without any apparent cause may well be regarded as prima facie evidence of negligence on the part of the person who had provided it. Stewart v.

¶ 1. See Master and Servant, vol. 34, Cent. Dig. § 397.

Ferguson, 164 N. Y. 553, 58 N. E. 662. But in this case there was evidence tending to show that its fall was due to negligent construction. There was also evidence showing that the materials furnished by the defendant for the construction of this scaffold was hemlock lumber, one inch thick, full of knots and knotholes. There was no expert evidence as to the fitness of such materials for such a purpose, though there was evidence of the load which was likely to be upon it, and that it fell under a less load than ordinarily expected. There was also evidence that some of the planks were found broken "crosswise," as well as split. We are not sure that expert evidence was essential, under such facts, to justify a submission of the question of the quality and fitness of such materials for such a purpose. The common experience and knowledge of the strength of such material would seem to furnish a fair standard for an intelligent judgment upon such a question. Inasmuch, however, as there must be a reversal of the case upon another ground, we express no opinion upon the ruling of the trial judge in respect to this aspect of the case.

The evidence tended to show that the masons did not undertake or assume to construct this staging, and that neither the plaintiff nor any of those workmen for whose use it was constructed had anything whatever to do with its building or the selection of materials therefor. Upon the other hand, there was evidence tending to show that the defendants assumed and undertook to construct same, and that they had same made by one John Frampton, a boss carpenter in their employment, and that Frampton was in no way aided or assisted by other than his carpenter helpers. There was also evidence tending to show that when the scaffold was finished the plaintiff and his fellow masons were directed by the foreman of the bricklayers to go upon and continue their work upon same. The only question, then, is whether the relation of the parties is such that the defendants are liable for the negligence of Frampton in the construction of the staging so made. There is a line of cases holding that when the employer furnishes suitable materials, and the workmen themselves construct a scaffolding or staging as a part of the work which they undertake to perform, and build it according to their own judgment, that the employer is not liable for an injury to one of their own number, sustained in the subsequent use of the structure, in consequence of negligence in construction. The erection and re-erection of such a staging as the work requiring its use progresses, being itself a part of the very work which the employés are to do, takes it without the general rule in respect to the duty of the master to exercise reasonable care to furnish a reasonably safe place and appliances. Am. & Eng. Ency. Law, vol. 20, p. 82; Kimmer v. Weber, 151 N. Y. 417, 421, 45 N. E. 860, 56 Am. St. Rep. 630; Armour v. Hahn, 111 U. S. 313, 4 Sup. Ct. 433, 28 L. Ed. 440; Killea v. Faxon, 125 Mass. 485. But the rule is quite otherwise if the employer himself undertake to furnish such scaffolding for the men who are to work thereon. In such case the duty is one of those positive duties of the master toward the servant which cannot be discharged by the substitution of a competent agent. The act or service to be done is that of furnishing a reasonably safe place or appliance, and negligence in the doing of such a service is the negligence of the master, without re-

gard to the rank of different employés. Connor v. Pioneer Co. (C. C.) 29 Fed. 629; McNamara v. McDonough, 102 Cal. 575, 36 Pac. 941; Coughtry v. Globe Woolen Co., 56 N. Y. 124, 15 Am. Rep. 387; Kimmer v. Weber, 151 N. Y. 417, 45 N. E. 860, 56 Am. St. Rep. 630; Bowen v. The C. B. & K. C. Ry., 95 Mo. 268, 8 S. W. 230; Mulchey v. Methodist Society, 125 Mass. 487; C. & R. Co. v. Maroney, 170 Ill. 520, 48 N. E. 953, 62 Am. St. Rep. 396; Behm v. Armour, 58 Wis. 1, 15 N. W. 806; Austin Mfg. Co. v. Johnson, 89 Fed. 677, 32 C. C. A. 309; Am. & Eng. Ency. Law, vol. 20, p. 81; Labatt, Master & Servant, 614 et seq. In Killea v. Faxon, 125 Mass. 485, it appeared that the staging had been made by direction of the master or his superintendent by a carpenter in his employment, and that it subsequently gave way when being used by a workman sent by a coppersmith to put up gutters bought from him. The court held that there was no evidence that the employer undertook to furnish a staging for the plaintiff, and that the negligence of the carpenter, who was a competent man, was the negligence of a fellow servant. It is only upon the assumption that the employer was under no obligation to furnish a reasonably safe staging to the plaintiff that the case is reconcilable with the doctrine of the courts of the United States in respect to the nondelegable character of the duty of the master to furnish his employés with reasonably safe appliances. In the case at bar there was no evidence tending to show that the masons, for whose use the scaffold in question was made, undertook to furnish, or build, or construct their own staging, and no evidence that it was customary for such workmen, directly employed each for himself, to build their own scaffolds. On the contrary, there was evidence tending to show that the defendant had employed one Frampton as boss carpenter to erect such scaffolding as should be needed, and to do such other carpenter work as should be needed in the progress of the building. There was evidence, therefore, from which the jury might reasonably infer that the defendants undertook to furnish all necessary scaffolding, and that they had in fact supplied a completed structure for the use of the plaintiff and his fellow masons. Whether we regard a mason's staging as a place to stand and do his work or as an appliance for the doing of his work, is not very important for the purposes of this case. If an obligation to furnish such staging was assumed by the defendants, they were bound to exercise reasonable care to furnish an appliance reasonably safe and suitable for the purpose. The distinction we draw is noted by the New York Court of Appeals in Kimmer v. Weber, 151 N. Y. 417, 421, 45 N. E. 860, 861, 56 Am. St. Rep. 630, where it is said:

"When a gang of masons are engaged in plastering or painting a room, the construction of proper platforms or places upon which to stand while doing the work is a detail of the business that is generally left to the men themselves. The master may, it is true, take this out of their hands, and assume to do it himself, and in that case he would be bound to furnish an appliance reasonably safe and suitable for the purpose."

In Connor v. Pioneer Co. (C. C.) 29 Fed. 629, Brewer, Circuit Judge, now Justice Brewer, charged a jury in a case where the plain-

tiff had been injured by the fall of a scaffold upon which he was working "that, if the defendant had furnished the material," etc., "and left with the tilers generally the duty of preparing their own platforms, and this platform, so prepared, was defective, that was the negligence of the employés, and the employer would not be liable; while, on the other hand, if the employer had employed special individuals—Mr. Simpson and his assistant—to attend to the work of preparing the platforms, and they failed to prepare a platform that was reasonably safe, their negligence was the negligence of the defendant, and the company would be responsible." If an employer undertake himself to furnish his employés with reasonably suitable and safe appliances, he does not discharge his duty by the employment of an agent to carry out his obligation. For the negligence of that agent he continues responsible. "If," says Justice Peckham, speaking for the court in Northern Pacific R. R. v. Peterson, 162 U. S. 346, 353, 16 Sup. Ct. 843, 845, 40 L. Ed. 994, "the master be neglectful in any of these matters, it is a neglect of a duty which he personally owes to his employés, and, if the employé suffer damage on account thereof, the master is liable. If, instead of personally performing these obligations, the master engages another to do them for him, he is liable for the neglect of that other, which, in such case, is not the neglect of a fellow servant, no matter what his position as to other matters, but it is the neglect of the master to do those things which it is the duty of the master to perform as such." This nondelegable character of the personal duties of an employer has been many times stated by the Supreme Court and by this court. Hough v. Ry. Co., 100 U. S. 213, 218, 25 L. Ed. 612; Northern Pac. R. Co. v. Herbert, 116 U. S. 642, 6 Sup. Ct. 590, 29 L. Ed. 755; Union Pac. R. R. v. Daniels, 152 U. S. 684, 14 Sup. Ct. 756, 38 L. Ed. 597; Texas Pac. Ry. Co. v. Barrett, 166 U. S. 617, 17 Sup. Ct. 707, 41 L. Ed. 1136; Felton v. Bullard, 94 Fed. 781, 785, 37 C. C. A. 1; L. & N. R. Co. v. Miller, 104 Fed. 124, 43 C. C. A. 436; W. U. Tel. Co. v. Burgess (C. C.) 108 Fed. 26, 33.

The judgment must be reversed, with directions to grant a new trial.

YORK v. WASHBURN.

(Circuit Court of Appeals, Eighth Circuit. April 6, 1904.)

No. 1,891.

1. FEDERAL COURTS—ACTIONS—TRIAL BY COURT—FINDINGS—EFFECT.
   Where an action at law is tried to the court without a jury, the finding of the court, given under the circumstances recited in this opinion, and whether regarded as general or special, has the same effect as the verdict of a jury, and prevents any inquiry on appeal as to whether it is sustained by the evidence.

2. OPINION OF TRIAL JUDGE—NOT A SPECIAL FINDING.
   An opinion of the trial judge, delivered in writing and setting forth the reasons for his decision, does not, by being copied into the judgment entry, become a special finding of the ultimate facts, in the nature of a special verdict.

3. STATUTE OF FRAUDS—STATE LAWS—STATE DECISIONS—RULES OF PROPERTY —EFFECT IN FEDERAL COURTS.

Whether an oral contract for a lease of real property for more than a year, not complying with the statute of frauds of the state where the property is situated, is a nullity or unenforceable only at the election of the parties, is not a question of general jurisprudence or of commercial or mercantile law, but a rule of property, which must be determined in the federal courts according to the decisions of the highest judicial tribunal of the state where such property is located.

4. SAME—LEASE FOR MORE THAN A YEAR—EARNEST MONEY—RECOVERY.

An oral contract for the letting of real property located in Minnesota for more than a year, not complying with the statute of frauds of such state, though unenforceable, is not void, and hence the contemplated lessee cannot recover earnest money paid thereon; the lessor being ready, willing, and able to perform.

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

For opinion below, see 118 Fed. 316.

Shubael F. White (Frank F. Price, on the brief), for plaintiff in error.

John G. Williams and W. D. Bailey, for defendant in error.

Before SANBORN, THAYER, and VAN DEVANTER, Circuit Judges.

VAN DEVANTER, Circuit Judge. This was an action at law by York to recover back earnest money paid by him to Washburn upon an unperformed agreement for the procurement and delivery of a mining lease of real property for a term of years. Plaintiff's complaint placed his right of recovery upon two grounds—one, that the agreement was oral, and therefore void under the statute of frauds of the state of Minnesota, in which the real property is situate; and the other, that defendant failed and refused to deliver a lease conforming in terms to the agreement. There was no allegation that the agreement left any of the terms of the lease to be settled by further negotiations, or that payment of the earnest money was made under any misapprehension or mistake. In addition to a general denial, the answer, so far as now material, was to the effect that defendant had been ready, able, and willing to deliver to plaintiff a lease conforming in all respects to the agreement, but that plaintiff had refused to accept such a lease, and, for the purpose of avoiding performance of the agreement, and as a mere subterfuge, had insisted upon receiving a lease differing in terms from those agreed upon. The case was tried to the court, the parties having waived a jury by stipulation. The judgment was for defendant. There was no special finding of the facts, and no exception was reserved to the general finding. Nor was there an application or request at the close of the trial for a finding or judgment for plaintiff, in the nature of a request for a directed verdict, based upon some specific proposition of law, or upon the theory that there was no substantial evidence to sustain a finding or judgment for defend-

¶ 3. State laws as rules of decision in federal courts, see notes to Griffin v. Wheel Co., 9 C. C. A. 548; Wilson v. Perrin, 11 C. C. A. 71; Hill v. Hite, 20 C. C. A. 553.

ant. All but one of the assignments of error are to the effect that, upon the evidence, or upon the statements of fact in a written opinion given by the trial judge, the judgment should have been for plaintiff. The assignments seem to be principally directed against portions of that opinion. It was carefully prepared; states the history of the case; quotes from the evidence, and comments thereon; states the judge's conclusions upon the law, with his reasons therefor; sustains defendant's version of the agreement in respect of the terms of the lease, and his claim that he "was ready, willing, and able to obtain and deliver to the plaintiff a lease in conformity with such agreement, and that the plaintiff, without any just cause, failed and refused to accept such lease and carry out the agreement"; and then directs the entry of a judgment for defendant. The opinion was copied into the judgment entry, but it is not, and was evidently not intended to be, a special finding of the ultimate facts, in the nature of a special verdict, such as is contemplated by sections 649 and 700 of the Revised Statutes [U. S. Comp. St. 1901, pp. 525, 570]. Insurance Co. v. Tweed, 7 Wall. 44, 51, 19 L. Ed. 65; Dickinson v. Planters' Bank, 16 Wall. 250, 257, 21 L. Ed. 278; Lehnen v. Dickson, 148 U. S. 71, 77, 13 Sup. Ct. 481, 37 L. Ed. 373; Reed v. Stapp, 3 C. C. A. 244, 246, 52 Fed. 641; Adkins v. Sloane, 8 C. C. A. 656, 60 Fed. 344; Kentucky, etc., Co. v. Hamilton, 11 C. C. A. 42, 63 Fed. 93; Hinkley v. City of Arkansas, 16 C. C. A. 395, 398, 69 Fed. 768; Minchen v. Hart, 18 C. C. A. 570, 72 Fed. 294; National, etc., Ass'n v. Sparks, 28 C. C. A. 399, 403, 83 Fed. 225, 229; Ogden City v. Weaver, 47 C. C. A. 485, 108 Fed. 564. That which the record discloses is nothing more than a general finding of all the issues in favor of defendant, but, whether the finding be general or special, it has the same effect as the verdict of a jury, and, in the circumstances in which it was given, is conclusive, and prevents any inquiry in this court as to whether it is sustained by the evidence. Norris v. Jackson, 9 Wall. 125, 19 L. Ed. 608; Martinton v. Fairbanks, 112 U. S. 670, 5 Sup. Ct. 321, 28 L. Ed. 862; Lehnen v. Dickson, 148 U. S. 71, 13 Sup. Ct. 481, 37 L. Ed. 373; Dooley v. Pease, 180 U. S. 126, 131, 21 Sup. Ct. 329, 45 L. Ed. 457; Wilson v. Merchants' Loan & Trust Co., 183 U. S. 121, 127, 22 Sup. Ct. 55, 46 L. Ed. 113; Mercantile Trust Co. v. Wood, 8 C. C. A. 658, 60 Fed. 346; Walker v. Miller, 8 C. C. A. 331, 59 Fed. 869; Hughes County v. Livingston, 43 C. C. A. 541, 555, 104 Fed. 306; Barnard v. Randle, 49 C. C. A. 177, 110 Fed. 906.

The remaining assignment of error challenges certain rulings upon the admission of evidence excepted to by plaintiff, which raise the question whether, if the agreement was in parol, plaintiff could recover back the earnest money, when defendant was not in default, and plaintiff had refused to accept a lease conforming to the agreement. The circuit court answered the question in the negative. The agreement related to real property in the state of Minnesota, and was governed by the law of that state. This is conceded, but counsel differ in their interpretation of the state statute (section 4215, Gen. St. 1894), which provides:

"Every contract for the leasing for a longer period than one year, or for the sale, of any lands, or any interest in lands, shall be void unless the con-

tract, or some note or memorandum thereof, expressing the consideration, is in writing, and subscribed by the party by whom the lease or sale is to be made, or by his lawful agent thereunto authorized, in writing; and no such contract, when made by such agent, shall be entitled to record unless the authority of such agent be also recorded."

Counsel have made an exhaustive examination of similar statutes in the several states, and of the decisions interpreting them. This research discloses that states having a statute identical with that of Minnesota differ in its interpretation; the difference being that, by the interpretation prevailing in Wisconsin and some other states, an agreement such as is here under consideration "is absolutely void and a nullity," while, by the interpretation prevailing in New York and some other states, the law will lend no aid in enforcing such an agreement, but it is not contrary to law, and the parties are at liberty to act under it. By the first interpretation, the vendee or lessee may, if the agreement be not performed, recover back the money paid, without reference to who is responsible for the default, and as though no agreement had been made. By the second interpretation, no recovery can be had if the vendor or lessor is not in default, but is able and willing to perform the agreement. We are only concerned with the interpretation placed upon the Minnesota statute by the court of last resort in that state. It is a cardinal rule in the courts of the United States that the judicial department of each state is the appropriate organ to construe its legislative enactments, and that in cases depending on the laws of a particular state, and "not controlled by the Constitution, laws, or treaties of the United States, or by the principles of the commercial or mercantile law or of general jurisprudence, of national or universal application," the construction which the highest judicial tribunal of the state has given to the laws of the state is controlling. Elmendorf v. Taylor, 10 Wheat. 152, 6 L. Ed. 289; Christy v. Pridgeon, 4 Wall. 196, 18 L. Ed. 322; Louisiana v. Pilsbury, 105 U. S. 278, 294, 26 L. Ed. 1090; Bauserman v. Blunt, 147 U. S. 647, 657, 13 Sup. Ct. 466, 37 L. Ed. 316; Hartford Ins. Co. v. Chicago, etc., Ry. Co., 175 U. S. 91, 100, 20 Sup. Ct. 33, 44 L. Ed. 84; Chattanooga, etc., Ass'n v. Denson, 189 U. S. 408, 23 Sup. Ct. 630, 47 L. Ed. 870; First National Bank v. Glass, 25 C. C. A. 151, 79 Fed. 706. The interpretation of a state statute of frauds by the highest court of the state establishes a rule of property, and is within the rule stated. Allen v. Massey, 17 Wall. 351, 21 L. Ed. 542; Lloyd v. Fulton, 91 U. S. 479, 485, 23 L. Ed. 363; Robinson v. Belt, 187 U. S. 41, 23 Sup. Ct. 16, 47 L. Ed. 65. The facts of the present case make Louisiana v. Pilsbury, supra, directly in point. It was there said by Mr. Justice Field:

"The construction, so far as contract obligations incurred under it are concerned, constitutes a part of the law as much as if embodied in it. So far does this doctrine extend, that when a statute of two states, expressed in the same terms, is construed differently by the highest courts, they are treated by us as different laws, each embodying the particular construction of its own state, and enforced in accordance with it in all cases arising under it."

Repeated decisions of the highest judicial tribunal of the state of Minnesota, rendered before this agreement was made, had uniformly

placed upon the statute of frauds of that state an interpretation similar to that prevailing in New York, and unlike that prevailing in Wisconsin; and, as part of the interpretation adopted in Minnesota, it had become established law in that state that when a vendor, under an agreement for the sale of lands which is within the statute of frauds, because not in writing, is nevertheless willing and offers to perform on his part, but the vendee refuses to perform, and repudiates the agreement, the latter is not entitled to recover an installment of purchase money previously paid. Sennett v. Shehan, 27 Minn. 328, 7 N. W. 266; La Du-King Manufacturing Co. v. La Du, 36 Minn. 473, 31 N. W. 938; McKinney v. Harvie, 38 Minn. 18, 35 N. W. 668, 8 Am. St. Rep. 640; McClure v. Bradford, 39 Minn. 118, 38 N. W. 753; Keystone Iron Co. v. Logan, 55 Minn. 537, 57 N. W. 156. In Sennett v. Shehan, which was an action much like this, it was said:

"The agreement which the parties entered into in this case was not an illegal one, and therefore incapable of being performed, if they were willing to abide by its terms. The plaintiff voluntarily paid to defendant the sum which he now seeks to recover, as a partial payment upon this contract; and, so long as the defendant is not in default, but is willing and ready to perform on his part, he is not at liberty to rescind the agreement and recall his money because the statute declares the contract to be void as not being in writing."

It is conceded that no question of right under the Constitution, laws, or treaties of the United States arises in this case, but it is insisted by counsel for plaintiff that there is presented a question of commercial or mercantile law or of general jurisprudence, of national or universal application. After citing the cases of Township of Pine Grove v. Talcott, 19 Wall. 666, 22 L. Ed. 227, and Burgess v. Seligman, 107 U. S. 20, 2 Sup. Ct. 10, 27 L. Ed. 359, counsel say:

"The real doctrine of the United States Supreme Court is that, where the decision of the state court is right and according to the plain letter of the law, * * * the federal courts must follow the same, but where it is contrary to the plain letter of the statute, * * * or contrary to what the Supreme Court of the United States deems to be the true interpretation of the statute, * * * the federal courts should not follow the state decision."

We think the question presented is one of purely local law, and is not controlled by the principles of the commercial or mercantile law or of general jurisprudence, of national or universal application. The question goes to the legal effect of the agreement, rather than to the meaning of the words or terms in which the parties expressed their mutual undertakings. The agreement related to property the permanent situs of which was in the state of Minnesota. The statute and the decisions of the state court interpreting it have no bearing upon agreements concerning property located elsewhere, and the statute was adopted and the decisions interpreting it were made before the agreement was entered into. We also think the contention of counsel respecting the effect of the decisions of the Supreme Court of the United States is refuted by the decisions cited to support it. The case of Township of Pine Grove v. Talcott involved the validity, in the hands of a bona fide purchaser, of township bonds issued in negotiable form, and in conformity with a state statute subsequently held invalid

by the courts of the state. Speaking through Mr. Justice Swayne, the court said:

"The question before us belongs to the domain of general jurisprudence. In this class of cases this court is not bound by the judgment of the courts of the states where the cases arise. It must hear and determine for itself. Here commercial securities are involved. When the bonds were issued, there had been no authoritative intimation from any quarter that such statutes were invalid. The Legislature affirmed their validity in every act by an implication equivalent, in effect, to an express declaration. And during the period covered by their enactment, neither of the other departments of the government of the state lifted its voice against them. The acquiescence was universal. The general understanding of the legal profession throughout the country is believed to have been that they were valid. The national Constitution forbids the states to pass laws impairing the obligation of contracts. In cases properly brought before us, that end can be accomplished unwarrantably no more by judicial decisions than by legislation." 19 Wall. 677, 22 L. Ed. 227.

In Burgess v. Seligman the question presented for decision was the liability as a stockholder of one who received from the corporation itself, as collateral security for the payment of debts of the corporation, certificates of stock in a corporation organized under the statutes of Missouri. When the transactions occurred out of which the liability, if any, arose, the state statute under which liability was asserted had not been construed by the state tribunals, but thereafter the Supreme Court of Missouri rendered two decisions placing an interpretation upon the statute which was urged upon the Supreme Court of the United States as controlling. In these circumstances, it was said by Mr. Justice Bradley, speaking for the court:

"We do not consider ourselves bound to follow the decision of the state court in this case. * * * Since the ordinary administration of the law is carried on by the state courts, it necessarily happens that by the course of their decisions certain rules are established which become rules of property and action in the state, and have all the effect of law, and which it would be wrong to disturb. This is especially true with regard to the law of real estate, and the construction of state constitutions and statutes. Such established rules are always regarded by the federal courts, no less than by the state courts themselves, as authoritative declarations of what the law is. But where the law has not been thus settled, it is the right and duty of the federal courts to exercise their own judgment, as they also always do in reference to the doctrines of commercial law and general jurisprudence. So when contracts and transactions have been entered into, and rights have accrued thereon, under a particular state of the decisions, or when there has been no decision, of the state tribunals, the federal courts properly claim the right to adopt their own interpretation of the law applicable to the case, although a different interpretation may be adopted by the state courts after such rights have accrued. But even in such cases, for the sake of harmony and to avoid confusion, the federal courts will lean towards an agreement of views with the state courts if the question seems to them balanced with doubt." 107 U. S. 33, 2 Sup. Ct. 21, 27 L. Ed. 359.

It has long been settled, and in the very nature of things it must be so, that the conclusive effect, in the federal courts, of the interpretation of a state statute by the courts of the state, does not depend upon the view which the federal courts may take of the soundness of that interpretation. Christy v. Pridgeon, 4 Wall. 196, 203, 18 L. Ed. 322; Supervisors v. United States, 18 Wall. 71, 82, 21 L. Ed. 771;

Louisiana v. Pilsbury, 105 U. S. 278, 294, 26 L. Ed. 1090; Fallbrook Irrigation District v. Bradley, 164 U. S. 112, 155, 17 Sup. Ct. 56, 41 L. Ed. 369; Adams Express Co. v. Ohio, 165 U. S. 194, 219, 17 Sup. Ct. 305, 41 L. Ed. 683; Williams v. Eggleston, 170 U. S. 304, 311, 18 Sup. Ct. 617, 42 L. Ed. 1047; Wilkes County v. Coler, 180 U. S. 506, 524, 21 Sup. Ct. 458, 45 L. Ed. 642; Louisville, etc., Co. v. Kentucky, 183 U. S. 503, 508, 512, 22 Sup. Ct. 95, 46 L. Ed. 298.

The Circuit Court took the correct view of the legal effect of the agreement under the law of the state of Minnesota, by which the rights of the parties must be determined, and properly admitted evidence of defendant's ability and willingness to perform the agreement, and of plaintiff's refusal to do so.

The judgment is affirmed.

LEWIS et ux. v. CLARK.

(Circuit Court of Appeals, Ninth Circuit. March 1, 1904.)

No. 838.

1. BUILDING AND LOAN ASSOCIATIONS—INSOLVENCY—FORECLOSURE SUIT BY FOREIGN RECEIVER.

A building and loan association of Minnesota deposited bonds and mortgages of its members with the state of Wisconsin, in compliance with the law of that state, in order to entitle it to do business therein, and to secure the performance of contracts made with citizens of the state. The association having become insolvent, a controversy arose in the courts of Wisconsin between a special receiver there appointed and the general receiver in Minnesota as to the right to such securities, pending which, however, it was stipulated that they should be collected by the Wisconsin receiver, and they were formally assigned to him by the general receiver. *Held*, that a federal court in Idaho, acting in a spirit of comity, properly permitted such receiver to maintain a suit therein to foreclose a mortgage given by a citizen of the state on property therein which constituted one of the securities so deposited, although he was not entitled to maintain such suit as a matter of right; it not being contrary to any law or public policy of the state, nor in any manner prejudicial to any right of the defendants.

2. SAME—CONTRACTS WITH BORROWING MEMBERS—EFFECT OF INSOLVENCY.

The insolvency of a building and loan association works a rescission of its contracts with its members, and sums borrowed by them become immediately due and payable, regardless of the terms of payment fixed by the contract.

3. SAME—USURY—LAW GOVERNING.

A bond and mortgage given by a member to a building and loan association organized under the laws of Minnesota, payable at its office in that state, are governed by its laws with respect to usury, although the mortgaged property may be situated in another state, where the borrower resides.

¶ 1. Suits by and against receivers of federal courts, see note to J. I. Case Plow Works v. Finks, 26 C. C. A. 49.

¶ 3. What law governs usury by building and loan associations, see note to Kirlicks v. Interstate Building & Loan Ass'n, 51 C. C. A. 319.

See Usury, vol. 47, Cent. Dig. § 11.

Appeal from the Circuit Court of the United States for the Central Division of the District of Idaho.

This is a suit brought by M. C. Clark, as receiver of the American Savings & Loan Association, formerly the American Building & Loan Association, to foreclose a bond and mortgage given by Isaac I. Lewis and his wife on property in the state of Idaho to the said American Building & Loan Association. This association is a corporation organized under the laws of the state of Minnesota. Lewis and his wife are citizens of the state of Idaho. In May, 1889, Lewis made application to the association for a loan of $5,000, and in September of that year received such loan or advancement, and the bond and mortgage upon which this suit is based were then executed. The bond was secured by a pledge of all stock owned by Lewis, which was to be the property of the association on maturity of said stock, which Lewis agreed to mature by the payment of certain moneys each month, part being called "interest," and part "dues on the shares of stock," one-half of which was stock called "premium for the privilege of obtaining the loan or advancement." Lewis made these payments monthly up to January, 1896, when he was notified that a receiver of the association had been appointed, and that no further payments would be accepted. The association was declared to be insolvent in proceedings brought in the state court of Minnesota, and William D. Hale was appointed receiver to take charge of the property and effects of the corporation, on January 14, 1896, and on June 18, 1896, he was made permanent receiver of the association. It appears from the record that said association, in order to engage in business in the state of Wisconsin, and in accordance with the laws of said state, deposited with the State Treasurer of Wisconsin, in trust for the benefit and security of all its members in the state of Wisconsin, securities of the value of $100,000. Among the securities so deposited was the bond and mortgage of Lewis and wife, which is sought to be foreclosed in this suit. Thereafter one L. V. Lewis, a member of the association, and a citizen of the state of Wisconsin, brought an action in the state court of Dane county, Wis., to have the bonds and mortgage in the hands of the State Treasurer of Wisconsin placed in the hands of a receiver, for the purpose of collecting them for the benefit of the Wisconsin members. In this action, Receiver Hale, who had been appointed by the Minnesota court, intervened, and claimed that the securities in the hands of the State Treasurer should be delivered to him, as the receiver of the association. In the course of the proceedings in that action, M. C. Clark, the complainant in this suit, was appointed receiver of the association for the state of Wisconsin. The contest between the respective receivers with reference to the securities in the hands of the Treasurer of Wisconsin continued until the suit was dismissed, for want of jurisdiction, by the Supreme Court of the United States, in May, 1901. Hale v. Lewis, 181 U. S. 473, 21 Sup. Ct. 677, 45 L. Ed. 959. Pending the controversy therein, the receivers, Hale and Clark, entered into an agreement, by leave of the Wisconsin court, by which the bond and mortgage in question in this suit were to be assigned and transferred by Hale to Clark. For the purpose of carrying out this agreement, a formal assignment was made by Hale to Clark. Thereafter Clark, the Wisconsin receiver, commenced this suit in the circuit court of Idaho, alleging, among other things, that at the time of his appointment as receiver "the American Savings & Loan Association had no creditors and owed no debts in the state of Idaho." The proceedings in this suit finally resulted in a decree of foreclosure of said bond and mortgage, from which decree Lewis and wife have appealed to this court.

Seldon B. Kingsbury, for appellants.

A. A. Frasier and W. E. Borah, for appellee.

Before GILBERT and ROSS, Circuit Judges, and HAWLEY, District Judge.

HAWLEY, District Judge, after making the foregoing statement of facts, delivered the opinion of the court.

It is contended by appellants that the complainant, Clark, as receiver of the Wisconsin court, has no standing in the court in Idaho, and should not have been permitted to maintain this suit, because he is a foreign receiver, and does not represent the association, its officers, membership, or interests; that the only interests which he represents are antagonistic to the whole membership of the association, opposed to the citizens of Idaho, and against the public policy of that state.

It is true that Clark is not the general receiver of the association. He was appointed by the court in Wisconsin for the purpose of receiving and foreclosing the securities which had been deposited with the State Treasurer as required by the statute of Wisconsin, so as to enable it to transact business in that state. His appointment may have been made for the better protection of the members of the association in said state, but it does not necessarily follow that his interests are entirely antagonistic to the association, its members, shareholders, or creditors. The stockholders authorized the deposit of the securities of the corporation in Wisconsin, and the members of the association are not in a position to question the validity of such deposit, or its binding force and effect, as against them.

We are not called upon in this suit to discuss the relative rights of the receivers, Hale and Clark, in order to determine the rights of the shareholders or creditors of the association under the law of Minnesota, who insist that all the securities held by the association should be deposited in Minnesota for the benefit of all the members of the association, nor to discuss the question as to the validity of the statute of Wisconsin requiring the deposit of $100,000 with the State Treasurer as a prerequisite of the right of the said association to transact business in that state.

In Lewis v. American Savings & Loan Association et al., 98 Wis. 203, 73 N. W. 793, 39 L. R. A. 559, the facts relative to the insolvency of the association, the laws of Minnesota and of Wisconsin, the resolution of the board of directors of the association passed May 1, 1889, authorizing the deposit of securities to the extent of $100,000 in compliance with the Wisconsin statute, as well as the appointments of Hale and Clark, are set forth at length, and the validity of such acts and the legal effect thereof are fully discussed. It was there held that the securities deposited in Wisconsin would be presumed to have been deposited in a bona fide attempt on the part of the association to comply with the laws of that state; that the failure of the association to comply with the statutory provisions of the state of its domicile in making such deposit did not render the transfer void, compliance with such provisions having been intended as a matter of local administration merely, and not as a condition precedent to the right to make it; that such deposit was within the lawful power of the association, as represented by its directors, and the action of the directors in making it was binding upon the association and all its members to the extent and according to the terms of the statute under which it was made; that the receiver appointed in Wisconsin was entitled to retain and sell or collect the securities, and apply the proceeds to the redemption in full of all shares held by the residents of Wisconsin, and to the performance and discharge of all the association's con-

tracts and obligations to members and persons residing therein, the residue, if any, to be turned over to the foreign receiver (Hale); that the association and its stockholders had waived the right to question the validity of the trust or the constitutionality of the Wisconsin statute on the ground that they impaired the obligation of contracts, even though in case of insolvency a preference was thereby secured to resident shareholders. See, also, Clark v. Olson (N. D.) 83 N. W. 519.

The shareholders in associations of this character are not, in the ordinary sense, creditors, and, if deemed creditors in any sense, they are necessarily subject to all equities existing between themselves. There were no creditors residing in the state of Idaho whose rights could in any manner be affected, except those who were shareholders in the association. The court did not err in recognizing and permitting the complainant, Clark, as receiver of the Wisconsin court, to bring and maintain this suit in Idaho. Lewis and his wife were not thereby deprived of any of their rights. They could not have made any other defense or availed themselves of any other privilege if the suit for foreclosure had been instituted by Hale, the general receiver of the Minnesota court, or by an independent or ancillary receiver appointed by the court in Idaho. The maintaining of such a suit is not against any public policy or law of the state. It is undoubtedly true that a receiver appointed by a court has no extraterritorial jurisdiction. A receiver in one state cannot maintain suit in the courts of other states as a matter of absolute right, but the courts of other states may, in the exercise of their sound discretion, as a matter of fact or comity, permit such a receiver to bring and maintain such suits. This doctrine of comity which usually prompts the courts to give this permission is almost universally applied, except in the single exception where some well-established right of the citizen of a state intervenes. Enforcement of this rule of comity does not impeach the sovereignty of the respective states, but produces a friendly intercourse between them; and it should only be denied when contrary to the policy of the state, or prejudicial to its real interests or the interests of its citizens. Cole v. Cunningham, 133 U. S. 107, 10 Sup. Ct. 269, 33 L. Ed. 538; Reynolds v. Adden, 136 U. S. 353, 10 Sup. Ct. 843, 34 L. Ed. 360. The suits of this character will also be sustained as an equitable proceeding to facilitate the settlement of the affairs of the insolvent association. The agreements and assignments between the receivers were evidently in furtherance of such a purpose.

In Hale v. Hardon, 95 Fed. 747, 750, 37 C. C. A. 240, the questions presented to the Circuit Court of Appeals were as to how far the defendant, a nonresident stockholder, in that case was bound by the action of the Minnesota court; and, second, whether the plaintiff in that suit, in his capacity as receiver for the creditors, appointed in a proceeding in Minnesota for the purpose of enforcing the liability of stockholders, might, in aid of that proceeding, maintain his action at law for such purpose in another and federal jurisdiction, upon grounds of comity or otherwise. Upon these questions the court, among other things, said:

"We may well observe at the outset that for many years the steady trend of federal decision has been in the direction of upholding and enforcing extra-

territorially this class of liabilities according to the fair intendment of the local law in cases properly within the provisions thereof, except where enforcement would unreasonably interfere with local vested creditor interests in states where enforcement is sought extraterritorially on grounds of comity, and perhaps, in some cases, where such enforcement would offend the general public policy of the state, while among the courts of the states there has been a diminishing diversity of decisions upon questions growing out of such statutory liabilities. It does not seem necessary to refer to the numerous decisions of the Supreme Court, and those of the various Circuit Courts of Appeal and of the Circuit Courts, so often cited, which sustain this general proposition. We shall therefore only refer, in this connection, to the more recent cases in the United States courts, of Rhodes v. Bank, 13 C. C. A. 612, 66 Fed. 512 [34 L. R. A. 742]; Whitman v. Bank, 28 C. C. A. 404, 83 Fed. 288; Elkhart Nat. Bank v. Northwestern Guaranty Loan Co., 30 C. C. A. 632, 87 Fed. 252; Dexter v. Edmands (C. C.) 89 Fed. 467; and to the more recent decisions of the state courts, as showing the present tendency of judicial decision in such jurisdictions (Bagley v. Tyler, 43 Mo. App. 195; Guerney v. Moore, 131 Mo. 650, 32 S. W. 1132; Ferguson v. Sherman, 116 Cal. 169 [47 Pac. 1023, 37 L. R. A. 622]; Cushing v. Perot, 175 Pa. 66, 34 Atl. 447 [34 L. R. A. 737, 52 Am. St. Rep. 835]; Bank v. Ellis, 172 Mass. 39, 51 N. E. 207 [42 L. R. A. 396, 70 Am. St. Rep. 232], and the admirable opinion of Chief Justice Field in that case); and to the exceedingly well-reasoned cases of Bank v. Lawrence (decided in Michigan, July, 1898) 76 N. W. 105, and Bell v. Farwell (decided by the Illinois Supreme Court in December, 1898) 52 N. E. 346 [42 L. R. A. 804, 68 Am. St. Rep. 194]. It would not be useful to undertake a review of the decisions of the various states, and it is quite needless to say that we must follow the decisions of the Supreme Court, so far as they cover the questions in this case, and, as to particular questions, if any, not covered by the Supreme Court decisions, that we should, in a case of this character, be governed by the judicial policy of the federal law, rather than that of any particular state."

In addition to the authorities there cited, see, also, Relfe v. Rundel, 103 U. S. 222, 26 L. Ed. 337; Parsons v. Charter Oak Life Ins. Co. (C. C.) 31 Fed. 305; Rogers v. Riley (C. C.) 80 Fed. 759; National Trust Co. v. Miller, 33 N. J. Eq. 155, 158; Gluck & Becker on Receivers (2d Ed.) § 5, p. 34 et seq.; High on Receivers, § 241.

The insolvency of a public building and loan association consists of its inability to perform the purposes for which it was created. Its insolvency works a rescission of the contracts between the association and its members. The money advanced to the borrowing member upon such insolvency immediately becomes due and payable, regardless of the terms of payment fixed in the written contract. Curtis v. Granite State Provident Association (Conn.) 36 Atl. 1023, 1025, 61 Am. St. Rep. 17; Knutson v. Northwestern Loan & Building Association (Minn.) 69 N. W. 889, 64 Am. St. Rep. 410.

The insolvent association in this case was organized under the laws of Minnesota. The bond and mortgage given by Lewis to the association were made payable to it at its home office, in the city of Minneapolis, Minn. The contract as thus made must be treated as a Minnesota contract, and the rights of the parties determined in accordance with the laws of that state, in so far as the question of usury in the payment of interest is considered, notwithstanding the security for its performance was the taking of a mortgage upon real estate in Idaho, where the law upon this question was different. The validity of such contracts has been sustained by this court. Dygert v. Vermont L. & T. Co., 94 Fed. 913, 37 C. C. A. 389; Pacific States

Savings, Loan & Building Association v. Green (C. C. A.) 123 Fed. 43, 44, and authorities there cited. See, also, United States Savings & Loan Co. v. Harris (C. C.) 113 Fed. 27.

The decree rendered by the court was certainly as favorable to appellants as the law would warrant. We find no error in the record prejudicial to appellants which would justify a reversal of this case. At the time the case was submitted, appellants filed a petition for a bill of review. This petition is denied, and the decree of the Circuit Court is affirmed.

HIBBERD v. BAILEY.

(Circuit Court of Appeals, Third Circuit. February 22, 1904.)

No. 41.

1. ADMINISTRATOR—RIGHT TO RECOVER ON BOND OF PREDECESSOR.
Under the statute of Pennsylvania, an administrator d. b. n. is authorized to demand and recover from his predecessor in the administration, or the sureties on his bond, all money due and belonging to the estate of the decedent.

2. BANKRUPTCY—PROVABLE CLAIMS—LIABILITY AS SURETY.
Where an orphans' court in Pennsylvania entered a decree nisi adjudicating the account of an administrator and directing a distribution, which decree was afterward "confirmed absolute," but later suspended as to the distribution, and the administrator directed to hold the "balance shown by said account" until further order of the court, such decree fixed the amount of the administrator's liability to the estate, and also that of the surety on his bond; and an administrator d. b. n. subsequently appointed, to whom the first administrator has been ordered by the court to pay over such amount, may prove the same in bankruptcy against the estate of the surety as a fixed liability evidenced by such decree, absolutely owing to the estate, within the meaning of Bankr. Act July 1, 1898, c. 541, § 63a, 30 Stat. 562 [U. S. Comp. St. 1901, p. 3447].

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

For opinion below, see 123 Fed. 185.

J. B. Rettew, for appellant.

Rudolph M. Shick, for appellee.

Before ACHESON, DALLAS, and GRAY, Circuit Judges.

GRAY, Circuit Judge. In March, 1895, John Wiseman, one of the bankrupts in the above-entitled case, together with another, was surety upon the bond of George L. Hubbard, administrator of George K. Hubbard, deceased, in the sum of $6,000. The condition of the bond, inter alia, was that George L. Hubbard, administrator of the estate of George K. Hubbard, should well and truly administer the said estate, should make and file an inventory and appraisement, according to law, should make or cause to be made, a just and true account of the said administration within one year from the date of the bond, or when thereunto legally required, and "all the rest and

¶ 1. See Executors and Administrators, vol. 22, Cent. Dig. §§ 488, 2521.

residue of the said goods, chattels and credits which shall be found remaining upon such administrator's account (the same being first examined and allowed by the orphans' court of the said county of Philadelphia) shall deliver and pay unto such person or persons respectively as the said orphans' court, by their decree and sentence pursuant to law, shall limit and appoint." On the 24th of May, 1896, an inventory and appraisement was filed in said estate, appraising the personal property of said decedent at the sum of $47,062.02, and on the 22d day of June, 1896, an account was filed by the administrator, showing a balance for distribution of $44,130.59. This account was audited by the orphans' court of Philadelphia county, Penrose, J. Upon the 28th of June, 1896, an adjudication nisi was filed, wherein it appeared that the balance for distribution, in the hands of George L. Hubbard, administrator, was $44,115.59, of which amount $33,797.02 represented the interest of the late George K. Hubbard in the firm of George K. Hubbard & Co., the balance being a cash asset. This balance, with interest, if any, was awarded in equal shares to the children of the decedent. At the expiration of the period at which adjudications nisi under the rules of the orphans' court were made absolute, if not excepted to, to wit, July 18, 1896, the decree was marked as of that date, "Confirmed absolute." No exceptions were ever filed to the account of the said administrator. On the 9th day of July, A. D. 1896, one John Quincy Adams filed in the court of common pleas of Philadelphia county, a bill in equity against George L. Hubbard, administrator of the estate of George K. Hubbard, deceased, et al., praying for a partnership accounting, and alleging, inter alia, that the estate of George K. Hubbard was indebted to him in a large sum. On the 18th day of July, A. D. 1896, upon application of the counsel of the said Adams to the orphans' court, Penrose, J., in chambers, indorsed upon the back of the adjudication the words "Confirmation of account is suspended until further ordered." This, it will be observed, was upon the same day that, in accordance with the rules of the court, "confirmation absolute" of the said decree of adjudication nisi had been entered upon its records. Attached to the said adjudication, is the following order of the orphans' court, made on the 12th day of October, 1896, signed by Penrose, J.:

"Estate of George K. Hubbard, deceased.

"Now, October 12, 1896, confirmation of the adjudication of the account of George L. Hubbard, administrator, filed July 1, 1896, having, upon petition of J. Quincy Adams, claiming as a creditor, been suspended until further order and the matter having come for further hearing before the auditing judge on the day first above mentioned; and it appearing that claim of said John Quincy Adams grows out of and involves a settlement of a partnership account existing at one time between the claimant and the decedent, which settlement is not within the jurisdiction of this court. It is therefore ordered that the distribution ordered by the said adjudication be suspended and that the balance shown by said account be held by the accountant until the settlement of the said partnership account, and the ascertainment of the amount if any being due the said John Quincy Adams, or until further order of the court. C. B. Penrose, Judge."

On the 9th day of April, 1902, John Wiseman, who was surety as aforesaid on the administration bond of George L. Hubbard, was ad-

judicated a bankrupt. On the 18th of September, 1902, George L. Hubbard was removed from his office of administrator, and ordered to pay over to his successor, thereafter to be appointed by the register of wills, all moneys, chattels and securities belonging to the estate of the said George K. Hubbard, deceased. On the 23d day of September, 1902, Dilworth P. Hibberd was appointed by the said register of wills administrator d. b. n. of the estate of George K. Hubbard, deceased, and was duly qualified to act, and thereupon made demand upon the said George L. Hubbard to pay over all the moneys, chattels and securities in his hands, that had been charged to him as administrator of said estate by the decree of the orphans' court. Said Hubbard was then unable to comply with the said order and decree, having been adjudicated a bankrupt, and wholly failed to turn over the moneys of the estate that had been loaned to his firm. Dilworth P. Hibberd, administrator d. b. n., thereupon presented and offered to prove a claim against the said John Wiseman, in bankruptcy, upon his liability as surety in the said administration bond, in the sum of $6,000, the full amount of the penalty thereof. Objection was made to this claim before the referee, by the trustee in bankruptcy, upon two grounds:

"(1) That the administrator d. b. n. had no right to present a claim on the bond of his predecessor, George L. Hubbard. (2) That the claim was not provable in bankruptcy, because of its being a contingent liability."

The referee at first disallowed the claim, but, upon exceptions to his report, afterwards decided that the claim was provable in bankruptcy. Upon an appeal taken to the District Court, that court reversed the decision of the referee, and held that the claim was not provable. 123 Fed. 185. From this decree of the District Court, the present appeal has been taken.

The question raised upon the first objection, viz.: Can an administrator d. b. n., in the state of Pennsylvania, maintain an action in the name of the commonwealth, to his use, against a surety on a bond of a previous administrator, is answered by the act of Assembly of that state, of February 24, 1834, § 31 (P. L. 78) by which it is provided that:

"Administrators d. b. n., with or without a will annexed, shall have power to demand and recover from their predecessors in the administration, or their legal representatives, all moneys, goods and assets remaining in their hands, due and belonging to the estate of the decedent."

We do not understand that the effect of this statute, in determining the question above stated, was contested by the appellee in his argument before this court. It is well, however, to read, in connection with the language of the statute, the following portion of the condition of the bond, executed by the bankrupt, viz.:

"That the administrator, George L. Hubbard, should make, or cause to be made, a just and true account of his said administration * * * and all the rest and residue of the said goods and chattels and credits which shall be found remaining upon the said administrator's account, the same being first examined and allowed by the orphans' court of the county having jurisdiction, shall deliver and pay unto such person or persons as the said orphans' court, by their decree or sentence, pursuant to law, shall limit and appoint."

The surety is undoubtedly liable upon this condition of the bond, for the performance of all such duties as are or may be imposed by law. The right of the administrator d. b. n. to demand, and the duty of the removed administrator to pay over to him, all of the moneys, goods and assets remaining in his hands, due and belonging to the estate of the decedent, is clearly imposed by the law of Pennsylvania.

The question presented for our determination is, has the liability of the principal in the bond been so legally liquidated and ascertained, as to the amount and the person to whom due, as to have fixed the liability of the surety therein at the time of the filing of the petition in bankruptcy?

These bonds, conditioned for the fidelity of an officer, such as an administrator or executor, appointed by law to discharge plain and well-defined duties, being taken in the name of the state, are held in trust by their legally designated custodian for the protection of those, who thereafter may be injured by the default of such officer in any of the duties covered by the condition of his bond. Such persons are ordinarily creditors or legatees, and prior to the act of 1834, in Pennsylvania, and above recited, an administrator d. b. n. could not in that commonwealth maintain an action to his use against either principal or surety on the bond of a previous administrator. A creditor or legatee, who desired to recover from a surety the legacy or debt unlawfully withheld from him by an executor or administrator, must first have brought suit against such administrator or executor as the principal on the bond, and have thus ascertained a definite amount due from such defaulting official to himself. Under the law and practice as obtaining in Pennsylvania, the orphans' court is vested with jurisdiction, not only to audit the accounts of executors and administrators, and charge them with the unadministered balance remaining in their hands and due the estate of their decedents, but also, upon proper proceedings had before them, to make distributive decrees, ascertaining the amount due and the persons to whom payable. A decree thus fixing an amount due and the person to whom payable, fixes the liability of the administrator or executor as principal in his bond. If such principal be insolvent, or his inability to pay be otherwise demonstrated, or, without regard to the ascertainment of these facts, nothing further is required to make certain and definite the liability of the surety in such bond. In the case of a creditor or legatee, there must be evidence produced before the orphans' court, showing the amount, as well as the ground, and existence of his claim as a lawful one, upon which a definite order and decree of the court can be made.

Assuming, as we do, that since the Pennsylvania act of 1834, above alluded to, the claim of an administrator d. b. n. against his predecessor in office is protected by the administration bond of such predecessor, the conclusion seems necessarily to follow, that the adjudication of the orphans' court finding a definite amount remaining in said predecessor's hands after an audit, and charging him with the same for distribution, fixes his liability upon his bond, and consequently the liability of his surety. The liability is to the estate of the decedent, and it does not intermit or become suspended by reason of

the fact that the situation does not yet admit of the appointment of an administrator d. b. n. The liability is for the whole amount found due to the decedent's estate, and no further adjudication is necessary, as in the case of a legatee, who must legally establish his claim out of the fund so remaining in the hands of the administrator.

Coming then, to the case before us, we are to consider how far, under the sixty-third section of the bankrupt act, par. "A," Act July 1, 1898, c. 541, 30 Stat. 562 [U. S. Comp. St. 1901, p. 3447], the claim of the estate of George K. Hubbard, deceased, was provable by his administrator d. b. n. against the estate of the bankrupt, surety on the administration bond. Paragraph "a," of the section referred to, describes as a provable debt, inter alia:

"A fixed liability as evidenced by a judgment or an instrument in writing absolutely owing at the time of the filing of the petition against him, whether then payable or not, with any interest thereon which would have been recoverable at that date, or with a rebate of interest upon such as were not then payable and did not bear interest."

The law of Pennsylvania fixes the liability of an administrator to pay over to his successors in office all the moneys, goods and assets remaining in his hands and due and belonging to the estate of the decedent. The amount "due and belonging to the estate of the decedent" was in this case ascertained by the adjudication of the orphans' court, made and entered of record upon the 28th of June, 1896, and finally confirmed by the order and decree of October 12, 1896, recited above in full from the record. Though distribution by this latter decree was suspended until further order, the amount "due and belonging to the estate of the decedent" was confirmed. No further evidence was necessary to fix the amount due or ascertain to whom the same was due, as in the case of a legatee claiming some part of the whole sum. The whole amount found by the decree of June 28th, and confirmed by that of October 12th, to be in the hands of the administrator, was, by virtue of the said adjudication, "due and belonging to the estate of the decedent." It is not required in Pennsylvania, that the administrator should be pushed to insolvency. A judgment at law or a decree of the orphans' court ascertaining the amount of his personal responsibility, and to whom, is all that is necessary as a prerequisite to a proceeding against the surety. Commonwealth v. Stub, 11 Pa. 150, 51 Am. Dec. 515.

The liability, therefore, of the surety in the bond, was a fixed liability, evidenced by the said adjudication at the time of the filing of the petition against him, whether then payable, or not. It is true, that the appointment of the administrator d. b. n. and the order of the orphans' court, of September 18, 1902, ordering and directing the said George L. Hubbard "forthwith to pay and turn over to the administrator so appointed all the moneys, chattels and securities belonging to the said estate," were not made until after the filing of the petition in bankruptcy. But the liability of the former administrator to the estate of the decedent, was fixed by an adjudication long prior to the bankruptcy proceedings. The act, as we have seen, expressly makes it a matter of indifference, whether said liability be payable at the time of adjudication evidencing it, or not. The debt was due the

estate. The administrator d. b. n. was merely the ministerial officer to demand and collect it as such. The right to file such claim depended upon the existence of a fixed liability properly adjudicated, as due and belonging to the estate prior to the filing of the petition in bankruptcy, not upon the date of the appointment of the administrator d. b. n., who was authorized by law to enforce such liability.

We are of opinion that a liability has been established against the principal to a greater amount than the liability of the bond; that that liability was fixed at the time of the filing of the petition in bankruptcy, and therefore became a fixed liability against the surety and bankrupt, such as is required by the provisions of the sixty-third section of the bankruptcy act.

We have carefully examined, but do not deem it necessary to discuss, the authorities cited on either side in the argument before us. Most, if not all, of those cited by the appellee, refer to the fixing of the liability of the executor or administrator to the particular creditor, legatee or distributee suing on the bond. In such case, of course, there is the necessity of another adjudication than that establishing the liability of the administrator to the estate of the decedent. Here, we are concerned with the primary liability to the estate which, as we have seen, is covered by the first adjudication.

The order of the court below, in setting aside the report of the referee, must be reversed, and the said report, allowing the claim of the said Dilworth P. Hibberd, administrator d. b. n. of the estate of George K. Hubbard, deceased, against George W. Bailey, trustee of the estate of John Wiseman, bankrupt, is confirmed.

E. H. GODSHALK CO. v. STERLING et al.

(Circuit Court of Appeals, Third Circuit. May 10, 1904.)

No. 16.

1. BANKRUPTCY—DISCHARGE—OBJECTIONS—SPECIFICATIONS—SPECIFICNESS.

A specification of objection to bankrupts' discharge, alleging that the bankrupts, with intent to conceal their financial condition, failed to keep books of account or records from which such condition could be ascertained, was sufficiently specific within Bankr. Act July 1, 1898, c. 541, § 14b, 30 Stat. 550 [U. S. Comp. St. 1901, p. 3427], as amended by Act Cong. Feb. 5, 1903, c. 487, § 4, 32 Stat. 797 [U. S. Comp. St. Supp. 1903, p. 411], providing that the failure to keep books, with such intent, shall deprive the bankrupt of the right to a discharge, though the specification did not disclose what books of account it was claimed the bankrupt should have kept.

2. SAME—DESTRUCTION OF VOUCHERS.

A specification of objection to bankrupts' discharge, alleging that the bankrupts, with intent to conceal their financial condition, did destroy, through the agency of their regularly authorized bookkeeper, canceled checks drawn by the bankrupts, together with stubs of such checks, from which such condition might be ascertained, was not objectionable for failure to more definitely describe the checks and stubs alleged to have been destroyed.

3. SAME—APPEAL—OBJECTIONS.
An objection to specifications of objections to a bankrupt's discharge, on the ground that the jurat was insufficient, cannot be made for the first time on a petition for review.

4. SAME—FALSE STATEMENTS.
A specification of objection to bankrupts' discharge, on the ground that they had made a materially false statement on which they had obtained credit, which failed to state the substance of such alleged false statement, was insufficient.

Petition for Revision of Proceedings of the District Court of the United States for the Eastern District of Pennsylvania.

E. B. Seymour, Jr., for petitioner.
Henry N. Wessel, for appellees.

Before ACHESON, DALLAS, and GRAY, Circuit Judges.

ACHESON, Circuit Judge. E. H. Godshalk Company, a creditor of Sterling & Snyder, bankrupts, filed in the court below four specifications of objections to the discharge of the bankrupts. The bankrupts moved to dismiss these specifications, and the court allowed the motion. The reasons assigned by the bankrupts in support of their motion were because the specifications, "and each of them, are insufficient, indefinite, and uncertain, and for the additional reason that they fail to specify facts which constitute legal ground for the refusal of the court to grant the discharge of the bankrupts, and for the further reason that they do not specify any legal objection to the bankrupts' discharge." The learned judge below, in sustaining the motion to dismiss, filed no opinion. Therefore we have not the benefit of any statement by him as to his reasons for his order of dismissal. The specifications in question come under section 14b of the bankrupt act of July 1, 1898, c. 541, 30 Stat. 550 [U. S. Comp. St. 1901, p. 3427], as amended by Act Feb. 5, 1903, c. 487, § 4, 32 Stat. 797 [U. S. Comp. St. Supp. 1903, p. 411]. This amendatory section, we incline to think, is more favorable to objecting creditors than was the original section as construed by the courts. But however this may be, we have reached the conclusion that at least two of the specifications in this case, namely, 1 and 4, were sufficiently specific, and that the court should have heard and investigated them. These two specifications of objection to the discharge of the bankrupts are as follows:

"(1) That such application should not be granted, because of the following facts, which the undersigned charges to be true, viz.: That the said bankrupts, Isaac Sterling and Harry Snyder, did, with intent to conceal their financial condition, fail to keep books of account or records from which such condition might be ascertained."

"(4) That such application should not be granted, because of the following facts, constituting an additional ground, which the undersigned charges to be true, viz.: That the said bankrupts, Isaac Sterling and Harry Snyder, did, with intent to conceal their financial condition, destroy, through the agency of one Albert Sterling, son of Isaac Sterling aforesaid, their regularly author-

¶ 3. Appeal and review in bankruptcy cases, see note to In re Eggert, 43 C. C. A. 9.

¶ 4. See Bankruptcy, vol. 6, Cent. Dig. § 714.

ized bookkeeper, canceled checks drawn by the said firm prior to the first day of January, A. D. 1903, and also stubs of said checks from which such condition might be ascertained."

These specifications, respectively, not only conform to the language of section 14b of the bankrupt act, as amended by the act of 1903, but we think that they sufficiently specify the necessary facts.

We cannot assent to the suggestion that it was the duty of the objecting creditor to specify what books of account the bankrupts should have kept. We think the specification went far enough when it affirmed that the bankrupts, with intent to conceal their financial condition, failed to keep books of account or records from which such condition might be ascertained.

The fourth specification distinctly avers that the bankrupts, with intent to conceal their financial condition, destroyed, through the agency of one Albert Sterling, son of one of the bankrupts, and the bookkeeper of the firm, canceled checks drawn by the firm prior to the 1st day of January, 1903, and also the stubs to said checks, from which such condition might be ascertained. We think that this specification was sufficient in its statement of facts. It was not for the objecting creditor to set forth the dates when those checks were drawn, or other particulars. The destruction of the checks and their stubs, with intent to conceal the firm's financial condition, was the important fact.

No objection seems to have been taken in the court below to the jurat, and it is too late to make such objection upon the hearing in this court upon this petition for review, even if the objection had any substantial basis. We do not see, however, that the jurat is open to objection.

Our conclusion is that the assignments of error relating to the action of the court below with respect to the specifications of objections numbered 2 and 3 should be overruled. The specification numbered 2 does not set forth what the "materially false statement" was upon which the bankrupts obtained credit. No good reason appears why at least the substance of this alleged false statement was not contained in the specification. The like observations are applicable to the third specification of objection. It does not set forth, as we think it should have done, what property the bankrupts transferred. The averment, "some of their property," is inexcusably vague.

The decree of the District Court, in so far as it overruled and dismissed the specifications of objection to the bankrupts' discharge, filed by E. H. Godshalk Company and numbered 1 and 4, is reversed, and the case is remanded to that court for further proceedings in accordance with this opinion.

WALMSLEY v. QUIGLEY.

(Circuit Court of Appeals, Eighth Circuit. April 28, 1904.)

No. 1,834.

1. AGENT'S AUTHORITY—EVIDENCE—DECLARATIONS OF AGENT.
The admissions or declarations of an alleged agent are alike incompetent to prove his authority or the extent of his powers.
(Syllabus by the Court.)

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

Charles J. Hughes, Jr., and Bret Harris, for plaintiff in error.
E. T. Wells, John Charles Thompson, John H. Chiles, and George S. Redd, for defendant in error.

Before SANBORN, VAN DEVANTER, and HOOK, Circuit Judges.

SANBORN, Circuit Judge. The defendant in error, Edward D. Quigley, brought an action in the Circuit Court against Sylvester Pierce Walmsley to recover a commission of $2,500, which he alleged was due to him for his services in procuring a purchaser for certain real estate, which, for the sake of brevity, will be called the "Dove's Nest Property." For his cause of action he alleged in his complaint that these facts existed: On April 1, 1901, Robert S. Morrison held the title to the real estate as a trustee for Walmsley and others whose names were unknown to him. M. C. Merrill told him that he desired to purchase this property. Thereupon he applied to Morrison for authority to sell the property to Merrill, and Morrison, "by authority of said defendant and the others equitably interested in said premises, and for whose use and behoof the said Morrison was holding the same," agreed with him that he should procure Merrill or some other person to buy the property for $25,000, and that he should receive as his commission for the negotiation and for procuring the purchaser $2,500. Afterwards he persuaded Merrill to visit and examine the property, and, while Merrill had the purchase under consideration, Morrison, by the direction and request of the defendant and others equitably interested in the property, conveyed it to Walmsley as trustee for those entitled to its benefit. At some subsequent time Merrill continued the negotiations for the purchase which had been instituted by the plaintiff, and finally, on December 24, 1901, bought the property for $25,000. The defendant, Walmsley, admitted in his answer that Morrison held the naked legal title to the real estate on April 1, 1901, in trust for the defendant and others who were the equitable owners thereof, that Morrison subsequently conveyed this title to him, and that he sold the property to Merrill in the autumn of the year 1901 through an agent named Owen, to whom he paid a commission of $2,500 for effecting the sale. He denied that Morrison ever had any beneficial interest in the property, that he ever had any right or

¶ 1. See Principal and Agent, vol. 40, Cent. Dig. § 416.

authority to sell the land, to offer it for sale, or to authorize any other person to do so. He denied that Morrison ever had any power or authority from him or from any of the other persons equitably interested in the property to make the alleged agreement to pay to the plaintiff a commission of $2,500 for procuring a purchaser of the property, and denied that Morrison ever made any such agreement. He denied that Merrill continued any negotiation instituted by Quigley at the time when he finally purchased the property through Owen.

Under these pleadings, and with the alleged authority of Morrison to agree on behalf of the defendant, Walmsley, and the other equitable owners of the property, to pay to the plaintiff a commission of $2,500 for procuring a purchaser of the property for the sum of $25,000, squarely in issue, the case came to trial. A jury was waived, and the trial was conducted before the court. The plaintiff introduced in evidence a sheriff's deed of the land in question to Morrison, dated September 16, 1898, and the certificate of its record upon September 26, 1898. The plaintiff, Quigley, was then called as a witness, and he testified that in February, 1901, Merrill wanted him to look up the Dove's Nest property, learn who owned it and what it could be purchased for, and told him that he wanted to buy it; that he proceeded to investigate the title, and found that the property stood in the name of Morrison; that he thereupon called upon Morrison, and the latter asked him to make a proposition which he could submit to some coowners; that he made a proposition to pay $25,000 for the property —$5,000 cash, and $5,000 every 90 days thereafter until the full price was paid; that Morrison told him that he would have to wait until he heard from New Orleans parties who were interested in the property before he could give him any answer to his proposition; that he waited two weeks, and that Morrison then said that he could not give a definite answer because some of the owners, Mr. Walmsley or their attorney, were in New York; that at the end of three or four weeks Morrison told him that they had accepted the proposition, and that he could go on with the sale; that he then put Morrison in communication with Merrill, and informed the latter that they had agreed to the proposition, and that he could go on and close the deal at any time. The foregoing is all the material testimony that had been presented in the case when counsel for the plaintiff asked Quigley what the terms of the agreement were with reference to commission, defendant's counsel objected to the question upon the ground that no relationship between the plaintiff and the defendant had been shown which would justify proof of commission, this objection was overruled, the plaintiff excepted, and the witness answered that they were to pay him 10 per cent. of the purchase price. The ruling of the court which admitted this evidence is the first specification of error assigned.

This is an action to recover $2,500 of the defendant, Walmsley, as an individual, and not as a trustee, and the judgment which has been rendered against him is a personal judgment. The cause of action rests upon the averment that Morrison, by authority of Walmsley, agreed to pay the plaintiff 10 per cent. of the purchase price of the property for his services in procuring a purchaser for it. Proof of the authority of Morrison to make this agreement on behalf of Walmsley

was clearly an indispensable prerequisite to the competency of evidence of the agreement. No such proof had been presented. The testimony of Quigley that Morrison had told him that "they" had accepted his proposition, even if it be conceded that Walmsley was one of the "they," was both insufficient and incompetent to establish the authority of Morrison to bind Walmsley by such a contract. The admissions and declarations of an alleged agent are alike incompetent to establish his authority or the extent of his powers. Union Guaranty & Trust Co. v. Robinson, 24 C. C. A. 650, 653, 79 Fed. 420, 422; Whitam v. Dubuque & S. C. R. Co. (Iowa) 65 N. W. 403, 405; Bacon v. Johnson (Mich.) 22 N. W. 276, 277. The Circuit Court should have sustained the objection to evidence of the agreement to pay the commission until the plaintiff had established the fact by competent proof that Walmsley had authorized Morrison to make such a contract on his behalf. There was no evidence of any such authority before the court at the time this ruling was made. Moreover, a careful perusal of the entire record has produced a settled conviction in our minds that there was no evidence at any time during the trial that the defendant ever gave Morrison any such authority or that he ever ratified any such contract. The result is that proof of the agreement of Walmsley to pay the commission was not only incompetent at the time it was offered, but it never became competent at any time during the trial of the action, and the error in receiving it was crucial and fatal to the plaintiff's recovery, so that it becomes unnecessary to consider any other question presented in this case.

The judgment below must therefore be reversed, and the case must be remanded to the Circuit Court with directions to grant a new trial. It is so ordered

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TSOI YII v. UNITED STATES. YEE YUEN v. UNITED STATES. CHEUNG HIM NIM v. UNITED STATES. CHEW HING v. UNITED STATES. LEE YUE v. UNITED STATES. CHIN CHEW FONG v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. April 4, 1904.)

1. CHINESE EXCLUSION—REVIEW OF ORDER OF DEPORTATION—JURISDICTION OF CIRCUIT COURT OF APPEALS.

Under section 6 of Act March 3, 1891, creating the Circuit Courts of Appeals (26 Stat. 828, c. 517 [U. S. Comp. St. 1901, p. 549]), which gives such courts the power to review by appeal or writ of error final decisions in the District Court, an appeal lies to such court from a judgment of a District Court rendered on an appeal from an order of a commissioner for the deportation of a Chinese person arrested under section 13 of the exclusion act of September 13, 1888, c. 1015, 25 Stat. 479 [U. S. Comp. St. 1901, p. 1317], which authorizes an appeal from a conviction before a commissioner to "the judge of the District Court for the district."

Appeals from the District Court of the United States for the Northern District of California.

C. T. Hughes, Frank V. Bell, and Dibble & Dibble, for appellants.

Duncan E. McKinlay, for the United States.

Before GILBERT and ROSS, Circuit Judges, and HAWLEY, District Judge.

GILBERT, Circuit Judge. The appellants in these cases, Chinese persons, were prosecuted before a United States commissioner under section 13 of the Chinese exclusion act of September 13, 1888, c. 1015, 25 Stat. 479 [U. S. Comp. St. 1901, p. 1317]. The commissioner in each case adjudged that they were unlawfully in the United States, and that they be deported. Appeals from his judgments were taken to the judge of the District Court for the Northern District of California. Judgments were made and entered in that court affirming the judgments of the commissioner. From the judgments of the District Court, appeals were taken to this court. The appellee now moves to dismiss on the ground that no appeal lies from the decision of the district judge. Section 13 of the act of September 13, 1888, under which the appeals were taken, provides as follows:

"That any Chinese person or persons of Chinese descent found unlawfully in the United States or its territories may be arrested upon a warrant issued upon a complaint, under oath, filed by any person on behalf of the United States, by any justice, judge or commissioner of a United States court, returnable before any justice, judge or commissioner of a United States court, or before any United States court, and when convicted upon a hearing and found and adjudged to be not lawfully entitled to be and remain in the United States, such person shall be removed from the United States to the country whence he came. But any such Chinese person convicted before a commissioner of a United States court may, within ten days from such conviction, appeal to the judge of the District Court for the district."

It is contended that all legislation relating to the Chinese is special, that the section above quoted gives the right of appeal only from the ruling of a commissioner to the judge of the District Court, and that the decision of such district judge is not the judgment of the court, and is not a final decision appealable to this court, such as is contemplated by section 6 of the act of March 3, 1891, c. 517, 26 Stat. 828 [U. S. Comp. St. 1901, p. 549], establishing the Circuit Courts of Appeals, and providing that they shall exercise appellate jurisdiction to review by appeal or writ of error final decisions in the District Court. In the case of United States v. Gee Lee, 50 Fed. 271, 1 C. C. A. 516, the phrase "the District Judge of the district," as used in section 13 of the act of September 13, 1888, was construed, and was held to be the equivalent of the words "District Court of the district." Judge Deady, who delivered the opinion of the court in that case, said:

"'Judge of the District Court' and 'District Court' are not, strictly speaking, convertible terms. But they are so in a popular sense, and it is safe to assume that Congress, in the use of the former phrase in this connection, intended to give the party an appeal to the District Court of the district."

In Chow Loy v. United States, 112 Fed. 354, 50 C. C. A. 279, the Circuit Court of Appeals for the First Circuit criticised the decision in the Gee Lee Case, and held that the appeal to the judge of the District Court for the district is to the judge as a special tribunal, and not to the District Court. In support of that view the court re-

ferred to the decision in Fong Yue Ting v. United States, 149 U. S. 698, 728, 13 Sup. Ct. 1016, 1028, 37 L. Ed. 905, where it was said:

"The designation of the judge in general terms as a United States judge is an apt and sufficient description of a judge of a court of the United States, and is equivalent to or synonymous with the designation, in other statutes, of the judges authorized to issue writs of habeas corpus or warrants to arrest persons accused of crime. Rev. St. §§ 752, 1014 [U. S. Comp. St. 1901, pp. 592, 716]."

And the Circuit Court of Appeals, arguendo, referred to Carper v. Fitzgerald, 121 U. S. 87, 7 Sup. Ct. 825, 30 L. Ed. 882, where it was held that no appeal lies to the Supreme Court from the order of a circuit judge made in chambers as a judge, and not as a court, discharging a person brought before him on a writ of habeas corpus. But in the case of Fong Yue Ting the remarks of the court above quoted were not directed to the provision of the act providing for an appeal to the district judge from a commissioner's decision. They had reference to the language of section 6 of the act of May 5, 1892, c. 60, 27 Stat. 25 [U. S. Comp. St. 1901, p. 1321], and the portion thereof which provides that a Chinese laborer who shall neglect or fail to apply for a certificate of residence within the year therein prescribed "may be arrested by any customs official, collector of internal revenue or his deputies, United States marshal or his deputies, and taken before a United States judge," and that it shall thereupon be the duty of a judge to order that the laborer be deported from the United States.

We think the whole question of our right to entertain these appeals is determined by the decisions of the Supreme Court in United States v. Mrs. Gue Lim, 176 U. S. 459, 20 Sup. Ct. 415, 44 L. Ed. 544, Chin Bak Kan v. United States, 186 U. S. 193, 22 Sup. Ct. 891, 46 L. Ed. 1121, and Ah How v. United States and the other cases therewith decided on February 23, 1904 (not yet officially reported) 24 Sup. Ct. 357, 48 L. Ed. ——. In the first of those cases certain Chinese had by the United States commissioner been adjudged to be unlawfully within the United States. They appealed, and the District Court held that they were lawfully entitled to be and remain in the United States. An appeal was taken to the Supreme Court, and that court affirmed the judgment of the District Court. In the Chin Bak Kan Case the appellant was arrested under the provisions of section 13 of the act of September 13, 1888, and was by a commissioner adjudged to be unlawfully in the United States, and ordered to be deported. An appeal was taken from the judgment of deportation rendered by the commissioner to the judge of the District Court of the United States for the Northern District of New York. That court affirmed the judgment. From that judgment an appeal was taken to the Supreme Court under section 5 of the act of March 3, 1891, 26 Stat. 827, on the ground that the construction of the treaty of 1894 was drawn into question. The Supreme Court entertained the appeal, and, in its opinion affirming the judgment appealed from, quoted the provisions of section 13 of the act of September 13, 1888, under which the arrest was made. The case of Ah How was a similar one. Mr. Justice Holmes, in delivering the opinion of the court, said, "These are appeals from judgments of the United States District Court con-

firming decisions of a commissioner, and adjudging that the appellants be removed from the United States to China," and the court affirmed the judgments of the District Court.

If appeals could be taken in those cases to the Supreme Court, they could be entertained only on the ground that the decision of the district judge on an appeal from the commissioner's decision was the judgment of the District Court, and, as such, a final decision, from which an appeal could be taken. It is true that in neither of those decisions was discussion had of that precise question, but it is not to be supposed that the Supreme Court did not consider all the terms of the act authorizing the judgment from which the appeal was prosecuted, and did not have in mind and pass upon the question of its own jurisdiction. On the authority of those decisions, the motions to dismiss will be overruled.

SHOE & LEATHER REPORTER et al., Petitioners.

In re FLAGG MFG. CO.

(Circuit Court of Appeals, First Circuit. April 26, 1904.)

No. 520 (original).

1. BANKRUPTCY—COURTS—JURISDICTION—MORTGAGED PROPERTY—SALE.
Union Trust Company, Petitioner, 122 Fed. 937, 59 C. C. A. 461, applied, to the effect that a court of bankruptcy has jurisdiction to order a sale in gross of all the assets of a bankrupt manufacturing corporation in its possession free from incumbrances, notwithstanding the corporation has given a mortgage on such assets to secure its bonds, leaving questions as to what assets are covered by the mortgage to be afterwards determined.

2. SAME—REVISORY PETITION—QUESTIONS REVIEWABLE.
An objection to an order of a court of bankruptcy fixing a minimum bid for the sale of the assets of the bankrupt, and providing that five-sixths of the purchase price might be paid in bonds secured by mortgage on such assets, will not be reviewed on a revisory petition where petitioners could not be prejudiced in any manner thereby.

3. SAME—QUESTIONS RAISED BELOW.
Where it was not objected in the District Court, sitting in bankruptcy, that part of the property of a bankrupt ordered to be sold had not been inventoried in the manner required by the bankrupt act, such objection would not be considered on a revisory petition.

Howland Twombly (Boyden, Bradlee & Twombly, on the brief), for petitioners.

Howard W. Brown, for respondent.

Before COLT and PUTNAM, Circuit Judges, and BROWN, District Judge.

PUTNAM, Circuit Judge. This is a revisory petition brought by certain creditors of the Flagg Manufacturing Company, a corporation which has been adjudged bankrupt. The corporation was actively engaged in manufacturing at the time of its bankruptcy, and in all essential features the case is like that of Union Trust Company, Pe-

¶ 2. Appeal and review in bankruptcy cases, see note to In re Eggert, 43 C. C. A. 9.

titioner, wherein we passed down an opinion on May 15, 1903, 122 Fed. 937, 59 C. C. A. 461. In this case, as in that, the bankrupt corporation had given a mortgage securing its bonds, and the indebtedness under that mortgage is very considerable. It also has a large unsecured indebtedness. This petition is brought by some of the unsecured creditors.

After a full investigation, the District Court, sitting in bankruptcy, ordered a sale of all the assets in lump, leaving all questions as to what portions thereof are covered by the mortgage and are not covered by it to be afterwards ascertained and determined. Therefore, so far as the main issue is concerned, the District Court rested securely on our decision in Union Trust Company, Petitioner.

Only two propositions require our attention. The District Court provided that the minimum bid should be $60,000, and that the purchaser might pay five-sixths of the purchase money in bonds secured by the mortgage referred to. The other sixth, being not less than $10,000, it ordered to be paid in cash. The petitioners claim that the District Court had no power to order any portion of the purchase price to be paid in bonds, but it is plain that they cannot be prejudiced by its order in that particular, so that we need not investigate its powers in reference thereto. The case in this respect falls within our expression in Boston Dry Goods Company, Petitioner, wherein we passed down an opinion on October 13, 1903, 125 Fed. 226, 229, 230, as follows:

> "It would be detrimental to the authority of the District Court, injurious to its administration of the bankruptcy statutes, and involve the numerous and useless delays which those statutes evidently have been framed to avoid, if, in administrative matters, where no substantial interests are concerned, we became meddlesome beyond what the law requires of us."

It is enough to say that this part of the case, as made by the petitioners, is disposed of by the general rule in equity which applies to these summary petitions, to the effect that equity does not concern itself with mere trivialities, nor unless, on the whole case, the proponent satisfies the court that he has a substantial interest, which is in danger.

The petitioners now maintain that the outstanding bonds, or some of them, are not valid obligations of the bankrupt corporation; but on this point the record gives us nothing definite, and the order of the District Court directing the sale contains sufficient remedial reservations, which it is not necessary to recite. The only other objection brought to our notice is that some of the property ordered to be sold has not been inventoried in the manner required by the bankruptcy statutes. While, of course, we would ordinarily expect the District Court, before selling property in lump as to which there are conflicting claims, to establish by proper inventory and appraisal the basis for a distribution of the proceeds when the title to the portions of the property in dispute is settled, yet this record presents nothing definite with regard to this proposition of the petitioners. It, however, appears that nothing of this character was brought to the attention of the District Court. Therefore this point is disposed of by the further observation made by us in Boston Dry Goods Company, Petitioner, to the effect that "we ought not to take jurisdiction over propositions of the char-

acter submitted to us, which the record does not clearly show were brought specifically to the attention of the District Court."

On the whole, we do not find that we would be justified in assuming to revise the District Court with reference to the case before us.

Let there be a decree dismissing the petition, with costs for the respondent.

HIBBERD v. McGILL.

(Circuit Court of Appeals, Third Circuit. February 22, 1904.)

No. 42.

1. BANKRUPTCY—PARTNERSHIP OR INDIVIDUAL DEBT.

An indebtedness contracted by a member of a partnership individually before the partnership was formed cannot be converted into a firm obligation by its entry as such on the books without the creditor's knowledge, or by the making of payments thereon by firm checks, so as to preclude the creditor from proving it against the estate of the individual partner in bankruptcy.

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

For opinion below, see 123 Fed. 187.

J. B. Rettew, for appellant.

Rudolph M. Shick, for appellee.

Before ACHESON, DALLAS, and GRAY, Circuit Judges.

GRAY, Circuit Judge. The facts, as disclosed by the record in this case, are as follows:

John Wiseman and George McGill traded together in Philadelphia, as partners under the firm name of Wiseman & McGill, in the wholesale grocery business, for a number of years prior to 1891. In January, 1891, George McGill died. There stood to his credit as capital, on the books of the firm, about $18,000. He left surviving him his widow, this claimant, and one daughter, Anna E. McGill. Dr. George W. Bailey was executor of his will, and one of the trustees for Anna E. McGill. Shortly after George McGill's death, Dr. Bailey, as executor, and acting as attorney in fact for Mrs. McGill and as trustee for Anna E. McGill, made a settlement with Mr. Wiseman, the surviving partner. In that settlement, it was agreed between Mr. Wiseman, the surviving partner, and Dr. Bailey, that $9,000 should be carried to the credit of Mrs. McGill. It was also agreed that Mrs. McGill should be paid $75 per month. This agreement was made prior to March 16, 1891, because on that date, there is a check in evidence, signed "Wiseman & McGill," for the first month's installment (probably the month of February) under that agreement. This sum was regularly paid each month, by checks signed in the same way during several years, and until the firm name was changed to Wiseman & Wallace. There is also in evidence the following receipt:

"Philadelphia, April 1, 1891.

"Received of Ella McGill Nine Thousand Dollars and the same is placed to her credit on our books.

"$9,000.00. [Signed] Wiseman & McGill."

It was testified that, on the 1st of April, Wallace, who had previously been a bookkeeper of the old firm, became a partner, the firm name of Wiseman & McGill being continued as stated. It is also in evidence that Mrs. McGill's account was kept upon the books of the firm, and that her monthly stipend was paid out of partnershp funds. There was no evidence, however, that either Dr. Bailey, her attorney, or Mrs. McGill herself, ever consented to consider the debt as a debt of the new firm. On the contrary, Mrs. McGill testified that she always considered that, as Wiseman had assumed the debt as surviving partner, it so continued as his individual debt. Indeed, Mr. Wiseman, in his testimony, confirms that of Mrs. McGill in this respect. There was other testimony which more or less tended to support one side or the other of the controversy, which took place before a referee, when Ella McGill undertook to prove her claim against the individual estate of John Wiseman, bankrupt. The claim was objected to by Wiseman's individual creditors, on the ground that it was a debt of the firm composed of John Wiseman and Thomas F. Wallace, constituting the firm of Wiseman & Wallace, and not a debt of Wiseman, individually. Objection was also made by former creditors, that the payment of $75 a month, as interest on the $9,000, was usurious, and that the claim, if allowed for firm assets, should be subject to a reduction for all money paid as interest over 6 per cent. The referee in bankruptcy disallowed the claim against the individual estate of John Wiseman, but allowed it against the firm assets, and found that the claim should not be reduced on the ground that the $75 a month had been paid, not only as interest, but in payment for the good will of the previous business. Exceptions were filed on the part of Ella McGill, and an appeal was taken to the United States District Court for the Eastern District of Pennsylvania. The learned judge of that court reversed the referee and allowed the claim against the individual estate of John Wiseman. From this finding and decree, the present appeal was taken.

The opinion of the learned judge, which comes to us in the record, is as follows:

"McPherson, J. I regret to say, that I find myself unable to agree with the learned referee in his finding of facts in this case. I have read the testimony with care, and it seems to me to establish clearly the fact that the agreement in controversy was originally made with John Wiseman individually, and not with the firm of Wiseman & Wallace. This being so, of course it could not become an obligation of the firm unless Mrs. McGill assented thereto. The firm could not be substituted as her debtor in place of John Wiseman unless she agreed to the change, and there is no evidence that she ever made any such agreement. It is true that the amount due her was entered upon the books of the firm, and that the monthly payments were made by checks of the firm out of partnership funds, but obviously these facts could not of themselves change the character of the debt. It is not shown that she knew of the entry upon the books, and certainly it could make no difference to her from what source the monthly payments were made. The testimony leaves me in no doubt, therefore, that Mrs. McGill is entitled to make her claim against the individual estate of John Wiseman. Concerning the monthly payments, I agree with the learned referee, that they were not made as interest and are therefore not obnoxious to the charge of usury. In this respect, the report of the Referee is confirmed, but his disallowance of Mrs. McGill's claim against the individual estate of John Wiseman must be disapproved." 123 Fed. 187.

The fact that the learned judge felt compelled to differ from the conclusions reached by the referee, presumably rendered more careful the scrutiny with which the testimony was reviewed by him. As the case turns almost entirely upon questions of fact, we would feel constrained to adopt the finding made by the learned judge under these circumstances, unless a manifest error in that regard should appear to have been made.

We have, however, carefully examined the testimony set out in the record, and are inclined to agree with the conclusions reached by the court below, and its order and judgment in the premises are therefore affirmed.

TERRY v. BIRD.

(Circuit Court of Appeals, Ninth Circuit. February 1, 1904.)

No. 960.

1. CIRCUIT COURTS OF APPEALS—JURISDICTION—SUIT INVOLVING CONSTRUCTION OF TREATY.

A suit in a Circuit Court by an Indian to determine his rights under a patent conveying land to him in severalty in accordance with the provisions of a treaty between his tribe and the United States, on whatever ground the jurisdiction of the court was invoked, is one involving the construction of a treaty of the United States, and which, by section 5 of Act March 3, 1891, creating the Circuit Courts of Appeals (26 Stat. 827 [U. S. Comp. St. 1901, p. 549]), is appealable directly to the Supreme Court, and is not reviewable by the Circuit Court of Appeals, the appellate jurisdiction of the Supreme Court being exclusive.

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

On motion to dismiss appeal. For opinion of court below, see 129 Fed. 472.

Jesse A. Frye, U. S. Atty., and Edward E. Cushman, Asst. U. S. Atty., for appellant.

George T. Reid, for appellee.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

GILBERT, Circuit Judge. George Bird, the appellee, an Indian of the Puyallup reservation in the state of Washington, filed a bill in equity against Frank Terry, the appellant, the superintendent of said agency, alleging, in substance, that under the treaty of December 26, 1854 (10 Stat. 1132), made between the United States and the Puyallup Indians, lands were reserved for the latter, which were to be assigned and patented to them in severalty; that the appellee was a member of said tribe, and on January 30, 1886, received, under the provisions of said treaty, a patent to the land in controversy; that by the terms of the patent the land was granted to the appellee as a head of a family and to his heirs; that at the date of said patent he and Mary Bird were husband and wife, and resided on the land described in the patent, and that she was the Mary Bird referred to in the patent, in which it was recited that the lands had been designated as the selection of "Teoaway or George Bird, the head of a family, consisting of himself and

Mary"; that Mary Bird died on August 15, 1887, leaving, her surviving, two sons, Joseph Winyer and Henry Winyer, who had been born to her by a marriage with a former husband; that said Joseph Winyer and Henry Winyer were never members of the appellee's family, but that they also received assignments of land upon said reservation at the time when the appellee was awarded his assignment of land; that the appellee is the owner in fee simple of the said land, but that the appellant contends that he owns only an undivided one-half interest therein, and that the other interest belongs to the heirs at law of Mary Bird; and that the said appellant claims that under the laws of the United States and the rules and regulations of the Secretary of the interior the appellee cannot lease said land to any person unless said lease is executed before the appellant and approved by the Secretary of the Interior, and unless the rent falling due thereunder is paid to the said appellant to be distributed by him one half to the appellee and the other half to the said heirs of Mary Bird; that the appellee has leased the whole of said land to one Frank Albert for a period of time less than two years for full and fair consideration paid by said Albert to the complainant, and that the appellant threatens to and will, unless restrained by the court, go upon the appellee's land and drive off the stock of said lessee, and evict him therefrom.

The appellee moves to dismiss the appeal on the ground that the case is one which involves the construction of a treaty made under the authority of the United States, from the judgment in which an appeal lies only to the Supreme Court of the United States. No case is made in the bill of diversity of citizenship, nor was jurisdiction of the Circuit Court invoked on that ground. The appellant contends, however, that the jurisdiction of the Circuit Court does not rest alone upon the fact that the case involves the construction of a treaty or law of the United States, but that it is conferred by the act of August 15, 1894, c. 290, 28 Stat. 286–305, which gives to the Circuit Courts "jurisdiction to try and determine any action, suit or proceeding arising within their respective jurisdictions involving the right of any person in whole or in part of Indian blood or descent to any allotment of land under any law or treaty." This provision, if applicable at all to the present case, does not confer a jurisdiction which otherwise would not exist, nor does it render the cause any the less one which involves the construction of a treaty of the United States, and which, under section 5 of the act establishing the Circuit Court of Appeals (Act March 3, 1891, c. 517, 26 Stat. 827 [U. S. Comp. St. 1901, p. 549]), is made appealable from the Circuit Court directly to the Supreme Court. In American Sugar Refining Company v. New Orleans, 181 U. S. 277–281, 21 Sup. Ct. 646, 45 L. Ed. 859, the court, referring to the act creating the Circuit Court of Appeals, said:

"The intention of the act in general was that the appellate jurisdiction should be distributed, and that there should not be two appeals. And the right to two appeals would exist in every case (the litigated matter having the requisite value) where the jurisdiction of the Circuit Court rested solely on the ground that the suit arose under the Constitution, laws, or treaties of the United States, if such cases could be carried to the Circuit Court of Appeals, for their decisions would not come within the category of those made final. As, however, a case so arises where it appears on the record, from

plaintiff's own statement, in legal and logical form, such as is required by good pleading, that the suit is one which does really and substantially involve a dispute or controversy as to a right which depends on the construction or application of the Constitution or some law or treaty of the United States (Gold Washing & Water Co. v. Keyes, 96 U. S. 199 [24 L. Ed. 656]; Blackburn v. Portland Gold Mining Co., 175 U. S. 571 [20 Sup. Ct. 222, 44 L. Ed. 276]; Western Union Telegraph Co. v. Ann Arbor Railroad Company, 178 U. S. 239 [20 Sup. Ct. 867, 44 L. Ed. 1052]; and as those cases fall strictly within the terms of section 5, the appellate jurisdiction of this court in respect of them is exclusive."

There can be no doubt that the present case is one which involves a construction of the treaty with the Puyallup Indians, and an adjudication of the rights of the appellee thereunder. Such a case is appealable to the Supreme Court, and no provision is made for its appeal to the Circuit Court of Appeals.

The motion to dismiss will be allowed.

PAULUS et al. v. M. M. BUCK MFG. CO. et al.

(Circuit Court of Appeals, Eighth Circuit. March 28, 1904.)

No. 1,968.

1. PATENT FOR INVENTION—OWNER OF UNDIVIDED INTEREST MAY GRANT LICENSE.

The owner of an undivided part of all the rights secured by a patent may, without the consent of his co-owners, grant a valid license to use the monopoly secured by the patent.

2. SAME—ASSIGNMENT—LICENSE—DEFINITION.

A patent secures the exclusive right to make, the exclusive right to use, and the exclusive right to vend the invention it protects. A grant of all these exclusive rights throughout the United States, a grant of an undivided part of all these exclusive rights, or a grant of all these exclusive rights throughout a specified part of the United States, is an assignment of an interest in the patent, by whatever name it is designated. A grant of any interest in or right under a patent less than these is a license.

3. SAME—UNRECORDED GRANT OF EXCLUSIVE RIGHTS—VALIDITY.

An unrecorded parol or written grant of all the exclusive rights under a patent is an assignment, and under section 4898, Rev. St. [U. S. Comp. St. 1901, p. 3387], it is void as against subsequent purchasers for value, without notice.

4. APPEAL—FINDINGS AND DECREE—PRESUMPTIONS.

Where a chancellor has considered conflicting evidence, and made his findings and decree thereon, they must be deemed to be presumptively correct in an appellate court; and, unless an obvious error has intervened in the application of the law, or some serious mistake has been made in the consideration of the evidence, they will not be disturbed.

(Syllabus by the Court.)

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

James H. Peirce, George P. Fisher, Jr., Paul Bakewell, and Frederick R. Cornwall, for appellants.

George H. Knight, for appellees.

Before SANBORN, THAYER, and HOOK, Circuit Judges.

¶ 1. See Patents, vol. 38, Cent. Dig. § 269.

¶ 2. Power of patentee to control his invention, see note to Heaton-Peninsular B. F. Co. v. Eureka Specialty Co., 25 C. C. A. 280.

SANBORN, Circuit Judge. This is an appeal from a decree which dismissed a bill for relief from an infringement of letters patent No. 428,516, for improvements in railway drills, issued to the complainant Aaron R. Paulus on May 20, 1890. On June 14, 1890, he conveyed an undivided one-fourth of his interest in the patent to his co-complainant, William W. Ellis. The issue in this case is one of title, and not one of impinging inventions. The complainants' title, as the record discloses it, has been stated. This is the title of the defendants: On February 24, 1890, Paulus made a written agreement to sell and convey one-half of his interest under the patent to W. W. Ellis and Mrs. Mary West, the wife of Charles J. West, as soon as he should receive his patent. This agreement was not recorded. On June 14, 1890, Paulus conveyed one-fourth of his interest as patentee to Charles J. West. On June 8, 1891, West assigned this interest to Mrs. Mary West, his wife. After these assignments had been recorded, and on September 23, 1896, Mrs. West conveyed her one-fourth interest in the patent to the defendants Weaver and Emminger. On May 24, 1897, Weaver and Emminger granted a license to the defendant the M. M. Buck Manufacturing Company to manufacture and sell the railway track drills protected by the patent to Paulus. Under this title, as the record of the Patent Office disclosed it, Weaver and Emminger owned an undivided one-fourth of the monopoly secured by the patent when they issued their license to the Buck Company, and Paulus and Ellis were entitled to no relief under their bill. The owner of an undivided part of all the rights secured by a patent may, without the consent of his co-owners, grant a valid license to use the monopoly it protects. Bloomer v. McQuewan, 14 How. 539, 14 L. Ed. 532; Blackledge v. Weir & Craig Mfg. Co., 47 C. C. A. 212, 108 Fed. 71. The burden was therefore upon the complainants to show that by reason of facts which the recorded title did not disclose the defendants ought not to be permitted to use the one-fourth of the exclusive rights under the patent which they had purchased. They endeavored to bear this burden in this way: They alleged in their bill, and the defendants denied in their answer, that about the 1st of June, 1890, they and Charles J. West, the owners of the patent, formed a partnership styled the Paulus R. R. Drill Company, and orally agreed that this partnership should have all the exclusive rights secured by the patent during its term; that neither one of them should sell his interest in the patent without first offering to sell it to the other members of the firm; that, if any one of them should sell to a stranger, the purchaser should step into the shoes of the vendor, and become a member of the partnership subject to the agreement; and that Weaver and Emminger had notice of these facts before they purchased their one-fourth interest from Mrs. West. Paulus and Ellis testified to the existence of the agreement of partnership and of transfer to the partnership of the exclusive rights protected by the patent, and Charles J. West and Mary West, his wife, testified that no such grant was ever made. The defendants introduced in evidence the written agreement dated February 24, 1890, by which Paulus contracted to sell to W. W. Ellis and Mrs. West a one-half interest in the patent as soon as he obtained it, and they testified that West never owned any inter-

est in the patent; that the assignment to him dated June 14, 1890, was made by mistake, when it should have been made to Mrs. West; that Paulus knew these facts; that he made the assignment to West in the performance of the agreement of February 24, 1890; and that Mrs. West never consented to any grant or license to the partnership which could in any way prevent her from using her one-fourth of the rights secured by the patent. The evidence was conclusive that Charles J. West and his wife left Villisca, Iowa, where the drill company was organized, and where it was operating, about the year 1892; that thereafter they lived in Ohio; that there was no agreement of dissolution of the partnership; and that neither West nor his wife participated in the profits or in the losses of the firm after they left Iowa. There was a sharp conflict of testimony upon the issue whether or not Weaver, Emminger, or the Buck Manufacturing Company received notice that the interest of Mrs. West was subject to the exclusive rights of the drill company to the monopoly before they acquired their interest. There was evidence which had some tendency to show that they had notice of facts which might have led a person of ordinary prudence and diligence to discover the claims of the complainants in this regard. On the other hand, the defendants testified that they had no notice or knowledge of any such claim.

The agreement which the complainants testify that the owners of the patent made to the effect that the drill company should have and exercise all the exclusive rights secured by the patent is called by their counsel an oral license, and much is written in the brief to show that a license may be made by parol. For the purposes of this case the concession is made that parties may make a valid oral license. But the agreement to which the complainants testify evidenced no license. It was a grant of the exclusive right to make, to use, and to vend the invention throughout the United States for the full term of the patent. They testify that the agreement was that the patent should "be used and controlled by the Paulus R. R. Drill Company for the term of the patent; that neither Paulus, Ellis, nor West could use the right outside the Paulus R. R. Drill Company"; and that, if either of them sold his interest, the purchaser should hold the same relation to the drill company that the vendor had held, and should take subject to the contract. The name by which a grant of a right under a patent may be called is not material. It does not condition or affect the rules of law which govern it. The exclusive rights secured by a patent are the right to make, the right to use, and the right to vend the invention it protects. A grant, transfer, or conveyance of these exclusive rights throughout the United States, or a grant of an undivided part of these exclusive rights, or a grant of these exclusive rights throughout a specified part of the United States, is an assignment of an interest in the patent, by whatever name it may be called. A grant, transfer, or conveyance of any right or interest less than these is a license. Waterman v. Mackenzie, 138 U. S. 252, 255, 256, 11 Sup. Ct. 334, 34 L. Ed. 923; Union Switch & Signal Co. v. Johnson Railroad Signal Co., 10 C. C. A. 176, 179, 61 Fed. 940, 943; Pickhardt v. Packard (C. C.) 22 Fed. 530, 532, 23 Blatchf. 23. The agreement to which the complainants testify constituted a grant to the partnership of all the

exclusive rights secured by the patent to Paulus, and it constituted an assignment of an interest in the patent, and not a license under it. Section 4898 of the Revised Statutes [U. S. Comp. St. 1901, p. 3387] provides that "an assignment, grant or conveyance shall be void as against any subsequent purchaser or mortgagee for a valuable consideration without notice unless it is recorded in the patent office within three months from the date thereof." The defendants Weaver and Emminger were purchasers of the interest of Mrs. West for a valuable consideration after the alleged assignment to the partnership, and the oral unrecorded grant to the firm was void as against them and their licensee, the Buck Manufacturing Company, unless they had notice of its existence before they purchased from Mrs. West. Gates Iron Works v. Fraser, 153 U. S. 332, 349, 14 Sup. Ct. 883, 889, 38 L. Ed. 734.

In the last analysis, therefore, the decision of this case is conditioned by the answers to these two questions of fact: Did the owners of the patent grant the exclusive rights under it to the Paulus R. R. Drill Company in 1890? Did the defendants have such notice of this grant as would have put a man of reasonable prudence and diligence upon an inquiry which would have discovered it before they acquired their respective interests? The burden was upon the complainants to prove a state of facts that would sustain an affirmative answer to each of these questions. The evidence upon each of these issues was conflicting. This was a suit in equity. The chancellor found that one or both of these questions must be answered in the negative, for he found for the defendants. This finding placed an additional burden upon the complainants, for the presumption is that the conclusion of a chancellor upon conflicting evidence is correct, and it ought not to be disturbed unless an obvious error has intervened in the application of the law, or some serious mistake has been made in the consideration of the evidence. Thallmann v. Thomas, 49 C. C. A. 317, 323, 111 Fed. 277, 283; Exploration Co. v. Adams, 104 Fed. 404, 408, 45 C. C. A. 185, 188; Mann v. Bank, 86 Fed. 51, 53, 29 C. C. A. 547, 549; Tilghman v. Proctor, 125 U. S. 136, 8 Sup. Ct. 894, 31 L. Ed. 664; Kimberly v. Arms, 129 U. S. 512, 9 Sup. Ct. 355, 32 L. Ed. 764; Furrer v. Ferris, 145 U. S. 132, 134, 12 Sup. Ct. 821, 36 L. Ed. 649; Warren v. Burt, 58 Fed. 101, 106, 7 C. C. A. 105, 110; Plow Co. v. Carson, 72 Fed. 387, 388, 18 C. C. A. 606, 607; Trust Co. v. McClure, 78 Fed. 209, 210, 24 C. C. A. 64, 65.

No good purpose would be served by extending this opinion to recite, review, and discuss the conflicting testimony. Suffice it to say that a careful reading and analysis and a deliberate consideration of all the evidence have failed to convince that the court below fell into any error of law or mistake of fact in its consideration or decision of the questions presented in this case. The decree below is accordingly affirmed.

HALE & KILBURN MFG. CO. v. ONEONTA, COOPERSTOWN & RICHFIELD SPRINGS RY. CO.

(Circuit Court, N. D. New York.)

No. 6,984.

1. PATENTS—ANTICIPATION—PRESUMPTION FROM ACTION OF PATENT OFFICE.
The presumption arising from the granting of a patent, that it was not anticipated by one previously issued, is strengthened where it is shown that such prior patent was called to the attention of the examiners and considered before the one in suit was granted, and in such case any doubt on the question must be resolved in favor of the later patent.

2. SAME—INOPERATIVE PRIOR DEVICE.
A patent for an operative and useful device is not anticipated by a prior device which is not operative, although the parts and combination may be similar.

3. SAME—INFRINGEMENT—CAR SEATS.
The Hale patent No. 359,354, for a car seat, construed, and *held* not anticipated, valid, and infringed.

In Equity. Suit for infringement of letters patent No. 359,354, for a car seat, granted to Henry S. Hale March 15, 1887. On final hearing.

Samuel Owen Edmonds, for complainant.

Harry E. Knight and George H. Knight (Harris L. Cooke, of counsel), for defendant

HAZEL, District Judge. This is a bill for infringement of United States letters patent No. 359,354, granted March 15, 1887, to Henry S. Hale, and by him assigned to complainant. The patent relates to car seats in which the seat proper may be automatically tipped or tilted, and shifted or moved slightly forward by the act of reversing the back. The defendant is a purchaser and user of the infringing seats. They were manufactured by the St. Louis Car Company, a Missouri corporation, which, according to the stipulation found in the record, assumed the defense herein, and hence may be regarded as the real defendant. The first claim of the patent, which alone is involved, refers to a combination of four elements, and reads as follows:

"(1) In a seat, the combination of the main frame having cam faces or guides, a seat-supporting frame having racks and working upon said cam faces to admit of reciprocation and to tilt the seat, the seat back, and connecting arms for hinging the seat back to the frame, provided with gear segments meshing with the rack on the seat-supporting frame, whereby the said gear segment shifts the seat with a uniform movement and locks the frame against vertical displacement, substantially as and for the purpose specified."

The defenses relied on are anticipation and noninfringement. The specification points out that the objects of the patent, briefly stated, are: (1) To enable the seats having high backs to be reversed in a limited space, suitable for use in railway cars; (2) to hinge the back of the seat firmly to the arms locking the same, so as to prevent oscillation until the back is raised from the seat to a vertical or nearly vertical

¶ 2. See Patents, vol. 38, Cent. Dig. § 73.

position, when the locks unlatch, and the back may then be oscillated by hand; (3) to pivot the seat back arms close to the seat, and by means of a rack and pinion device connect them with the seat carrying frame, "whereby the movement of the seat back will shift the seat in the proper direction with a uniform movement, and at the same time hold the seat frame down and lock it from displacement." The specification states: "The seat frame runs upon cam faces, substantially in the manner set out in my former application herein referred to, for the purpose of tipping or tilting the seat in the act of shifting it." Such an arrangement causes the seat proper to move simultaneously with the back of the seat whenever the back is reversed. The desideratum is to obtain a uniform movement of the back and seat so as to lock the same rigidly after the back is turned. This is absolutely essential to the successful operativeness of the seat. Failure in this respect is apt to jam or wedge the seat, displacing the alignment and the adjusting mechanism, resulting in temporary annoyance, as well as some inconvenience to the manipulator. The reversible car seat, namely, a car seat having a back pivoted to the arm of the seat so as to change the direction of its facing, was not new when the application for the patent in suit was filed. The sole apparent purpose of the invention is to secure automatic uniformity of movement of the frame upon which the seat is placed, by tipping or tilting its front edge upward with a simultaneous shifting movement of the seat forward, and then locking the seat frame so as to prevent displacement. The patent in detail describes the mechanism by which these objects are attained. For the purposes of this action these details need not be specifically set forth. It is enough to briefly describe the car seat and its manner of operation. According to complainant's expert witness:

"The seat-back arms are pivoted close to the seat, and connected by means of a rack and pinion device with a seat-carrying frame, the seat frame itself running upon supporting means, such as guides or cam faces, whereby, as the movement of the seat back is imparted to change it from one edge to the other of the seat, the seat frame will be given a uniform movement towards the edge, which is for the time being to constitute the front, and will be held locked in such position, the act of moving the seat frame in the manner noted imparting thereto also a tipping or tilting of the front edge."

Notwithstanding the many prior applications found in the record, the prior art is within a very limited field. It is practically conceded on both sides that the only references to which attention need be given are the Gardner patent, No. 250,435, dated December 6, 1881, and the Paulding & Maybeck, No. 281,129, granted about three years before the filing of the application for the patent in suit. The earlier patent relates to reversible car seats, but does not appear to have any of the elements of the patent in suit. It describes a tilting or raising of the seat, and not a forward movement, as specifically pointed out in complainant's structure. The Paulding & Maybeck patent relates to car seats having reversible backs, and, according to defendant, discloses the identical function found in the combination of claim 1 in suit. The differentiating structural features consisted in the manner in which the seat was moved. The movement of the seat was owing to a reversal of its attached pivoted arms from one position to the other, their lower ends engaged between two projecting pins or teeth. Thus,

with the aid of suitable devices, the seat was moved, and locked the back in either of its extreme positions. It is contended by the defendant that the mechanism of this device which moved the seat is the plain equivalent of the rack and pinion movement found in complainant's patent. It is quite true that its operation very closely approaches the patent in suit. The series of diagrams in evidence, prepared by defendant's expert witness Soule, to demonstrate the mechanical equivalency of the different forms of rack and sector arrangements shown by the Hale and Paulding & Maybeck patents, are entitled to more than passing consideration. The adaptation of the segmental pinion and rack, a well-known mechanism, found in the Hale patent, may have been perfectly obvious to the skilled observer of the Paulding & Maybeck structure when attention was called to it. Any doubt which I may have upon that point is resolved in favor of the patent. Certain it is that the rack and pinion device, in combination with the other elements of claim 1, produce a structure which effectively achieves the particular object of the inventor, which, as has been said, was to shift the seat "with a uniform movement, and at the same time hold the seat frame down and lock it from displacement." Furthermore, I am convinced, by a fair preponderance of the evidence, that the practical operativeness of the alleged anticipating patent is successfully disputed. The specification of the Hale patent calls attention to the scope of the Paulding & Maybeck patent in the following language:

"The idea of pivoting the back-supporting arms close to the seat, and shifting the seat thereby, broadly, is not new, as somewhat the same principles are embodied in patent No. 281,129; but my improved device, by which this result is accomplished in so perfect a manner, and whereby additional advantages are attained, is new, as far as I am aware, and renders what was heretofore an unsatisfactory, and, I may say, impracticable, device, now operative with the highest degree of utility and comfort."

The alleged mechanical equivalency of the complainant's structure, and the asserted impracticability of the broader Paulding & Maybeck patent, were directly brought to the attention of the Patent Office. It may therefore be fairly assumed that on comparison of the two patents a conclusion was reached inimical to the defendant's claim. For this reason the presumption of the validity of the patent here considered is entitled to increased weight. The conclusion that the two devices are not equivalents is strongly supported by the action of the Patent Office, and, accordingly, all doubt upon the controverted question of anticipation must be resolved in favor of the patent. Fraim v. Keen (C. C.) 25 Fed. 820; Goodyear Co. v. Gardner, 4 Fish. Pat. Cas. 224, Fed. Cas. No. 5,591. It has been suggested that the alleged anticipatory patent was incapable of practical operation. A contrary view does not satisfactorily appear from the proof. An assumption of successful operativeness is negatived by the evidence. Upon this point complainant's expert witness Hains lays much stress. He testifies regarding the Paulding & Maybeck patent, in substance, that the connections between the lower ends of the cams G, and the rocker frame are so loose that a uniform movement is impossible, and that a vertical displacement of the rocker frame is liable to occur in turning the back of the seat. This evidence based upon the Paulding & May-

beck specification and drawing, tending to show that the structure there described was incapable of successful operation, is entitled to weight, especially in view of its corroboration by other testimony in the case. Some doubt even as to its operativeness may be found in the expressions of the defendant's witness, Forney, who testifies that in 1883 he saw a model seat constructed by Paulding & Maybeck. He remarked to persons present when the model was exhibited that he could get up a better car seat himself, and subsequently obtained a patent for an improvement. It also appears by the record that in about the year 1885 the Paulding & Maybeck seat was used as an experiment for a short time by the New York Central Railroad to ascertain its practicability and usefulness. Soon afterwards it disappeared from the market, and the Forney seat and complainant's structure went into extensive use. The witness Forney admitted at the hearing that "there might be practical objections to the Paulding & Maybeck seat which would develop in practice." The conclusion reached upon this point is that the defendant has failed to establish the practicability of the structure claimed to anticipate the patent in suit, and, as the idea of a more perfect car seat has been successfully embodied in the patent by Hale, he must be acknowledged the real inventor. As the prior invention upon which defendant relies was not capable of practical operation, the combination of old elements found in the Hale patent, correlated for adaption to a new and useful purpose, is entitled to the protection of the patent laws. General Electric Co. v. Wise (C. C.) 119 Fed. 926; Cimiotti Co. v. American Co., 115 Fed. 498, 53 C. C. A. 230; American Graphophone Co. v. Leeds (C. C.) 87 Fed. 873.

Infringement. An analysis of claim 1 of the Hale patent, together with an examination of the defendant's structure, discloses the infringement by which complainant feels aggrieved. True, there are dissimilar features in defendant's structure, but the details in construction, while differing in appearance, are functionally the same. Substantially the same combination of elements arranged as presented in claim 1 are found in defendant's structure. The infringing car seat has a main frame, having cam faces or guides, slightly inclined, to enable the rocker frame to be reciprocated as it moves backward and forward. A seat-supporting frame and suitable rack are adjusted to reciprocate upon the cam faces or guides so as to tilt or shift the seat. It also appears that the arms of the seats are connected with the main frame, and are provided with gear segments meshing with the rack on the seat-supporting frame, which is adapted to uniformly move or tilt the seat, locking the frame against vertical displacement. The patent in suit is not limited to the precise construction described in the claim, and therefore the different appearances of the mechanism are wholly immaterial.

I conclude that claim 1 is infringed by the defendant, and that the complainant is therefore entitled to an accounting, with costs. The patent having expired, no injunction will issue.

DIAMOND MATCH CO. v. UNION MATCH CO.

(Circuit Court, D. Minnesota, Fifth Division. April 23, 1904.)

1. PATENTS—SUIT FOR INFRINGEMENT—PRELIMINARY INJUNCTION.
A court is not required to grant a preliminary injunction against the infringement of a patent because its validity has been sustained by a decision in another circuit, but is at liberty to exercise its independent judgment on the proofs, and will the more readily do so where it appears that before the hearing in the prior suit the defendant therein had ceased to have any interest in defending it.

2. SAME—SUFFICIENCY OF PROOFS.
Where the complainant's right, on the proofs, is doubtful, and there is a substantial controversy between the parties as to the validity of a patent, which cannot well be determined without a full hearing, the court will not grant a preliminary injunction which would work great financial injury to a defendant able to respond in damages if infringement should be found on the final hearing.

3. SAME—MACHINE FOR MAKING MATCHES.
A preliminary injunction against infringement of the Beecher patent, No. 389,435, for a machine for making matches, denied on the proofs.

In Equity. Suit for infringement of letters patent No. 389,435, for a machine for making matches, granted to E. B. Beecher September 11, 1888. On motion for preliminary injunction.

Paul Bakewell, John R. Nolan, and C. D. O'Brien, for complainant.
J. L. Washburn, C. T. Benedict, and H. H. Bliss, for defendant.

MORRIS, District Judge. But for the decision and decree of the Circuit Court of the United States for the District of New Jersey in the case of Diamond Match Company v. Ruby Match Company et al., 127 Fed. 341, certified copies of which decision and decree have been filed herein, it is probable, I think, that this application for a preliminary injunction would not have been made; but, if made, there is no question in my mind but that it should have been denied. Counsel for complainant contend—and that was their principal contention on the hearing—that, under the proofs filed herein, said decree ought to be conclusive upon this court as to the validity of the claims there adjudicated, if it is in doubt on that question, and that then the only question left to be considered is that of infringement.

That was a suit based on letters patent issued to E. B. Beecher, September 11, 1888, against defendants therein, who were manufacturing under patents to Alexander Kelly—one of July 5, 1898, and the other of July 3, 1900—and in it claims 4, 15, and 17 of the Beecher patent were considered and adjudicated. Claims 4 and 15 were held to be valid, and defendants therein were found to be infringing those claims. Claim 15 is not involved in this suit, and that decision can only be invoked here as to claim 4. It appears from the proofs herein that, before that case was argued and submitted to the court, the charter of the defendant, Ruby Match Company, had, according to the laws of Delaware, been repealed by proclamation of the Governor, and that it had, long prior to the repeal of its charter, gone out

¶ 1. See Patents, vol. 38, Cent. Dig. § 484.

of the business of manufacturing matches, so that at the time of the argument and submission of the case, and at the time of its decision, neither said defendant nor its officers had any interest in the result of the suit, except as to costs, and as to an accounting of damages and profits by reason of past infringement by defendants prior to the date of the decree, which accounting, as the decree shows, was waived by complainant. It also appears that at the time of the argument and submission of the case, and for a long time prior thereto, the counsel for defendants had received little, if any, assistance, and no compensation, from the defendants therein, and that he was greatly hampered in his defense. And it further appears that the defense, as it concerned claim 4 of the Beecher patent, was principally made upon the issue of noninfringement, and upon the proper manner of construing and interpreting said claim, and that the question of its validity was not strenuously pressed by counsel for defendants therein; he being sure that the validity of that claim might be admitted, and yet the court would be obliged to find that there was no infringement of it by the machine there in suit. Whether these facts were known to counsel at the time or not, the fact that they existed would cause me to hesitate long in this case, where the validity of that claim is vigorously denied and contested, to issue a preliminary injunction based upon that decision.

Aside from that, however, after a careful consideration of the opinion in that case, in the light of the proofs here, and the very able and exhaustive arguments of counsel, extending over a period of nearly six days, I find myself unable to concur in the reasoning therein in so far as it relates to claim 4 of the Beecher patent. It is not necessary or proper that I should here and now determine the question of the validity of that claim, and I do not wish to be understood as doing so. I only wish to say that I do not concur in the reasoning of the learned judge in that case thereon. Indeed, if I should follow his reasoning, in so far as it relates to that claim, to what I consider its logical conclusion, I should be led to the opinion that both Beecher and Kelly had been anticipated in the prior art. This being the case, I feel obliged to dispose of this application upon the proofs here as though that decision had not been rendered. Welsbach Light Co. v. Cosmopolitan Incandescent Light Company, 104 Fed. 83, 43 C. C. A. 418; Mast, Foos & Co. v. Stover Mfg. Co., 177 U. S. 485, 20 Sup. Ct. 708, 44 L. Ed. 856.

Thus considering it, the language of the court in the case of Standard Elevator Company v. Crane Elevator Company, 56 Fed. 718, 6 C. C. A. 100, at pages 719, 720, 56 Fed., and page 101, 6 C. C. A., expresses exactly my position:

"The object of the provisional remedy is preventive, largely, and it will not be granted if it is more likely to produce than to prevent irreparable mischief. If the controversy between the parties be substantial, and not, as to the alleged infringer, colorable, merely, courts of equity are not disposed to adjudicate upon the rights of the parties otherwise than according to the approved usages of chancery, when the defendant's rights might, by the issuance of a writ of injunction, be put in great jeopardy, and the complainant can be compensated in damages. Without passing any opinion upon the complainant's right or the defendant's infringement, it suffices to say that, upon the proofs in the

record, we cannot declare that the right or the infringement is so clear from doubt as to warrant the issuance of a preliminary injunction. The evidence as to the construction of claims and infringement, upon which the court below was called to pass, was largely and necessarily ex parte. There was no opportunity of probing the witnesses. Scientific expert evidence is not wholly reliable when not subjected to the searchlight of intelligent cross-examination. It would, we think, be most unsafe to determine this controversy without full and orderly proof. It would be most unwise to imperil, and presumably wholly ruin, the large capital and interests involved in the business of the appellants, by arresting the enterprise in advance of a final decree, when the damages which the appellee may sustain can be compensated in money. The financial ability of the appellants to so respond has not, in our judgment, been successfully attacked."

I have therefore been obliged to deny the motion for a preliminary injunction.

WESTINGHOUSE ELECTRIC & MFG. CO. v. WAGNER ELECTRIC MFG. CO.

(Circuit Court, E. D. Missouri, E. D. February 13, 1904.)

No. 4,657.

1. PATENTS—INFRINGEMENT—ELECTRICAL CONVERTERS.
   The Westinghouse patent, No. 366,362, claim 4, for an electric converter constructed with open spaces in its core, an inclosing case, and a nonconducting fluid or gas in said case, adapted to circulate through said spaces and about the converter for the purpose of cooling the same, construed, and *held* not infringed by a converter in which spaces were left between the coils and between them and the inclosing core for containing a cooling liquid, but which had no open spaces in its core.

2. SAME—CONSTRUCTION OF CLAIMS—ESTOPPEL.
   Where a patentee and complainant, his assignee, had for a number of years placed a certain construction on a claim of his patent, with knowledge that during such time defendant was making and selling a device for a similar purpose, but which did not infringe the patent as so construed, complainant is estopped to claim a different construction for the purpose of charging defendant with infringement.

In Equity. Suit for infringement of letters patent No. 366,362, for an electrical converter granted to George Westinghouse, Jr., July 12, 1887. On final hearing.

Kerr, Page & Cooper, Bakewell & Cornwall, and B. F. Babbitt, for complainant.

Fowler & Bryson, for defendant.

ADAMS, District Judge. This is a suit based on the fourth claim of letters patent of the United States No. 366,362, granted to complainant's assignor July 12, 1887, for new and useful improvements in electric converters. The relief asked for is an injunction restraining the defendant from infringing the claim and an accounting. The patent has been in litigation before. On May 10, 1900, complainant instituted a suit on the same patent in the Circuit Court of the United States for the Northern District of New York against the Union Carbide Company (112 Fed. 417), which will hereafter be referred to as the "Carbide Case." The defendant in this case, being the manu-

facturer of the device claimed to constitute an infringement in the Carbide Case, appeared, and conducted the defense, and it is conceded is bound by the decree therein rendered. Before final submission of that case complainant dismissed as to claims 1, 2, 3, and 5, submitting claim 4 only to the final judgment of the court. The defenses to that action were want of patentable invention and noninfringement. The trial court decided that claim 4 of the patent was valid, and that defendant had infringed the claim by manufacturing the device then before the court, and this decree was affirmed by the Circuit Court of Appeals for the Second Circuit. 117 Fed. 495, 55 C. C. A. 230. The present action is based on the same claim (4), and no controversy is now made except on the issue of infringement. Defendant contends that this present device is so different from the device involved in the Carbide Case that the judgment in that case is not res adjudicata of the present issue of infringement, and that in fact the defendant's device does not infringe claim 4. The only question for decision, therefore, is whether the defendant's device constitutes an infringement of claim 4 of the patent in suit. The invention of the patent relates, according to the specification, "to the construction of a class of apparatus employed for transforming alternating or intermittent electric currents of any required character into currents different therefrom in certain characteristics," and the object of the invention, according to the specification, is "to provide a simple and efficient converter which will not become overheated when employed for a long time in transforming currents of high electro-motive force, and which will be thoroughly ventilated." The claim in question is as follows:

"(4) The combination, substantially as described, of an electric converter constructed with open spaces in its core, an inclosing case, and a nonconducting fluid or gas in said case adapted to circulate through said spaces and about the converter."

Complainant claims that the converter, now commonly called a "transformer," manufactured by the defendant, infringes claim 4 in three particulars: First, because there is an open space between the coils themselves; second, because there is a rectangular opening inside of the core, through which the coils pass; and, third, because there are open spaces between the core and the coils. The question for determination is whether either of these three spaces or openings constitute "open spaces in its core" within the true meaning of claim 4 of the patent.

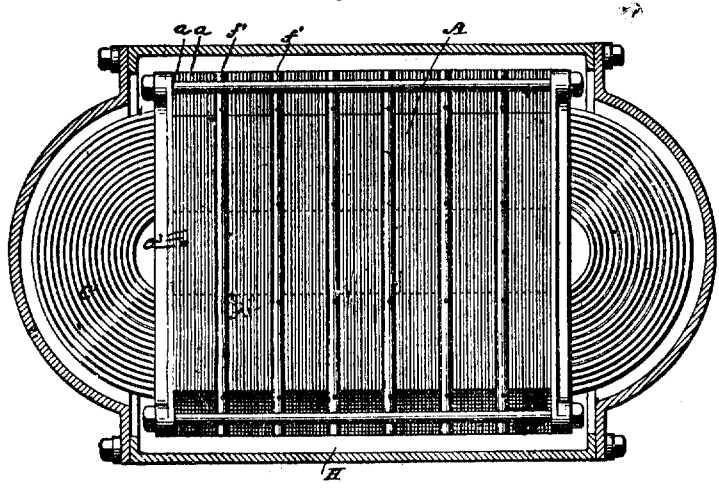
I have reached the conclusion that the defendant's transformer does not, by reason of either one or all of the above-mentioned features, have "open spaces in its core," within the true meaning of the patent in suit, for the following reasons:

First. The fact that there is a space between the two coils when inserted in the core is not an infringement of claim 4 for the most obvious reason that claim 4 calls for no such space, and for the quite equally obvious reason that claim 1, which is not now in controversy, does contain that element. From these two facts it is altogether probable that the patentee did not himself understand or intend that claim 4 should be construed as containing the element. After a careful reading of the opinion of the Court of Appeals in the Carbide Case, 117 Fed. 495, 55

C. C. A. 230 (which is conceded by counsel to be binding upon the defendant in this case), I find no reason for reading the element of "open space between the coils" into claim 4.

Second. The drawings and description of complainant's patent, as well as the model shown in evidence and used in argument, show a device in which the coils completely fill the opening in the surrounding core, and in which parallel open spaces a few inches apart appear in the substance of the core, extending throughout its body in such way as to permit the oil in which the transformer is submerged to freely circulate about the surrounding core and into the interior. A longitudinal section of this device is shown in Fig. 2 of the drawings of the patent, which is as follows:

Fig. 2.



These numerous parallel open spaces so shown in the drawings and model, and any other open spaces, whether parallel or not, cutting through the body of the surrounding core and extending into the interior opening containing the coils, are, in my opinion, the "open spaces in its core" contemplated by claim 4. The purpose of these open spaces, as disclosed by the patent and the evidence of experts, is to permit the oil to so bathe the heat-producing surfaces of the transformer, and to so circulate throughout the parts of the transformer, as to preserve the insulation of the coils, and radiate the heat generated by the transformer's action. The use of oil or paraphine in a tank inclosing the transformer for the purposes just specified has been long known to the art, and is recognized by at least two patents prior in date to complainant's patent. Accordingly, the invention has for its main purpose only the physical means for effectually securing this circulation of oil. It deals with the core itself, and divides it up into groups of plates, each group separate from the other in such way as to make numerous parallel open spaces in the core leading from its outer surface on all its four sides into the interior opening made for the introduction of the coils. This interior opening, called in the patent "two rectangular openings,

e^1 and e^2, through which the wires pass," is not, in my opinion, "an open space in its core," within the meaning of claim 4. I adopt the views of Prof. Nipher with respect to this rectangular opening. He says: "The core is not the core of a transformer or converter until these rectangular openings are made through it." He says further: "These openings give character to the core." "It is not a core until they exist there." "The core is in fact given such a form that it surrounds the coil in a certain sense, and the space so surrounded by the core might be called a 'coil opening.'" The core of a transformer is the iron part of it. It must be so constructed as to permit the introduction of the coils of wire approximately through its center. The wire coil must be put in to make a transformer. I cannot understand how this space left in the inside of the iron for this purpose can be an open space in the core. It might be as well said that the space left on the outside of the iron, between it and the incasing tank, is an open space in the core. The defendant's device has a space between the coils, and has also this rectangular opening for the introduction of the coils into the core, but, for the reasons above expressed, these are not "open spaces in its core," within the meaning of the patent in suit.

Third. The defendant's device also has certain open spaces between the core and the coils, as shown in its model in evidence. The complainant's device has no such spaces. Complainant's core hugs the coils closely, and thereby secures greater efficiency of action. But it is contended that these spaces between the core and coils are the mechanical equivalent of the spaces in the core already considered. I cannot agree to this view of the case. They are physically two different things. One (the complainant's) has the spaces cutting the core throughout its whole substance, thus permitting the oil to percolate copiously into all heat-producing surfaces. The other (defendant's) has its spaces inside the core between its inner surface and the outer surface of the coils, thereby releasing the grasp of the core upon the coils, and decreasing the efficiency of its transforming action. If the patent in suit were a broad and valid patent for a circulatory system throughout the heat-producing parts of a transformer, the two devices might be the mechanical equivalent; but it is not such a patent. It is distinctly a patent for a machine involving physical elements, and I cannot bring myself to think the spaces of the defendant's device between the core and the coils are the same as the open spaces in the core of complainant's device, or the mechanical equivalent thereof. They may perform the same function, but they do it by means of different physical elements, and the defendant's device is constructed at the expense of efficiency, which the complainant's device avoids.

The problem for years before the grant of complainant's patent was to devise efficient means for cooling the heat-producing surfaces of the transformer, and for protecting the insulation of the coils. The complainant invented the physical means shown in claim 4. The defendant adopted the totally different physical means shown in its model. In view of the foregoing, I cannot construe the opinion in the Carbide Case as giving the complainant the monopoly of all means by which the external and internal surfaces of the heat-producing parts of a converter can be cooled. This view would preclude the use of any and every

other device looking towards the accomplishment of the main object, namely, the circulation of oil throughout the heat-producing parts of a converter. The opinion in that case uses the language that the patentee was "entitled to claim the means" for accomplishing that object, manifestly referring to the means claimed in claim 4, and described in the patent, namely, of opening up the core itself in the way already pointed out, leaving all other means (not the mechanical equivalent, however) open to the free use of the public.

I think the construction which I have already placed on claim 4 is the one which complainant itself placed upon that claim for years, and in fact until the spring of 1903, when it moved in this case for a rule to punish the defendant for contempt.

In 1887, on the same date the patent in suit was granted, the patentee, George Westinghouse, Jr., secured a British patent for a device of similar construction to that employed in the defendant's transformer. The drawings and claims of that British patent show a transformer with open spaces between the coils and between the coils and the core. Claims 10 and 11 of that patent distinctly call for "strips of insulating material extending along the sides of the coils and separating the same from the surrounding core." The American and British were applied for and secured at the same time. Accordingly, it is obvious that the patentee had in mind the construction involved now in defendant's device, and he deemed it important enough to be made the subject of a separate patent. To give him now the monopoly of this construction by virtue of his American patent would, in my opinion, give him something which he intentionally failed to claim when he secured it, and which he obviously then thought should be specifically claimed in order to secure it.

Again, it clearly appears that the defendant was engaged in making its transformer for some years prior to the hearing of the Carbide Case, and that the witnesses in that case knew of this fact. They certainly knew that defendant was manufacturing a transformer with open space between the coils and a rectangular opening into the core for the insertion of the coils. But no attempt was there made to hold these features to be an infringement of claim 4 of the patent. Complainant there contented itself by claiming the parallel open spaces throughout the core itself to be an infringement. After the judgment was rendered in that case, the complainant, with full knowledge that the defendant was manufacturing transformers with the open spaces and openings now claimed to be an infringement of claim 4, never sought to hold the defendant guilty of contempt for violation of the injunctive order in that case. After that injunctive order became final, the defendant conformed thereto by changing its transformer so as to close up all the parallel open spaces throughout the core itself, leaving the core one solid mass of iron plates with no open spaces in it, but retaining in its structure the open spaces between the coils and between the core and coils as before, and has continued to manufacture such transformers, so modified, from that day to this. The proof shows no claim that the use of this modified structure constituted a violation of the injunctive order in that case.

Soon afterwards the present suit was instituted, and a preliminary injunction was granted against the defendant restraining it from infringement. This restraining order was consented to by defendant under the belief that it related exclusively to the same kind of a transformer which was declared an infringement in the Carbide Case, and I am satisfied that counsel on both sides so regarded it at the time. In due time after the institution of this suit the defendant filed an answer admitting that the judgment in the Carbide Case was an estoppel against it as to the validity of claim 4, and consenting to a final decree enjoining it from infringing that claim. At about this juncture complainant and defendant, by counsel, came to an understanding that neither party should take any evidence until further notice. The case remained in this condition for about a year; and in the meantime defendant refrained from manufacturing or selling the transformer condemned as an infringement in the Carbide Case, but continued to manufacture and sell the transformer now claimed to be an infringement. This condition of things remained until May, 1903, when a motion was made to punish defendant for contempt on the ground that the manufacture and sale of its present transformer was a violation of the preliminary injunction granted in this case. This motion was denied, and since then proofs have been taken, and the cause is now submitted for a final decree. All of these facts convince me that complainant's present claim that defendant's present transformer is an infringement of claim 4 of its patent is an afterthought on its part, and that from the date of its British patent, in 1887, to the date of filing the motion to punish defendant for contempt, in May, 1903, the complainant continuously interpreted claim 4 of its patent as not covering the defendant's device now in question. This seems to me to be such a contemporaneous and continuous construction put upon claim 4 of the patent by complainant, and one upon which defendant has innocently acted, that complainant ought to be estopped at this late day from asserting the contrary.

The patent in suit has only about five months longer to run. It expires on July 12th of this year. To now enjoin the defendant, after it has been manufacturing, selling, and advertising the transformer complained of for a period of about eight years, as shown by the testimony, and under circumstances disclosed by this record, would, in my opinion, be grossly inequitable. My conclusions are:

1. That the transformer now being used by the defendant is not, within the true meaning of the patent itself, an infringement of claim 4.

2. The construction which I have placed upon this claim is in harmony with the contemporaneous and continuous construction placed upon the same claim by the patentee himself, and by the complainant.

3. The complainant, by its own conduct, is estopped from claiming the contrary.

The decree will be that the defendant be enjoined from manufacturing or selling the transformer like that declared an infringement in the Carbide Case, and for the usual accounting, but it will be so framed as to exclude from its operation the transformer now manufactured by the defendant, which has afforded the only issue before the court in this case.

I am not disposed to work out the question of costs, though the statute relating to disclaimer (section 4922, Rev. St. U. S. [U. S. Comp. St. 1901, p. 3396]) as that involves a lengthy consideration of the question whether the complainant should not, before bringing this suit, have entered a disclaimer as to claims 1, 2, and 5 of the patent. I think the equity of the matter can be reached by a direct order concerning the costs. The complainant had a right, as long as the defendant was making use of the transformer adjudged to be an infringement in the Carbide Case, to institute its suit for an injunction and accounting by reason thereof; and, notwithstanding the fact that defendant admitted the infringement in its answer, the complainant should not be adjudged to pay all of the costs of this proceeding. I think an equitable disposition of this matter is to require each of the parties to pay its own costs, and it will be so ordered.

MISSOURI PAC. RY. CO. v. WESTERN ASSUR. CO.

(Circuit Court, D. Kansas, First Division. April 28, 1904.)

No. 8,152.

1. INSURANCE—CONDITIONS—PROOFS OF LOSS—FILING—TIME.
   A condition in a fire policy requiring proofs of loss to be furnished within 60 days afforded a reasonable time to enable assured to comply therewith.

2. SAME—WAIVER.
   Where a fire policy provided that proofs of loss should be furnished within 60 days from the date of loss, and declared that an extension of such period should be evidenced by a writing attached to or indorsed on the policy, and that the insurer should not be held to have waived any forfeiture provided for in the policy, or any condition thereby imposed on insured by any proceeding on the part of the company relating to appraisal or examination of the property insured, a forfeiture for assured's failure to furnish proofs of loss within the time required, in the absence of such written extension, was not waived by an acknowledgment of notice of loss and the commencement and continuation of negotiations for settlement without requiring proofs to be made.

Waggener, Doster & Orr, for plaintiffs.
Sylvester G. Williams and Osmond & Cole, for defendant.

POLLOCK, District Judge. This is an action at law, brought to recover on a contract of insurance. A copy of the contract relied upon by plaintiff is attached to and made part of the petition. The plaintiff, in its petition, alleges a compliance with all the terms and conditions of this contract requisite on its part to be performed in order to establish its right to a recovery, except that condition of the contract requiring plaintiff to make and furnish proofs of loss. In this respect the petition, by way of pleading an avoidance of the terms and conditions found in the contract with respect to proofs of loss, states:

"Said plaintiff further says that it has performed all the conditions and terms of said contract except the condition therein set out for the making of proofs of loss to said assurance company within sixty days after the

¶ 2. See Insurance, vol. 28, Cent. Dig. §§ 1405, 1406.

occurrence of the loss which said contract of insurance covers. Said plaintiff was ready to make and did make all proofs of loss required by said defendant company within said period of 60 days, but the further making of said proof was waived by said defendant by the acknowledgment of notice of the occurrence of the loss of said building by fire, and the commencement and continuance of negotiations for a settlement of such loss without the making of further proofs thereof, whereby said plaintiff was led to believe that said defendant did not desire and would not require further proof to be made."

The conditions expressed in the contract relating to proofs of loss and the maintenance of an action upon the policy are as follows:

"If fire occur, the insured shall give immediate notice of any loss thereby in writing to this company, * * * and within sixty days after the fire, unless such time is extended in writing by this company, shall render a statement to this company, signed and sworn to by said insured, stating the knowledge and belief of the insured as to the time and origin of the fire; the interest of the insured and of all others in the property; the cash value of each item thereof and the amount of loss thereon; all incumbrances thereon; all other insurance, whether valid or not, covering any of said property; and a copy of all the descriptions and schedules in all policies, any changes in the title, use, occupation, location, possession, or exposures of said property since the issuing of this policy; by whom and for what purposes any building herein described and the several parts thereof were occupied at the time of fire, etc."

"This company shall not be held to have waived any provision or condition of this policy or any forfeiture thereof by any requirement, act, or proceeding on its part relating to the appraisal or to any examination herein provided for; and the loss shall not become payable until sixty days after the notice, ascertainment, estimate, and satisfactory proof of the loss herein required have been received by this company, including an award by appraisers when appraisal has been required.

"No suit or action on this policy, for the recovery of any claim, shall be sustainable in any court of law or equity until after full compliance by the insured with all the foregoing requirements nor unless commenced within twelve months next after the fire.

"This policy is made and accepted subject to the foregoing stipulations and conditions, together with such other provisions, agreements, or conditions as may be endorsed hereon or added hereto, and no officer, agent, or other representative of this company shall have power to waive any provision or condition of this policy except such as by the terms of this policy may be the subject of agreement endorsed hereon or added hereto, and as to such provisions and conditions no officer, agent or representative shall have such power or be deemed or held to have waived such provisions or conditions unless such waiver, if any, shall be written upon or attached hereto, nor shall any privilege or permission affecting the insurance under this policy exist or be claimed by the insured unless so written or attached."

In short, the above-quoted provisions of the contract of insurance in this case provides: (1) What "proofs of loss" under the policy shall contain; (2) that such proofs of loss shall be furnished by the assured to the insurer within 60 days from the date of loss, unless this specified period of time is extended; (3) that an extension of such period of time shall be evidenced by writing to that effect; (4) such written extension of time shall be attached to or indorsed upon the contract of insurance; (5) that the company shall not be held to have waived any forfeiture provided for in the policy, or any condition thereby imposed upon the insured by the terms of the policy by any requirement or proceeding on the part of the company relating to any appraisal or examination of the property insured provided for in the

policy; (6) that loss under the policy shall not become payable until 60 days after "proofs of loss" are furnished; (7) that no suit or action shall be brought on the contract of insurance until the assured shall have complied with all the requirements and conditions of the contract precedent on his part to be performed.

The petition of plaintiff, in legal effect, by the plea of waiver, admits (a) that "proofs of loss" were not furnished within 60 days from the date of the fire, as required by the terms of the policy; (b) that no extension of time in which to furnish such proofs of loss was granted by the insurance company or its agents to the assured in writing; (c) that no such "proofs of loss" as are provided for in the contract have been furnished. To this petition the defendant has filed a general demurrer. Can plaintiff recover in this action at law on the contract of insurance under the allegations of its petition? The solution of this problem must depend on the construction of the terms employed in the contract and plaintiff's compliance with such terms and conditions, unless compliance has been waived by the defendant. In regard to the conditions imposed upon the assured to furnish "proofs of loss" as required by the terms of the contract of insurance, it has been held:

"The condition requiring service of proofs of loss is one wholly for the benefit of the insurer. The assured contracts to perform it, and until he does so he has no legal claim against the insurer, and no cause of action. The proofs thus provided for are the legal evidence of the loss. The performance of the condition is not a thing to be done at the request of the insurer. The company may remain silent, and, until proofs are furnished, it cannot be called upon to pay the loss." Armstrong v. The Agricultural Insurance Co., 130 N. Y. 560, 29 N. E. 991.

In Fournier v. German-American Ins. Co., 23 R. I. 36, 49 Atl. 98, it is said:

"The filing of 'proofs of loss,' so called, is a perfectly reasonable condition in order to protect the company from fraud, and covers a great deal more than stating that the loss has occurred and giving the value of the property destroyed. It embraces, among other things, a statement of any changes in the title, use, occupation, location, possession, or exposures of the property since the issuing of the policy. It specifies by whom and for what purpose the building described in the policy, and each part thereof, was occupied at the time of the fire; and it must also set forth the knowledge and belief of the insured as to the time and origin of the fire, and, unless a sworn statement as to these things is furnished by the assured, it would be a comparative easy matter to defraud the insurance company."

Such being the conditions imposed upon the assured to furnish "proofs of loss" to the insurer as found in his contract of insurance, and such being the character of the "proofs of loss" so required to be furnished, the contract period of 60 days from the date of loss is a reasonable time to enable the assured to comply with the conditions imposed. However, in the event this period of time for any reason proves insufficient, and an extension of time is desired by the insured, the parties to the contract have expressly stipulated, not that a waiver on the part of the company of the failure of the assured to furnish "proofs of loss" within the 60 days required by the terms of the contract may not be shown, but, in order that the entire engagement and obligation of the company may rest in writing, and not in the fickle

memory of interested parties or witnesses, it is stipulated that such waiver, if any, must rest in a writing to that effect, executed in such manner as will bind the company. That such is the contract existing between the parties there is no room to doubt. That this contract has not been complied with by the assured stands admitted.

Has nonperformance of this condition by assured been waived by defendant? Reference to the adjudicated cases will show not a little "judicial legislation" on this subject of insurance in many of the states, doubtless occasioned from the hardship or supposed hardship resulting to the assured from an enforcement of the contract of insurance only according to its terms and conditions as found therein written, and by way of avoidance of such supposed injustice to assured. However, the federal Supreme Court has not indulged in this "judge-made" law, but has uniformly and consistently held that a policy of insurance, where plain and unambiguous in terms, is a contract between the parties, to be enforced only according to its provisions, and in the same manner as any other contract in writing. In the case of Imperial Insurance Company v. Coos County, 151 U. S. 452, 14 Sup. Ct. 379, 38 L. Ed. 231, Mr. Justice Jackson, delivering the opinion of the court, said:

"Contracts of insurance are contracts of indemnity upon the terms and conditions specified in the policy or policies, embodying the agreement of the parties. For a comparatively small consideration the insurer undertakes to guaranty the insured against loss or damage, upon the terms and conditions agreed upon, and upon no other; and when called upon to pay, in case of loss, the insurer therefore may justly insist upon the fulfillment of these terms. If the insured cannot bring himself within the conditions of the policy, he is not entitled to recover for the loss. The terms of the policy constitute the measure of the insurer's liability, and, in order to recover, the assured must show himself within those terms; and if it appears that the contract has been terminated by the violation on the part of the assured of its conditions, then there can be no right of recovery. The compliance of the assured with the terms of the contract is a condition precedent to the right of recovery. If the assured has violated or failed to perform the conditions of the contract, and such violation or want of performance has not been waived by the insurer, then the assured cannot recover. It is immaterial to consider the reasons for the conditions or provisions on which the contract is made to terminate, or any other provision of the policy which has been accepted and agreed upon. It is enough that the parties have made certain terms, conditions on which their contract shall continue or terminate. The courts may not make a contract for the parties. Their function and duty consists simply in enforcing and carrying out the one actually made."

The latest expression of that court upon this subject is found in Assurance Co. v. Building Association, 183 U. S. 308, 22 Sup. Ct. 133, 46 L. Ed. 213, wherein Justice Shiras, delivering the opinion of the court, says:

"What, then, are the principles sustained by the authorities, and applicable to the case in hand? They may be briefly stated thus: That contracts in writing, if in unambiguous terms, must be permitted to speak for themselves, and cannot by the courts, at the instance of one of the parties, be altered or contradicted by parol evidence, unless in case of fraud or mutual mistake of facts; that this principle is applicable to cases of insurance contracts as fully as to contracts on other subjects; that provisions contained in fire insurance policies that such a policy shall be void and of no effect if other insurance is placed on the property in other companies without the

knowledge and consent of the company are usual and reasonable; that it is reasonable and competent for the parties to agree that such knowledge and consent shall be manifested in writing, either by indorsement upon the policy or by other writing; that it is competent and reasonable for insurance companies to make it matter of condition in their policies that their agents shall not be deemed to have authority to alter or contradict the express terms of the policies as executed and delivered; that where fire insurance policies contain provisions whereby agents may, by writing indorsed upon the policy or by writing attached thereto, express the company's assent to other insurance, such limited grant of authority is the measure of the agent's power in the matter, and where such limitation is expressed in the policy, executed and accepted, the insured is presumed, as matter of law, to be aware of such limitation; that insurance companies may waive forfeiture caused by nonobservance of such conditions; that, where waiver is relied on, the plaintiff must show that the company, with knowledge of the facts that occasioned the forfeiture, dispensed with the observance of the condition; that where the waiver relied on is the act of an agent it must be shown either that the agent had express authority from the company to make the waiver, or that the company subsequently, with knowledge of the facts, ratified the action of the agent."

The opinion is lengthy, and exhaustive of the subject discussed, and was evidently prepared with the intent of clearly setting forth the views of that court on the nature of a contract of insurance and the rules of law governing its construction and enforcement. The question there considered, while not identical with that at bar, yet is of so close analogy as to furnish a rule for decision here.

So, in the case at bar, it is held, the assured not having furnished "proofs of loss" within the period of 60 days from the date of the fire, as required by the terms of the policy, it would, in my judgment, be competent for plaintiff to allege and show, if possible to so do, that defendant company, through its duly authorized officers or agents, had waived such breach of condition by extending the time for performance in the manner stipulated in the contract—that is, by a writing to that effect—or had in writing waived performance of the condition requiring assured to furnish "proofs of loss" either by denying liability under the contract in advance of "proofs of loss," thus repudiating its contract on its part, or by in any manner in writing notifying assured that "proofs of loss" would not be required in accordance with the condition imposed in the policy. But such is not the waiver pleaded in the petition. The waiver of the breach of a condition to be performed under the express terms of the contract in this case by assured, precedent to the maintenance of this action for a recovery upon the contract, which the parties have stipulated shall rest in and be evidenced only by writing, is here attempted to be predicated upon acts and conduct of the defendant necessarily resting in parol, and not evidenced by writing. This, in my judgment, may not be done; nor do I think, from a careful examination of the case of Thompson v. Phœnix Insurance Co., 136 U. S. 287, 10 Sup. Ct. 1019, 34 L. Ed. 408, that case in any wise conflicts with the view here expressed.

It follows the demurrer to the petition must be sustained. It is so ordered.

SCOTT v. STOCKHOLDERS' OIL CO. et al.

(Circuit Court, E. D. Pennsylvania. April 28, 1904.)

No. 1.

1. FEDERAL COURTS—PROCESS—SERVICE—PLEA IN ABATEMENT—AFFIDAVIT.
Where, in an action against a foreign corporation, a plea in abatement was filed on its behalf to vacate the service, which averred that the person on whom process was served was neither an agent nor officer of the corporation, an affidavit by the person so served, as required by equity rule 31, that the averments in the plea were true in fact, and that it was not interposed for delay, was insufficient, since the plea on its face showed that such person had no authority to make it on behalf of the corporation.

2. SAME.
Where the return of service on an alias summons in an action against a foreign corporation showed service on the corporation's alleged resident agent on January 20, 1904, a plea in abatement to quash the service, verified on March 3, 1904, and reciting that the person served "is" not an agent or officer of the corporation, was insufficient, since it did not negative the fact that he was such agent on the date of service.

In Equity. Motion to strike off plea in abatement.
See 120 Fed. 698; 122 Fed. 835.

Samuel J. Houston and Lawrence W. Baxter, for complainant.
Joseph R. Embery, for Theodore J. Dumble.

J. B. McPHERSON, District Judge. The history of this litigation is as follows: The service of the summons on the Dumble Development Company was made upon its secretary and general manager, but was set aside by Judge Dallas for the following reasons:

"The Dumble Development Company is admittedly a Delaware corporation. The return does not state, nor does it appear from the record, that it is an inhabitant of this district, or has in any manner become subject to the jurisdiction of this court; and therefore, even if it be true, as stated, that the person served was, when served, 'secretary and general manager of said company,' yet the return is legally insufficient, because it does not affirmatively show all that is requisite to constitute a valid service." Scott v. Stockholders' Oil Co. (C. C.) 122 Fed. 835.

An alias summons was thereupon issued, and upon this writ the marshal has made return as follows:

"January 20th, 1904, at Philadelphia, in my district, served the within writ on the Dumble Development Company by giving a true and attested copy thereof to Theodore J. Dumble, the registered agent of said company, as will appear by the certificate of the Secretary of the Commonwealth of Pennsylvania, hereto annexed and made part of this return; and at the time of said service I made known to said Dumble the contents of said writ. I first tried to serve said writ at 1217 Filbert street, Philadelphia, the designated office or place of business of said Dumble Development Company, but I was unable to find said Dumble, its registered agent, at said place. I then served the

¶ 1. Service of process on foreign corporations, see note to Eldred v. American Palace-Car Co., 45 C. C. A. 3.

said writ as above specified at the dwelling house of said Dumble, 1519 Ruan street, Frankford, Philadelphia."

The certificate of the Secretary of the Commonwealth, attested by the seal of the state, declares under date of January 19, 1904:

"I do hereby certify that the records of this department show, that on November 5, 1902, the Dumble Development Company, a corporation of the state of Delaware, filed in this office a statement of office and agent in compliance with our act of April 22, 1874 [P. L. 108], entitled 'An Act to prohibit foreign corporations from doing business in Pennsylvania, without having known places of business and authorized agents,' designating in said statement as agent Theo. J. Dumble, 1217 Filbert street, Philadelphia; that after careful, thorough and diligent search through the records of this department, I have been unable to find any subsequent statement filed by said company or any substitution or revocation of the authority of the above named Theo. J. Dumble, as agent of said corporation."

Section 1 of the act referred to in the secretary's certificate prohibits any foreign corporation from doing business in Pennsylvania until it has established an office and appointed an agent for the transaction of business in this state. Section 2 is as follows:

"It shall not be lawful for any such corporation to do any business in this commonwealth, until it shall have filed in the office of the Secretary of the Commonwealth a statement, under the seal of said corporation, and signed by the president or secretary thereof, showing the title and object of said corporation, the location of its office or offices, and the name or names of its authorized agent or agents therein; and the certificate of the Secretary of the Commonwealth, under the seal of the commonwealth, of the filing of such statement, shall be preserved for public inspection by each of said agents, in each and every of said offices." P. L. 1874, p. 108.

Upon such an agent service of a writ of summons may be made by virtue of the act of 1903, § 2, cl. "g" (P. L. 139):

"In the case of a registered foreign corporation, partnership limited, or joint stock company, by serving its duly registered attorney as in the case of a summons issued against him personally, or by leaving a true and attested copy thereof for him at the registered place, if he be not found there during the usual business hours of any business day, with the person for the time being in charge of the business carried on at such place."

The return of the marshal, so far as it goes, is in compliance with this statute, but the development company, being of opinion that essential averments of fact are still lacking, and that the facts that are averred are not correctly stated, has filed this plea in abatement:

"The Dumble Development Company, one of the above-named defendants, specially appearing under protest for the purpose of this plea, and for no other purpose, says that this defendant has not properly been served with process; that Theodore J. Dumble is not its agent or officer; that it is not a corporation organized under the laws of the state of Pennsylvania, nor a citizen nor inhabitant of the state of Pennsylvania, nor does it have an office or agency in the state of Pennsylvania, nor does it transact business therein, nor does it have any property therein; but that it is a corporation organized under the laws of the state of Delaware, and residing in Wilmington, in the district of Delaware—all of which matters and things are true."

To which Theodore J. Dumble makes this affidavit:

"Theodore J. Dumble, being duly sworn, says: 'I am the person upon whom service of process was made as agent of the Dumble Development Company. The averments contained in the foregoing plea are true in fact, and the plea is not interposed for delay.' "

The present motion to strike off the plea is founded upon equity rule 31, which declares that:

"No demurrer or plea shall be allowed to be filed to any bill, unless upon a certificate of counsel that in his opinion it is well founded in point of law, and supported by the affidavit of the defendant that it is not interposed for delay, and, if a plea, that it is true in point of fact."

It is contended on behalf of the complainant that the present affidavit does not comply with this rule, because it shows upon its face that it was not made by any person authorized to speak in behalf of the development company. I think this contention is sound. The averment of the plea is that Theodore J. Dumble is not the company's agent or officer, and, assuming this to be true, as must be assumed for the purpose of this motion, it is also true that he discloses no authority to make the affidavit in the defendant's behalf. The company can only speak by one of its agents or officers, and, so far as appears from the plea, the affiant is a stranger to the corporate affairs. It may also be noted that the plea is further defective in this respect: It avers that Theodore J. Dumble "is" not its agent or officer—meaning, of course, upon March 3, 1904, when the affidavit was subscribed, whereas the relevant date to which the plea should refer is January 20th, the day when the alias summons was served. The plea is therefore defective in both particulars, and might be stricken from the files without further ceremony. But I am unwilling to take a step that might be unduly harsh, and shall therefore permit the development company to supply the defects of the plea on or before May 15th.

It may be well for the complainant to consider at this stage of the case whether he has sufficiently complied, or can hereafter sufficiently comply, with the rule that was laid down in St. Clair v. Cox, 106 U. S. 350, 1 Sup. Ct. 354, 27 L. Ed. 222, concerning what must appear on the record in the case of suits against foreign corporations. The subject is also considered in Earle v. Chesapeake & Ohio Railway Co., 127 Fed. 235, a recent case decided in this court. Otherwise much needless labor and expense may be incurred in the hearing of the suit, while the court may be compelled in the end to dismiss the proceeding of its own motion for want of jurisdiction.

If the plea is not amended on or before May 15th, the clerk is directed to strike it from the files.

JONES v. ADAMS EXPRESS CO.

(Circuit Court, E. D. Kentucky. February 27, 1904.)

No. 429.

1. REMOVAL OF CAUSES—SUFFICIENCY OF PETITION—ALLEGING DIVERSITY OF CITIZENSHIP.

The fact that there are a large number of parties plaintiff or defendant does not take a case out of the well-settled rule that, in order to show the jurisdiction of the federal court on removal the petition therefor must allege the citizenship of each party. It is not sufficient to allege a diversity of citizenship in general terms.

On Motion to Set Aside Order Overruling Motion to Remand to State Court.

Morton, Webb & Wilson, for plaintiff.
Breckinridge & Shelby, for defendant.

COCHRAN, District Judge. It is well settled that a party bringing a suit in a federal court or seeking to remove one brought in a state court thereto must show affirmatively in his petition or bill in the one case and in his petition for removal in the other case that the federal court has jurisdiction thereof by alleging the facts essential to give it jurisdiction. If he does not show this, his petition or bill in the one case will be dismissed, or the cause in the other case will be remanded to the state court, and that by the court upon its own motion upon becoming aware of the failure to show jurisdiction. It is also well settled that if the ground of federal jurisdiction relied on is that of diversity of citizenship, the party suing or removing must allege not simply that the parties are citizens of different states, but the states of which they are citizens. In the case of Cameron v. Hodges, 127 U. S. 325, 8 Sup. Ct. 1155, 32 L. Ed. 132, Mr. Justice Miller said:

"This court has always been particular in requiring a distinct statement of the citizenship of the parties and of the particular state in which it is claimed, in order to sustain the jurisdiction."

In the case of Benjamin v. City of New Orleans, 74 Fed. 417, 20 C. C. A. 591, it was held that a bill filed in the United States Circuit Court of Louisiana by the assignee of certain claims against the city of New Orleans, which alleged that each of the assignors of said claims were "citizens, respectively, of states other than the state of Louisiana," was properly dismissed because it did not set forth the states of which said assignors were citizens. Judge Speer said:

"The defendant is entitled to actual and definite notice in the plaintiff's pleading of the citizenship or alleged citizenship of each assignor. No fact in the pleading of the plaintiff in these courts can be more material, for the authority of the court to act depends upon it. It was not sufficient, then, to say that the assignors were 'citizens, respectively, of states other than Louisiana,

¶ 1. Averments of citizenship to show jurisdiction in federal courts, see note to Ship v. Williams, 10 C. C. A. 261.

See Removal of Causes, vol. 42, Cent. Dig. §§ 170, 172, 173.

and competent, as such citizens, to maintain suit in this court.' Jurisdiction cannot be inferentially averred."

The general allegation of diversity of citizenship is not sufficient to give the federal court jurisdiction, in the absence of a motion to make it more specific. It is simply sufficient to permit an amendment making it more specific. This was all that was decided in the case of Stadlemann v. White Line T. Co. (C. C.) 92 Fed. 209. If an amendment had not been offered in that case, making the petition for removal specific by alleging the particular state of which the plaintiff in the action was a citizen, the motion to remand would have been sustained. So far there can be no question as to the correctness of the positions taken.

The question which this case presents is whether the numerousness of the parties plaintiff or defendant makes any difference. It is alleged in the petition for removal that the petitioner and defendants in the action are more than 3,000 in number. The plaintiff had a right to sue them all. Under the decision in the case of Adams Express Co. v. Schofield (Ky.) 64 S. W. 903, 23 Ky. Law Rep. 1120, he had a right to sue them under the name of Adams Express Company, and the cause was not removable unless all of them were citizens of states other than Kentucky. The defendants claim that to compel them to set out the states of which each of them are citizens will be a hardship on them, and a practical denial of the right to come into the federal court. Is the fact of the numerousness of the petitioners and the hardship that it will be upon them to require them to make their petition for removal more specific sufficient reason for this court taking jurisdiction of this cause, nothing else appearing than what is alleged in the petition for removal? Two reasons occur to me why, in a case of this kind, it is not sufficient reason. It will simply postpone the hardship to a later stage of the proceeding. It will certainly be imposed upon them by a denial of the general allegation as to the citizenship of the petitioners. The other is that it takes from the petitioners the burden of showing that this court had jurisdiction, and imposes on defendant to the removal the burden of showing that it has not jurisdiction, thereof. Certain advantages accrue to defendants by so many of them being able to do business together without incorporation. If it were not so, they would not transact business in this way. Certain disadvantages grow out of it also. They should take the disadvantages with the advantages—the bitter with the sweet. I think the fair inference from the decisions in the cases of Chapman v. Barney, 129 U. S. 677, 9 Sup. Ct. 426, 32 L. Ed. 800, Great So. F. P. H. Co. v. Jones, 177 U. S. 449, 20 Sup. Ct. 690, 44 L. Ed. 482, is that the numerousness of parties plaintiff or defendant is not sufficient to take a case out of the well-settled rules heretofore stated.

I think, therefore, that I erred in overruling the motion to remand. The order overruling it will therefore be set aside. The petitioners may file an amendment setting forth the states of which each of them is a citizen, if they so desire; otherwise the motion to remand will be sustained.

In re EVERLETH.

(District Court, D. Vermont. April 19, 1904.)

1. BANKRUPTCY—EXEMPTIONS—WEARING APPAREL.

Neither a watch and chain, nor a sword and belt, constituting a part of Masonic regalia, are exempt to a bankrupt as wearing apparel under the Vermont statute; nor are the watch and chain exempt as a timepiece, constituting a part of the tools of his trade as a barber, where among such tools there was also a clock; but a hat, although also a part of his regalia, is exempt.

In Bankruptcy.

Anthony F. Schwenk, for bankrupt.
Clarke C. Fitts, for trustee.

WHEELER, District Judge. The bankrupt appears to have been a barber, and to have had the tools and implements proper and necessary for a barber's shop, including a clock; and he also had a watch and chain, worth $20, and Masonic regalia, consisting of a hat, belt, and sword, of the value of $35, which he claims to be exempt. The clock has been turned over by the bankrupt to the trustee. The questions remaining are as to the watch and chain and the regalia. The watch and chain are claimed to be exempt as constituting a timepiece, but they do not seem to be as necessary for that purpose as the clock; and a watch and watch chain have usually been understood to be attachable, and not exempt, under the laws of this state. They are not in any sense any part of the barber's outfit, nor of the wearing apparel, which is exempt by name in the state statutes.

Such a question as to articles similar to the Masonic regalia was before the Supreme Court of the state in Sawyer v. Sawyer, 28 Vt. 249. The articles there were a sword, sword belt, and epaulets of the intestate, worn by him when in uniform as a purser in the United States Navy; and a watch, ornamental key, and chain, a finger ring, and a breastpin worn by him usually, in his lifetime. It was held by a majority of the court that the sword and belt, watch and chain, and finger ring were not a part of the wearing apparel, and did not pass as such to the widow, but remained a part of the estate, and that the epaulets, with the coat on which they were, should go as wearing apparel to the widow. That question as to the meaning of the words "wearing apparel," on decreeing distribution between the widow, the heirs, and creditors, was very similar to the one here as to the meaning of the same words in setting out property between the bankrupt and creditors.

That decision has never, so far as has been pointed out or noticed, been overruled in any respect. As applicable here, it disposes of all questions except as to the hat. This hat is understood to be such a one as, when worn, would answer all the purposes of a hat, and would be, of itself, wearing apparel. It may be used only for the purposes of the order to which the bankrupt belonged; but, when so used, it would be for a covering or protection of the head from

¶ 1. See Bankruptcy, vol. 6, Cent. Dig. § 659.

the weather, as hats ordinarily are that constitute a part of the wearing apparel, and it might be so used at any time. It is like the coat, on which the epaulets were worn, in Sawyer v. Sawyer, about which no question appears to have been made but that it was wearing apparel.

The decision of the referee is therefore modified as to the hat, and, as so modified, affirmed. The denial of the right to the watch as a timepiece so varies the circumstances as to the clock delivered up that the trustee may properly enough now set out the clock, if the bankrupt so desires, with the hat, as exempt.

Decision of referee modified as to the hat, and then affirmed, with leave to allow the clock to be set out as exempt, with the hat.

In re McCRACKEN & McLEOD.

(District Court, W. D. Tennessee. May 3, 1904.)

1. BANKRUPTCY—PETITIONS—NECESSITY—CONSOLIDATION—RES JUDICATA.
   The consolidation of bankruptcy petitions filed by different creditors under order of court before the adjudication of bankruptcy, and before reference to the referee, was res judicata of the question of the necessity for the filing of the second petition, and precluded the referee from thereafter reviewing the question and holding that such second petition was unnecessary.

2. SAME—ATTORNEY'S FEES—DIVISION.
   Where two bankruptcy proceedings were filed by attorneys representing different creditors, and were consolidated by order of court, as authorized by general bankruptcy order No. 7 (89 Fed. v, 32 C. C. A. xi), a single attorney's fee should be divided between such attorneys according to the relative value of the services and amount of work done by each.

Petition to Review.

Jas. R. Duffin and R. W. Maddox, for petition.
Hawkins, Peeler & Hawkins, opposed.

HAMMOND, J. The one attorney's fee allowed the petitioning creditors by section 64b (3) of the bankruptcy statute of 1898 (Act July 1, 1898, c. 541, 30 Stat. 563 [U. S. Comp. St. 1901, p. 3448]), should be equitably divided between the attorneys representing two petitions filed and consolidated by order of the court under general order 7 of the Supreme Court Orders in bankruptcy (89 Fed. v, 32 C. C. A. xi). The referee decided that the attorneys filing the second petition were not entitled to share in the fee, because that petition was unnecessary—giving the whole of it to the attorneys filing the first petition in point of time—and this petition was filed to review that finding. The consolidation by order of the court before the adjudication and before the reference to him precluded that question before the referee, and he was not authorized, after such an order of consolidation, to determine that the petition was unnecessary. It was already res judicata, and he should have confined his action to determining the amount of the fee, and, if the attorneys could not agree about its division, to allow to each a share according to the relative

value of the services and amount of work done by each in behalf of the creditors, having care to adhere to the statute by not allowing more than one fee, however numerous the attorneys.

The finding will be vacated, and the case returned to the referee, with directions to proceed according to law. Ordered accordingly.

In re GORDON SUPPLY & MFG. CO.

(District Court, M. D. Pennsylvania. April 9, 1904.)

No. 411.

1. BANKRUPTCY—TRUSTEES—SELECTION.

Where a trustee chosen to administer the assets of a bankrupt corporation by a majority of the creditors was not only a stockholder in the corporation, but had been closely associated as attorney for those who had previously been in control, and whose management was not only the subject of criticism, but might call for action on the part of the trustee to hold them personally responsible, such trustee, though unobjectionable personally, should not be permitted to act over the objections of a minority.

In Bankruptcy. On exceptions to action of referee approving of trustee selected by majority of the creditors.

C. P. O'Malley, for objectors.

W. H. Jessup and Charles H. Welles, opposed.

ARCHBALD, District Judge. There can be no objection personally to the trustee who has been chosen by a majority of those interested in the estate, at the creditors' meeting; and the right of such majority, under ordinary circumstances, to control the matter, must be conceded. The trustee is the representative of creditors, and they are the ones to decide who he shall be, subject only to the right of the court to supervise the choice where it is objected to. In the present instance the trustee chosen is not only a stockholder in the bankrupt corporation against which the proceedings were instituted, but he has been admittedly associated closely, as attorney and legal adviser, with those who have been hitherto in control; and their management is not only the subject of criticism, but may call for action on the part of the trustee to hold them personally responsible. To approve of the trustee now selected comes too near, therefore, to a continuation of previous conditions, to be warranted. With so many others who would be fully as efficient and entirely acceptable, the majority have no right to impose their present choice on the objecting minority.

The election is therefore set aside, and a new election ordered.

¶ 1. See Bankruptcy, vol. 6, Cent. Dig. § 185.

MISSOURI DRUG CO. v. WYMAN.

(Circuit Court, E. D. Missouri, E. D. May 9, 1904.)

1. MAILS—FRAUDULENT USE—STATUTES—CONSTITUTIONAL LAW.
   Rev. St. §§ 3929, 4041 [U. S. Comp. St. 1901, pp. 2686, 2749], and Act March 2, 1895, c. 191, § 4, 28 Stat. 964 [U. S. Comp. St. 1901, p. 2688], giving the Postmaster General authority to prevent the use of the mails by persons engaged in use thereof to conduct fraudulent schemes or to sell goods by false pretenses, are not unconstitutional, since, as the right to use the mails is a statutory privilege only, its withdrawal is not a deprivation of property without due process of law.

2. SAME—POSTAL REGULATIONS.
   Under the plenary power conferred on Congress to establish and regulate the postal system, it may lawfully confer on the Postmaster General authority to prevent the mails being used as a medium to disseminate printed matter which, on grounds of public policy, has been declared nonmailable.

3. SAME—POST-OFFICE DEPARTMENT—JURISDICTION.
   Congress having declared that certain kinds of printed matter shall be nonmailable, and that the mails shall not be used to accomplish fraudulent schemes, whether certain mail matter belongs to the prohibited class, or whether a person is in fact making a fraudulent use of the mails, is within the jurisdiction of the executive branch of the government, the determination of which is not reviewable by the courts if sustained by any credible evidence.

4. SAME—MEDICAL REMEDIES—FRAUDULENT ADVERTISING—OPINIONS—PUFFING.
   A drug company advertised "Vitality Pills" by printed matter sent through the mails, representing itself as an expert, and that the pills had been the result of long medical research, made from an animal extract taken from healthy young bulls; that they were a positive cure for all nervous and sexual diseases where epilepsy or insanity had not already set in, would enlarge the sexual organs, etc., and were the only known positive cure for lost manhood, etc. These statements were false, the only medicinal value of the pills being certain old and well-known drugs possessing some tonic properties. *Held*, that such representations were misrepresentations of fact and of alleged expert knowledge, authorizing a fraud order issued by the Post-Office Department, and not mere statements of opinion and laudatory statements used in advertising.

On Petition for Injunction.

On November 3, 1903, the Acting Assistant Attorney General for the Post-Office Department at Washington, D. C., notified the Missouri Drug Company, doing business in the city of St. Louis, Mo., that charges had been lodged with the Postmaster General against the drug company to the effect that it was engaged in conducting a scheme or device for obtaining money through the mails by means of false and fraudulent representations or promises, in violation of sections 3929 and 4041 of the Revised Statutes of the United States [U. S. Comp. St. 1901, pp. 2686, 2749]; that a statement of the nature of the charges was inclosed with the notice; and that it was desired that the drug company make a reply to the charges on November 18, 1903. On the day appointed for the hearing before the Acting Assistant Attorney General for the Post-Office Department the drug company appeared by its president, and filed a written reply to the charges of some length. In its reply it set out with considerable detail its method and manner of doing business, and insisted, in substance, that it was not engaged in obtaining patronage for the medicines which it was engaged in selling by means of false and fraudulent representa-

¶ 1. Nonmailable matter in furtherance of fraud, see note to Timmons v. United States, 30 C. C. A. 86.

tions, but was transacting its business in a lawful manner. Subsequent to the hearing, and on December 7, 1903, the drug company was advised, in substance, that all the evidence in the case had been carefully considered by the Post-Office Department, and that it had been decided "that that part of the company's business which relates to the cure for lost manhood is in violation of the postal fraud laws." It was further advised that it was "not the desire of the Post-Office Department to interfere with any legitimate business (of the drug company), but to suppress that part which relates to the cure for lost manhood," and that it had been decided to give the company an opportunity to discontinue the objectionable branch of its business by signing an affidavit that it had entirely discontinued and abandoned the sale of its "Vitality Pills," and all other business connected with its cure for lost manhood, with the exception of completing the treatment of patrons who had actually ordered "Vitality Pills" at the time of the signing of the affidavit. On receipt of this communication the drug company, under date of December 17, 1903, filed an affidavit to the effect that it had ordered the immediate discontinuance of all public advertising in the newspapers and magazines of a cure for lost manhood known as "Vitality Pills," and that it had stopped the use of the mails for the shipment of "Vitality Pills," except in fulfillment of promises made previous to the signing of the affidavit. Subsequently the Post-Office Department appears to have been advised that, notwithstanding the statement contained in the affidavit of December 17, 1903, the drug company was using the mails for the purpose of distributing "Vitality Pills," whereupon, under date of February 15, 1904, a fraud order was issued by the Postmaster General, known as "Order No. 126." This order recited, in substance, that it had been made to appear to the Postmaster General, upon evidence satisfactory to him, that the Missouri Drug Company, its officers and agents, at St. Louis, Mo., was engaged in conducting a scheme or device for obtaining money through the mails by means of false and fraudulent pretenses, representations, and promises, in violation of the act of Congress entitled "An act to amend certain sections of the Revised Statutes relating to lotteries and for other purposes," approved September 19, 1890, 26 Stat. 465, c. 908 [U. S. Comp. St. 1901, p. 2659]. Whereupon the postmaster at St. Louis, Mo., was forbidden to pay any postal money orders payable to the order of the Missouri Drug Company, and to inform persons transmitting such postal money orders that payment thereof had been forbidden, and that the amount would be returned upon presentation of the original order, or a duplicate thereof, which should be applied for and obtained under the regulations of the department. The postmaster at St. Louis, Mo., was further ordered to return all letters, whether registered or not, and other mail matter, which should arrive at his office directed to said Missouri Drug Company, to the postmasters at the offices at which such mail matter was originally received, with the word "Fraudulent" plainly written or stamped upon the outside of such letters or other mail matter; and that, where there was nothing on such letters to indicate who were the senders, to cause such letters to be sent to the dead letter office, with the word "Fraudulent" plainly written or stamped thereon, to be disposed of as other dead matter under the laws and regulations applicable thereto. After the issuance of this order, and on March 2, 1904, the drug company filed its bill of complaint against Frank Wyman, postmaster in the city of St. Louis, praying for an injunction perpetually enjoining and restraining him and his employés from obeying such order of the Postmaster General, and from interfering with the complainant's mail matter in any respect. The bill of complaint alleged, in substance, and as a ground of relief, that it had been for some time past engaged in the business of healing diseases and ailments of the human family, and more particularly those diseases and ailments which affected the nervous and sexual organs; that it had expended large sums of money in advertising its remedies for such ailments, and had created a large demand for its remedies throughout the United States; that said business was a legal and legitimate business, conducted according to legal and business methods, and was founded solely on the medicinal virtues of the remedies which it was engaged in selling; that its remedies were capable of cure, and had cured many ailments of the nervous and sexual organs; that sections 3929 and 4041 of the Revised Statutes of the United States [U. S. Comp. St. 1901, pp. 2686, 2749] have no applica-

tion whatever to the business in which the complainant was engaged, and that said business was legitimate, and that no fraud, deceit, deception, or misrepresentation of any kind had ever been practiced by it. On the presentation of the bill of complaint an order was entered requiring the postmaster at St. Louis to appear on a certain day and show cause why a temporary injunction such as was prayed for in the bill should not be granted. In obedience to the rule to show cause a return was made by the postmaster, in which return it was alleged, amongst other things, that at the time said fraud order was issued, and for a long time prior thereto, the complainant had been engaged in a scheme by it devised to defraud divers persons throughout the United States, which scheme was to be effected through the use and by means of the post-office establishment of the United States. On the hearing of the application for a preliminary injunction the court made an order restraining the postmaster, during the pendency of the cause, and until a final hearing, from executing so much of the order of the Postmaster General as required him to return mail matter addressed to the complainant to the senders thereof and branding it fraudulent. At the same time, by consent of the complainant and the defendant, an order was made directing that the cause be speeded to a final determination, that the time be shortened for the taking of such testimony as the parties desired to submit, and that when such testimony was taken the cause be submitted to the court for such final decree as it thought proper to enter. The defendant thereafter filed an answer to the bill of complaint. In the answer so filed the defendant in substance repeats the allegations contained in his return to the rule to show cause, that when the fraud order was issued the complainant was, and for a long time prior thereto had been, engaged in a scheme and artifice to defraud divers persons resident in the United States by means and by use of the post-office establishment. The nature of such fraudulent scheme was also stated with some detail in the answer. In pursuance of the permission given to the parties to take such testimony as they desired to take, considerable testimony has been taken by the complainant, and the cause has been submitted to the court for final decree upon such testimony, the defendant declining to take any testimony in his own behalf.

Ashley C. Clover and James H. Harkless, for complainant.
David P. Dyer, U. S. Dist. Atty., for respondent.

THAYER, Circuit Judge, after stating the case as above, delivered the opinion of the court.

Regarding the proposition which was advanced on the hearing that the statutes under which the Postmaster General assumed to act in issuing the fraud order, to wit, sections 3929 and 4041 of the Revised Statutes [U. S. Comp. St. 1901, pp. 2686, 2749], and section 4 of chapter 191 of the act of March 2, 1895 (28 Stat. 964 [U. S. Comp. St. 1901, p. 2688]), are unconstitutional, it is sufficient to say that the court adheres to the views which it expressed on that point in the case entitled American School of Magnetic Healing v. McAnnulty (C. C.) 102 Fed. 565, and to the views previously expressed by the Circuit Court of Appeals for the Sixth Circuit in Enterprise Savings Ass'n v. Zumstein, 15 C. C. A. 153, 67 Fed. 1000, and by the Supreme Court of the District of Columbia in Dauphin v. Key, 4 MacArthur, 203. In other words, the court holds that, in virtue of the plenary power conferred upon the Congress of the United States to establish a postal system and make regulations for its government and control, it may lawfully declare what shall and what shall not be carried in the mails, and may lawfully confer on the Postmaster General the requisite authority to prevent the mails from being used as a medium to disseminate printed matter which, on grounds of public policy, it has declared to be nonmailable. When Congress declares, as it has an undoubted right to

do, that a certain kind of printed matter shall not be deposited in the mail, or that the mails shall not be used by any person or corporation to accomplish fraudulent schemes, the duty of determining whether certain mail matter belongs to the prohibited class or whether a certain person is in fact making use of the mails to accomplish a scheme to defraud, are questions which can be decided most conveniently by those who are charged with the administration of the postal laws. The determination of such questions is, in its nature, an executive function. It frequently happens that officers who are charged with the execution of the laws are compelled to exercise some measure of judgment and discretion, and to determine, to the best of their ability, questions both of law and fact on which the proper execution of the law depends. No reason is perceived, therefore, why Congress could not lawfully vest the Postmaster General with authority to inquire and determine whether any person or corporation was using the mails to consummate a scheme to defraud after it had determined that the mails should not be used for that purpose. Indeed, it would seem that the power in question could not well have been lodged elsewhere than with the head of the Post-Office Department, whose duty it is to see that the postal laws are in all respects faithfully executed, and that the privilege accorded to citizens of using the mails is not abused. The statutes in question operate equally upon all persons. They do not deprive any one individual or class of individuals of a privilege which is accorded to others, nor do they take away from the citizen any right which is guarantied to him by the federal Constitution. The right to use the mails is a mere privilege conferred by legislative enactment, and it must always be exercised under and subject to such conditions and restrictions as Congress sees fit to impose. Sections 3929 and 4041 [pages 2686, 2749], now under consideration, appear to have been enacted for no other purpose than to vest the Postmaster General with the power to effectually prevent the mails from being used as a means of disseminating printed matter which was deemed harmful to the public, and which Congress for that reason had declared should not be so disseminated.

The bill of complaint contains an allegation, in substance, that the sections of the Revised Statutes last mentioned have no application to such a business as the complainant is engaged in transacting, and it is on this ground that the drug company principally relies to obtain injunctive relief. In support of this contention it asserts that all the representations made by it to induce people to purchase its "Vitality Pills" were matters of opinion, and, being of that character, that persons who purchased on the strength thereof cannot be said to have been defrauded. It further insists that because all of the fraudulent representations that were relied upon to prove the existence of a scheme to defraud were mere expressions of opinion, they could not, as a matter of law, accomplish a fraud; and that the Postmaster General had no jurisdiction to find that the drug company was engaged in a scheme to defraud, and on the strength of that finding deprive it of the privilege of using the mails. This argument is based largely on some observations of the Supreme Court of the United States which were made arguendo in the case of School of Magnetic Healing v. McAnnulty, 187 U. S. 94, 23 Sup. Ct. 33, 47 L. Ed. 90. In that case, how-

ever, it was a conceded fact (the case having passed off on a demurrer to the bill, which admitted all of its allegations) that the defendant who was proceeded against was doing business and inviting patronage from those having physical ailments on the professed theory that the human mind is largely responsible for bodily ailments, and that these could be cured or ameliorated by influences brought to bear on the mind of the patient, and that persons received treatment from the defendant with full knowledge that it was administered upon that theory. In view of these facts the court said, in substance, that the theory upon which the defendant administered medical treatment might be erroneous, but no one could say with certainty that it was erroneous, inasmuch as the truth or falsity of the theory was wholly a matter of opinion; that those who received treatment with knowledge of the principle upon which it was based could not be heard to say that they were defrauded; that, in view of the admission made by the government, it was legally impossible to say that the defendant was engaged in a scheme to defraud, and that the Postmaster General had made a mistake of law, on account of which a court of equity could afford relief, in finding the existence of a scheme to defraud upon an admitted state of facts where no fraud was possible. The case which is cited and relied upon bears little analogy to the case in hand. In the case now under consideration it appears that the complainant, to induce the sale of its "Vitality Pills" for the cure of lost manhood, by its advertisements and circulars makes certain statements of matters of fact which the Postmaster General may have found, and probably did find, to be false and misleading, and to have been made with intent to deceive the public. For example, its leading advertisement contains the statement that "after years of research eminent physicians have at last discovered a remedy which is indorsed by the leading members of the medical profession as permanent in its effect"; that "the principal ingredient is an animal extract, taken from healthy young bulls"; that "it is scientifically prepared by the best chemists in the world"; and that "the reputation of the institution (that is to say, the Missouri Drug Company) is such that all physicians know, when they stand sponsor for a remedy, that remedy must be exactly as represented; and when, upon their reputation, they make the statement that Vitality Pills will cure all cases of lost manhood, spermatorrhea, * * * and weakness of any nature of the nerve or sexual organs, a cure must be positive and permanent." The advertisement further declares that "Vitality Pills will effect a cure at any age"; that "there is no case that it will not cure permanently, except where epilepsy or insanity has already set in"; and that the company "have received many letters from people all over the country telling of the most astonishing cures made by Vitality Pills." In the complainant's circulars and other literature, which is widely disseminated through the mails, are found statements to the following effect: That the complainant's medical department "is in charge of one of the most eminent physicians in this country"; that "the organs of generation can be made larger"; that it "utters this all-glorious truth professionally, having made many successful experiments"; that "the Missouri Drug Company is one of the largest chemistries in the United States"; that "in presenting the Vitality Pills for

the cure of diseases caused by an abnormal condition of the nervous system we can unhesitatingly state that it is the best, the most certain, and only permanent cure that has thus far been discovered for the diseases and symptoms which are brought about by * * * sexual excesses," etc.; that "the formula of Vitality Pills is not a spontaneous or miraculous discovery, but was formed after years of scientific research by the greatest professors of nervous diseases, and was compounded in its present form and efficaciousness at great expense to the Missouri Drug Company"; also "that these wonderful pills are to-day accepted as the only known cure for lost manhood," etc., "and are now being used by the profession for the treatment of all disorders resulting from either self-abuse or sexual excesses"; that "it is now conceded that Vitality Pills are the only specific known which will actually cure permanently lost manhood in all its forms and conditions"; that Vitality Pills are "to-day the only cure of its kind in the world free from all injurious and objectionable properties, and will always cure if the simple directions for its use are followed"; also that the complainant has in its possession "thousands of testimonials received from men in every walk of life, both old and young, who send their thanks and gratitude for being lifted from the midnight despair into the sunshine of hope and happiness by Vitality Pills." The testimony that was adduced at the trial shows that these extravagant statements, and some others of a similar nature, which the complainant confesses that it has made to create a demand for its "Vitality Pills," rest upon no substantial basis of fact or experience, and, as some of them are statements of matters of fact, rather than expressions of opinion, the court has little hesitation in holding that the case was of a kind where the Postmaster General, acting within the authority conferred upon him by the postal laws, could properly find, as he appears to have done after giving the drug company an opportunity to be heard, that it was engaged in a scheme to obtain money through the mails by means of false and fraudulent pretenses and representations, and that it was doing so at the time the fraud order was issued.

It must also be borne in mind that it is not always true that a misrepresentation, to amount to a fraud, must be a misrepresentation as respects some matter of fact, although such is the general rule. There are well-established exceptions to this rule. An opinion may sometimes be expressed under such circumstances as will render a person guilty of a fraud; as, where one who is an expert, or who possesses peculiar knowledge of the value or the quality of an article expresses to another, who lacks such special knowledge, and who relies upon the superior information of the person with whom he is dealing, an opinion as to the value or quality of the article which he does not honestly entertain, doing so for the purpose of deceiving him. Cooley on Torts (2d Ed.) p. 567, and cases there cited; Eaton on Equity, p. 291, and cases there cited. In view of this exception to the general rule, some of the statements which the complainant appears to have been in the habit of making with respect to the merits of its "Vitality Pills," treating them as expressions of opinion, might well be found to be false and fraudulent if they were not entertained by the complainant, but were

made solely with a view of inducing the unwary to purchase its "Vitality Pills."

Counsel for the complainant say that the representations which it was in the habit of making concerning its "Vitality Pills" are the ordinary puffing statements which are usually made by the manufacturers of patent medicines and other nostrums to introduce them into the market, and it is doubtless true that representations are sometimes made with little regard for the truth, to create a demand for such articles, and that the public is in that manner sometimes deceived. This argument, however, is entitled to no weight, and cannot be accepted as a sufficient excuse, much less as a justification, for the statements which the complainant appears to have made to create a demand for its "Vitality Pills." Even if it believes that these pills have some medicinal value —which they may have, as they appear to be compounded in part of some old and well-known drugs which possess some tonic properties— yet the latitude ordinarily allowed to a vendor to puff his wares would not justify such representations as the complainant's literature discloses. This court, however, is not called upon to make an independent finding upon the question whether the drug company, at and prior to the issuance of the fraud order, was or was not engaged in a scheme to obtain money through the mails by means of false and fraudulent representations or pretenses, and it would not be understood as making a definite finding on that issue. The law devolves on the Postmaster General, in the discharge of his executive functions, the duty of determining that issue, and the courts will not interfere with his action, or reverse his finding, where the complaining party has had a reasonable opportunity to be heard in its defense unless the case on which the head of the department has acted is one where, upon the state of facts laid before the officer, it is legally impossible to hold that the complaining party was engaged in obtaining money through the mails by false or fraudulent representations, so that such a finding, when made, may be characterized, not as an erroneous finding, but rather as a mistake of law. The case above cited, School of Magnetic Healing v. McAnnulty, 187 U. S. 94, 23 Sup. Ct. 33, 47 L. Ed. 90, fell within this rule, and the judgment of the lower court was reversed because on the state of facts then involved, the existence of which were admitted, it was impossible to say that the conduct of the defendant was fraudulent. The judiciary cannot review or control the action of executive officers in the determination of questions of fact which they have been expressly empowered to determine, and in the decision of which they must of necessity exercise judgment and discretion. Enterprise Savings Ass'n v. Zumstein, 15 C. C. A. 153, 159, 67 Fed. 1000, and authorities there cited. Moreover, when an executive officer, in the performance of his duties, is called upon to determine a question of fact on which the due administration of the law depends, his finding upon such an issue, based upon conflicting evidence, if uninfluenced by fraud or mistake, is usually regarded as conclusive, and will not be disturbed by the courts. Burfenning v. Chicago, St. Paul, Minn. & Omaha Ry. Co., 163 U. S. 321, 16 Sup. Ct. 1018, 41 L. Ed. 175; Gardner v. Bonestell, 180 U. S. 362, 21 Sup. Ct. 399, 45 L. Ed. 574; United States v. Winona & St. P. R. Co., 67 Fed. 948, 15 C. C. A. 96, 107, and cases there cited.

Indeed, as this court had occasion to remark, in substance, in the case of American School of Magnetic Healing v. McAnnulty (C. C.) 102 Fed. 565, 569, if the courts could be called upon and be required to review the findings of the Postmaster General in every case of this sort the statute under consideration would not prove to be an efficient means for preventing the misuse of the mails.

In view of these considerations, the court holds that it has no right to grant the relief which the complainant seeks to obtain. The finding of the Postmaster General that the complainant was engaged in a scheme to obtain money through the mails by means of false and fraudulent pretenses and representations is one which this court is not authorized to review or overrule, inasmuch as the finding is based on evidence which certainly tends to sustain it, and in that event the statute empowers the Postmaster General to judge of its weight and sufficiency. The bill of complaint is accordingly dismissed, at the complainant's cost.

UNITED STATES v. MOORE et al.

(Circuit Court, N. D. Alabama, S. D. May 8, 1904.)

1. CONSTITUTIONAL LAW—RIGHTS OF CITIZENS—ORGANIZATION.
   The right of a citizen to organize miners, artisans, laborers, or persons in any pursuit, as well as the right of individuals in such callings to unite for their own improvement or advancement, or for any other lawful purpose, is a fundamental right of a citizen in all free governments; but it is not a right, privilege, or immunity granted or secured to citizens of the United States, by its Constitution or laws, and is left solely to the protection of the states.

2. SAME—LIFE AND LIBERTY.
   The fourteenth amendment of the federal Constitution, which prohibits a state from depriving any person of his life, liberty, or property without due process of law, adds nothing to the rights of any citizen against another, but merely furnishes additional guaranties against any encroachment by the states upon the fundamental rights which belong to every citizen as a member of society.

3. SAME—FEDERAL COURTS—JURISDICTION.
   Federal courts have no jurisdiction to punish a conspiracy to oppress and intimidate a citizen of the United States to prevent him from exercising the right to establish a miners' union in a state, in the furtherance of which defendants were alleged to have assaulted such citizen, with intent to murder him by shooting at him with a pistol; such offense being entirely within the jurisdiction of the state courts.

On Demurrer to Indictment.

The indictment, found under section 5508 of the Revised Statutes [U. S. Comp. St. 1901, p. 3712], contained two counts. The first charged that the defendants, Charles Moore, William Ballinger, John Chance, George De Loach, Luther Rayburn, and Sterling Shores, conspired to injure, oppress, and intimidate one B. L. Greer, a citizen of the United States, to prevent the free exercise and enjoyment by him of a right or privilege secured to him by the Constitution and laws of the United States, to wit, "the right and privilege of establishing, organizing, and perfecting a local union of the United Mine Workers of America at Empire, in the county of Walker and state of Alabama," and that, in pursuance of the conspiracy, and to effect its object, the defendants unlawfully assaulted and beat said Greer, etc. The second count charges a conspiracy among defendants to injure, oppress, and threaten said

Greer "for having, and because of his having exercised the right and privilege," named, setting it forth as described in the first count, and that, in the execution of the conspiracy, and to effect its object, the defendants unlawfully, and with malice aforethought, assaulted said Greer with intent to murder him by shooting at him with a pistol, etc.

The defendants demurred substantially on the following grounds: (1) Because it appears from the indictment that the right or privilege claimed is not secured to said Greer as a citizen of the United States by the Constitution and laws thereof, and that said conspiracy and assault did not violate any privilege or immunity of a citizen of the United States. (2) The indictment shows that no offense was committed against the criminal laws of the United States, but only an offense against the laws of the state of Alabama. (3) The indictment shows that this court has no jurisdiction to try and punish the offense set forth.

Thos. R. Roulhac, Dist. Atty., and N. L. Steele, Asst. Dist. Atty., for the United States.

Walker Percy and W. I. Grubb, for defendants.

JONES, District Judge (after stating the facts as above). Unquestionably the right of a citizen to organize miners, artisans, laborers, or persons in any pursuit, as well as the right of individuals in such callings to unite for their own improvement and advancement, or for any other lawful purpose, is a fundamental right of a citizen, protected in every free government worthy of the name. The only issue this case presents is, to what government, under our complex institutions, is committed the duty to protect that right?

In ascertaining the privileges or immunities of citizens of the United States, as distinguished from the rights which pertain to the citizen of the state as such, and to what governments, respectively, their protection is committed, we must consult the history of our institutions, as well as the language of the Constitution. All well-informed persons know that our ancestors brought with them from England traditionary privileges, personal and political rights, which had been gained in struggles between Commons and King, confirmed by repeated acts of Parliament and judicial decisions, and so long acquiesced in that in time they finally became the accepted maxims of government which constitute the British Constitution. The Revolution deprived the people of the Colonies of none of these rights, but put them more directly in their own keeping. Their painful experience with the helplessness and inefficiency of the government under the Articles of Confederation convinced the people that their welfare and happiness would be best subserved by committing some of their powers, rights, and liberties to a new government, which, as to such matters, should be supreme and independent of the states. Accordingly the people of the United States, acting through their several state conventions, created the government of the United States, with all needful power to conduct their affairs with other nations, to regulate the rights of the states, and the rights of citizens of different states as among themselves and with the general government, and some other matters of common concern to the people, and committed to the new government all their powers, rights, and liberties as to those carefully enumerated matters, specified in the Constitution of the United States, and reserved all the other rights, powers, and liberties theretofore enjoyed by the people of the states to

the keeping and protection of the state governments, which remained after the adoption of the Constitution, as they were before, sovereign as to them. As there was much apprehension in the conventions which ratified the Constitution, which contained no bill of rights, that the rights of the states and of the people would be unduly trenched upon by the general government, the first Congress proposed ten amendments; the resolutions submitting them, reciting that:

"The conventions of a number of states having, at the time of their adopting the Constitution, expressed a desire, in order to prevent misconstruction or abuse of its powers, that proper declaratory and restrictive clauses should be added; and as extending the ground of public confidence in the government will best insure the beneficent ends of its creation," etc.

These amendments denied power to Congress to interfere with certain enumerated rights of the citizen, and gave certain constitutional guaranties, as to the right of trial by jury, etc. The last two of the ten amendments thus proposed provided that "the enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people," and that "the powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states, respectively, or to the people." It is quite apparent, therefore, that the protection of certain rights of the citizen of a state, although he is by recent amendments made a citizen of the United States and of the state in which he resides, depends wholly upon laws of the state, and that as to a great number of matters he must still look to the states to protect him in the enjoyment of life, liberty, property, and the pursuit of happiness.

Inevitably, then, when a citizen claims protection of a right or privilege, as one secured to citizens of the United States by its Constitution or laws, these inquiries arise: Is the right or privilege claimed granted in terms by any provision of the Constitution, or so appropriate and necessary to the enjoyment of any right or privilege which the Constitution does specify and confer upon citizens of the United States as to arise by necessary implication? Is its exercise necessary or appropriate in the performance of any of the duties which the Constitution and laws of the United States exact from its citizens? Is its protection by federal authority needful to the just supremacy of the general government over any matter committed to it, or directly conservative or promotive of any of the ends for which the Constitution ordained the government of the United States? If the character of the right or privilege claimed does not permit affirmative answer to any of these inquiries, it is clear the right is not derived from or dependent on the Constitution, and its protection is not committed to the general government.

It is no longer open to discussion or doubt that "the United States are a nation whose powers of government, legislative, executive, and judicial, within the sphere of action confided to it by the Constitution, are supreme and paramount. Every right created by or arising under or dependent upon the Constitution may be protected and enforced by such means and in such manner as Congress, in the exercise of the correlative duty of protection and of the legislative powers conferred upon it by the Constitution, may, in its discretion, deem most eligible

and best adapted to attain the object." In re Quarles and Butler, 158 U. S. 535, 15 Sup. Ct. 960, 39 L. Ed. 1080; Logan v. United States, 144 U. S. 293, 12 Sup. Ct. 617, 36 L. Ed. 429. Among the rights and privileges secured to citizens of the United States, expressly or impliedly, which are grouped here to show how entirely different they are in origin and nature from the right involved in this case, are the right to vote for presidential electors and members of Congress; the right to hold and seek office under the federal government; the right to petition Congress for redress of grievances, and to freely print, speak, or write one's sentiments, being responsible for the abuse thereof, concerning any right or matter committed to the federal government; the right, of his own volition, to become a citizen of any state of the Union by bona fide residence therein, with the same rights as other citizens of that state; the right of every judicial or executive officer or other person engaged in the service, or kept in the custody of the United States, in the course of the administration of justice, to be protected from lawless violence; the right to the privileges of the writ of habeas corpus; the right to go to and return from the seat of government; the right to resort to the courts of the United States; the right to communicate to any executive officer any information which the citizen has of the commission of an offense against the laws; the right to engage in interstate commerce; the right to enter a homestead upon the public domain, and live on it for the purpose of perfecting the entry; the right to claim the protection of the government when on the high seas or in foreign lands, or in any place committed exclusively to federal jurisdiction; the right to be exempt from discrimination on account of race, as to equality before the law, suffrage, or service on juries; the right to pass from one state to any other for any lawful purpose; the right to be free from taxes and excises not imposed by the state on its own citizens; and the right to be free from slavery or involuntary servitude, except as a punishment for crime.

The power conferred upon Congress by the Constitution concerning these rights, in some instances, as under the fourteenth amendment, is corrective merely of invasion of them by state law or authority. Under other provisions, as under the thirteenth amendment, the power of Congress is full, primary, and direct, authorizing not only the annulment of state laws antagonistic to the right secured, but extending as well to legislation for the protection of the right, and punishment of individuals who transgress its laws on the subject. It deals with things, not merely with names. Prigg v. Pennsylvania, 16 Pet. 539, 10 L. Ed. 1060. "It is clear that this amendment, besides abolishing forever slavery and involuntary servitude, gives power to Congress to protect all persons within the jurisdiction of the United States from being in any way subjected to slavery or involuntary servitude, except as a punishment for crime, and in the enjoyment of that freedom which it was the object of the amendment to secure." United States v. Harris, 106 U. S. 540, 1 Sup. Ct. 610, 27 L. Ed. 290. Under this amendment Congress has the undoubted power to deal not only with the laws which seek to accomplish the forbidden ends, but also with acts of individuals which bring about the same result. Peon-

age Cases (D. C.) 123 Fed. 671; Slaughterhouse Cases, 16 Wall 36, 21 L. Ed. 394.

The Supreme Court recently declared:

"To leave to the several states prosecutions of conspiracies to prevent citizens enjoying the privileges granted or secured by the Constitution of the United States would tend to defeat the supremacy and independence of the national government. As said by Chief Justice Marshall in McCullooch v. Maryland [4 Wheat. 316, 4 L. Ed. 579], and cannot be too often repeated, no trace is to be found in the Constitution of an intention to create a dependence of the government of the Union on those of the states for the execution of the great powers assigned to it. Its means are adequate to those ends, and on those means alone was it expected to rely for the accomplishment of its ends. To impose on it the necessity of resorting to means it cannot control, which another government may furnish or withhold, would render its course precarious, the result of its measures uncertain, and create a dependence on other governments which might disappoint its most important designs, and is incompatible with the language of the Constitution." 158 U. S. 537, 15 Sup. Ct. 961, 39 L. Ed. 1080.

If, therefore, the citizen is obstructed or intimidated by the lawless acts of individuals in the "free exercise or enjoyment of any right or privilege secured to him by the Constitution and laws of the United States," Congress may make such acts crimes against the United States, and punish them in its courts. Section 5508 of the Revised Statutes [U. S. Comp. St. 1901, p. 3712] is a lawful exercise of the authority of Congress to that end. It is to be borne in mind, however, that "the protection of this section extends to no other right—to no right or privilege dependent on a law or laws of the states. Its object is to guaranty safety and protection to persons in the exercise of rights dependent on the laws of the United States, including, of course, the Constitution and treaties, as well as statutes, and it does not, under this section, at least, design to protect any other right." United States v. Waddell, 112 U. S. 79, 5 Sup. Ct. 36, 28 L. Ed. 673.

The right or privilege here involved is not granted in terms to any citizen of the United States by any provision of the Constitution. Its exercise is not necessary to the enjoyment of any right or privilege which the Constitution does specify and confer. It does not result from relations of citizens of the United States to the government of the United States, as needful or proper to the discharge of any duty the citizen owes it. Its protection is not essential to the supremacy of the general government over any matter committed to it by the Constitution, nor is its enforcement a proper means to any end which the Constitution ordained the government of the United States to accomplish. The right has not been assailed or invaded under any state law or by any state authority, or on account of race, color, or previous condition of servitude, or in any other way than by the acts of lawless individuals. How, then, can such an offense fall within the criminal jurisdiction of the courts of the United States?

The Constitution of the United States, as we repeat, left the power and duty to protect life, liberty, property, the pursuit of happiness, freedom of speech, the press, and religious liberty, and the right to order persons and things within their borders, for the protection of the health, lives, limbs, morals, and peace of citizens, save as the original power of the states over them might be disturbed or de-

stroyed by the specific grants of power to the general government, where the Constitution found them—in the exclusive keeping and power of the state—and denied the general government any responsibility for or power over them. Rights like these do not arise from the Constitution of the United States, and are in no wise dependent upon it. Provisions of the Constitution which refer to rights like these are merely in recognition of rights which existed before the government of the United States was formed, in abdication of power in the general government to interfere with or invade them, and in some instances intended as a breakwater against their invasion by state power. As said in United States v. Cruikshank, 92 U. S. 553, 23 L. Ed. 588:

"The very highest duty of the states when they entered into the Union under the Constitution was to protect all persons within their boundaries in the enjoyment of those unalienable rights with which they were endowed by their Creator. In these respects, as regards the particular right here involved, the recent amendments to the Constitution have made no change in the power or duty of the general government. The fourteenth amendment, which prohibits a state from depriving 'any person of life, liberty or property without due process of law,' adds nothing to the rights of one citizen against another, but simply furnishes additional guaranties against any encroachment by the states upon the fundamental rights which belong to every citizen as a member of society." United States v. Cruikshank, 92 U. S. 554, 23 L. Ed. 588.

In that case it was further said:

"Within the scope of its powers as enumerated and defined, the government of the United States is supreme and above the states, but beyond it has no existence. It was erected for special purposes, and endowed with all power for its preservation and the accomplishment of the ends the people had in view. It can neither grant nor secure to its citizens any right or privilege not expressly or by implication placed under its jurisdiction."

If, as contended by the government, Congress has power to punish conspiracies to prevent the exercise of rights like that here invaded, it has equal power to punish individual acts having the same end in view. It could invade the whole domain of the municipal codes of the states, and punish every act of lawless violence directed against the enjoyment of any right concerning life, liberty, and property, or the pursuit of happiness. The authority and duty of the states in the premises would be transferred to the federal government, whenever it legislated as to them, and violations of its laws as to such rights were punished in its courts; and that government, contrary to the design of the Constitution of the United States, would have at least concurrent jurisdiction with the state governments in prescribing and punishing offenses against rights whose protection was never committed or intended to be committed to the United States, but, on the contrary, expressly left to the power of the states. Civil Rights Cases, 109 U. S. 3, 3 Sup. Ct. 18, 27 L. Ed. 835; Slaughterhouse Cases, 16 Wall. 36, 21 L. Ed. 394; United States v. Cruikshank, 92 U. S. 550, 23 L. Ed. 588.

All who value the blessings of justice administered without respect of persons, and who love liberty regulated by law, will share in the regret that acts like those disclosed in the indictment can happen in our midst, and that apprehension exists that the right here claimed, which is dependent solely upon the laws of Alabama, will not be vin-

dicated and enforced in the tribunals of this state. Whether these apprehensions be well or ill founded, it would be a less evil to society to leave the wrong unredressed than to usurp jurisdiction to punish the offenders here.

As the acts charged cannot constitute an offense against the laws of the United States, the demurrers will be sustained, and an order will be entered that the defendants go hence without day.

WILSON et al. v. CHICAGO LUMBER & TIMBER CO. et al.

(Circuit Court, D. Colorado. March 28, 1904.)

No. 4,277.

1. DEEDS—CONSTRUCTION—REFERENCE TO MAP.

A deed to land in the town site of Denver, made pursuant to a decree of the probate judge, entered after hearing on the petition of the grantee, described the land by metes and bounds; making the old bed of the South Platte river, as shown on a map referred to therein, a part of the northwesterly boundary, and the extreme depth of the tract westerly from the street on which it fronted 125 feet, which was the depth claimed by the petitioner. At the time the map was made, it was difficult, if not impossible, to correctly locate the old bed of the river, which had been obliterated by floods. According to the scale of the map, it was shown to be 260 feet from the street at the nearest point where it would be reached by the boundary given, but the field notes of the survey on which the map was based showed it to be very near the street. *Held*, that it could not be presumed that the judge intended to grant more than the petitioner claimed, nor could the distances given in the description be ignored because of the reference to the river bed, the location of which was uncertain, and that the deed must be construed as conveying no land west of a line 125 feet from the street.

Action in Ejectment. On trial to the court.

R. H. Gilmore and John D. Fleming, for plaintiffs.
Elmer E. Whitted, for defendants.

HALLETT, District Judge. This is an action of ejectment to recover the possession of land in the city of Denver, the description of which will soon appear. Plaintiffs claim title under a deed issued by Henry A. Clough, probate judge of Arapahoe county, to Polinah S. Truax, of date September 17, 1872, pursuant to an act of Assembly approved February 8, 1872 (Ninth Session, p. 191). Polinah Truax made a petition to the probate judge of Arapahoe county, in which she declared that she held, under deed from Jacob Dowing, a former probate judge, of date 9th September, 1869, land described as follows:

"Beginning at a point 65 feet from the northwest corner of F and Williams Streets; thence along the west side of F street to Bassett street, 185 feet; thence westerly at right angles with F street 125 feet; thence southerly on a line parallel with F street 185 feet; thence easterly 125 feet to the place of beginning."

She then described certain improvements which she had made on the premises, and declared that she had occupied the same since January 1, 1872, in good faith and in ignorance of any adverse claim. She knew not why her title was challenged, and prayed for a deed to her

according to the terms of the aforesaid act of Assembly. Thereupon the probate judge directed that a hearing be had upon the petition on the 16th day of September, 1872. On the 17th of September the hearing before the court occurred, in which Polinah Truax appeared, and the city of Denver appeared by its attorney. After describing the tract claimed by the petitioner as given in her petition, with a frontage of 185 feet on F street and a depth of 125 feet, the court declared that Polinah Truax had acquired an interest in and to the following described piece of land—being a portion of that above described—in good faith, and without actual notice of the legal defects to the title thereof, and had located dwelling houses thereon prior to January 25, 1872, to wit: "Beginning at a point on the west line of F street in the East Division of the city of Denver in said county and territory, 106 feet north from the northwest corner of F and Williams streets; thence on the west line of F street 144 feet; thence at right angles with F street westerly to the east line of the old bed of the South Platte River, as the same is marked and defined on the map of the said city, as per survey of F. J. Ebert; thence southerly along the east line of the old bed of the South Platte River, 162 feet; thence in a direct line southerly and parallel with F street to a point 106 feet northerly from Williams street and 125 feet westerly from the westerly line of F street; thence at right angles and in a direct line easterly 125 feet to F street, to the place of beginning"—but that the said Polinah S. Truax did not obtain an interest in the remainder of the land, as first above described, in good faith, and without actual notice of the defects to the title thereof, improving the same by the erection of a dwelling or dwellings thereon. A deed was then issued by the probate judge for the land as described in the order, except that the course along the east line of the old bed of the South Platte river was given as 62 feet, instead of 162 feet, as mentioned in the order. This discrepancy between the order and the deed was not noticed by counsel in the course of the trial, and, in a plat of the premises put in by the plaintiffs, and marked "Exhibit C," this course was marked as of the length of 62 feet, so that it may be assumed that the length of the course as stated in the order was in fact erroneous.

The second course in the description of the premises conveyed in the deed extends westerly from F street to the east line of the old bed of the South Platte river, as the same is marked and defined on the map of said city, as per survey of F. J. Ebert, and plaintiffs maintain that this line is at a distance of more than 260 feet from the west line of F street. From this point of intersection, plaintiffs follow the line of the old bed of the South Platte river a distance of 62 feet, and there diverge in a southerly direction for a distance of 87 feet, which brings plaintiffs to a point 106 feet from the north line of Williams street, and 294 feet from the westerly line of F street. Thence the plaintiffs proceed to the place of beginning, 106 feet northerly from the intersection of Williams and F streets, and on the west line of F street.

It may be useful to observe that F street now is called "Fifteenth Street," and these terms are used interchangeably in the record. The course of this street is northwest and southeast, and the right-angle courses from F or Fifteenth street would be northeast and southwest.

The southwesterly line of the premises claimed by plaintiff is some-

what irregular as to about one-half, by the course of 62 feet along the line of the old bed of the South Platte river, but it may be said that the extension of territory embraced within the deed, according to plaintiffs' construction of the description over that called for in the description in the petition filed by Polinah Truax with the probate judge, is much greater than the original claim of Polinah Truax. Polinah Truax claimed a depth of 125 feet from F street in her petition to the probate judge. The depth now claimed by plaintiffs must be something over 160 feet, in addition to the 125 feet. I have not made the necessary calculation to ascertain the position of the southwesterly line upon an average of the entire width of the premises, but, as stated above, it must be somewhat beyond 160 feet.

We are now to consider whether the deed will admit of this construction in respect to the premises conveyed. It will be observed that Polinah Truax claimed title to no more than 125 feet in depth, and declared that she had a deed from an earlier probate judge for this quantity of land. The presumption is strong that the probate judge would give no more than was claimed by the petitioner.

Secondly, the probate judge declared that the land granted was a portion only of that described in the petition. If it be contended that this referred to the frontage on F street, which was reduced from 185 feet to 144 feet, did the probate judge intend to extend the lines in one direction, after restricting them in another, and so as to make the entire claim very much larger than that which Polinah Truax claimed in her petition?

Furthermore, plaintiffs reject a part of the description in the fourth course, in order to enlarge the territory claimed by them. This fourth course is "thence in a direct line southerly to a point 106 feet northerly from the north line of Williams street and 125 feet westerly from the westerly line of F street." Plaintiffs accept the point 106 feet northerly from the north line of Williams street, and cast out the part which declares that it shall be 125 feet westerly from the westerly line of F street, in order to put this point 169 feet further to the southwest. This they are not permitted to do if the description can be made effectual in any other way. The rule is that all calls in a deed must be followed if it be practicable to do so. If, now, we assume that the probate judge found the east line of the old bed of the South Platte river to be within 125 feet from the westerly line of F street, and within the territory described in the petition of Polinah Truax, as to the northwest corner thereof, we shall have no difficulty in giving effect to the calls of the description. This would bring the third course of the description along the east line of the old bed of the South Platte river, 62 feet within the premises claimed by Polinah Truax in her petition, and make the fourth course intelligible in going to a point 106 feet northerly from the north line of Williams street, and 125 feet westerly from the west line of F street. This accords with the judgment of the probate court, that less was given than Polinah Truax had asked in her petition. It was less in a southwesterly direction from F street, and less in the frontage upon F street.

In opposition to this view, plaintiffs contend that the reference to the map of the city of Denver, as per survey of F. J. Ebert, upon which

the line of the old bed of the South Platte river is traced at a distance of more than 260 feet from the westerly line of F street, shows the intention of the probate judge to convey all the lands claimed by them. The fact that the line of the old bed so appears is not disputed. The greater part of the testimony in the record is directed to the location of the old channel. When the Ebert map was made, in 1865, the line of this channel was not visible at the point in dispute. It had been obliterated by the flood which took place in Cherry creek and in Plum creek in the month of May, 1864, so that the actual location of the channel and the east line of the old bed of the South Platte river in the year 1865 must have been difficult, if not impracticable, to locate. Nevertheless Ebert made notes of the channel, which were given in evidence at the trial. These notes bring the channel very close to the line of F street, and they serve to explain in some measure the appearance of a small segment of land at the corner of Williams and F street, marked as "Block 5." It may be presumed that Ebert assumed that this small segment of land was all that would be available, outside the channel of the river, for town purposes. According to these notes of survey, the entire tract claimed by Polinah Truax in her petition to the probate judge was within the channel of the South Platte river. Whether the probate judge examined the field notes to ascertain the location of the old channel of the South Platte river, we do not know. To assume that he did so accords with his character for diligence and probity in the discharge of an official duty. The rule for which plaintiffs contend, that the line traced on the Ebert map and the distance of it from F street, as shown by the scale of that map, must be accepted as showing the western limit of the grant, is not reasonable, under the circumstances disclosed in the record. Clough was a public officer engaged in the discharge of a public duty. It is doubtful whether he could give more land to Truax than was called for in her petition. It is clear from the language used by him in the deed, and in the order upon which the deed was issued, that he did not intend to do so.

The rule for which plaintiffs contend, and to which counsel have cited many cases, is of large and wholesome application, where the parties to a conveyance intend to make a map or chart of the premises conveyed the best evidence of the extent of the grant. It is sometimes applied where a statute or a rule of practice has made the map or chart extraordinary evidence of the description of the land. Such was the case of Beaty v. Robertson, 130 Ind. 589, 30 N. E. 706. It has little application to a plat of a town, which is always open to correction from field notes or other competent evidence to show the true lines of survey. O'Farrel v. Harney, 51 Cal. 125; Whiting v. Gardner, 80 Cal. 79, 22 Pac. 71.

This controversy relates entirely to a tract of land west of that described in the petition of Polinah Truax to the probate judge, and between that tract and the bed of Cherry creek. As to that land, the court finds that Polinah Truax acquired no title from the deed by Clough to her, and therefore the plaintiffs have shown no title. Upon that, the judgment will be for defendants.

In re LAKE JACKSON SUGAR CO.

(District Court, S. D. Texas. January 28, 1904.)

No. 1,044.

1. BANKRUPTCY—INVOLUNTARY BANKRUPTS—PERSONS ENGAGED IN FARMING—CORPORATIONS.

Bankr. Act July 1, 1898, c. 541, § 4b, 30 Stat. 547 [U. S. Comp. St. 1901, p. 3423], provides that any natural person except a wage-earner or a person engaged chiefly in farming or the tillage of the soil, and any corporation principally engaged in manufacturing, trading, etc., owing debts to the amount of $1,000 or over, may be adjudged an involuntary bankrupt. *Held*, that a person engaged chiefly in farming or the tillage of the soil should be construed to apply only to natural persons, and not to corporations.

2. SAME—EVIDENCE.

Evidence *held* insufficient to establish that a corporation against which involuntary bankruptcy proceedings were brought was engaged chiefly in farming or the tillage of the soil, within Bankr. Act July 1, 1898, c. 541, § 4b, 30 Stat. 547 [U. S. Comp. St. 1901, p. 3423], providing that any natural person except a wage-earner or a person engaged chiefly in farming or the tillage of the soil, etc., may be adjudged an involuntary bankrupt.

In Bankruptcy.

The following is the referee's report:

To the Honorable Waller T. Burns, Judge of the United States District Court for the Southern District of Texas:

This proceeding, involuntary in its nature, was instituted 4th of November, 1903, by H. D. Taylor & Sons and other parties against the Lake Jackson Sugar Company, of Brazoria county, Texas, by petition duly sworn to and filed with the clerk of this court; in which petition it is alleged that the petitioners are creditors of the said Lake Jackson Sugar Company, having provable claims against it to the amount, in the aggregate, of $500 and over; that the said company owes debts to the amount, in the aggregate, of $1,000 and over; that the said company is insolvent, and is neither a wage-earner nor is it engaged principally in farming or in the tillage of the soil; that within the four months next preceding the filing of their petition, to wit, on the 3d day of November, 1903, a receiver, because of the said company's insolvency, was put in charge of its properties, under the laws of the state of Texas, the name of which receiver is T. E. Bennett, of Angleton, Texas; that said company has committed other acts of bankruptcy by paying money to certain of its creditors, thus creating a preference in favor of such creditors over other of its creditors; that said company has long ceased to pay its debts, and that suits are now pending against it. The prayer of the petitioners is that the Lake Jackson Sugar Company be adjudged bankrupt within the purview of the acts of Congress relating to bankruptcy.

To the said petition of H. D. Taylor & Sons et al. the said receiver, T. E. Bennett, made answer under oath, virtually admitting all the allegations therein, except that which alleges that "the Lake Jackson Sugar Company is neither a wage-earner nor a person engaged principally in farming or the tillage of the soil." To the same effect did several intervening creditors of said company make answer thereto, affirmatively alleging in their respective answers that said company was and is chiefly engaged in the business of farming and tillage of the soil. The Lake Jackson Sugar Company, though duly served with process, wholly made default.

The petitioners filed a replication to these answers, thus raising the issue as to whether or not the defendant, the Lake Jackson Sugar Company, is or

¶ 1. What persons are subject to bankruptcy laws, see note to Mattoon Nat. Bank v. First Nat. Bank, 42 C. C. A. 4.

is not engaged chiefly in farming and the tillage of the soil, and this is the only issue in the case. And in pursuance of an order of your honor, made in the above cause, and bearing date December 3, 1903, whereby the undersigned was authorized and directed, as referee of this honorable court, "to consider the petition in the above cause, and also to hear the contest therein raised by answers therein filed, and to take such proceedings therein as are required by the acts of Congress relating to bankruptcy, and that the said Lake Jackson Sugar Company and contesting creditors shall attend upon said referee at such date in the near future as shall suit said referee and the parties at interest," I, S. W. Jones, referee, as aforesaid, do report that, having duly extended notices to the said Lake Jackson Sugar Company and to all others in interest, through their attorneys of record, of the time and place for the hearing before me of the matters referred—that is to say, at 11 o'clock a. m., on the 19th day of December, 1903, at the United States courtroom in the city of Galveston, Texas—I did, on the day and at the place aforesaid, proceed to consider the said petition and to hear the contest in the above cause raised by answers therein filed, and to take such proceedings therein as are required by the acts of Congress relating to bankruptcy; and, having been attended by Sterling Myer, of the law firm of Hunt & Myer, counsel for the petitioning creditors, A. R. Masterson (for H. Masterson), counsel for T. E. Bennett, receiver, and by A. E. Masterson, counsel for intervening and contesting creditors, and having heard read the pleadings and the documentary evidence and the oral and written testimony produced before me and the arguments of counsel, and having duly and carefully considered the same, and having carefully examined and inquired into the matters so referred, I do find and report as follows:

From the evidence before me I find: That the Lake Jackson Sugar Company was incorporated under the general incorporation act of this state in April or May, 1900, for the purpose of "manufacturing sugar cane into molasses, sugar, and all other products of sugar cane, and for that purpose to purchase material necessary for such manufacturing, and to sell the products of such manufacturing business; to purchase such real estate, machinery, and appliances as may be necessary or suitable to conduct such business." That very shortly after its incorporation the said company leased two large plantations upon which to raise sugar cane and other products, constructed a railway, equipped with necessary rolling stock, from these plantations to a sugar mill, where it could convert the sugar cane into merchantable commodities, and thence to a trunk line of railway by which the said company could market its products. That it about the same time began the cultivation upon said lands of sugar cane and corn, except a small portion thereof, which it sublet to a third party for rice culture upon shares. That it raised each year large quantities of sugar cane, varying with the seasons, and also corn, employing for that purpose a large number of live stock and from seventy-five to one hundred laborers. That about six or seven hundred acres of said lands were employed in the raising of such cane. That the juice from this cane was manufactured by the said company into molasses, sugar, and syrup, and the commodities were placed, each year, upon the market, and sold in most of the cities and towns of any size in the state of Texas; and that the said company neither purchased nor sold any cane.

Joseph Rhea testified, besides other facts: That he is now, and had been for four or five years previous hereto, the manager for the defendant company. That the company employed its laborers by the day. That the mill was used in reducing the cane raised into sugar, molasses, and syrup. That no cane was ever used except that raised on the two plantations. Never raised any cotton. That five or six hundred acres were used in raising corn. That the corn was used in feeding the live stock employed on the two plantations; that this live stock is valued at $10,000. That the cane crop raised by the company in 1902 was valued at $20,000. That the manufactured products of the said company were its only sources of revenue; that these products were generally sold to jobbers. That letters were often written offering them for sale. That "we [meaning the defendant] sent out samples and wrote letters offering them for sale to jobbers throughout the country. We manufactured syrup of a very high grade, and placed it in every town in Texas of any size, during

the present season, and no complaint have we had. We had a ready sale for this syrup, and sold it through jobbers. We also sold our sugar through jobbers. The syrup was put up in cans and some in barrels. The store on the plantations was for the accommodation of our employés. On the 1st of January, 1903, we carried a stock worth about $2,500, which consisted of groceries, dry goods, hardware, farm implements, lumber, and shingles. This store was open to any one who wished to buy, and others would buy as well as our laborers and people in the vicinity were aware of that fact. We generally kept a general stock of goods on hand in the store. We sold at a profit, and would make from 25 to 50 per cent. profit. That railroad and its equipment cost about $40,000, and the sugar mill about $15,000. The Lake Jackson Sugar Company does not own the sugar mill. We did not pay our laborers wages in merchandise, but gave them time checks, which were equivalent to money, and these time checks were cashed at the end of every two weeks, or they could be used in the purchase of merchandise at the store, if the laborer so wished. We put up our sugar in barrels, just as other manufacturers do."

The following is a letter addressed by the defendant, through J. Rhea, its manager, recognized by him as emanating from him, together with the printed heading thereon, which form was generally used in the company's correspondence:

"R. Oliver, President. J. Walker, Secretary. Jos. Rhea, Manager.
"The Lake Jackson Sugar Company.
"Dealers in General Merchandise, Hardware, Harness, Farm Implements, Builders' Supplies, Lumber, Shingles, Windows, Doors and Sash, Lime, Cement and Brick.
"Manufacturers of Sugar, Molasses and Pure Ribbon Cane Syrup.
"Angleton, Texas, Jany. 31, 03.

"Messrs. H. D. Taylor and Sons, Houston, Tex.—Gentlemen: We are in receipt of your letter of the 28th inst., and note what you have to say concerning syrup. You state can goods is not going rapidly because you have so much barrel goods on hand, now this is the very reason, as you have acknowledged, 'You have none,' therefore you cannot know of its selling qualities. This goods does not interfere with your sales in barrel good, as it goes to a different trade, it is of a much higher quality and when once the best trade gets it to their table they will constantly call for it. You should put it up to your best customers that they can have an opportunity to give their trade the Pure Article. We are sure that you will be more than satisfied and that every desire you may have for a syrup will be filled when you have put our goods before your trade.

"We are anxious for you to try our goods, not for the sake of a sale, but to have your customers try it, that they will know where the pure goods, the goods with the best flavor and bearing the proper color, can be found. We know our goods can not be equaled and for this reason we insist that you use it. We have placed it in every town in Texas of any size during the present season and not one complaint have we had. We trust you will give this matter, the question of pure syrup, due consideration and await your orders with pleasure.

"We enclose B/L to the candy we are returning, you will please credit our account and mail us credit memorandum. Our samples of sugar went forward on yesterday, which we trust you have by now. Trusting to have you command us at an early date and assuring you our best efforts in filling your orders, we remain,

"Yours very truly, The Lake Jackson Sugar Co.
"Jos. Rhea, Manager."

The bankrupt act of July 1, 1898, c. 541, § 4b, 30 Stat. 547 [U. S. Comp. St. 1901, p. 3423], provides as follows: "Any natural person, except a wage earner or a person engaged chiefly in farming or the tillage of the soil; any unincorporated company, any corporation engaged principally in manufacturing, trading, printing, publishing, or mercantile pursuits, owing debts to the amount of $1,000.00 or over, may be adjudged an involuntary bankrupt upon default or an impartial trial, and shall be subject to and entitled to the pro-

visions of this act. Private bankers, but not national banks, or banks incorporated under state or territorial laws, may be adjudged involuntary bankrupts." And it is claimed in this case by the respondents that, inasmuch as the defendant company is, as alleged by them, chiefly engaged in farming or the tillage of the soil, it (the defendant) comes within the exception above quoted, to wit, "a person engaged chiefly in farming or the tillage of the soil," and is not amenable to said bankrupt act. But it seems to me that this contention is clearly erroneous. I have been cited to no authority, nor have I been able to find any, where such a defense has been advanced by a corporation in an involuntary proceeding. Indeed, it is rather a novel idea that a corporation should be engaged chiefly in farming or the tillage of the soil. The phrase above quoted from the act should be and has been strictly construed, even in cases where an individual person was alleged bankrupt (Collier on Bankruptcy, p. 54); and, in my opinion, the use of the phrase "natural person," when construed in connection with the above-quoted phrase, "except wage-earners and those chiefly engaged in farming or the tillage of the soil," and all that follows it, is to exclude corporations from this exception. Collier on Bankruptcy, p. 53.

But suppose I am in error in this. Has the defendant company been brought within this exception according to the facts disclosed? From those facts it appears that it (the defendant company) has been for several years engaged in three different branches of business—in farming, in merchandising, and in the manufacture of sugar, molasses, and syrup from the sugar cane which it raised upon the plantations cultivated by it; and of these, which did the company deem of paramount importance to its welfare? Was it its farming or its manufacturing interest or enterprise? It raised corn, it is true, but sold none, consuming all of it in feeding the mules, numbering fifty head and over, employed by it in cultivating two plantations, whereon was raised this corn, and also sugar cane, the juice of which latter was converted by the company into sugar, molasses, and syrup, and sold in the open market; one year realizing therefrom $20,000. The company bought no cane and sold none, and its only source of revenue was from its manufactured articles. If these facts be true—and they are nowhere contradicted—the only natural conclusion is that manufacturing, and not farming, was its chief pursuit or vocation; that the latter was only incidental to the former, and only pursued in furtherance of its manufacturing interests—in other words, that its manufacturing interests were deemed by it of paramount importance to its welfare and pecuniary advancement. The premises considered, I conclude that the defendant, the Lake Jackson Sugar Company, is insolvent, has committed acts of bankruptcy, and is amenable to the acts of Congress relating to bankruptcy, and that an order adjudicating it bankrupt should be entered by this honorable court in this case; and I respectfully so recommend.

Respectfully submitted, S. W. Jones, Referee in Bankruptcy.

Hunt & Myer, for petitioning creditors.
Masterson, Morris & Masterson, for receiver.
A. E. Masterson, for contesting creditors.

BURNS, District Judge. Exceptions overruled, and referee's report confirmed.

In re PANCOAST.

(District Court, E. D. Pennsylvania. April 30, 1904.)

No. 1,912.

1. BANKRUPTCY—PROOF OF CLAIMS—AUTHENTICATION.

Under Bankr. Act July 1, 1898, c. 541, § 20, 30 Stat. 551, 552 [U. S. Comp. St. 1901, p. 2430], a notary public is authorized to administer the oath to a proof of claim, being an officer authorized to administer oaths in proceedings in the courts of the United States by Act Aug. 15, 1876,

c. 304, 19 Stat. 206 [U. S. Comp. St. 1901, p. 662]; and such oath is sufficiently authenticated, prima facie, by what purport to be the notary's official signature and seal, although made in a different state from that in which the proceedings are pending, and without regard to the special requirements of the statutes of either state.

In Bankruptcy. On certificate from referee.

Henry N. Wessel (Alfred Aarons, of counsel), for S. W. Downer.

J. B. McPHERSON, District Judge. The facts upon which the question for decision arises appear from the following report of the referee:

"Henry N. Wessel, Esq., an attorney at law in Philadelphia, presented the proof of debt of S. W. Downer, of Downer, Gloucester county, New Jersey, a creditor of the above-named bankrupt, for $23.63, together with a general letter of attorney in fact to the said Henry N. Wessel and J. B. Larzalere, Esq., an attorney at law located at Norristown. To the proof of debt was attached an itemized bill showing the consideration for the debt. The affidavit to the proof of debt was taken before one Harry C. C. Shute, an alleged notary public of Glasboro, N. J., and there is attached his seal as follows: 'Harry C. C. Shute, Notary Public, Glasboro, N. J.'

"There is not attached to the affidavit any certificate of the court that the said Harry C. C. Shute is a notary public and in commission; neither is there attached to the certificate a statement in plain legible characters in the English language of the date upon which his commission expires.

"It is because of the omission of the certificate of the court, and also the omission of the statement of the date upon which his commission expires, that the referee refuses to file and allow the claim, the referee holding that before he shall file and allow a claim taken before a foreign notary the probate shall be 'according to the forms now or hereafter required by this state, relative to such acknowledgment or probate.' Act Assem. April 22, 1863, § 1; P. L. 548. The act of April 4, 1901, § 5 (P. L. 71), requires every notary public to 'append to each certificate, attestation, or official notarial act, a statement in plain legible characters in the English language of the date upon which his commission expires.' The notary not having complied with the laws of the state of Pennsylvania, in that he has not appended the date of the expiration of his commission as required, the referee holds that the probate is not sufficient.

"The referee further holds that, before he shall receive and file a claim probated by a foreign notary, there shall be attached a certificate of the court that the notary is a notary, and in commission, and that the mere fact that he signed himself as a notary and attaches what purports to be his seal of office is not sufficient. For these two reasons the referee has refused to file the claim, and at the request of the said Henry N. Wessel, Esq., he certifies the facts to your honorable court for the purpose of having the matter passed upon by your honorable court, and finally adjudicated."

I am unable to assent to the correctness of this conclusion. The power of a notary to administer the oath in question is not to be tested by the Pennsylvania statutes, but by the bankrupt act itself and by other federal legislation. It is unnecessary to consider the laws of New Jersey, as will be seen in a moment. Section 20 of the bankrupt act declares that "oaths required by this act, except upon hearings in court, may be administered by (1) referees, (2) officers authorized to administer oaths in proceedings before the courts of the United States or under the laws of the state where the same are to be taken. * * *" Act July 1, 1898, c. 541, 30 Stat. 551, 552 [U. S. Comp. St. 1901, p. 2430]. Now, a notary public is an officer authorized to administer oaths in proceedings before the courts of the United States, for he

was expressly given such power by Act Aug. 15, 1876, c. 304, 19 Stat. 206 [U. S. Comp. St. 1901, p. 662], which provides "that notaries public of the several states, territories and the District of Columbia, be, and they are hereby, authorized to take depositions, and do all other acts in relation to taking testimony to be used in the courts of the United States, take acknowledgments and affidavits, in the same manner and with the same effect as commissioners of the United States Circuit Court may now lawfully take or do." That commissioners of the United States Circuit Court had power at that time to take proof of a debt in bankruptcy, appears from section 5076 of the Revised Statutes, which required creditors to prove their claims either before a register of the court or before a commissioner of the Circuit Court. Other acts giving a commissioner power to administer oaths are referred to in the discussion by the Supreme Court of a notary's power in this respect in United States v. Curtis, 107 U. S. 671, 2 Sup. Ct. 507, 27 L. Ed. 534.

Nothing is said in these acts about the method of certifying the oath, but, in my opinion, the signature and seal of the notary are sufficient, without more, in the first instance, whether he be a notary of this state or of some other state. There is a conflict in the decisions upon this subject, but the decided weight of authority, I think, is in favor of the view just stated. A number of the cases are cited in 21 Am. & Eng. Enc. of Law (2d Ed.) page 561. See, also, Brandenburg on Bankruptcy (3d Ed.) § 849. In Wood v. St. Paul Street Railway Co., 42 Minn. 411, 44 N. W. 308, 7 L. R. A. 149, a statement of lien was offered in evidence, sworn to before a notary public in Philadelphia, the oath being authenticated by a signature and a notarial seal. No proof was offered of the genuineness of the signature or the seal, or that the person signing the jurat was a notary, or, if a notary, that he was authorized to administer oaths in Pennsylvania. Nevertheless, the Supreme Court of Minnesota upheld the admission of the statement in evidence, giving the following reasons for their decision:

"We think these affidavits may be made in another state, before any officer authorized by the laws of such state to administer oaths. Of course, if taken in another state, they must be duly authenticated, so as to show on their face the official character of the officer, as well as his authority to administer oaths. In each of the present cases the affidavit was sworn to in Pennsylvania before a notary public of that state, who authenticated it by signing the jurat and affixing his notarial seal. If, instead of being affidavits, these had been certificates of protest or authentications of similar commercial documents, it is elementary law that the notary's seal would prove itself, without any further proof of his official character, or of his authority to do the act. A notary public is considered not merely an officer of the country where he is admitted or appointed, but as a kind of international officer, whose official acts, performed in the state for which he is appointed, are recognized as authoritative the world over. Defendant's counsel concedes that this is true as to all his acts in the way of authentication of what he terms commercial documents, but insists that outside of such matters a notary has no power, in the absence of statutory authority, to administer oaths. Although this is sometimes stated in the books as being the law, yet its correctness may well be doubted. The powers of a notary, which is a very ancient office, are largely founded on customary law. The English notaries have always considered themselves authorized to administer oaths, and whatever chance for doubt about it there might have been was set at rest by the act of 5 & 6 Wm. IV, c. 62, § 15. Brooke, Not. 20. Affidavits taken before notaries in foreign countries have uniformly

been received by the courts of England in judicial proceedings without any other proof of their official character or their authority to administer oaths than their notarial seals. Omealy v. Newell, 8 East, 364; Walrond v. Van Moses, 8 Mod. 321; Haggitt v. Iniff, 5 De Gex, M. & G. 910; Cole v. Sherard, 11 Exch. 482. It was said in Omealy v. Newell, supra, that this had been the uniform practice 'as far back as living memory could trace it.' The same practice seems to have obtained in the American courts. U. S. v. Libby, 1 Woodb. & M. 221 [Fed. Cas. No. 15,597]; Winans v. Denmead, 2 MacArthur, 475 [Fed. Cas. No. 17,860]; Tucker v. Ladd, 4 Cow. 47; Conolly v. Riley, 25 Md. 402. This practice has also long prevailed in this state, especially in the probate courts and in the proof of claims in insolvency proceedings. It is true, as counsel suggests, that these are rules of practice, as to which the courts are to some extent a law unto themselves; but the fact is important, and in point as a recognition not only of the regularity of affidavits sworn to outside the state, but also of the general power of notaries to administer oaths without proof of statutory authority to do so. As a matter of fact, in every state and territory of the Union notaries have power to administer oaths, and for the last forty years affidavits sworn to before a notary in any state of the Union, and authenticated by his notarial seal, have been admissible in all the federal courts, without any proof of their authority to administer oaths. It is true that perhaps in every state the powers of notaries, including that of administering oaths, have been regulated by statute, which, however, are largely declaratory in their nature. But whether this authority be of a statutory origin or founded on a customary law, the recognition of its existence has become so general, if not universal, that there is now no good reason why it should not be judicially recognized as one of the general powers of notaries, and affidavits authenticated by seals of notaries of other states placed on precisely the same footing as their certificates of protest or authentications of so-called commercial documents."

In my opinion, this is an excellent statement of the reasons why no further proof should, in the first instance, be required of the notary's official character than a signature and seal that purport to be his. It may be added that, as Chief Justice Tilghman remarked in Browne v. Phila. Bank, 6 Serg. & R. 484, 9 Am. Dec. 463: "It ought to be presumed, till the contrary be proved, that no man would dare to assume the office without proper authority." It is true that the notary public in that case was a Pennsylvania officer, but similar reasons, although perhaps not quite so strong, call for the application of the presumption to a notary public of another state.

The referee is directed to receive the proof of claim referred to in his certificate.

In re BELKNAP.

(District Court, E. D. Pennsylvania. May 2, 1904.)

No. 1,773.

1. ACTS OF BANKRUPTCY—PREFERENCE—JUDICIAL PROCEEDINGS.

Where a landlord's levy on the goods of his tenant under a distress warrant did not operate as a preference, as defined by Bankr. Act July 1, 1898, c. 541, § 60, cl. "a," 30 Stat. 562 [U. S. Comp. St. 1901, p. 3446], amended by Act Cong. Feb. 5, 1903, c. 487, § 13, 32 Stat. 799 [U. S. Comp. St. Supp. 1903, p. 416], the failure of the bankrupt to procure the release of such levy did not constitute an act of bankruptcy.

2. SAME.

Where counsel for one of the petitioning creditors of a bankrupt threatened him with criminal proceedings unless the debt due was immediately paid, whereupon the bankrupt sold certain property for nearly its full

value to raise money for the purpose at a time when his entire stock was worth less than his entire indebtedness, but the creditor afterwards refused to receive the money, and instituted criminal proceedings, such sale by the bankrupt did not constitute an act of bankruptcy within Bankr. Act 1898, c. 541, § 3a, subds. 1, 2, 30 Stat. 546 [U. S. Comp. St. 1901, p. 3422], providing that the conveyance of property with intent to hinder, delay, or defraud the bankrupt's creditors, or a transfer thereof while insolvent with intent to prefer some creditors over others, shall constitute acts of bankruptcy.

3. SAME—REMOVAL OF PROPERTY.

Where a creditor of a bankrupt removed certain goods from the bankrupt's store during the bankrupt's absence, and retained possession thereof over the bankrupt's protest, the bankrupt's failure to take legal proceedings to recover possession of the goods, in the absence of evidence of collusion, did not constitute an act of bankruptcy within Bankr. Act July 1, 1898, c. 541, § 3a, subd. 1, 30 Stat. 546 [U. S. Comp. St. 1901, p. 3422], providing that the removal of any part of a bankrupt's property with his permission, with intent to hinder, delay, and defraud creditors, shall constitute an act of bankruptcy.

Isaac Hassler and J. Hector McNeal, for petitioning creditors.
John R. K. Scott and E. O. Michener, for alleged bankrupt.

J. B. McPHERSON, District Judge. This petition was filed November 4, 1903, and sets forth as the acts of bankruptcy that Charles F. Belknap did, "on the 21st day of October, 1903, suffer and permit a levy to be made at the instance of the Fidelity Trust Company, one of his creditors, upon certain of his goods and chattels at 333 Chestnut street, which said goods will be exposed for sale under said levy at said premises on November 4, 1903, thereby suffering and permitting, while insolvent, a creditor to obtain a preference through legal proceedings, and not having, at least five days before the sale or final disposition of any property affected by such preference, vacated or discharged same; (2) that said Belknap has within four months last past conveyed, transferred, concealed, and removed part of his property with intent to hinder, delay, and defraud his creditors, in that he has removed from his premises almost all of his effects, and concealed or disposed of the same for the purpose of hindering, delaying, and defrauding his creditors, and with said intent." The testimony shows that the first act of bankruptcy thus set forth was not a levy under execution, but was a distraint of goods under a landlord's warrant, and the question is presented whether such a levy is a "legal proceeding" within the meaning of section 3a (3), Act July 1, 1898, c. 541, 30 Stat. 546 [U. S. Comp. St. 1901, p. 3422]. I do not think it necessary to decide the question, however, because it is clear to my mind that no preference was obtained by the distress. A preference is described by Act July 1, 1898, c. 541, § 60, cl. "a," 30 Stat. 562 [U. S. Comp. St. 1901, p. 3446], as amended in Act Feb. 5, 1903, c. 487, § 13, 32 Stat. 799 [U. S. Comp. St. Supp. 1903, p. 416], in the following language:

"A person shall be deemed to have given a preference, if, being insolvent, he has within four months before the filing of the petition, or after the filing of the petition and before adjudication, procured or suffered a judgment to be entered against himself in favor of any person, or made a transfer of any of his property, and the effect of the enforcement of such judgment or transfer will be to enable anyone of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class."

Passing without decision the further question whether a "judgment" is to be so interpreted as to include a distress for rent, it is enough to say, I think, that, even if this be true, the effect of the distress did not enable the landlord to obtain a greater percentage of his debt than any other creditor of the same class. There is no other creditor of the same class, for there is but a single landlord; and, as the claim for rent had priority over the claims of the general creditors, the distress did not enable the landlord to obtain a greater percentage of his debt. The rent was entitled to be paid first out of the proceeds of the very property upon which the distress was levied, whenever it should be sold by the trustee, and therefore the distress gave no new right, but merely hastened the time of payment. When he distrains, a landlord is simply enforcing the priority which is given to him by law, and in no way gains any improper advantage over other creditors by thus converting the property into money more speedily. He may, of course, be restrained from selling, if there are good reasons for such an order; I am supposing that a sale has actually taken place.

The second act of bankruptcy is under section 3a (1) 30 Stat. 546 [U. S. Comp. St. 1901, p. 3422], and the facts with reference to this charge are found by the referee as follows:

"Counsel for one of the petitioning creditors went to Belknap, and threatened him with criminal proceedings unless the debt due his client was immediately paid. Belknap then sold certain property to raise money for this purpose, but the creditor afterwards refused to receive the money, and instituted criminal proceedings. Belknap denies having sacrificed goods for that purpose, saying that he obtained for them not much less than their full value, but admitted that at the time his stock of goods was worth less than $25,000, the amount of his indebtedness."

As it seems to me, this transaction cannot be regarded as being the act of bankruptcy described in section 3a (1). The intent to defraud is essential under this clause, and differs from the intent to prefer, which is essential to the act of bankruptcy described in section 3a (2). The proper distinction should be preserved between these two clauses. The subject has been so satisfactorily discussed by Judge Archbald, of the Middle District of Pennsylvania, in Githens v. Shiffler, 7 Am. Bankr. Rep. 453, 112 Fed. 505, that I content myself with referring to his opinion as a clear vindication of the conclusion that the facts here do not make out an intent to defraud. See, also, Re Mingo Valley Creamery Ass'n, 4 Am. Bankr. Rep. 67, 100 Fed. 282. It is urged that Re Morgan, 4 Am. Bankr. Rep. 402, 101 Fed. 982, is an authority in support of the opposite view, and it is true that some language in the opinion will bear that construction. But an examination of the case discloses a completed preference in favor of two creditors, and it is certainly reasonable to suppose that the court was speaking with reference to the actual facts. But, even if I should be mistaken in this, Githens v. Shiffler is of more weight in this circuit.

It also appeared that another creditor, named Wright, whose debt was about $6,000, came to Belknap's place of business upon one occasion, and in Belknap's absence took about $1,200 of goods, and carried them away to his own store, and retained possession of them in spite of Belknap's protest. Belknap took no legal proceedings against

Wright to recover possession of the goods, but the referee has found that there was no evidence of collusion between Belknap and Wright, and he declined to hold that upon these facts the further act of bankruptcy described in section 3a (1) as permitting to be removed any part of the bankrupt's property with intent to hinder, delay, or defraud his creditors had been committed. Another support to his ruling may be found in the fact that the petition does not aver any such act of bankruptcy; and therefore, both for the reason given by the referee—with whose finding of fact upon this subject I agree—and also for the reason that the petition is silent upon the subject, the referee's decision was undoubtedly correct.

The exceptions to his report are overruled, and, in accordance with his recommendation, the petition is dismissed, at the costs of the petitioning creditors.

HEIDE v. WALLACE & CO.

(Circuit Court, D. New Jersey. May 6, 1904.)

1. UNFAIR COMPETITION—GROUNDS FOR EQUITABLE RELIEF.

The use by one manufacturer to designate his product of a name previously in use by another does not alone constitute unfair competition, but, to justify a court of equity in interfering, there must also be such an imitation of display or dressing as to deceive purchasers into buying defendant's goods for those of complainant; fraud being the practical basis of any such relief.

2. SAME—FACTS CONSIDERED.

Complainant manufactures and sells in five-cent packages a small confection, composed chiefly of liquorice, under the name of "Liquorice Pastilles." They are of diamond shape, and have embossed thereon the letters "H-H." Defendants make and sell a similar article under the same name, having the same size, color, and shape, and the letter "W" embossed thereon. *Held*, that none of such facts, nor all together, entitled complainant to an injunction on the ground of unfair competition, the name being descriptive, and having been previously used by others in substantially the same form, and neither the shape of the confection, nor the embossing of letters thereon, having originated with complainant; there being no attempt by defendants to imitate his packages.

In Equity. Suit for unfair competition. On final hearing.

William Raimond Baird and Stephen J. Cox, for complainant.
Louis C. Raegener, for defendant.

ARCHBALD, District Judge.[1] This is a suit for alleged unfair competition. The complainant is successfully engaged in the manufacture of candies and confections, among which is one, the principal ingredient of which is liquorice, attractively flavored, and put up in the form of small diamond-shaped lozenges, embossed with his monogram "H-H." These lozenges he denominates and has extensively advertised as "Liquorice Pastilles," and has chiefly sold them in small packages or boxes, which retail at 5 cents each. As at present on the market, the

¶ 1. Unfair competition, see notes to Scheuer v. Muller, 20 C. C. A. 165; Lare v. Harper & Bros., 30 C. C. A. 376.

[1] Specially assigned.

coloring upon these boxes is mixed red, blue, and gilt, with the plaintiff's name prominently displayed upon them to indicate their origin. The defendants also manufacture similar diamond-shaped confections, on which the letter "W" is embossed, and which are put up in the same-sized packages, also labeled "Liquorice Pastilles." The plaintiff contends that this invades his rights, and has therefore brought suit to restrain their infringement, and compel the defendants to account in damages for the trade unfairly diverted from him.

After a careful consideration of the various cases bearing on the subject, the conclusion was reached in Draper v. Skerrett (C. C.) 116 Fed. 206, that, to justify a court of equity in interfering in an alleged case of unfair competition, there must be something more than the mere duplication by the one party of the other's trade-name, and that this was to be found in the deceptive use of imitative methods of display, or other device by which the public are led into buying the infringer's goods where they intended to buy those of the original producer; the fraud so perpetrated being a legitimate ground for equitable interference, and the practical basis of it. It is by this standard that the complainant's right to relief in the present instance must be judged. Stevens Linen Works v. Don & Co. (C. C.) 121 Fed. 171; Allen B. Wrisley Co. v. Iowa Soap Co., 122 Fed. 796, 59 C. C. A. 54.

Ten different points of resemblance between the plaintiff's goods and those put out by the defendants are claimed. They have, as it is said, the same name, "Liquorice Pastilles;" the same diamond shape; the same embossing of letters; the same mint flavor; the same diminutive size; the same black color; the same combination of gum and liquorice; the same retail price, 5 cents; the same-sized box or package; and practically much the same lettering thereon. But many of these are forced, if not fanciful, and relate to matters which the complainant could not expect, under any circumstances, to monopolize. His contention must be made out, if at all, on the use by the defendants of the words "Liquorice Pastilles" to designate their confections, and the adoption of the diamond form, bearing an embossed initial letter, together with any points of imitative display of which they may be guilty. If these do not establish unfair competition, there is nothing shown that will; the only significance of the others being as possible makeweights to strengthen that idea. But analyzing the matter still further, it is difficult to see how the plaintiff can claim the right to prohibit other manufacturers from putting up this confection in diamond form, any more than in a square, cube, oval, or drop. It is true that he has adopted a diamond with his initials, "H–H," as a trade-mark, and has denominated his goods, of which he has a great variety, "Diamond Confectionery;" but this does not give him a monopoly of that particular shape, even if he was the first to employ it for liquorice compounds, which he was not. Neither can he prevent others from stamping or embossing an initial letter thereon, so long as it does not imitate the monogram "H–H," which distinguishes his productions. This device has been employed for the purpose of marking their goods by others in the same trade, including the defendants, fully as long, if not longer, than the complainant. Furthermore, except as these so-called pastilles are sold in bulk, neither the form nor the lettering is brought to the attention of

purchasers until after they have bought them; and while both, no doubt, even so, might aid in an intended deception, it has to be initially induced and practically accomplished by the outside of the package, as addressed to the eye of the customer, which is thus controlling.

The case, in this view, is brought down to the use by the defendants of the words "Liquorice Pastilles," and the manner they have taken to dress their packages. But so far as the former is concerned, the plaintiff has shown no exclusive right in the words "Liquorice Pastilles" to designate this class of goods. Liquorice is a well-known article of commerce; and "pastille," a French diminutive, meaning a little piece of paste; and the two combined make a descriptive term in no way particularly distinctive of the goods which the plaintiff manufactures, any more than others. But conceding, for the sake of argument, that if the plaintiff was the first to employ the term, and had worked up a trade under it, so that it had become specially indicative of his goods, others might be compelled to abstain from their use, the fact is that he was not the originator of the name, which was used, by not one, but several, before and contemporaneously with him, applied to exactly the same character of confections. As early as 1869, and for upwards of 20 years after that, the Roworth Manufacturing Company sold small pieces of liquorice under the name of "Pastilles de Paris," and Duche & Sons for 12 or 14 years past have sold round pieces stamped with an eagle, and known as "Flexible Liquorice Pastilles." "Pastilles de reglisse," which is the French for "liquorice," made by Florent & Co., of Avignon, France, have been imported into this country for upwards of 20 years; and they are also made by Warric Bros., of Paris, and by Wilkenson & Co., of London, but for just how long does not appear. In the face of this demonstration, it cannot be successfully contended that the term "Liquorice Pastille," which has been in such long and familiar use, is distinctive of the plaintiff's manufacture. It is only when he adds his name and trade-mark that we have anything that is, and these the defendants in no way imitate. Neither do they the style or coloring with which he dresses out his package. This is in mixed red and blue, set off with gilt, with the diamond trade-mark—

Red represented by black.
Gold represented by shaded lines
Blue represented by stipple
White as shown.

prominently displayed; while the defendant's package is predominantly yellow, with an entirely different style of lettering in red, shaded with white on a black background, with their name written below. There is

nothing whatever to suggest an attempt to catch the unwary purchaser, and inveigle him into taking the one when he was seeking the other; nor could the most careless be deceived, except as he was in reality unconcerned as to which he got. It does not seem to me that, having regard to these considerations, the complainant has a vestige of a case or that the doctrine with respect to unfair competition could be made to apply to it, except by a most unwarranted extension and strain. Undoubtedly the complainant has extensively advertised these goods, and it may be that the defendants are reaping some of the benefit of it. But so long as he has seen fit to do so, employing the common and ordinary name of "Liquorice Pastilles," he must take the ill results with the good. He certainly cannot expect to enjoy a monopoly based solely on that which he did not create.

What has been said with respect to the 5-cent boxes applies with even greater force to the larger packages and the sales in bulk. Without stopping to particularly discuss that feature of the case, this reference will show that it has not been overlooked.

Let a decree be drawn dismissing the bill, with costs.

PALATO v. INTERNATIONAL SILVER CO.

(Circuit Court, D. Connecticut. April 21, 1904.)

No. 543.

1. MASTER AND SERVANT—INJURY OF SERVANT—NEGLIGENCE OF FELLOW SERVANT.

Evidence considered, and *held* to show that the injury of an employé by the falling of the ram of an hydraulic press, which he was assisting to repair, was not due to any defect in the appliances used, nor to the incompetence of a fellow servant, but, so far as appeared, to his negligence, for which the master was not liable.

At Law.

Canfield & Judson, for plaintiff.
Seymour C. Loomis, for defendant.

PLATT, District Judge. This is a hearing in damages after default, under the state practice, in an action by Louis Palato to recover $3,000 damages for injuries which he claims to have suffered from the negligence of the defendant, transferred from the state court for diversity of citizenship.

Having heard the evidence, I find the following facts:

On June 6, 1903, at the defendant's factory, in Derby, Conn., a certain hydraulic press became out of repair, and required repacking. The plaintiff had for many years been employed upon that press, and at times upon a smaller one in the same room. Each press had required repacking about once in six months, and the plaintiff had been present at and taken part in nearly all such repackings, and was thoroughly experienced in all the details connected therewith. A necessary part of such work was to lift out the ram or plunger which was used in connection with the dies in stamping out the metal blanks. The ram was

circular in form, with a diameter of about 17 inches, about 17 inches in height, and weighed about 1,000 pounds. When in use, it was raised by hydraulic pressure so that its upper surface reached the head of the press, and then, by removing the upward pressure, was permitted to fall of its own weight upon the die below. The lower face of the ram, when so raised that its upper surface reached the head of the press, had a fall of about 11 inches before it reached the face of the die, which was set in a cylinder of practically the same diameter. Whilst the work of repacking was going on, the ram was controlled by a block and falls. The way of it was this: Above the room in which the press stood was a small attic room, called the "fanroom." That room was used to get the height necessary for the action of the lifting apparatus. There was a trapdoor immediately over the head of the press. A pulley was securely fastened by an eyebolt screwed into the ceiling of the fanroom. This could be raised and lowered somewhat, and, in addition, a chain could be suspended from a hook at the lower part thereof. The chain was dropped down through the trapdoor, and through a circular opening in the head of the press, a trifle larger than the chain, into a like opening in the ram, where it was fastened by a crossbar of steel. The length of this chain was then governed by a hitch made over the hook suspended by the pulley. In each instance of repacking, the play of the pulley not being sufficient for the purpose, several hitches were made up in the fanroom—sometimes three, sometimes four, depending upon the number of times it was necessary to carry the ram away from its central location, and toward the edge of the press or beyond. The vitals of the case center around this hitch.

I will now describe briefly the actual proceedings on the day of the accident: Edward J. Welch was the foreman in charge of the hydraulic press work. It is conceded that he had not at the time sufficient experience to have attended to the hitches himself. He put several men at work on the repacking. Abram N. Burke was put in charge of making the hitches in the fanroom above. Palato and others worked on the press in the room below. The ram was lifted out and taken to one side, and then brought back several times; Burke attending to the hitches in the fanroom. At last, while the ram was resting upon a circular board, about two inches in thickness, placed over the cylinder, the chain being still fastened to the ram by the steel bolt, the signal was given to Burke to lift the ram toward the head of the press by the pulley. Just before that Palato says that he thought he saw a vibration, and asked if the hitch was solid. Burke called out that it was all right, and the ram was lifted from its resting place. At the instant when it reached the head of the press, Palato reached under the ram, with oiled waste in his hand, and began to wipe off the undersurface of the ram. As he did so, the ram fell upon the circular board, and mangled his arm from the wrist to the elbow. Fortunately the ram began to tip sideways when it came upon the board, and, with Welch's assistance, the weight was removed from Palato's arm.

No bones were broken, but the contusion was serious; and, in discussing the extent of the injury, the plaintiff claims that the nerves were seriously and probably permanently injured, so that the arm can never be used again with its normal power, and the defendant insists

that the injury was mainly in the ligaments and muscles, which have practically recovered their normal use, and that he is on the high road to full recovery. In that part of the case, it was important to establish the existence of a certain bony growth near the elbow socket, and, as bearing upon that question, certain X-ray pictures, called "skyographs," were admitted in evidence.

The case turns upon the kind of hitch which it was safe to use, upon Burke's competency to make the hitch, and upon Palato's carelessness in reaching his arm under the ram to wipe it, when the situation an instant before had been such as to suggest to him that the danger was approaching which did in fact reach him in the twinkling of an eye. Burke was in the fanroom alone, and made the hitches. He made the hitch in this way: A link chain of sufficient strength, 6 feet and 9 inches long, having been attached to the ram below as heretofore described, was thrown over the hook in such a manner that the chain was supported by the hook above its heel, and crossed in the dip of the hook below and opposite; the free end falling first across the dip, and the weight-carrying portion lying upon the free portion. By this simple device, it is evident that, owing to the force of friction, the chain can carry the full weight of its capacity, and, the greater the weight, the greater the security. It is a well-known hitch, in common use among practical engineers and mechanics, called the "Blackwall Hitch," and can be found described in any well-known text-book touching on such matters. It is easily understood by a man of fair intelligence. I find as a fact that the hitch used was a proper one in the circumstances, and that Burke was a competent man to be employed in making it. His experience with the hitch was sufficient, and the master was not negligent in intrusting the management of it to him. Palato had made hitches in former years, but, owing to the loss of some fingers about four years before the accident, had been forced to desist. One Silvester had also attended to the hitches on many prior occasions. Both of these men gave evidence that in making the hitches they had always used a double hitch, to wit, had thrown the chain twice around and above the heel of the hook, which they insisted increased the security of the fastening, but I am unable to accept their statements as true. The surrounding and underlying facts and circumstances belie the statements as to the way they had made the hitch, and it is not apparent that absolute security, or even that better security, would result from the double hitch. Burke testified that he made the hitch as he had made it on several former repackings, and as he had seen Silvester and Palato make it. I am entirely satisfied, from the appearance of the witnesses, and from their manner when testifying, and from other evidence, and from the general situation, that Burke told the truth when he so testified. All the appliances are conceded to have been proper, and I find that Burke was fit and competent to adjust the appliances.

It is contended that the single hitch is unsafe when the tension is not uniform, that the evidence in this case shows clearly that the tension was not uniform, and that therefore its adoption makes the master liable. The difficulty with that contention is this: It is proven, and I find as a fact, that after each hitch was made the tension was uniform—varying, it is true, in intensity, but existing nevertheless to some ex-

tent—until the next occasion arose for carrying the ram away from its central position. Then the chain was loosened to permit the removal, but upon its return a new hitch was necessary, and from that time no sufficient lack of tension could exist to enable the chain to slip below the heel of the hook if adjusted above the heel. At the time of the accident it had served to lift the ram upward some 11 inches from its resting place. The single hitch was adaptable in the circumstances, and beyond valid criticism. The trouble came, not from the character of the hitch, but, if the evidence points to any clearly defined cause, from the failure of a competent man to make the single hitch as he should and could make it, coupled with a very careless act on the part of the plaintiff, in attempting to wipe the undersurface of a half ton weight the instant after something had suggested to him the possibility of danger. So far as the master is concerned, it was the inevitable mistake which can be found now and then in the doings of the most careful and competent men, and to charge the accident to it would be to hold it an insurer. In many previous trials it had not occurred, and I am led at this moment to add one word in closing: I have taken into consideration evidence tending to show that the master has, since the accident, found a way to make assurance doubly sure, and has adopted that method. Perhaps I ought not to have admitted the evidence, but the plaintiff cannot complain. If the defendant has adopted such a contrivance, its action is humane and creditable, but by reason thereof it ought not to be punished for its former method, which was in exact harmony with the best experience of the times.

It follows that the master discharged the duty which the law imposes upon it, and the plaintiff is only entitled to nominal damages. Let judgment be entered for $25 and costs.

THE EXPRESS.

(District Court, S. D. New York. May 2, 1904.)

1. SEAMEN—WAGES—PENALTY FOR REFUSING TO PAY WITHOUT SUFFICIENT CAUSE.

   Libelants were hired as deck hands on a steamer making daily trips between New York and another port at $30 per month, and after working six days left the service without the consent of the master. *Held*, that the refusal of the owner to pay them wages for the time they worked did not subject him to the penalty imposed by Rev. St. § 4529, as amended U. S. Comp. St. 1901, p. 3077, for refusing and neglecting to pay seaman's wages when due without sufficient cause, there being reasonable ground, at least, for the owner's claim that libelants' contract was one from month to month, and that they had no right to abandon the service before the end of the month.

In Admiralty. Suit to recover seamen's wages.

Richard D. Currier, for libelants.
James J. Macklin, for claimant.

HOLT, District Judge. This is a libel for seamen's wages. The amount sued for is small, but the question of statutory construction involved is of some importance. The libel was filed by Higgins and

Buckley, who were employed by the master of the steamer Express to work as deckhands for $30 a month. The steamer made daily trips from New York to Newark and back. Libelants began work on October 14, 1903, and left the vessel, without the master's consent, on October 20th. I understand it to be admitted that the claimant has settled with Higgins. Buckley has been paid $1. He claims to be entitled to recover $5 still due for wages, and a dollar a day since, under the statute imposing that penalty for neglect to pay seamen's wages when due without sufficient cause. Rev. St. U. S. § 4529; Act Dec. 21, 1898, c. 28, § 4, 30 Stat. 756 [U. S. Comp. St. 1901, p. 3077]. The claimant refused to pay at first, on the ground that Buckley had no right to abandon the service until the end of the month, but in the answer has offered to pay the $5, but denies liability for the penalty. The sole question, therefore, is whether the penalty is due. In my opinion, the penalty cannot be recovered in this case. In the first place, the libel does not allege any facts showing that the refusal was without sufficient cause. In the next place, I think that there were reasonable grounds for the claim that this was a contract of employment from month to month. There are cases that hold that it is the custom at the port of New York that men engaged to work on vessels employed about the harbor may be discharged or may leave at any time, although their wages may have been fixed at a certain rate per month. Moore v. Neafie (D. C.) 3 Fed. 650; Disbrow v. The Walsh Brothers (D. C.) 36 Fed. 607. But this usage, in my opinion, only applies to men working on vessels employed about the harbor, making no regular voyages or trips. The general rule in admiralty is that a sailor who agrees to serve on a ship, without specifying any particular time, ships for the voyage; but I think that that rule would hardly apply in the case of a steamboat making regular daily trips between two ports. It is important in such a case that the employment should be steady and continuous, and I see no reason why, if a man makes a contract to work upon such a vessel at a certain amount per month, the contract should not receive its natural construction of being a contract by the month. At all events, the claimant asserted that that was the agreement, and that the men had no right, arbitrarily and without cause, after six days' service, to leave the ship. That was a fair question of controversy, and the refusal to pay under such circumstances was not, in my opinion, a refusal without sufficient cause, within the meaning of the statute. The statute is a penal statute, intended to punish masters of vessels who, without any just excuse, arbitrarily refuse to pay seamen their wages when due.

My conclusion is that there should be a decree for the libelant Buckley for $5. As the substantial question in controversy has been decided in favor of the claimant, the libelant should not recover costs.

PEPIN TP. et al. v. SAGE.

(Circuit Court of Appeals, Eighth Circuit. April 14. 1904.)

No. 1,887.

1. MUNICIPAL CORPORATIONS—EFFECT OF DISSOLUTION—LAWS OF MINNESOTA.

Sections 33, 34, ingrafted on article 4 of the Constitution of Minnesota by way of amendment in 1892, prohibit the passage of any local or special law regulating the affairs of, or incorporating, erecting, or changing the lines of, any county, city, village, township, ward, or school district, but provide that the Legislature may repeal any existing special or local law, and that it shall provide general laws for the transaction of any business so prohibited. Gen. St. Minn. 1894, § 258, provides that whenever a law is repealed which repealed a former law the former law shall not thereby be revived unless it is so specially provided. In 1868 a village was created by a special act from territory lying partly within a city and partly within a township previously created. The act creating the village made no reference to the city or township, their boundaries, or the statutes defining them. In 1895 the special act creating the village was repealed. *Held*, that the constitutional and statutory provisions cited had no application to such repealing act; that the statutes creating the city and township and defining their boundaries were not repealed by the act creating the village, the effect of which was to except the territory covered by it from the city and township, and from the operation of the statutes creating them, which exception ended when such act was repealed, leaving the territory within the city and township as before its enactment.

2. SAME.

The express authority for the repeal of any existing special or local law conferred by the proviso to the constitutional amendment is a limitation upon the inhibition against the passage of special or local laws, and withdraws such repealing acts, as well as the changes necessarily wrought in existing conditions, by giving them their ordinary legal effect, from the operation of that inhibition; and hence the act repealing the law creating the village is not to be construed as one changing the boundary lines of the city and township, but merely as releasing the territory previously excepted from their jurisdiction by the act repealed, upon which it again came within their jurisdiction by virtue of the valid and subsisting statutes creating them and defining their boundaries.

3. STATUTES—EFFECT OF REPEAL.

Gen. St. Minn. 1894, § 258, providing that the repeal of a law repealing a former law shall not revive the former law unless so expressly provided, applies only to cases of absolute repeal, and not to cases where the law repealed merely ingrafted an exception on a prior law, leaving it in force. In such cases the repeal leaves the former law to be applied without the exception.

4. MUNICIPAL CORPORATIONS—DISSOLUTION—APPORTIONMENT OF INDEBTEDNESS.

In the absence of constitutional limitation it is wholly within the power of a Legislature on the dissolution of a municipal corporation and the transfer of its territory to others to apportion its indebtedness between such others, and to determine what proportion shall be borne by each; but in the absence of such apportionment they will be severally liable in proportion to the value of the taxable property of the dissolved corporation which falls within their boundaries respectively, and the power of taxation to be exercised to pay such debts will extend to all the taxable property within their respective jurisdictions.

¶ 4. Dissolution and reincorporation of municipal corporations—Effect on indebtedness—see note to City of Uvalde v. Spier, 33 C. C. A. 506.

See Municipal Corporations, vol. 36, Cent. Dig. §§ 107, 109.

5. STATUTES—CONSTITUTIONALITY—SPECIAL LEGISLATION.

Const. Minn. art. 4, § 33, which prohibits the enactment of special laws where a general law can be made applicable, has in numerous decisions been construed by the Supreme Court of the state, which has uniformly held that a law based on a classification purely arbitrary and not justified by some apparent natural reason, was within the prohibition. Act April 10, 1901 (Laws 1901, p. 279, c. 201), provides, in effect, that where a municipality created by special act, and having outstanding bonds or other written obligations, has been or shall be dissolved by the repeal of the act creating it, the effect of which is to attach its territory to one or more existing municipalities, such indebtedness shall be enforceable solely against the territory which was responsible for its payment at the time of the repeal. *Held*, that under the rule of the Supreme Court such act is special legislation, and void, there being no natural reason why a distinction should be made between municipal corporations created by special act and dissolved by its repeal and those created and dissolved under the general laws of the state, which have long existed, and provide both for the creation and dissolution of such corporations; nor between "bonds or other written obligations" and other forms of indebtedness in respect to the property which shall be charged with payment on dissolution.

6. EQUITY—LACHES.

An owner of bonds issued by a village, who commenced an action thereon before the expiration of the period of limitation, and obtained a judgment against the village, which was afterward adjudged in quo warranto proceedings to have been dissolved by a prior act of the Legislature, and who, within two years after obtaining his judgment, and within one year after the judgment of ouster, commenced a new suit in equity against the successors of the village, based on his judgment, was not chargeable with laches.

Appeal from the Circuit Court of the United States for the District of Minnesota.

John E. Stryker (J. F. McGovern, John W. Murdoch, and Michael Marx, on the brief), for appellants.

George H. Selover (Owen Morris, on the brief), for appellee.

Before SANBORN, THAYER, and VAN DEVANTER, Circuit Judges.

VAN DEVANTER, Circuit Judge. This is an appeal from a decree charging the township of Pepin and the city of Wabasha, in the state of Minnesota, as the successors of the late village of Reads, in that state, with the payment of bonds issued by the village during its corporate existence, and apportioning the debt between the succeeding municipalities in the proportion that the taxable value of the property falling within each by reason of the dissolution of the village bears to the taxable value of the entire property within the village at the time of its dissolution. The facts are, briefly, as follows: The village of Reads was created by a special act approved March 5, 1868 (Sp. Laws 1868, p. 261, c. 34), out of territory partly within the township of Pepin and partly within the city of Wabasha. The bonds were issued by that village under authority of special acts approved March 6, 1868 (Sp. Laws 1868, p. 29, c. 16), and March 5, 1869 (Sp. Laws 1869, p. 211, c. 37), by the first of which it is provided that the faith of the village "or the municipal corporation which may succeed it" shall be pledged for the payment of the principal and interest of the bonds, and that to make such payment taxes

shall be levied and collected upon the taxable property of the village in the same manner as other taxes are levied and collected in the village "or the municipal corporation which shall succeed it." Before the actual issuance of the bonds, but after their issuance was authorized by statute and by a vote of the electors of the village, a special act, approved March 5, 1869, again placed in the city of Wabasha the portion of the village which had been taken from the city when the village was created. A special act approved January 29, 1891 (Sp. Laws 1891, p. 551, c. 51), returned to the village the territory originally taken from the city, and from then until its dissolution the village covered the identical territory over which it was first erected. The charter or special law under which the village was created was repealed and the village dissolved by an act approved April 22, 1895 (Laws 1895, p. 798, c. 390), and taking effect February 6, 1896. Acting under the belief, generally shared by all, that this statute did not dissolve or disorganize the village, its inhabitants continued to elect officers, and through them to transact the business of the village and to govern its territory and people as theretofore until in 1899, when in proceedings in the nature of quo warranto prosecuted by the state a judgment of ouster was rendered against the village and those acting as its officers. State ex rel. v. Village of Reads, 76 Minn. 69, 78 N. W. 883. In 1897 appellee commenced an action in the court below against the village to recover the unpaid principal and interest of all of the bonds, excepting one not then due. The action was defended on behalf of the village by the persons claiming to be and acting as its officers, and July 12, 1898, resulted in a judgment for appellee and against the village for the amount due upon the matured bonds. There were seven of the bonds. One matured each year beginning July 1, 1892. The present suit was commenced April 24, 1900. Three questions are presented: (1) Did the territory of the village, upon its dissolution, fall within the township of Pepin and the city of Wabasha, and make them the successors of the village, each to the extent that it received the territory of the village? (2) Is the act of April 10, 1901 (Laws Minn. 1901, p. 279, c. 201), entitled "An act providing a method for the payment of the debts of dissolved municipalities," a valid law under sections 33 and 34 of article 4 of the Constitution of the state, and does it restrict the enforcement of the debt in question to the territory which was responsible for its payment at the time of the dissolution of the village? (3) Is part of appellee's claim barred by laches? It is not questioned that appellee's remedy is in equity.

The present suit strongly resembles and has closely followed the one shown in Mount Pleasant v. Beckwith, 100 U. S. 514, 25 L. Ed. 699, where it was determined, in the absence of constitutional restrictions: (1) The creation, division, and dissolution of municipal corporations, and the powers to be exercised by them, are subject to the legislative control of the state creating them. (2) Where one municipality is legislated out of existence, and its territory is annexed to other municipal corporations, it belongs wholly to the Legislature to apportion between them the debts of the dissolved municipality, and to determine what proportion shall be borne by each; but in the

absence of such legislation the municipal corporations receiving the territory of the one dissolved will be severally liable for its then subsisting legal debts in the proportion that the taxable property within it falls within them respectively, and the power of taxation to be exercised to pay such debts will extend to all the taxable property within their respective jurisdictions, and will not be restricted to the property and persons within the territory annexed. Other cases of similar import are Broughton v. Pensacola, 93 U. S. 266, 23 L. Ed. 896; Meriwether v. Garrett, 102 U. S. 472, 26 L. Ed. 197; Mobile v. Watson, 116 U. S. 289, 6 Sup. Ct. 398, 29 L. Ed. 620; United States ex rel. v. Port of Mobile (C. C.) 12 Fed. 768; Brewis v. Duluth (C. C.) 13 Fed. 334; Laird v. De Soto (C. C.) 22 Fed. 421. The principles announced and applied in Mount Pleasant v. Beckwith are in full accord with the decisions of the Supreme Court of the state of Minnesota, so far as that court has spoken upon the subject. State v. City of Lake City, 25 Minn. 404, 414; City of Winona v. School District, 40 Minn. 13, 16, 41 N. W. 539, 3 L. R. A. 46, 12 Am. St. Rep. 687. Counsel for appellants practically concede that the law is as just stated, and they rely upon certain provisions of the Constitution and statutes of Minnesota as controlling in the present case. Their first contention is that the territory within the village of Reads did not, upon its dissolution, fall within or become part of the township of Pepin and the city of Wabasha, and therefore the township and city are not the successors of the village, and are not charged with the payment of its debts. To support the contention they cite sections 33 and 34, ingrafted upon article 4 of the state Constitution by way of amendment in November, 1892, and section 258, Gen. St. 1894. So far as material, these are as follows:

"Sec. 33. In all cases when a general law can be made applicable no special law shall be enacted; and whether a general law could have been made applicable in any case is hereby declared a judicial question, and as such shall be judicially determined without regard to any legislative assertion on that subject. The Legislature shall pass no local or special law regulating the affairs of, or incorporating, erecting or changing the lines of any county, city, village, township, ward or school district. * * * Provided, however, that the inhibition of local or special laws in this section shall not be construed to prevent the passage of general laws on any of the subjects enumerated. The Legislature may repeal any existing special or local law, but shall not amend, extend or modify any of the same.

"Sec. 34. The Legislature shall provide general laws for the transaction of any business that may be prohibited by section one of this amendment [Sec. 33], and all such laws shall be uniform in their operation throughout the state."

"Sec. 258. Whenever a law is repealed which repealed a former law, the former law shall not thereby be revived, unless it is so specially provided."

We think these provisions are not applicable to the act dissolving the village. Originally the township and city included the territory in question, and the special acts which placed it within the village contain no reference whatever to the township or city, or to their boundary lines, or to the statutes defining them. The statutes creating the township and the city were not at any time repealed, but were left in force. The township and the city were not at any time extinguished, but remained in existence under the operation of those

statutes. The effect of the special acts creating the village and defining its boundaries was to except the territory covered by it from the township and the city and from the operation of the statutes creating them. Subject to that exception, the legislative will, as at all times registered and expressed in living, operative, and valid statutes—not enactments entirely repealed, either expressly or by implication—placed this territory in the township and city. When the special acts which by implication put that exception upon these statutes were repealed, the exception was at an end. These statutes and their definition of the boundaries of the township and city were then operative as if there had been no exception. They did not need to be revived because they had not been repealed. Nor was any amendment, extension, or modification of them necessary to give them effective operation over the territory of the extinguished village. While carefully prohibiting the passage of local or special laws, including those changing the boundary lines of any city, village, or township, the amendment to the Constitution expressly permits the repeal of existing laws of that character, and impliedly, but not less certainly, permits the repeal to have the usual or ordinary effect of such a statute. This repealing act is confined to a direct annulment of the charter or special law creating the village and makes no attempt at any affirmative legislation or to give to the repeal any other than the usual or ordinary effect.

In respect of the constitutional provisions cited, our opinion may be stated in this manner: The express authority for the repeal of "any existing special or local law" is a limitation upon the inhibition against the passage of special or local laws, and withdraws such repealing acts from the operation of that inhibition. The act repealing the charter or law creating the village of Reads is within the express authorization, and is to be given the usual or ordinary legal effect of such an act. The changes wrought in existing conditions by giving this effect to an authorized repealing act are also within the express authorization, and not within the inhibition. Upon the dissolution of the village the territory embraced therein became part of the township of Pepin and the city of Wabasha, not because the repealing act changed the boundary lines of the township or city, but because it released that territory from the excepting effect of the charter or law creating the village; and when this was done that territory came within the boundaries of the township and city as theretofore lawfully defined, by valid statutes still subsisting, and therefore became part of the township and city, and was brought within their jurisdiction. In other words, while this territory was released from the effect of the village charter by the repealing act, it resumed its place in the township and city by reason of the statutes creating them and defining their boundaries. Of course, this result would not have followed if these statutes had been repealed in the meantime, or if the act repealing the village charter had provided—if it could do so without violating the inhibition against special or local laws—that the territory and inhabitants within the limits and jurisdiction of the village should be resolved into the body of the state, and be subjected to its immediate control.

What has been said seems in principle to also dispose of the contention in respect of the effect of section 258, Gen. St. 1894, before quoted, but it may be well to notice the construction uniformly given to similar statutes prescribing a rule for determining the effect of a repealing act. Perhaps the first of the cases is Brown v. Barry, 3 Dall. 365, 1 L. Ed. 638. An act of Virginia adopted in 1792 expressly repealed a prior act. A third act declared that the operation of the repealing statute should be suspended for the time being. In 1789 a statute like section 258 had been adopted, and the contention was that it prevented the repealed statute from being revived by the suspension of the repealing act. The court, speaking through the chief justice, said:

"The act suspending the repealing act of November, 1792, is not within the act of 1789, which declares that the repeal of a repealing act shall not revive the act first repealed. The suspension of an act for a limited time is not a repeal of it; and the act of 1789, being in derogation of the common law, is to be taken strictly."

Smith v. Hoyt, 14 Wis. 273, presented the question in this way: A general statute required the defendant in civil actions to answer in 20 days. An act adopted in 1858 (Laws 1858, p. 134, c. 113) gave the defendant in foreclosure suits six months in which to answer. This was repealed by a still later act. The contention was that the first statute was repealed by the act of 1858 as to foreclosure suits, and that upon the repeal of that act a statute like section 258 prevented the revival of the statute first named. The court held the contention untenable, and, after declaring that the act of 1858 did not strictly repeal the first or general statute but merely excepted a class of cases from its operation, said (page 277):

"That being so, where the statute creating the exception is repealed, the general statute which was in force all the time would then be applicable to all cases according to its terms. And this would be no violation of the rule of construction before referred to, that the repeal of a repealing act should not revive the act repealed. The act of 1858 was equivalent to a proviso attached to the general rule that it should not be applicable to foreclosure defendants. But if a proviso creating an exception to the general terms of a statute should be repealed, courts would be afterwards bound to give effect to it according to those general terms, as though the proviso had never existed. And this could not be said to revive a repealed statute. The rule against this relates to cases of absolute repeal, and not to cases where a statute is left in force, and all that is done in the way of repeal is to except certain cases from its operation. In such cases the statute does not need to be revived, for it remains in force, and the exception being taken away, the statute is afterwards to be applied without the exception."

West Virginia has such a statutory provision respecting the effect of the repeal of a repealing act. In holding it inapplicable to the repealing act then under consideration, it was said by the Supreme Court of Appeals of that state in State v. Mines, 38 W. Va. 125, 131, 18 S. E. 470, 472:

"Now, as I remarked above, section 20 of chapter 35 of the Code was broad and comprehensive, applying every statute of limitation against the state. The act of 1875 [Acts 1875, p. 118, c. 55] only changed or modified it to a certain extent—that is, prevented its operation as to judgments and claims of the state, leaving it in all other respects operative—simply made an exception to the generality of the operation of the statute; and when that act

was itself repealed, and the exception or limitation was no longer in force, said section 20 operates free of that exception. It was only a partial abrogation of section 20. It would have been different, had it been a total abrogation."

Other decisions to the same effect are State v. Sawell, 107 Wis. 300, 83 N. W. 296; Edworthy v. Savings Ass'n, 114 Iowa, 220, 223, 86 N. W. 315; Glaholm v. Barker, L. R. 1 Ch. App. 223; Mount v. Taylor, L. R. 3 C. P. 645. It is clear that, within the meaning of section 258, the statutes creating the township and city and defining their boundaries were not repealed by the charter or law creating the village, and that the repeal of the latter presents no occasion or opportunity to apply the rule stated in that section.

We are of opinion that the territory of the village, upon its dissolution, fell within the township and city, and made them the successors of the village. But it is urged upon us that this results in transferring the debts of one community to other communities which had no voice in the creation of the debts or in their transfer. In one sense that is true, but the result of a ruling to the contrary would be distressing to contemplate. It would amount to a declaration that the state extinguished one of its municipalities under circumstances which make proceedings for the collection and payment of the municipal debts impossible. A result which imputes to a state such an indifference to the claims of justice and to the lawful engagements of the municipalities under its control is not permissible where another is possible under the law. The circumstances of this case do not permit such an imputation. The answer to the present insistence is given in Mount Pleasant v. Beckwith, supra, where the court said (pages 529, 531, 100 U. S., 25 L. Ed. 699):

"But in all these cases, if the extinguished municipality owes outstanding debts, it will be presumed in every such case that the Legislature intended that the liabilities as well as the rights of property of the corporation which thereby ceases to exist shall accompany the territory and property into the jurisdiction to which the territory is annexed. * * * Power exists here in the Legislature not only to fix the boundaries of such a municipality when incorporated, but to enlarge or diminish the same subsequently, without the consent of the residents, by annexation or set-off, unless restrained by the Constitution, even against the remonstrance of every property holder and voter within the limits of the original municipality. Property set off or annexed may be benefited or burdened by the change, and the liability of the residents to taxation may be increased or diminished; but the question in every case is entirely within the control of the Legislature, and, if no provision is made, every one must submit to the will of the state, as expressed through the legislative department. Inconvenience will be suffered by some, while others will be greatly benefited in that regard by the change. Nor is it any objection to the exercise of the power that the property annexed or set off will be subjected to increased taxation, or that the town from which it is taken or to which it is annexed will be benefited or prejudiced, unless the Constitution prohibits the change, since it is a matter, in the absence of constitutional restriction, which belongs wholly to the Legislature to determine."

April 10, 1901, the Legislature of the state enacted a statute entitled "an act providing a method for the payment of the debts of dissolved municipalities (Laws 1901, p. 279, c. 201)" which is as follows:

"Section 1. That in all cases in which the Legislature of the state of Minnesota has repealed, or may hereafter repeal the charter of any city, village, borough, or other municipality, or the special law under which the same is,

or was, organized, or created, against which municipality there are outstanding bonds or other written obligations which are, at the time of such repeal, a legal and enforceable claim against the municipality affected by such repeal, without making, or having made, any provision for the payment of such indebtedness, and the effect of such repeal is to attach the territory of the municipality so dissolved to one or more municipalities existing at the time of such repeal, said indebtedness shall be and continue to be enforceable solely against the territory which was responsible for the payment of the same at the time of said repeal, and it shall be the duties of the proper officers of the municipality, or municipalities, which acquire the territory of the dissolved municipality, to levy such tax or taxes upon the property and territory coming within its or their jurisdiction, by reason of such repeal for the payment or discharge of such outstanding indebtedness, and to collect, receive and apply the same in such payment of such indebtedness in practically the same manner as would have been the duty of the proper officers of the dissolved municipality to levy taxes for the payment of said indebtedness, and to collect, receive and disburse the same, had there been no repeal of said charter or special law. And the territory so attached to such municipality or municipalities shall not be liable for any of the debts of such municipality or municipalities existing at the time of the repeal of said charter or special law, but all such debts shall continue a demand solely against the municipality or territory which was liable for the payment of the same at the time of said repeal.

"Sec. 2. This act shall apply to all cases falling within its provisions in which judgment has not already been recovered by the owner or holder of such bonds, or other forms of indebtedness as are described in section one of this act, against the municipality or municipalities acquiring the territory of the dissolved municipality."

The second contention of counsel for appellants rests upon this act, and is that the enforcement of the debt in question should be restricted to the territory which was responsible for its payment at the time of the dissolution of the village, and that the decree against the succeeding municipalities should be limited to requiring "the assessment, levy and collection of a tax upon the property situate within the boundaries of the dissolved municipality for the purpose of paying the amount which appellee is entitled to recover." Counsel for appellee challenge the validity of this act under the provisions of sections 33 and 34 of article 4 of the state Constitution, before quoted. The claim is that it is not a general law, and does not have uniform operation throughout the state. This act has not been considered by the Supreme Court of the state, but the principles by which its validity is to be tested are well settled by the decisions of that court, among which are Nichols v. Walter, 37 Minn. 264, 33 N. W. 800; State ex rel. v. Cooley, 56 Minn. 540, 58 N. W. 150; State ex rel. v. Ritt, 76 Minn. 531, 79 N. W. 535; Murray v. Commissioners, 81 Minn. 359, 84 N. W. 103, 51 L. R. A. 828, 83 Am. St. Rep. 379; Duluth Banking Co. v. Koon, 81 Minn. 486, 84 N. W. 335; Hetland v. Commissioners (Minn.) 95 N. W. 305; State ex rel. v. Justice (Minn.) 97 N. W. 124; Thomas v. St. Cloud (Minn.) 97 N. W. 125. In Nichols v. Walter, an act regulating the removal of county seats was held not general, or of uniform operation, because the terms of the act were such that in any county which had located its county seat by a vote of its electors at any time before the passage of the act removal could be effected only by a vote of three-fifths of the electors, while in other counties removal could be had upon a majority vote. The court was of opinion that the basis of the classification was arbitrary, and that the

application of different rules to the two classes of counties was not grounded in necessity or propriety. Referring to the constitutional limitation, it was said (page 271, 37 Minn., page 802, 33 N. W.):

"A law is general and uniform in its operation which operates equally upon all the subjects within the class of subjects for which the rule is adopted; but, as we have said, the Legislature cannot adopt a mere arbitrary classification, even though the law be made to operate equally upon each subject of each of the classes adopted. An illustration and example of that we take from State v. Hammer, 42 N. J. Law, 435, 440: 'Thus a law enacting that in every city in the state in which there are ten churches there should be three commissioners of the water department, with certain prescribed duties,' would present a specimen of such a law. So in the matter we have supposed, of granting powers and privileges to incorporated villages, if those situated on rivers were placed in a class for the purpose of conferring on them special powers and privileges not referring to nor suggested by the peculiarity of their situation—as, for instance, for the purpose of maintaining high schools—the classification would be merely arbitrary. The principle adopted by the Supreme Court of New Jersey comes more nearly to what we regard the true principle of classification than that stated by any other court. We quote again from State v. Hammer: 'But the true principle requires something more than mere designation by such characteristics as will serve to classify, for the characteristics which thus serve as the basis for classification must be of such a nature as to mark the objects so designated as peculiarly requiring exclusive legislature. There must be a substantial distinction, having reference to the subject-matter of the proposed legislation, between the objects or places embraced in such legislation and the objects or places excluded. The marks of distinction on which the classification is founded must be such, in the nature of things, as will, in some reasonable degree at least, account for or justify the restriction of the legislation.' Or, to state it differently, though not so well, the true practical limitation of the legislative power to classify is that the classification shall be upon some apparent natural reason—some reason suggested by necessity, by such a difference in the situation and circumstances of the subjects placed in different classes as suggests the necessity or propriety of different legislation with respect to them."

In State ex rel. v. Cooley, the court declared its adherence to what had been stated in Nichols v. Walter, and then said (page 551, 56 Minn., page 153, 58 N. W.):

"By 'necessity' is meant 'practical,' and not 'absolute,' necessity. But the characteristics which will serve as a basis of classification must be substantial, and not slight or illusory. For example, distinctions due merely to pre-existing repealable special legislation would not, of themselves, constitute a proper basis of classification, for that would tend to perpetuate the very peculiarities which the Constitution was designed ultimately to remove."

In State ex rel. v. Ritt, an act was likewise held not general or of uniform operation which provided for one assessor for the entire county in each county of not less than 100,000 and not over 185,000 inhabitants, and left in force in all counties of less than 100,000 or over 185,000 inhabitants the existing law providing for an assessor for each township, city, and village. In support of the act it was contended that there was necessity or propriety in having the property in very populous counties assessed by or under the supervision of one officer as a means of attaining greater uniformity in valuation. Without acceding to the contention, the court said (page 535, 76 Minn., page 536, 79 N. W.):

"But, the more populous the county, the stronger this reason would apply. If it applies to counties whose population is between 100,000 and 185,000, it applies with still greater force to counties containing more than 185,000.

There is no apparent reason suggested by necessity, or by the difference in the situation or circumstances of counties having a population of not less than 100,000 and not over 185,000 and counties having a population of over 185,000, why the county assessor system should be applied to the former, and the latter left under the local assessor system in the same class with counties having a population of less than 100,000. The attempted classification is therefore arbitrary and incomplete, for the reason that it does not include all the members of the same class, but excludes some whose conditions and wants render such legislation equally necessary and appropriate to them as a part of the same class."

In Murray v. Commissioners an act was likewise declared invalid which provided for the treatment, at the expense of the county of their residence, of a limited number of indigent habitual drunkards in counties having a population of 50,000 or more. The court, after observing that drunkenness was not confined to counties having more than 50,000 population, based its decision upon a statement that a classification cannot be sustained unless it embraces all, and excludes none, whose condition and wants render the legislation necessary or appropriate to them as a class, and that, to be valid, legislation limited in its relation to particular subdivisions of the state must rest on some characteristic or peculiarity plainly distinguishing the places included from those excluded. Hetland v. Commissioners involved an act which authorized the issuance of bonds to provide money to complete courthouses in counties having a population of 100,000 or less, which had entered into a contract for the erection of a courthouse, and had expended $7,000 or more towards its erection. The act was held invalid as establishing an unwarranted classification, and as being general in form, but special in operation. State ex rel. v. Justus presented the question of the validity of an act requiring journeymen plumbers to take an examination and procure a certificate of competency as a condition to their employment in cities or towns having a system of sewer or water works. The court was of opinion that faulty plumbing was injurious and pernicious whether done by a journeyman plumber or by a master plumber, and whether done in a city or town without a system of sewer or water works, or in a city or town where such a system exists. The act was declared invalid as making an arbitrary and unreasonable distinction in the places and persons to which it applied. Thomas v. St. Cloud involved an act authorizing the issuance of bonds with which to purchase waterworks in cities which have owned waterworks and have sold them with a reserved right to repurchase them. The act was adjudged special and invalid, because "the basis of the classification used is so narrow, restricted, and peculiar that the inference is unavoidable that it was not intended as a general law, but to meet the requirements of a special situation."

By its terms the act under consideration makes the presence of the following conditions requisite to its operation: (1) The indebtedness must be that of a municipality organized or created under a charter or special law. (2) The dissolution of the municipality must have occurred through the direct legislative repeal of such charter or special law. (3) The indebtedness must be outstanding bonds or other written obligations. (4) The effect of the repeal must have been to attach the territory of the municipality so dissolved to one or more mu-

nicipalities existing at the time. In Minnesota there has long existed a system of general laws providing for the creation, division, and dissolution of villages and other municipal corporations, and for detaching territory therefrom and attaching territory thereto. Municipalities existing under these general laws incur debts substantially in the same way and for the same purposes as do those existing under special laws. Both classes contract debts by implication as well as through bonds or other written obligations, and both may incur liabilities through tortious acts of their officers and servants. The engagements and liabilities of both classes stand upon the same footing, and the creditors of both are entitled to the same consideration. Both classes are subject to dissolution, and the necessity or propriety of providing for the payment of their debts in that event is the same whether the municipality owes its existence to a special law or to the general laws, and whether it be dissolved by direct act of the Legislature or by the action of its inhabitants had under the general laws. Nothing in the special or general character of the laws by or under which municipalities are created or dissolved suggests that it should be made the basis of a distinction or difference in those who succeed to the obligation to pay the debts of dissolved municipalities, or in the property from which the money to pay these debts shall be raised by taxation or in the character of the debts to be paid, whether evidenced by written obligations or otherwise. The subject is one which in its nature, and with justice to all concerned, can be reasonably covered by a general law operating uniformly in all cases. To make the repealable special charters of municipalities owing their existence to that character of legislation the basis of a classification, when no necessity or reason for a difference in remedies, liability, or legislative treatment inheres in that fact, is special legislation. A statute establishing such a classification does not include all objects which, in their nature, are of the same class, but excludes some whose conditions and wants render such legislation equally necessary and appropriate to them as members of the class.

Tested by the rules announced and applied by the Supreme Court of the state, the act of April 10, 1901, is violative of the constitutional restriction upon special legislation, and is void. It may, as is asserted by counsel, propose an equitable and just plan of adjusting and discharging the debts of the dissolved municipality or municipalities to which it applies, but this does not satisfy the imperative constitutional requirement that, to be valid, the act proposing and establishing the plan must not be special, but general, and of uniform operation throughout the state. Wanting in this essential, it falls within the inhibition against special legislation, no matter what its merits in other respects. It is of significance that the act declares that it shall apply to cases in court falling within its provisions which, at the time of its passage had not proceeded to judgment. The present suit was commenced April 24, 1900, and had not passed to a decree when the act was passed, April 10, 1901. There is no claim that any other suit of this character was then pending, or even contemplated. The conditions existing at the time and the terms of the act make the inference unavoidable that it was not intended to be a general law of uni-

form operation, but to meet the supposed requirements of a particular situation. The act is clearly void, and does not affect the rights, remedies, or liabilities of any one.

We think the contention that part of appellee's claim is barred by laches is without merit. The period of limitation within which actions could be commenced upon the village bonds is fixed at six years by the state statute. As to one bond, that period expired July 1, 1898, as to another, it expired July 1, 1899, and as to the others, it had not expired when the present suit was commenced. Appellee's action at law against the village, upon the two bonds with others, was commenced before the expiration of the period of limitation, and was prosecuted to a judgment in his favor before the judgment of ouster in the proceeding in quo warranto; and the present suit, which is rested in part upon the judgment in the action at law, was commenced within less than one year after the dissolution of the village had been so judicially pronounced. The record does not disclose such delay on the part of appellee as requires or permits the application of the doctrine of laches.

The decree is affirmed.

RESURRECTION GOLD MIN. CO. v. FORTUNE GOLD MIN. CO.

(Circuit Court of Appeals, Eighth Circuit. April 14, 1904.)

No. 1,789.

1. BOUNDARIES—WHEN CALLS AND COURSES AND DISTANCES CONFLICT.

In cases of conflicts between monuments called in a conveyance and the courses and distances there noted, the former, if standing in their original positions, prevail.

If monuments called have been lost or removed, the places where they were originally set may be shown by parol or documentary evidence, and, if proved to the satisfaction of the jury by a fair preponderance of testimony, they prevail over the courses and distances.

If the monuments called have been lost or removed, and their original locations are not proved, the courses and distances control the description, and must be followed in its application to the land.

2. SAME—PAROL EVIDENCE TO CHANGE CALLS OF MONUMENTS.

Parol evidence is incompetent to substitute in a conveyance a call for another monument in the place of the call for the original monument there contained.

A round stake four inches in diameter, set loosely six inches in the ground between two convenient reference points within four feet of it, with two blazes upon it, and an inscription with a lead pencil of the figures "3-2309" upon the later blaze, does not fill the description of a post four inches square, with the figures "3-2309" cut into it, set firmly in the ground, where no reference points are available.

3. CROSS-EXAMINATION—RIGHT OF—DISCRETION IN ALLOWING.

A full and fair cross-examination of a witness upon the subjects of his direct examination is a right, and not a privilege, of the party against whom he is called, and its denial or substantial restriction is reversible error.

The allowance of cross-examination is discretionary only, after the right has been fairly exercised.

¶ 1. See Boundaries, vol. 8, Cent. Dig. § 18.

4. SAME—LIMITED TO SUBJECTS OF DIRECT EXAMINATION.
It is the general rule in the federal courts that the cross-examination of a witness should be limited to the subjects of his direct examination.

5. SAME—MAY ELICIT AFFIRMATIVE DEFENSE.
Where a witness for the plaintiff has disclosed on his direct examination a part of a conversation or transaction, the fact that the entire conversation or transaction constitutes an affirmative defense is no bar to its disclosure by cross-examination.

6. SAME—DENIAL PREJUDICIAL.
Prejudice is presumed from the denial or undue restriction of a cross-examination. It is no answer that the cross-examiner could call the witness or other witnesses to prove the facts he seeks. He is entitled to bind his adversary by proof of the facts by the latter's witness.

7. SAME—GENERAL RULE.
The general rule is that error produces prejudice, which may not be disregarded, unless it appears beyond a doubt that it did not prejudice, and could not have prejudiced, the party who assigned it.

8. WILLFUL TRESPASSER—DEFINITION—NEGLIGENCE AS EVIDENCE OF.
One who takes the ore of another from his land without right, either recklessly or with the actual intent so to do, is a willful trespasser. One who takes such ore without right, but inadvertently and unintentionally, or in the honest belief that he is exercising his own right, is not a willful trespasser, and may avail himself of the lower measure of damages.
Mere negligence, of the character described by the word "inadvertence," in ascertaining the limits of the lands or rights of the owner, will not alone sustain a finding of that recklessness, fraud, bad faith, knowledge, or intent requisite to establish a willful trespass, but it is competent evidence upon the issue of willfulness or innocence.
An intentional omission, however, to exercise care to ascertain such limits, for the purpose of maintaining ignorance regarding them and trespassing upon them, or a reckless disregard of them, is as fatal to the claim of a trespasser to limit damages to the lower measure as knowledge of the owner's rights and an intent to violate them.
Thayer, Circuit Judge, dissenting in part.

(Syllabus by the Court.)

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

Gerald Hughes (Charles J. Hughes, on the brief), for plaintiff in error.

Clayton C. Dorsey (Willard Teller, on the brief), for defendant in error.

Before SANBORN, THAYER, and HOOK, Circuit Judges.

SANBORN, Circuit Judge, delivered the opinion of the court.

This is an action of trespass brought by the Fortune Gold Mining Company, a corporation, the lessee of the Fortune lode mining claim, against the Resurrection Gold Mining Company, a corporation, for the intentional removal of ore from the Fortune claim. The plaintiff alleged, and the defendant denied, that the former was the lessee from the owner and was in the possession of the Fortune lode mining claim, and that the defendant intentionally and willfully removed therefrom ore of the value of $100,000. The real issue between the parties, however, was whether the boundary of the Fortune claim at corner No. 3 was at the point where the courses and distances recited in the patent located it, or at a place about 28 feet farther northwest. If it was at the

former point, the trespass of the defendant was inconsiderable; but if, as the plaintiff claimed and the jury found, it was in the latter place, ore of the value of several thousand dollars had been extracted from the plaintiff's claim by the defendant.

The plaintiff's title rested upon a patent issued in 1894, and the description in that patent upon the survey for patent made in January, 1882. The original monuments erected by the surveyor at corners 1 and 2 of the Fortune claim, when he surveyed it for patent, were standing upon the ground at the time of the trial. The monument erected at corner 4 had disappeared. The plaintiff insisted that a round stake, with two blazes upon one side of it, loosely placed in the earth, and surrounded by a mound of stones at a place about 28 feet northwest of the point where the courses and distances run from the known corners 1 and 2 located corner 3, was the original monument erected by the surveyor to mark that corner, and that it was in the same place where the surveyor put the original monument in January, 1882. The patent and the field notes on which the patent was based were introduced in evidence by the plaintiff. The recitals of the patent, so far as they are material to the questions in this case, are that it is a grant of the Fortune lode mining claim known as "Lot No. 2,309"; that this claim is bounded as follows: Beginning at corner No. 1, a post four inches square, marked 1–2309, thence south 1 degree 30 minutes west 300 feet to corner No. 2, thence south 88 degrees 48 minutes east 1,465 feet to corner No. 3, thence north 1 degree 30 minutes east 300 feet to corner No. 4, thence north 88 degrees 48 minutes west 1465 feet to corner No. 1 at the place of beginning; and that the lot No. 2,309 extended 1,465 feet in length along the Fortune vein or lode. The field notes recited that a post marked each corner, that at corner No. 3 there were "no reference points available," and that "all corner posts are 4" square x 4 ft. long set 2 ft. in ground, and have cut into them the respective number of the corner and number of the survey. No bearing ties available from any of the corners." The amended field notes recite that there was at corner No. 1 "a post 4 ins. square, 4 ft. long, set 2 ft. in ground and marked 1–2309," at corner No. 2 "a post 4 ins. square, 4 ft. long, set 2 ft. in ground and marked 2–2309," at corner No. 3 "a post 4 ins. square, 4 ft. long, set 2 ft. in ground and marked 3–2309," and at corner No. 4 "a post 4 ins. square, 4 ft. long, set 2 ft. in ground, and marked 4–2309." Neither the patent nor the field notes describe a mound of stones as a part of any of the monuments. The original monuments which stand at corners 1 and 2 are posts 2½ feet high, about 5 inches square, set firmly in the ground, with the figures "1–2309" and "2–2309" cut into them respectively about ⅛ of an inch. The stake which the plaintiff claims is the original monument at corner No. 3 is round, 4 or 5 inches in diameter, about 3 feet high, and it sets loosely about 6 inches in the ground, and is surrounded by a mound of stones. It is blazed on one side. A partial attempt has been made to square it at the top. No figures are cut into it. Some one has whittled or hewn off one side of the blaze, and upon this new blaze has faintly written with a lead pencil the figures "3–2309."

The owner of the claim from whom the plaintiff derives its lease testified that he was present when the survey for patent was made, that

four stakes of about the same character were set at the four corners, that stones were piled around them, that he did not notice and does not know how they were marked, that he does not know how the round stake at corner No. 3 is marked, that he thinks the round stake is the original post set there by the surveyors, that it looks to him like it, and that it is in the same location in which the original post was set. He testified that when the original post was placed at this corner by the surveyor in 1882 there was a stump 18 inches in diameter and 12 or 14 feet high 18 inches north of the post, and another large stump 3 feet south of the post, and that the surveyor and his assistants measured the distances from the post to these stumps and blazed them. The stumps still remain upon the ground. No other witness testified that he knew the round stake to be the original post. Several stated that they had seen the stake, in the place where it now stands, at various times between the survey in 1882 and the time of the trial. One of the defendant's witnesses testified that in 1896 he found a stake at this corner about 2½ feet high and 5 or 6 inches square, but that on July 9, 1898, he looked for it at the same place but could not find it. No other material evidence upon the issue of the identity of the round stake with the original post set at corner 3 appears in the record.

It is assigned as error that in this state of the evidence the court refused to grant the request of the defendant to instruct the jury "that a post which is round, blazed on one side, and bearing lead-pencil marks or figures, not set in the ground, but set up in a mound of stones, does not fulfill the description of a post which calls for a post four inches square, four feet long, set two feet in the ground, and having the number of the corner and the number of the survey cut into said post," and that the court on the contrary charged the jury "that a stake such as described by the witnesses in this case as located at corner No. 3 is sufficient to meet the calls of the patent." The description of the land in controversy in the patent is copied from and founded upon the field notes of the survey of the claim which were introduced in evidence by the plaintiff, so that, as far as the question here presented is concerned, the case stands as though the field notes were written into the description of the patent.

Before entering upon the discussion of the specific issue to which our attention is first challenged, it may be well to recur for a moment to the rules for the application of a description in a patent or in a deed to the land to which it refers. A plain and unambiguous description in a written conveyance can no more be contradicted or modified by parol evidence than any other part of a written agreement. It is only when a patent ambiguity arises in the description itself, or in the application of it to the land, that evidence aliunde becomes admissible for the purpose of fitting the description to the ground to which it refers and of removing uncertainty. When the monuments called for in a conveyance do not correspond with the courses and distances there recited, such an ambiguity necessarily arises, and parol and other evidence is then admissible to remove it. In cases of this character the original monuments called by the patent, if they still remain in place, prevail over the courses and distances noted in the description. If the monuments called have been lost or removed, the places where they were

originally located may be shown by parol or other competent evidence, and, if proved to the satisfaction of the jury by a fair preponderance of evidence, these original locations will prevail over the courses and distances, and control the application of the description to the land. Robinson v. Kime, 70 N. Y. 147, 154; Lodge v. Barnett, 46 Pa. 485; Wendell v. People, 8 Wend. 190, 22 Am. Dec. 635; Jackson v. Widger, 7 Cow. 723; Pernam v. Wead, 6 Mass. 131; Lessee of McCoy v. Galloway, 3 Ohio, 282, 283, 17 Am. Dec. 591; Bagley v. Morrill, 46 Vt. 94, 100; Opdyke v. Stephens, 28 N. J. Law, 83, 89. If the monuments are lost or removed and their original locations are not established by competent proof, the courses and distances prevail, and control the description.

Parol evidence, however, is incompetent to substitute a different monument for one clearly called by a deed or patent, or by the survey upon which it is founded, because that course of proceeding would violate the settled rule that written contracts may not be contradicted or modified by oral evidence. It is not competent to create an ambiguity by changing the written description by parol evidence, and then to proceed to apply the changed description to the land by the rules of law and evidence to which reference has been made, which are applicable only to conveyances which are in themselves ambiguous, or become so in their application to the ground. Bruckner's Leesee v. Lawrence, 1 Doug. 19, 25, 27–36; Bagley v. Morrill, 46 Vt. 94, 100; Drew v. Swift, 46 N. Y. 204, 209; Pollard v. Shively, 5 Colo. 309, 315; Lessee of McCoy v. Galloway, 3 Ohio, 282, 283, 17 Am. Dec. 591; Claremont v. Carlton, 2 N. H. 369, 9 Am. Dec. 88.

The patent in the case before us disclosed no ambiguity, and presented no conflict between its courses and distances and any monument for which it called at corner No. 3, because it specified no monument at that corner. There was therefore no excuse for parol evidence on the face of the patent, and the courses and distances which it contained were prima facie controlling and consistent with themselves. Thereupon counsel for the plaintiff introduced in evidence the field notes of the survey, and read them into the patent for the purpose of raising the requisite ambiguity upon which its cause of action rests. These field notes recite that the monument at corner No. 3 was "a post 4 ins. square, 4 ft. long, set 2 ft. in ground, marked 3–2309," that these numbers were cut into the post, and that it stood at a place where no reference points were available. This description imported no ambiguity into the patent, unless the post there described could be found, or unless its original location could be proved to be at some other point than at the place where the courses and distances located the corner. In order to prove that there was such a stake at such a place, and in order to create the ambiguity which did not otherwise exist, the plaintiff introduced testimony that a round stake 4 inches in diameter, with two blazes, the later on the side of the earlier, with the figures "3–2309" written in pencil upon it, but without any figures cut into it, stood between two available reference points 28 feet northwest of the position of the corner as indicated by the courses and distances, and the court instructed the jury that the latter stake satisfied the description of the corner post. Stakes in themselves are generally similar. The descrip-

tion contained in the word "stake" or the word "post" segregates no stake or post from others of similar character. The distinguishing characteristics of the post described by the surveyor in his field notes were not the material of which it was made, its length, or its size. They were its peculiar shape, and especially the marks he put upon it for the express purpose of identifying it and setting it apart from all others. The post was squared, and the figures "3–2309" were cut into it to forever distinguish it from all other pieces of wood, just as these marks on the stakes at corners 1 and 2 have clearly and conclusively identified them. If this round blazed stake with its fading pencil marks upon it stood near the post at corner 2, no one would hesitate for a moment to say that it was not the square post with its carved figures described in the surveyor's notes. The post at corner 3 described in the notes was square. That which the owner of the land found and testified concerning was round, with two blazes of evidently different dates upon one side of it. The figures "3–2309" had been cut into the former. No figures had been cut into the latter, but the figures "3–2309" had been written upon it with a lead pencil. The former stood where no reference points were available; the latter where two excellent references were within four feet of it. The latter had none of the distinguishing marks and did not satisfy the description of the former, and the instruction of the court to the contrary cannot be sustained. Its effect is to import an ambiguity into a conveyance where none existed before, by changing the written description in the patent and field notes by oral evidence. Its effect is to strike out of the patent and field notes the description of the square post marked by the figures "3–2309" cut into it, and to write into them the description of the round blazed stake inscribed with the figures "3–2309" by means of a lead pencil, and in this way to violate the settled rule that written conveyances may not be modified or contradicted by parol.

The next question presented relates to the cross-examination of McNeece, the owner of the claim. He testified on his direct examination that he was present and saw the stake set when the survey for patent was made, that the round stake with the blazes and pencil marks is in the same place in which the surveyor set the original post for corner No. 3, and as follows:

"Q. Describe the manner in which the monuments were set. A. We drove down a stake here [indicating on map], and piled a pile of rock around it; the same with this stake here, and the same with No. 3, and the same with No. 4."

After he had testified on cross-examination that the original monument which marks corner number 4 of the Kokomo claim, which the field notes of the Fortune claim declare bears north 2 degrees 5 minutes east 196 feet from corner No. 4 of the Fortune, is still standing, and after he had testified that, when the survey of the Fortune was made, the surveyors measured the distance from corner No. 3 to two stumps near it and blazed them, he was asked on cross-examination, "Did they measure the distance from that corner No. 4 at the time they set it in the patent survey to corner No. 4 of the Kokomo?" and the court sustained an objection to the question, and refused to permit the witness to answer it. The fact was that if corner No. 4 of the Fortune was 196 feet distant from corner No. 4 of the Kokomo, then that corner was

about 300 feet from the place where the defendant claimed, and the courses and distances located corner No. 3, and about 325 feet from the round stake which this witness had testified marked that corner. Hence, if the surveyors measured the distance from corner No. 4 of the Fortune to corner No. 4 of the Kokomo, that fact tended much more strongly to show that McNeece was mistaken in his testimony to the effect that the round stake was at the location of the original monument than if the surveyors had simply calculated that distance. Many arguments are urged upon us by counsel for the plaintiff for the purpose of sustaining this ruling. They say that permission to answer this question was discretionary with the court below, and that its refusal was no abuse of discretion; that the answer to the question would have established an affirmative defense; and that the refusal to permit the introduction of the answer was not prejudicial to the defendant because it might have made the owner of this property its own witness and then have asked him the same question; and that in any event the expected testimony was only cumulative. But a fair and full cross-examination of a witness upon the subjects of his examination in chief is the absolute right, and not the mere privilege, of the party against whom he is called, and a denial of this right is a prejudicial and fatal error. It is only after the right has been substantially and fairly exercised that the allowance of cross-examination becomes discretionary with the trial court. Gilmer v. Higley, 110 U. S. 47, 50, 3 Sup. Ct. 471, 28 L. Ed. 62; Chandler v. Allison, 10 Mich. 460, 473; Heath v. Waters, 40 Mich. 457, 471; Sperry v. Moore's Estate, 42 Mich. 353, 361, 4 N. W. 13; Martin v. Elden, 32 Ohio St. 282, 287; Wilson v. Wagar, 26 Mich. 452, 456, 458; Reeve v. Dennett, 141 Mass. 207, 6 N. E. 378; Taggart v. Bosch (Cal.) 48 Pac. 1092, 1096; New York Iron Mine v. Negaunee Bank, 39 Mich. 644, 660; Jackson v. Feather River W. Co., 14 Cal. 19, 24; Wendt v. Chicago, St. P., M. & O. Ry. Co., 4 S. D. 476, 484, 57 N. W. 226.

The converse of this rule is equally controlling. In the courts of the United States the party on whose behalf a witness is called has the right to restrict his cross-examination to the subjects of his direct examination, and a violation of this right is reversible error. If the cross-examiner would inquire of the witness concerning matters not opened on the direct examination, he must call him in his own behalf. Houghton v. Jones, 1 Wall. 702, 706, 17 L. Ed. 503; Montgomery v. Ætna Life Ins. Co., 97 Fed. 913, 916, 38 C. C. A. 553, 557; Safter v. U. S., 87 Fed. 329, 330, 31 C. C. A. 1, 2; Mine & Smelter Supply Co. v. Parke & Lacey Co., 107 Fed. 881, 884, 47 C. C. A. 34, 36; McCrea v. Parsons, 112 Fed. 917, 919, 50 C. C. A. 612, 614; Merchants' Life Ass'n v. Yoakum, 98 Fed. 251, 260, 39 C. C. A. 56, 65; Sauntry v. U. S., 117 Fed. 132, 135, 55 C. C. A. 148, 151; Goddard v. Crefield Mills, 75 Fed. 818, 820, 21 C. C. A. 530, 532; 1 Greenleaf, Ev. § 445; 8 Enc. of Pl. & Prac. 104; Hopkinson v. Leeds, 78 Pa. 396; Fulton v. Bank, 92 Pa. 112, 115; People v. Edwards (Cal.) 73 Pac. 416; People v. Keith (Cal.) 68 Pac. 816; Stevens v. Walton (Colo. App.) 68 Pac. 834, 835; People v. McLean (Cal.) 67 Pac. 770, 771; Acklin v. McCalmont Oil Co. (Pa.) 50 Atl. 955, 956; State v. Hawkins (Wash.) 67 Pac. 814; Bowsher v. Chicago, B. & Q. R. Co. (Iowa) 84 N. W. 958,

960; Missouri Pac. R. Co. v. Fox (Neb.) 83 N. W. 744, 752; Boucher v. Clark Pub. Co. (S. D.) 84 N. W. 237, 240; Stubbings v. Curtis (Wis.) 85 N. W. 325, 327; Lake Erie & W. R. Co. v. Miller (Ind. App.) 57 N. E. 596, 598; State v. Savage (Or.) 60 Pac. 610, 615; Baker v. Sherman (Vt.) 46 Atl. 57, 62; Pennsylvania Co. v. Kennard Glass & Paint Co. (Neb.) 81 N. W. 372, 376, 377; Posch v. Southern Electric R. Co., 76 Mo. App. 601; People v. Dole (Cal.) 55 Pac. 581, 585, 68 Am. St. Rep. 50; State v. Ballou (R. I.) 40 Atl. 861, 862; Fisher v. Porter (S. D.) 77 N. W. 112, 114; State Bank v. Waterhouse (Conn.) 38 Atl. 904, 908, 66 Am. St. Rep. 82; East Dubuque v. Burhyte (Ill.) 50 N. E. 1077, 1078; Ernst v. Estey Wire-Works Co. (Sup.) 46 N. Y. Supp. 918, 920; Thalheim v. State (Fla.) 20 South. 938, 946; Devine v. Railway Co. (Iowa) 69 N. W. 1042; Crenshaw v. Johnson (N. C.) 26 S. E. 810.

The reason of the rule is that a witness during his cross-examination is the witness of the party who calls him, and not the witness of the party who cross-examines him. Wilson v. Wagar, 26 Mich. 457, 458; Campau v. Dewey, 9 Mich. 417, 418. The cross-examiner has the right to bind his opponent by the testimony of the witness upon cross-examination relative to every subject concerning which his opponent examined him in the direct examination. But he has no right to bind his opponent by the testimony of the witness during the cross-examination upon subjects relative to which his opponent did not inquire. If the cross-examiner would investigate these subjects by the testimony of the witness, he may and he must make him his own witness, and stand sponsor for the truth of his testimony. It is discretionary with the court to permit the cross-examiner to do this at the time he is conducting the cross-examination, because the time and the manner of the trial are within the discretion of the court. It is discretionary with the trial court to permit leading questions to be put to a hostile witness upon his direct examination. But in the federal courts the line of demarcation which limits a rightful cross-examination is clear and well-defined, and it rests upon the reason to which attention has been called. It is the line between subjects relative to which the witness was examined upon the direct examination and those concerning which he was not required to testify. It exists because within that line the party who calls the witness stands the sponsor for the truth of his testimony, while without that line he does not. It does not vary, at the discretion of the court, with any convenience or necessity of court or counsel, because no convenience or necessity can be conceived of which would not enable the cross-examiner to make the witness his own, and because to subject the rule to the discretion of the court or counsel is to abrogate it.

On the other hand, the right of cross-examination upon the subjects opened by the direct examination is invaluable, and it should be carefully preserved. Under the English and American systems of jurisprudence the opportunity to exercise the right of cross-examination is a condition precedent to the reception of the direct evidence of the witness. Heath v. Waters, 40 Mich. 457, 471; Sperry v. Moore's Estate, 42 Mich. 353, 361, 4 N. W. 13. The right of cross-examination is the great safeguard against fraud, false statements, and half truths resulting from statements of parts, and omissions of other parts, of

conversations and transactions, which are frequently more misleading and dangerous than direct falsehoods. It furnishes the cardinal and most effective means to discover and disclose the whole truth in all judicial investigations. It extends to the eliciting of every fact relative to the matters recited in the direct examination which either conditions, qualifies, or weakens the statements there made, or supplies any omission in the earlier testimony of the witness concerning the subjects there treated. Martin v. Elden, 32 Ohio St. 287; 1 Thompson on Trials, § 406. The testimony given by a witness on his cross-examination is the evidence of the party in whose behalf he is called, and not that of the party on whose account the cross-examination is conducted. The former, and not the latter, is bound by the evidence elicited upon the cross-examination. Wilson v. Wagar, 26 Mich. 457, 458; Campau v. Dewey, 9 Mich. 417, 418. Hence it is no answer to a refusal to permit a full cross-examination that the party against whom the witness was called to testify might have made him his own witness and then have propounded to him the questions to which he was entitled to answers upon the cross-examination. "No one is required to make his adversary's witness his own to explain or fill up a transaction he has partially explained already." He has the right to bind his adversary by the truth elicited from his own witness. Chandler v. Allison, 10 Mich. 460, 473; New York Iron Mine v. Negaunee Bank, 39 Mich. 644, 660.

Nor is it any answer to the refusal to permit a cross-examination of the character of that here in question that it would develop an affirmative defense. If upon the direct examination a witness is led to disclose a part of a single conversation or transaction the whole of which constitutes an affirmative defense or a counterclaim, that fact does not deprive the defendant of his right to prove the entire conversation or transaction by the same witness upon his cross-examination. Moreover, the rule which prohibits the proof of affirmative defenses upon cross-examination relates to those only which are pleaded by the party adverse to him who calls the witness. It never applies to a cross-examination by which the adverse party simply seeks to disprove, weaken, or modify the case against him which the witness himself has made. Wendt v. Chicago St. P., M. & O. Ry. Co., 4 S. D. 476, 484, 57 N. W. 226; Jackson v. Feather River W. Co., 14 Cal. 19, 24. The defendant in this case pleaded no affirmative defense and no counterclaim, and its aim upon the cross-examination was to disprove by the witness McNeece the case which that witness had made against it by requiring him to relate the entire transaction, a portion of which he had recited upon his direct examination. The rule which the plaintiff invokes here is inapplicable to the case in hand.

The testimony which the defendant sought to elicit was not cumulative, because no other witness testified, and no other knew, so far as this record discloses, whether or not the surveyors measured the distance from corner 4 of the Fortune to corner 4 of the Kokomo when they set the monuments. Nor, if it had been cumulative, would that fact have deprived the defendant of its right to elicit the testimony on a proper cross-examination from the plaintiff's witness for whose testimony the Fortune company stood sponsor. One is not deprived of his right of cross-examination by the fact that he may be able to obtain tes-

timony tending to establish the facts he seeks from his own witnesses. If he were, the right of cross-examination would in the large majority of cases cease to be. A party has the right, if he can do so by proper cross-examination, to prove the facts he relies upon by the cross-examination of the witness of his adversary, by whose testimony the latter is concluded, although he may be able to introduce other witnesses to establish the same facts.

None of the reasons why its witness should not have answered the question propounded to him which counsel for the plaintiff urged upon us commend themselves to our judgment. They had requested McNeece on his direct examination to describe the manner in which the monuments were set when the survey for the patent was made, and he testified to the method of the survey and to the setting of each of the four posts in its place. Upon cross-examination he testified, readily and without objection, about the setting of the posts and the measurements made by the surveyors, until he came to the question whose answer seemed likely to tend to weaken or disprove the case made by his direct testimony, and there he was stopped by the objection of counsel for the plaintiff. The question which he was asked related to the subject of his direct examination, to the res gestæ which he had in part there related, and it tended to qualify and weaken the case which his direct testimony had made. Under all the rules it fell far within the pale of the right of cross-examination, and the refusal of the court to permit the witness to answer it cannot be lawfully sustained.

Nor can counsel escape a reversal of the judgment below upon the theory that, although this ruling was erroneous, it was not injurious to the defendant, and that for two reasons: In the first place, it is the general rule of the federal courts that error produces prejudice, and that it cannot be disregarded unless it appears beyond a doubt that the error complained of did not prejudice and could not have prejudiced the rights of the party who assigns it. Boston & Albany Railroad v. O'Reilly, 158 U. S. 334, 337, 15 Sup. Ct. 830, 39 L. Ed. 1006; Deery v. Cray, 5 Wall. 795, 807, 18 L. Ed. 653; Gilmer v. Higley, 110 U. S. 47, 3 Sup. Ct. 471, 28 L. Ed. 62. In the second place, the presumption is that the answer to a question propounded would have been favorable to the party who asked it, that he would have followed the inquiry thus opened farther, and that his cause was prejudiced by the suppression of the investigation. Martin v. Elden, 32 Ohio St. 282, 287; Buckstaff v. Russell, 151 U. S. 626, 637, 14 Sup. Ct. 448, 38 L. Ed. 292; Atchison, Topeka & S. F. R. Co. v. Phipps, 125 Fed. 478, 480, 60 C. C. A. 314.

There is no escape from the conclusion that the ruling of the court which refused to permit the defendant to elicit an answer to the question he propounded upon cross-examination is reversible error. If there were doubt relative to the question concerning this cross-examination which we have been considering, the terse and lucid opinion of Mr. Justice Campbell regarding it in Chandler v. Allison, 10 Mich. 460, 473, would persuade. He said:

"Whenever an entire transaction is in issue, evidence which conceals a part of it is defective, and does not comply with the primary obligation of the oath, which is designed to elicit the whole truth. If the witness were, as he always may be, requested to state what he knows about it, he would

not do his duty by designedly stopping short of it. Any question which fills up his omissions, whether designed or accidental, is legitimate and proper on cross-examination. When the answers are given, the nature and extent of the transaction becomes known from a comparison of the whole, and each fact material to a comprehension of the rest is equally important and pertinent. A party cannot glean out certain facts which, alone, would make out a false account, and save his own witness from the sifting process by which only those omissions can be detected. There could be no such thing as cross-examination if such a course were allowed; no one could expose a fraudulent witness for his dishonest concealments; and every one who knew of such practices would be driven to the necessity of calling, in his own behalf, an adverse witness to show his own concealments, whom, if perjured, he could not impeach. The absurdity of such a process is too plain to need pointing out. No one can be compelled to make his adversary's witness his own to explain or fill up the transaction he has partially explained already."

The statutes of Colorado limited the width of the Fortune claim to 150 feet on each side of the center of the vein or crevice. 2 Mills' Ann. St. Colo. § 3149. After the owner of the claim had testified that the original post at corner 3 was located where the round blazed stake was standing, a point about 23 feet farther north than the location of that corner indicated by the remaining monuments and the courses and distances, and after he had testified that the corner posts placed at the time of the survey for patent were set at about the same places as the corner stakes driven at the time of the original location of the claim, and after he had testified to the location of his discovery shaft, counsel for the defendant offered in evidence the original location certificate of the claim, dated June 7, 1880, and two amended certificates, one dated December 22, 1881, and the other February 15, 1882, all signed by the witness, and these certificates were rejected upon the ground that they tended to contradict the terms of the patent. But the offer of these certificates was not made to contradict or vary any of the terms of the patent, but simply to weaken and rebut the case made by the witness who had, by his own testimony that the original monument which marked corner 3 was about 23 feet farther north than the description in the patent located it, raised an ambiguity which both parties were endeavoring to make certain by evidence. The amended location certificates made and signed by this witness and others within two months of the survey for patent, to which he had testified, recited, one that the locators claimed 1,500, and the other that they claimed 1,465, lineal feet along the Fortune lode, together with 150 feet on the north side and 150 feet on the south side of the middle of said vein at the surface, and all veins, lodes, ledges, or deposits, and surface ground within the lines of said claim 395 feet running north 88 degrees 30 minutes west (according to the December certificate), and north 88 degrees 48 minutes west (according to the February certificate), from center of discovery shaft, and 1,100 feet running south 88 degrees 30 minutes east (according to the December certificate), and 1,070 feet running south 88 degrees 48 minutes east (according to the February certificate), from the center of the discovery shaft. The difference in the courses recited in the two certificates was insufficient to affect their evidence, and it is plain that, if the line runing east from the center of the discovery shaft described in these certificates intersected the east line of the claim at a point about 175 feet south of the round stake, that fact would tend to prove that

the witness McNeece was mistaken in his testimony that this stake was at the place where the original monument was located, while, if that line would intersect the east line of the claim about 150 feet south of the round stake, that fact would tend to corroborate his evidence. The certificates were offered to establish the former fact, not to contradict, but to corroborate and sustain, the description in the patent and in the field notes, and to rebut the testimony of this witness by which the plaintiff was seeking to apply them to a tract of land which upon their face they did not describe. The evidence was competent and material for the purpose for which it was offered, and it should have been received.

The result of our examination of this record is that this case must be again tried. At the coming trial two important issues may be presented: First, whether or not the round stake stands in the same place in which the square carved post called for by the field notes as the mark of corner No. 3 was originally located; and, second, whether the defendant intentionally or innocently took ore from the plaintiff's claim. Upon the first issue the location of corners 3 and 4 by means of the monuments at corners 1 and 2 and the courses and distances described in the patent and in the field notes, run both forward and backward from corners 1 and 2, the relations of the disputed corners and lines upon the two theories advanced by the respective parties to the various ties and references in the patent and in the field notes of the Fortune claim, the testimony of the witnesses who knew the location of the original monuments, and other evidence which directly tends to prove or disprove the theory of either party, should be received. Upon the second issue evidence of the knowledge and information which the managing officers of the defendant had relative to the location of the disputed lines and corner before and during the removal of the ore, evidence of their relevant acts and omissions during this time, and testimony of their intent and purpose in taking the ore, will be competent evidence.

The measure of damages for the reckless, willful, or intentional taking of ore from the land of another without right is the enhanced value of the ore where it is finally converted to the use of the trespasser. The measure of damages for wrongfully taking ore from the land of another through inadvertence or mistake, or in the honest belief that one is acting within his legal rights, is the value of the ore in the mine. The wrongful taking of the ore, in the absence of all other evidence, raises a presumption of fact that the trespasser took it intentionally and willfully. This presumption, however, is a disputable one, which evidence may so completely overcome that it will become the duty of the court to instruct the jury that it cannot prevail. The trespasser may overcome it, and may limit the recovery against him to the lower measure of damages, by proof presented on behalf of the owner, or on his own behalf, that he took the ore unintentionally, in good faith, in the honest belief that he was lawfully exercising a right which he possessed. When this issue is presented for determination, the question is, did the trespasser take the ore from his neighbor's land recklessly, or with an actual intent to do so, or inadvertently or unintentionally, or in the honest belief that he was exercising his own right? If the former he was a willful trespasser, if the latter he was an innocent trespasser, within the meaning of the rule relative to the measure of damages. U. S. v. Homestake Min.

Co., 117 Fed. 481, 482, 485, 486, 54 C. C. A. 303, 304, 307, 308; Golden Reward Min. Co. v. Buxton Min. Co., 97 Fed. 413, 422, 38 C. C. A. 228; St. Clair v. Cash Gold Min. & Mill. Co. (Colo. App.) 47 Pac. 466, 468, 469.

The rules upon this subject have been again stated, because some discussion has arisen at the bar whether or not a jury may lawfully infer that a trespass was willful and intentional from the single fact that the trespasser failed to exercise ordinary care in ascertaining the limits of his victim's land or rights. Our answer is that the wrongful taking raises the presumption of an intentional and willful trespass, and that negligence in ascertaining the limits of the land or of the rights of the owner is competent evidence upon the issue. but that negligence which amounts to mere inadvertence, without evil intent or recklessness, is not in itself sufficient proof to sustain a finding of fraud, bad faith, willfulness, or evil intent in committing the trespass. In Durant Min. Co. v. Percy Consol. Min. Co., 35 C. C. A. 252, 253, 93 Fed. 166, 167, this court held that a jury was not required to find a trespass to be willful from the negligence of the trespasser in ascertaining the line between his own property and that of the owner whose ore he took; and we said, in the course of the discussion of that question, that "a jury may lawfully infer that a trespasser had knowledge of the right and title of the owner of the property upon which he entered, and that he intended to violate that right, and to appropriate the property to his own use, from his reckless disregard of the owner's right and title, or from his failure to exercise ordinary care to discover and protect them." It was not, however, our intention to hold that lack of ordinary care alone would justify a finding that a trespasser was guilty of that bad faith, fraud, knowledge, or intent which renders him liable for the higher measure of damages, or to go farther than to intimate that the negligence of the trespasser, like all his other acts and omissions, is competent evidence for the consideration of the jury in determining the real issue whether his trespass was intentional or reckless on the one hand, or inadvertent or innocent on the other. While mere negligence which is synonymous with inadvertence will not alone sustain a finding of willful trespass, one may be "so far negligent as to justify an inference that he acted knowingly and intentionally" and to warrant a jury in finding his trespass willful. Golden Reward Min. Co. v. Buxton Min. Co., 97 Fed. 413, 422, 38 C. C. A. 228, 238. An intentional or reckless omission to exercise care to ascertain the boundaries of his victim's land or rights, for the purpose of maintaining ignorance regarding them, or a reckless disregard of them, is as fatal to the claim of a trespasser to limit the recovery of damages against him to the lower measure as an intentional and willful trespass. These rules and principles, applied to the evidence to be produced upon the coming trial, will, we trust, result in a fair and impartial hearing of the issues presented, and a just and righteous judgment. The judgment below is reversed, and the case is remanded for a new trial.

HOOK, Circuit Judge (concurring). I concur in the result announced, and also in what is said in support thereof, excepting in one particular. I concur in the view that reversible error was committed in the

exclusion of the question propounded to the witness, McNeece on cross-examination. An authority directly in point is Eames v. Kaiser, 142 U. S. 488, 12 Sup. Ct. 302, 35 L. Ed. 1091. As applicable to this matter, it is said in the foregoing opinion that a fair and full cross-examination of a witness upon the subjects of his examination in chief is the absolute right, and not the mere privilege, of the party against whom he is called, and a denial of this right is a prejudicial and fatal error. To this I assent.

But it is also said:

"The converse of this rule is equally controlling. In the courts of the United States the party in whose behalf a witness is called has the right to restrict his cross-examination to the subjects of his direct examination, and a violation of this rule is reversible error."

I am unable to agree that this is a correct statement of the law. The questions presented by the record in the case before us do not require any expression as to what is said to be the converse of the rule which is actually applied and enforced, but inasmuch as it appears in the foregoing opinion, and a similar difference of opinion arose in Balliet v. United States (decided at this term) 129 Fed. 689, it is not inappropriate that my position in respect thereto be definitely stated.

It is undoubtedly the settled rule in the courts of the United States that the right of cross-examination of a witness is limited to the subjects of his direct examination. This rule finds adequate support in Railroad v. Stimpson, 14 Pet. 448, 461, 10 L. Ed. 535, and in Houghton v. Jones, 1 Wall. 702, 706, 17 L. Ed. 503. Moreover, with some few exceptions, the rule prevails in all of the states. But from this rule is deduced the conclusion, to which I am unable to assent, that, if a trial court fails to confine the cross-examination of a witness to matters concerning which he testified in his principal examination, prejudicial and fatal error is committed. The position of Judge THAYER and the writer of this opinion is that, after a cross-examining party has been accorded all of his rights as limited by the rule of Railroad v. Stimpson and Houghton v. Jones, supra, whether the cross-examination may then take a wider scope or latitude is generally a matter within the sound discretion of the trial court, and error is not committed unless such discretion is abused. This position finds overwhelming support in the decisions of almost every court of last resort in the United States, in the views of the text-writers, in the everyday proceedings of trial courts, and in the general concurrence of the bar. That a trial court is given a broad discretion in controlling the latitude of a cross-examination has become an axiom of the practice. In the exercise of that discretion within its legitimate scope, no error, reversible or otherwise, can be committed. It may not be said that a court is possessed of a discretion to commit error. The doing of whatever under the law it has the power to do or the discretion to do is not erroneous. Error may be successfully predicated upon an abuse of discretion, but not upon the reasonable exercise thereof. It may be safely asserted that, in nearly every case in which the rule that a cross-examination is limited to the subjects of the examination in chief is declared, the appellant was pressing for a latitude which the court in its discretion declined to allow, and that in most of the others there appeared to be such an abuse

of discretion as constituted reversible error. It rarely happens that a reversal is awarded because of a mere latitude of cross-examination, if the subjects thereof were pertinent to the issues. That there is a broad field of discretion between the limits of the affirmative, positive rights of a cross-examining party on the one side, and the line of abuse and injustice upon the other is indisputable.

In Rea v. Missouri, 17 Wall. 532, 542, 21 L. Ed. 707, it was said:

"Still, where the cross-examination is directed to matters not inquired about in the principal examination, its course and extent is very largely subject to the control of the court, in the exercise of a sound discretion, and the exercise of this discretion is not reviewable on writ of error."

In Wills v. Russell, 100 U. S. 621, 626, 25 L. Ed. 607, the cases of Railroad v. Stimpson and Houghton v. Jones, supra, which hold that a cross-examination is limited to matters stated in the examination in chief, are cited and approved, but it is expressly said that they do not decide the converse of the proposition. The court, speaking through Mr. Justice Clifford, said:

"It has been twice so ruled by this court, and is undoubtedly a valuable rule of practice, and one well calculated to promote regularity and logical order in jury trials; but it is equally well settled by the same authorities that the mode of conducting trials, and the order of introducing evidence, and the time when it is to be introduced, are matters properly belonging very largely to the practice of the court where the matters of fact are tried by a jury. Both of the cases referred to by the plaintiffs show that the judgment will not be reversed merely because it appears that the rule limiting the cross-examination to the matters opened by the examination in chief was applied and enforced; but those cases do not decide the converse of the proposition, nor is attention called to any case where it is held that the judgment will be reversed because the court trying the issue of fact relaxed the rule and allowed the cross-examination to extend to other matters pertinent to the issue. Cases not infrequently arise where the convenience of the witness, or of the court, or the party producing the witness, will be promoted by a relaxation of the rule, to enable the witness to be discharged from further attendance; and, if the court in such a case should refuse to enforce the rule, it clearly would not be a ground of error, unless it appeared that it worked serious injury to the opposite party."

In Davis v. Coblens, 174 U. S. 719, 726, 19 Sup. Ct. 832, 835, 43 L. Ed. 1147, it is said:

"Thereupon defendant's counsel cross-examined him at great length, against the objection of plaintiffs, regarding his business of buying and selling real estate, and the extent of it and character. The ruling of the court permitting the cross-examination is assigned as error. We see no error in it. The question of plaintiffs' counsel was a general one, and opened many things to particular inquiry. The extent and manner of that inquiry was necessarily within the discretion of the court, even though it extended to matters not connected with the examination in chief. In Rea v. Missouri, 17 Wall. 532 [21 L. Ed. 707], it was said: 'Where the cross-examination is directed to matters not inquired about in the principal examination, its course and extent are very largely subject to the control of the court, in the exercise of a sound discretion, and the exercise of that discretion is not reviewable on a writ of error.'"

In Homestake Min. Co. v. Fullerton, 69 Fed. 923, 16 C. C. A. 545, this court said:

"Trial courts should be allowed a liberal discretion in determining the latitude to be given to a cross-examination, and particularly in determining the form in which questions should be propounded to a witness which are simply

designed to impeach his credibility. We are not prepared to say, therefore, that the trial court exceeded its discretionary powers in sustaining the objection to the several questions above quoted."

The doctrine was again referred to with approval by this court in Sauntry v. United States, 117 Fed. 132, 135, 55 C. C. A. 148.

In Seymour v. Lumber Co., 58 Fed. 957, 7 C. C. A. 593, it was said by the Circuit Court of Appeals of the Sixth Circuit:

"The course and extent of cross-examination, when directed to matters not inquired about in the principal examination, is very largely subject to the control of the court, in the exercise of a sound discretion, which is not reviewable on writ of error."

As illustrative of another phase of the same doctrine, Judge Taft said, concerning the refusal of a trial court to allow a re-examination of a witness:

"This subject was collateral to the main issue, and largely within the discretion of the court." Sutherland v. Round, 57 Fed. 467, 6 C. C. A. 428.

In Hart v. Atlas Knitting Co., 77 Fed. 399, 23 C. C. A. 198, the Court of Appeals for the Second Circuit said:

"It is true that no issue was raised by the pleadings as to the cancellation of orders with other persons, but courts have universally recognized the necessity of leaving the course and extent of a cross-examination very largely to the discretion of the trial judge."

The extent to which a witness may be cross-examined is within the discretion of the trial court, and it will not be reviewed unless the discretion has been abused. Root v. Railway, 183 Mass. 418, 67 N. E. 365; State v. Haab, 105 La. 230, 29 South. 725; Pennsylvania Co. v. Newmeyer, 129 Ind. 401, 28 N. E. 860; Hanchett v. Kimbark, 118 Ill. 129, 7 N. E. 493; State v. Bunker, 7 S. D. 642, 65 N. W. 33; State v. Pfefferle, 36 Kan. 90, 12 Pac. 406; Wroe v. State, 20 Ohio St. 460; Hanoff v. State, 37 Ohio St. 178, 41 Am. Rep. 496; White v. McLean, 57 N. Y. 671; City v. Gavin, 182 Ill. 232, 54 N. E. 1035; Lesser v. Furniture Co., 68 N. H. 343, 44 Atl. 490.

The rule was interpreted by Mr. Justice Sharswood in Jackson v. Litch, 62 Pa. 455, as follows:

"A party will not be permitted to lead out new matter, constituting his own case, by the cross-examination of his adversary's witnesses. Ellmaker v. Buckley, 16 Serg. & R. 72; Floyd v. Bovard, 6 W. & S. 75; Mitchell v. Welch, 17 Pa. 339 [55 Am. Dec. 557]; Turner v. Reynolds, 23 Pa. 199. Yet I have not been able to find a single case in which this court has reversed on that ground. It has generally been considered as a matter within the sound discretion of the court below, and in Schnable v. Doughty, 3 Pa. 392, though the Supreme Court thought that the rule had been violated, they distinctly refused to reverse. In Helser v. McGrath, 52 Pa. 531, the present Chief Justice remarked: 'These rules, as well as all others on the order of examination of witnesses and the introduction of testimony, have for their object the eliciting of truth, and the preservation of the equality of the rights of parties in trials in courts. Much, however, must still be left to the discretion of the judge. Neither the rule nor the exception must be allowed, if it can be prevented, unduly to prejudice the parties. The exercise of a prudent discretion by the judge is the only guard against this in many cases. Although we will not reverse in this case for an excess of latitude in the cross-examination, because we do not discover the injury from it, yet we think it was very great, and beyond the limits of the authorities generally. Doubtless the learned judge thought he saw the propriety of allowing it, and we

cannot say he was wrong, for we have not his means of judging.' It may be concluded from these authorities that, in order to reverse, it must be an extreme case, in which discretion has been abused, and in which it is apparent that the party has been injured."

This case was cited and the doctrine reaffirmed in Bohan v. Avoca, 154 Pa. 404, 26 Atl. 604.

It is said in the concurring opinion in Balliet v. United States, supra, that, if the rule limiting a cross-examination to the subjects of the examination in chief is relaxed or suspended when the trial court is of the opinion that it is necessary or convenient to do so, the rule is abrogated and ceases to be a rule at all; that such discretion is not committed to a court. But there are other rules in the law of evidence equally well settled, the rigid enforcement of which is by universal consent committed to the discretion of the trial courts. Thus in Ballew v. United States, 160 U. S. 187, 193, 16 Sup. Ct. 263, 40 L. Ed. 388, the court recognized and applied the well-known rule that a re-examination of a witness should be confined to matters to which the cross-examination related, and that an attempt to draw out new matter is, in the language of that court, clearly improper. 1 Greenleaf on Evidence, § 467. Though this is a recognized rule of the law of evidence, nevertheless all will agree that its suspension or relaxation in actual practice is almost as frequent as the administration of the oath to witnesses.

Again, it is a general rule that leading questions on direct examination are not permissible. That rule was applied by this court in Parker v. Brown, 85 Fed. 595, 29 C. C. A. 357. But it was said by the Supreme Court in Railroad v. Urlin, 158 U. S. 271, 273, 15 Sup. Ct. 840, 39 L. Ed. 977, that the granting or refusal of permission to ask such questions is within the discretion of the trial court, and that there must appear a plain case of abuse of discretion in order to justify the claim that error was committed; and it was said by this court in Eli Mining & Land Co. v. Carleton, 108 Fed. 24, 47 C. C. A. 166, that an objection to a question as leading is "never regarded by an appellate court."

It seems that the true theory is that these rules are intended primarily to limit the positive rights of the parties when engaged in the examination or cross-examination of witnesses, but are not intended to impose an unyielding limitation upon the discretion of a court as exigencies arise during the progress of the trial. By denying to trial courts a discretion in the enforcement of these rules—and I do not conceive that there is any difference between them which is material to the matter under discussion—we would add immeasurably to that great mass of technicalities which unfortunately encroach upon, and not infrequently entirely obstruct, the channels of justice. The object of all evidence in courts of justice is that the truth may be elicited, and this is of much more importance, than the mere order in which the evidence is adduced or the latitude allowed in the examination of witnesses. I am of the opinion that when one of these rules of evidence is relaxed or suspended by a trial court, and its action in that regard is challenged on appeal, the appellate court does not proceed upon the assumption that reversible error was committed, but that, on the contrary, it is presumed that error was not committed, unless it clearly appears that the discretion of the trial court was abused.

THAYER, Circuit Judge (dissenting in part). I am unable to concur in the conclusion announced on all of the questions that are considered and decided in the foregoing opinion. I do not concur in the view that the instruction of the trial judge relative to the post at the corner No. 3 of the Fortune lode claim was an erroneous instruction. The patent granting the Fortune lode, and the original and amended field notes of the survey on which the patent was founded, were read in evidence, without objection; and it is conceded, in the foregoing opinion, that the case stands as though the field notes were written into the description of the patent. Therefore the patent declares that corner No. 3 of the claim as granted is marked by a post four inches square, four feet long, set two feet in the ground, and having the number of the corner and the number of the survey cut therein. When the boundaries of the claim were run, however, according to the courses and distances mentioned in the patent, no post whatever was found at corner No. 3 as thus located, but within 23 feet of that point, and to the northwest, a post was found which was squared on one side and surrounded by a mound of stones, and bore the number of the corner and the survey written thereon in pencil. One witness, who was present at the survey of the Fortune claim, testified that this was the very post which was erected by the surveyor to mark corner No. 3 when the claim was surveyed, and that it was at the point where the surveyor placed it. Several other witnesses, who lived in the vicinity and were familiar with the locality, gave evidence tending to show that the post had been standing in the same position since the date of the survey, and had been seen repeatedly by them since that time. One of these witnesses, a surveyor by profession, testified, in substance, that he had seen this post on several occasions since 1887, and had recognized it as the established corner of the Fortune claim by tying other surveys made by him to that corner, and that he had driven a nail into the post, to identify it, as early as 1887, and that he found the nail in the post as late as 1901, having tied other surveys to that corner in the meantime.

Now, on this state of facts, when the learned trial judge came to charge the jury, he instructed them as follows:

"The court instructs the jury that monuments control the courses and distances mentioned in a patent, and if the monuments called for in the patent or field notes of the original survey are found upon the ground, or supplied by proof of their former existence, then distances must be lengthened or shortened and courses changed to conform with the location of said monuments; and in this connection the court instructs you that a stake, such as described by the witnesses in this case as located on corner No. 3, is sufficient to meet the calls of the patent; and, if they believe from the evidence that such stake is at the place at which corner No. 3 was located by the deputy mineral surveyor in making survey for patent, then the jury may find that the line of the patent should be extended to said corner No. 3."

In the same connection he instructed the jury:

"That it is the lines actually run out and marked upon the grounds by the surveyor making survey for patent, when such lines can be identified, and not the lines which said surveyor reports in his field notes, which control and identify the granted premises. If, therefore, the jury believe from the evidence that the deputy mineral surveyor, in making survey for the Fortune patent, placed his monument marking corner No. 3 at the point where said monument is found to-day, and where the same is placed by plaintiff's maps

and plats, then your finding should be for the plaintiff; that it is the owner of the Fortune claim to corner No. 3 as indicated by the monument now existing upon the ground."

The trial judge declined to give an instruction in favor of the plaintiff in error which is quoted above in the majority opinion, and he also declined to give an instruction which was asked by the plaintiff in error to the effect that corner No. 3 of the Fortune lode mining claim should be re-established by running from corner No. 2 on the courses and distances given in the patent, "unless [the jury found] from a preponderance of the evidence that the stake as contended for by the plaintiff, and which now stands upon the ground, does comply with the description of said post as set out in the patent." In other words, plaintiff in error, who was the defendant below, asked the trial court, first, to permit the jury to determine whether the post standing upon the ground at corner No. 3 complied sufficiently with the description of the post at that corner as given in the patent, and, in the second place, to declare, as a matter of law, that the post did not so comply.

On the state of facts above narrated, I am of opinion that the trial court was fully warranted in instructing the jury, as it did in substance, that if the post found on the ground at corner No. 3 was at the place where the surveyor placed his monument at the time of the survey to mark corner No. 3 of the claim, then the existing post might be regarded as answering the calls of the patent, and that the boundary of the claim should be extended thereto. There would seem to be little justice in depriving the plaintiff below, who is the defendant in error here, of valuable property by adhering strictly to courses and distances, which are apt to be to some extent erroneous, if the jury were satisfied by reliable testimony, as they appear to have been, that the artificial monument found on the ground was in the exact spot where the surveyor had placed it to mark corner No. 3 at the time he surveyed the claim for patent. The patent and field notes showed that the corner in question had been marked at the time of the survey by an artificial monument, to wit, a post of a certain description; but when the corner was located by following courses and distances, no post whatever was found at that point, or evidence that one had ever been erected at that place. This fact alone created some uncertainty—a doubt as to the accuracy of the course. Near by, however, was found a monument, that had evidently been set by a surveyor, which corresponded generally with the monument called for in the patent. It was so near as to justify an inference that it was the post referred to in the patent, and that, as frequently happens in running lines over a rough country, the course and distance from corner No. 2 to corner No. 3 had been read erroneously. These facts, in my judgment, warranted the introduction of oral proof to the effect that the monument found on the ground was the one set by the surveyor, or was at the very spot where he had placed a post to mark the corner. Proof to this effect was in fact received, without objection from anybody that the reception thereof violated any rule of evidence, and it was ample to establish the fact which it was intended to establish. The doctrine announced in the foregoing opinion comes dangerously near declaring that if a monument set by a surveyor to mark the boundary of property is accidentally destroyed, or is not

described to a nicety, the owner loses his property, although he may be able to prove to a certainty exactly where the monument was set, or that the monument remains where it was placed by the surveyor but was not described accurately. I am unable to concur in this view.

Furthermore, I have not been able to conclude that a material or prejudicial error was committed by the trial court in refusing to permit the witness McNeece to answer the question, on his cross-examination, if, when the Fortune claim was surveyed, the surveyor measured the distance from corner No. 4 of that claim to corner No. 4 of the Kokomo claim, which distance, as the patent declared, was 196 feet on a certain course. Conceding that an answer to this question might have been properly allowed, it is a different question whether the court committed a reversible error in sustaining an objection to the interrogatory. The object which the plaintiff in error, who was the defendant below, had in view in asking this question, appears to have been to show that if the distance between these corners of the Kokomo and the Fortune was as specified—that is to say, 196 feet—then corner No. 4 of the Fortune would be located about 323 feet distant from the post which was found at corner No. 3, making the claim of excessive width; whereas if corner No. 4 of the Fortune was located according to this call of the patent—that is to say, 196 feet from corner No. 4 of the Kokomo—it would be in the neighborhood of 300 feet from corner No. 3 of the Fortune as located by following courses and distances, which the defendant insisted should be followed. In other words, the evidence tended, in some measure, to confirm the contention of the defendant below as to the proper location of corner No. 3, while it tended in some measure to overcome plaintiff's contention on the same point. But as I read the record, the fact which the defendant below wished to establish was conclusively shown afterwards, by the testimony of a surveyor who had measured the distance in question, that if corner No. 4 of the Fortune was located 196 feet distant from corner No. 4 of the Kokomo, then it would be at a point 328 feet distant from the post which, as the plaintiff claimed, was set to mark corner No. 3 of the Fortune. There seems to have been no substantial controversy on this point, so that it is difficult to see in what manner the defendant below was prejudiced by the refusal to allow McNeece to answer the question if the distance between the two corners was measured. The fact which the defendant wished to establish, and from which it desired to draw inferences, was established by authentic testimony, and does not seem to have been seriously disputed. I am of opinion, therefore, that it is overtechnical, unnecessary, and unwise to hold that the refusal of the trial court to permit McNeece to answer this particular question on his cross-examination, was a material error.

Incidentally, the foregoing opinion contains the statement—although the case at bar does not seem to involve a discussion or decision of that question—that "the party on whose behalf a witness is called has the right to restrict his cross-examination to the subjects of his direct examination, and a violation of this right is reversible error." This statement, besides being unnecessary, is, in my judgment, erroneous, in that it states the rule too broadly, and is calculated both to mislead practitioners and cause them to sue out writs of error on insufficient grounds. While it is true that it is customary in the federal courts to limit the

cross-examination of a witness to matters inquired of in chief, yet it is not true that every relaxation of this rule constitutes a reversible error. As Mr. Justice Clifford well observes in Wills v. Russell, 100 U. S. 621, 626, 25 L. Ed. 607:

"Cases not infrequently arise where the convenience of the witness or of the court or the party producing the witness will be promoted by a relaxation of the rule, to enable the witness to be discharged from further attendance: and, if the court in such a case should refuse to enforce the rule, it clearly would not be a ground of error, unless it appear that it worked serious injury to the opposite party."

No federal case has been cited, and none, I apprehend, can be found, where the judgment of a trial court has been reversed solely because a question was asked of a witness on cross-examination about a matter not inquired of in chief. The cases cited in support of the doctrine announced in the foregoing opinion are those where a litigant was complaining in the appellate court because the trial court did not permit a witness to testify on cross-examination about matters to which he had not been interrogated in chief, and the rulings were upheld. Trial judges will often find it to be convenient, and even necessary, to permit a witness to be asked a question or questions on cross-examination relative to a subject about which he has not testified on his direct examination. They must of necessity exercise some discretion on such occasions, and the true doctrine is, in my opinion, that a judgment will not be reversed on appeal because of some relaxation of the general rule, unless the trial court abuses its discretion and permits a witness to be interrogated on his cross-examination about matters not gone into in chief, when there was no reasonable excuse for so doing, and when it is apparent that the opposite party was thereby prejudiced.

I have not been able to conclude that the exclusion of the location certificates was such an error as warrants a reversal of the judgment. It is conceded by learned counsel for the plaintiff in error that the location certificates cannot be introduced for the purpose of contradicting the patent as to the area of the claim, or in any other respect, and such is clearly the law. Doe v. Waterloo Mining Co. (C. C.) 54 Fed. 935, 940; Waterloo Mining Co. v. Doe, 27 C. C. A. 50, 82 Fed. 45; Golden Reward Mining Co. v. Buxton Mining Co. (C. C.) 79 Fed. 868, 874; Lindley on Mines (2d Ed.) § 778. But it is claimed, as I understand, that the location certificates contained an important admission on the part of McNeece, who was one of the locators, which tended to rebut his statement that the post found on the ground at corner No. 3 of the claim was where it was originally located by the surveyor. The admission, as I understand, is contained in the first paragraph of the amended location certificate, which declares, in substance, that McNeece and others had made a location by right of discovery, in compliance with the act of Congress and the local customs, claiming 1,500 linear feet on the Fortune lode vein "along the vein thereof with all its dips, angles and variations as allowed by law, together with 150 feet on each side of the middle of said vein at the surface so far as can be determined from present developments * * * within the lines of said claim 395 feet running N. 88° 30′ W. from center of discovery shaft and 1105 feet running S. 80° 30′ E. from center of discovery shaft." It is said that the

course of the center line of the vein as thus given corresponds with the course given in the patent from corner No. 2 to corner No. 3, the two lines being practically parallel, and that the center line of the vein projected would intersect the east end line more than 150 feet south of the post found at corner No. 3, which the plaintiff below claimed to be the true corner as actually located by the surveyor. It will be observed, however, from the language employed in the location certificate, "so far as can be determined from present developments," that when this location certificate was prepared the course of the vein—that is to say, the middle of the vein at the surface—could only be approximately determined. So far as developments at that time had disclosed, the middle thread of the vein was believed to be about parallel with the line from corner No. 2 to corner No. 3. It is quite apparent, from the location certificate, that McNeece and his fellow locators intended to claim 150 feet on each side of the center of the vein at the surface, wherever subsequent developments might prove the center line to be. He or the surveyor supposed at the time the course of the vein to be about N. 88° 30′ W. from the center of the discovery shaft. I fail to see that the fact that this center line of the vein, as described by the location certificates, intersects the east end line of the claim more than 150 feet south of the post, was entitled to any greater significance, or that it gave any increased weight to the fact, which was not denied, that the line drawn from corner No. 2 to corner No. 3 of the claim, following courses and distances, established corner No. 3 about 23 feet south of the post which was found on the ground. The actual course of the vein was founded on supposition largely. As the location certificates show, it was believed to be about parallel with the north side line as the claim had been surveyed, and it was so described probably without any survey of the center line of the vein at the surface because it could not be accurately determined. The real point in dispute between the parties, as it seems to me, was whether the post which was found at the corner No. 3 was at the spot where the surveyor placed it to mark the corner, and that issue, in my judgment, was fairly tried.

I concur in what is said in the foregoing opinion concerning the proper rule for the admeasurement of damages.

BALLIET v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. March 21, 1904.)

No. 1,886.

1. CRIMINAL LAW—WITNESSES—EXAMINATION—NOTICE TO ACCUSED.
Since Rev. St. U. S. § 1033 [U. S. Comp. St. 1901, p. 722], providing that a person indicted for treason or a capital offense shall be furnished with a list of witnesses, to be produced three days before the trial on the indictment for treason and two days before the trial of any other capital cases, limits such right to trials for treason and capital offenses, it impliedly authorizes the examination of witnesses in trials in the federal

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¶ 1. See Criminal Law, vol. 14, Cent. Dig. §§ 1420, 1422.

courts for lesser crimes without such witnesses being previously disclosed to accused.

2. SAME—FEDERAL COURTS—STATE LAW—ADOPTION—PRACTICE—CUSTOM.
A federal court in 1859 adopted certain chapters of the Code of the state in which it was sitting relating to criminal procedure, requiring the names of all witnesses, on whose evidence the indictment is found, to be indorsed on the indictment, and providing that the county attorney should not introduce any witness who was not examined before a committing magistrate or the grand jury, etc. In 1893 the practice in such court was changed so as to authorize the government to introduce testimony of witnesses other than those whose names were indorsed on the indictment, without giving previous notice to accused. *Held*, that a defendant subsequently indicted was not entitled to claim the benefit of the former practice.

3. APPEAL—ASSIGNMENTS OF ERROR—OBJECTIONS TO TESTIMONY.
Where neither the assignment of errors nor the brief of counsel on appeal quotes the substance of testimony objected to, in full, as required by Court of Appeals rules 11 and 24 (89 Fed. vii, xi, 32 C. C. A. xiv, xxiv), and the pages of the record where the testimony is reported are not referred to, such objections will not be reviewed.

SAME—BILL OF EXCEPTIONS—EXHIBITS—OBJECTIONS.
Where objections to the admission of written and printed exhibits are relied on on appeal, it is improper to describe them in the bill of exceptions merely by date and general import, but they should be set out in full at the places where they appear to have been offered and read.

5. USE OF MAILS—SCHEME TO DEFRAUD—EVIDENCE—LETTERS—ADVERTISING MATTER.
Since, in a prosecution for use of the mails in furtherance of a scheme to defraud, in violation of Rev. St. U. S. § 5480 [U. S. Comp. St. 1901, p. 3696], by inducing the public to purchase worthless mining stock, the gist of the offense is fraud, letters and telegrams principally written by defendant, showing that he exercised absolute control of a mining company, the stock of which he was engaged in selling, some of such letters containing false and fraudulent representations inducing a sale of stock, and other false and fraudulent advertisements in newspapers and magazines, printed as news and paid for at high rates as advertisements, which pretended to give a true account of defendant's achievements as a mining expert, and calculated to deceive the public, were admissible.

6. SAME—WITNESSES—DEFENDANT—CROSS-EXAMINATION—MATERIAL MATTERS—FAILURE TO EXPLAIN—PRESUMPTIONS.
Where, in a prosecution for using the mails with intent to defraud, defendant became a witness in his own behalf, as authorized by Act March 16, 1878, c. 37, 20 Stat. 30 [U. S. Comp. St. 1901, p. 660], providing that a person charged with an offense shall at his own request, but not otherwise, be a competent witness, and that his failure to make such request shall not create any presumption against him, an instruction that, defendant having gone on the stand, if he had not fully explained or had not explained matters material to the issues which were naturally within his knowledge, the jury might consider such failure as a circumstance tending to show that the facts, if explained, would bear out the contention of the government, and his failure to explain them, or give a truthful explanation, was against him, was erroneous as misleading, and as placing an undue burden of proof on defendant.

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

F. W. Lehmann (S. F. Balliet, on the brief), for plaintiff in error.
Lewis Miles, U. S. Atty., for defendant in error.

Before SANBORN, THAYER, and HOOK, Circuit Judges.

THAYER, Circuit Judge, delivered the opinion of the court.

This is a criminal action which was brought by the United States against Letson Balliet for an alleged violation of section 5480 of the Revised Statutes of the United States [U. S. Comp. St. 1901, p. 3696]. As no questions are raised in this court respecting the sufficiency of the indictment, it will suffice to say, generally, that two indictments were found against Letson Balliet, the plaintiff in error, which were subsequently consolidated for trial; that the indictments charged, in substance, that Letson Balliet, the plaintiff in error, had devised a scheme and artifice to defraud certain persons, which was to be consummated by opening correspondence with them by means of the United States mail; that his scheme was to pretend that he was the owner of the White Swan Gold Mine, located at Baker City, in the state of Oregon, and to induce persons to subscribe and pay for stock in said mines by false representations as to the richness, value, condition, and output of the mines, with intent to convert the money so obtained from the sale of stock to his own use; and that in furtherance of such scheme he deposited various letters, circulars, newspapers, etc., in the mail, which were addressed to certain persons, all of which contained various false representations concerning the value and condition of the mines, that were known to him at the time to be untrue. The trial of the consolidated indictments resulted in the production of a great mass of evidence, oral and written, which tended to support the charge, and on the strength of which the accused was ultimately convicted.

In this court the accused seeks to obtain a reversal of the judgment below, because the names of certain witnesses who were allowed to testify in behalf of the government were not indorsed on the indictments prior to the trial, and because no notice was served upon the accused, in advance of the trial, that such persons would be produced as witnesses against him, also because incompetent testimony was introduced during the progress of the trial, and because the jury were misdirected. The record discloses that, by an order made by the District Court of the United States for the Southern District of Iowa in June, 1859, certain chapters of the Code of Iowa, relating to grand jurors and criminal procedure, were adopted and put in force in that District. Two sections of the local statute, which are now sections 5276 and 5373 of the Code of Iowa of 1897, that were so adopted and put in force, in substance, require the names of all witnesses on whose evidence an indictment is found to be indorsed thereon before it is presented in court, and also provide that the county attorney, in offering evidence in support of an indictment, shall not be permitted to introduce any witness who was not examined before a committing magistrate or the grand jury, and the minutes of whose testimony was not presented with the indictment, to the court, unless he shall have given the accused, at least four days before the commencement of the trial, a notice in writing stating the name, place of residence, and occupation of such witness, and the substance of what he expects to prove by him on the trial. It further appears that from and after the promulgation of the aforesaid rule, and up to the year 1893, it was the uniform practice in the federal courts for the Southern District of Iowa to indorse upon indictments found in those courts the names of witnesses who had testified before

the grand jury. In the year 1893, however, during the progress of a criminal trial in the United States Court for the Southern District of Iowa, it was decided that on the trial of a criminal case the United States could introduce testimony of witnesses, other than those whose names were indorsed on the indictment, without having given the four days' notice prescribed by the local statute; and continuously since that ruling was made it has been the custom and practice, in the trial of criminal cases in the Southern District of Iowa, to permit the United States to introduce in its testimony in chief, as witnesses, persons whose names had not been indorsed on the back of the indictment, and to do so without giving any previous notice whatsoever to the defendant. This practice, as the record discloses, has been uniform from the year 1893 down to the time when the trial in the case at bar took place.

In view of these facts, we conclude that the judgment below should not be reversed because some witnesses were allowed to testify on behalf of the United States whose names were not indorsed on the indictments, although no notice was given to the accused that such witnesses would be produced. Except when a person is indicted for treason or some capital offense (vide section 1033, Rev. St. U. S. [U. S. Comp. St. 1901, p. 722]), there is no provision found in the federal statutes requiring the accused in a criminal action to be furnished with a list of the witnesses who will be produced against him, or requiring the names of witnesses to be indorsed on the indictment; and the fact that a special provision is made for advising the accused of the names of witnesses who will be produced on trials for treason and other capital offenses warrants the inference that in prosecutions for other offenses against the laws of the United States it is unnecessary to advise the accused of the names of witnesses who will be sworn. The maxim, "Expressio unius est exclusio alterius," clearly applies. By virtue of section 1033 [page 722], supra, a person indicted for treason or a capital offense is entitled to be furnished with a list of witnesses to be produced, three days before the trial on an indictment for treason and two days before the trial in other capital cases, and, if the accused seasonably claims this right, it is error to put him on trial, and permit witnesses to testify against him, without furnishing him with a list. Logan v. United States, 144 U. S. 263, 304, 12 Sup. Ct. 617, 36 L. Ed. 429. But in the absence of some statute prescribing a contrary rule, there is neither error nor irregularity in permitting a witness for the government to be sworn in criminal cases, other than those above mentioned, whose name does not appear on the back of the indictment or has not been furnished to the accused. Thiede v. Utah Territory, 159 U. S. 510, 515, 16 Sup. Ct. 62, 40 L. Ed. 237. Waiving, on this occasion, any consideration of the question whether it was competent for the Circuit Court of the United States for the Southern District of Iowa to adopt a rule, as it appears to have done, which would operate to exclude as witnesses in criminal proceedings, other than capital cases, persons who were qualified to testify under the laws of the United States, because their names were not indorsed on the indictment or furnished to the defendant, we are of opinion that, even if it was competent for the court to prescribe such a rule, the rule was practically abrogated and annulled, nearly 10 years before the case at bar was tried,

by the same court which prescribed it, by the adoption of a contrary practice and by an uniform adherence to the contrary practice. The first ground of reversal is therefore untenable, and must be overruled.

The errors that are assigned because of the admission of incompetent evidence relate to two kinds of testimony: First, to oral testimony; and, second, to written and printed exhibits, consisting of letters, telegrams, circulars, and publications in various newspapers, which the defendant had caused to be printed and distributed by means of the mail. In so far as the assignments are addressed to oral testimony which was received on the trial, they will be ignored, because they are not assigned in conformity with rules 11 and 24 of this court (89 Fed. vii, xi, 32 C. C. A. xiv, xxiv), to which we have frequently alluded. Neither in the assignment of errors nor in the brief of counsel is the substance of the objectionable testimony quoted in full, as the rules require, nor are we referred to the pages of the record where the testimony is reported, so that we can find it conveniently without loss of time, and ascertain if a seasonable objection in due form was interposed when it was offered. Where this is not done, and the record, as in the present case, is lengthy, we will not consider objections to the admission or exclusion of oral testimony, as we have frequently decided. Lincoln Savings Bank & Safe-Deposit Co. v. Allen, 27 C. C. A. 87, 82 Fed. 148; City of Lincoln v. Sun Vapor Street Light Co., 8 C. C. A. 253, 59 Fed. 756; United States v. Indian Grave Drainage District, 29 C. C. A. 578, 85 Fed. 928. If counsel will not take the trouble to state the full substance of evidence which they claim to have been erroneously admitted, and point out the pages in the record where it can be found and examined, we may well assume that the alleged error is not material, and accordingly ignore it.

Concerning the written and printed exhibits which, as the plaintiff in error claims, were erroneously admitted in evidence, it is to be observed, in the first place, that some of them are not set out in full in the bill of exceptions, and, in the second place, that the objections which were made to the admission of all the exhibits were couched in the most general terms, the objection being that they were "incompetent, irrelevant, and immaterial." None of the exhibits are copied in the bill at the places where they appear to have been offered and read, but they are found elsewhere; some of them are copied in part only, while others are not copied even in part, but are described merely by their date and general purport. This method of preparing a bill of exceptions is subject to grave criticism, and the practice of making up a bill in that form ought to be discouraged, since it renders it impossible for an appellate court to determine readily what evidence was in fact admitted, what was its precise nature, and what may have been its bearing upon the issues in the case. Waiving these objections to the bill of exceptions, however, and conceding that the question whether these exhibits were properly admitted in evidence is before us in such a form that we can consider it, we have concluded that the question must be answered in the affirmative. The letters and telegrams in question were principally written by the defendant himself. They showed that he exercised absolute control over the affairs of the White Swan Mines Company, Limited, whose stock he was engaged in selling. They further

showed the manner in which he conducted the business of that company, and the use that he made of the money which he received from the sale of its stock. Some of the letters also contained representations that were made by the defendant for the evident purpose of inducing the sale of its stock. The other exhibits consisted principally of reports made by the defendant to stockholders of the White Swan Mines Company, Limited, and articles which the defendant had composed and caused to be published in certain newspapers and periodicals, among others, in the Chicago Inter-Ocean, the City Argus, of San Francisco, Ainslee's Magazine, and a monthly publication termed "The Mining News." Of these newspaper articles it is sufficient to say that they were paid for at a high rate, as advertisements, out of the funds which the defendant realized from the sale of stock, although the articles did not appear to be advertisements, but purported to contain legitimate items of news which the proprietors of the several publications had gathered in the ordinary way. They were of an exceedingly laudatory character. Some of them referred to the defendant as "The Mining King of Eastern Oregon," "The Cecil Rhodes of America," "Oregon's Bonanza King," "The New Star in Mining Circles," etc. These articles also pretended to give a true account of the defendant's wonderful achievements and rapid rise to eminence as a mining expert and developer of mining properties; they also contained glowing accounts of the richness and future prospects of the White Swan Mines. In a word, the articles in question were well calculated to excite the cupidity as well as to deceive credulous and ignorant people, thereby inducing them to invest their means in purchasing the stock which the defendant was engaged in selling. The testimony in the case also shows that the defendant had been exceedingly industrious in giving a wide circulation to these articles by mailing them to hundreds, if not thousands, of persons. The case was tried below upon the correct theory, namely, that it was incumbent upon the government to show that the defendant had concocted a scheme to defraud which was to be consummated by the use of the mails—that is, by entering into correspondence through the mail with certain persons—and that in execution of the scheme he had deposited in the mail the letters which were referred to in the indictment. In other words, the case proceeded upon the theory that fraud was the gist of the offense charged in the indictment, and that it must be made to appear that the defendant's purpose from the beginning was to sell a worthless stock by means of false representations, or a stock which was less valuable than it was represented to be, and to appropriate the proceeds, or a part thereof, to his own use. This being so, we are of opinion that all of the exhibits above mentioned were properly received in evidence to develop the defendant's purpose. The jury were entitled to consider all of the defendant's acts and declarations in connection with the exploitation of the White Swan Mines, both before and after the letters mentioned in the indictment were deposited in the mail, for the purpose of determining with what intent the defendant had acted. In no other way could his purpose be established. Besides, the exhibits in question contained so much of exaggeration, and were put forth in such a form, as though they contained well authenticated items of news, and with such a reckless disre-

gard of the truth, as would fairly justify the inference that they were intended to deceive, and were acts done in furtherance of a scheme to defraud by means of the mail. We think the trial court would have erred had it excluded the several exhibits.

We have next to consider whether the jury were misdirected, and only one alleged error of this sort is called to our attention. At the conclusion of a somewhat lengthy charge, the trial judge made this statement, to which an exception was duly taken:

"It has been suggested that I have overlooked one thing. I may say you may consider, in determining the question, the fact that the defendant having gone upon the witness stand, if he has not fully explained, or has not explained matters which are material to the issues in this case, and which are naturally within his knowledge, you may consider that as a circumstance tending to show that the facts, if explained, etc., would bear out the contention of the government, and his failure to explain them or give a truthful explanation is against him."

We have not been able to conclude that this instruction states a correct rule of law, or that the giving of it was not a material error. As we interpret this instruction, it means that, inasmuch as the defendant had elected to testify in his own favor, if while on the stand he had not fully explained all matters and things material to the issues in the case which the jury might think were naturally within his knowledge, then the jury might conclude that the facts, etc., if he had indulged in an explanation concerning them, would have borne out the contention of the government—that is, shown that he was guilty—and that his failure to explain was against him; that is, would justify a conclusion of guilt. This rule of law would put the defendant in a criminal case in a peculiar attitude, for if he takes the stand as a witness he must perforce explain every fact and circumstance which has been put in evidence against him, as tending to establish guilt, which a jury may deem material, and such as he could explain, at the risk of having them conclude, because of his silence as respects such facts and circumstances, that they are true and that he is guilty. If a defendant in a criminal case desires to take the stand and contradict some particular fact or circumstance that has been testified to, he cannot safely do so for fear of raising a presumption of guilt by his failure to explain other facts and circumstances in evidence which the jury may happen to regard as material and may think the accused could explain. The federal statute (Act March 16, 1878, c. 37, 20 Stat. 30 [U. S. Comp. St. 1901, p. 660]) provides, in substance, that a person charged with an offense "shall at his own request but not otherwise, be a competent witness. And his failure to make such request shall not create any presumption against him." When the defendant in a criminal case, in compliance with this statute, waives his constitutional privilege by taking the witness stand, he occupies the attitude of any other witness, and may be cross-examined like an ordinary witness, and to the same extent. Fitzpatrick v. United States, 178 U. S. 304, 315, 20 Sup. Ct. 944, 44 L. Ed. 1078. The federal statute does not, like the statutes of some states (vide Rev. St. Mo. 1899, § 2637), expressly provide that the examination of the accused shall be limited to the matters testified to on his direct examination, but we apprehend that it should be so limited, because that is the general rule which obtains in the federal courts relative to the cross-

examination of all witnesses except, when the rule is relaxed, as it sometimes is, on grounds of convenience or necessity. Houghton v. Jones, 1 Wall. 702, 706, 17 L. Ed. 503; Wills v. Russell, 100 U. S. 625, 626, 25 L. Ed. 607; Montgomery v. Ætna Life Ins. Co., 38 C. C. A. 553, 97 Fed. 913; Goddard v. Crefield Mills, 21 C. C. A. 530, 75 Fed. 818; Safter v. United States, 31 C. C. A. 1, 87 Fed. 329. It is also doubtless true that, when a defendant in a criminal case takes advantage of the statute and testifies in his own favor, the government may comment on his testimony and draw inferences therefrom as freely as if he were an ordinary witness and not the accused. It is only where the accused fails to testify that the statute prohibits unfavorable comment and attempts to create a presumption against him because he has not done so. Conceding this much, we are nevertheless of opinion that the instruction in question went too far, in that it required the accused to explain every fact and circumstance which had been introduced against him, and gave to them additional probative force because he had not done so or attempted to do so. Furthermore, it left the jury at full liberty to determine what matters which had been given in evidence were "material to the issues in the case," without directions on that point, and equal liberty to determine what matters were "naturally within his knowledge" and susceptible of explanation. The testimony in the case had taken a very wide range and covered a considerable period of time. While on the stand some facts and circumstances that had been introduced in evidence may have been overlooked by the accused or by his counsel, and he may not have been interrogated with respect thereto for that reason, or they may have been regarded as of no importance, or the circumstances may have been of a character which admitted of no further explanation, being in themselves such circumstances as the jury could ignore or draw such inferences therefrom as they thought proper. And yet the instruction was of a nature which permitted the jury to draw unfavorable inferences against the accused, because in the course of his examination he had not alluded to every fact and circumstance already in evidence, and given an explanation thereof consistent with his innocence. We are satisfied that the instruction cast an undue burden on the defendant, and that it was also misleading. Moreover, we are not able to say with certainty, as we must be to uphold the verdict, that the defendant was not prejudiced by the instruction.

The judgment below is accordingly reversed, and the case is remanded for a new trial.

SANBORN, Circuit Judge (concurring). I concur in the result, and in the opinion in this case, with this exception: The opinion contains the statement that it is the general rule in the federal courts relative to the examination of all witnesses, except when the rule is relaxed, as it sometimes is, on grounds of convenience or necessity, that the cross-examination must be limited to the matters testified to upon the direct examination of the witness. I concede the general rule, but I do not understand that it is discretionary with the federal courts to relax the rule, on the ground of convenience or necessity, so far as to permit a cross-examiner to cross-examine a witness, produced by his opponent,

upon subjects not germane to those upon which he was examined in chief. Resurrection Gold Mining Co. v. Fortune Gold Mining Co. (C. C. A.) 129 Fed. 668; Houghton v. Jones, 1 Wall. 702, 706, 17 L. Ed. 503; Montgomery v. Ætna Life Ins. Co., 97 Fed. 913, 916, 38 C. C. A. 553, 557; Safter v. U. S., 87 Fed. 329, 330, 31 C. C. A. 1, 2; Mine & Smelter Supply Co. v. Parke & Lacy Co., 107 Fed. 881, 884, 47 C. C. A. 34, 36; 1 Greenleaf, Ev. § 445; Hopkinson v. Leeds, 78 Pa. 396; Fulton v. Bank, 92 Pa. 112, 115. A rule which may be relaxed by the court when in its opinion it is necessary or is convenient to relax it is no rule at all. Such an exception is the abrogation of the rule, because it leaves its controlling force and effect in every case to the discretion of the trial court. In my opinion the rule has not been so abrogated by the federal courts, and it ought not to be so destroyed. This rule rests upon a sound reason, which varies not, at the discretion of the court, by reason of convenience or necessity. It exists because a witness during his cross-examination is the witness of the party who calls him, and not the witness of the party who cross-examines. Wilson v. Wagar, 26 Mich. 452, 458; Campau v. Dewey, 9 Mich. 381. The cross-examiner has the right to bind his opponent by the testimony of the witness upon cross-examination relative to every subject concerning which his opponent examined him in the direct examination. But he has no right to bind his opponent by the testimony of the witness during the cross-examination upon subjects relative to which his opponent did not examine him. If he would examine the witness upon such subjects, he may and he must make him his own witness, and stand sponsor for the truth of his testimony. It is discretionary with the court to permit the cross-examiner to do this at the time he is conducting the cross-examination, because the time and the manner of the trial are within the discretion of the court. It is discretionary with the trial court to permit leading questions to be put to a hostile witness upon his direct examination. But in the federal courts the line of demarkation which limits a rightful cross-examination is clear and well-defined. It is the line between subjects relative to which the witness was examined upon the direct examination and those concerning which he was not required to testify. It exists because within that line the party who calls the witness stands sponsor for the truth of his testimony, while without that line he does not. It does not vary with any convenience or necessity of court or counsel, because no convenience or necessity can be conceived of which would not enable the cross-examiner to make the witness his own and take the chance of his testimony. For these reasons I adhere to the general rule upon this subject, but am unable to concede the correctness of the exception thereto stated in the opinion.

THE TRITON.

(Circuit Court of Appeals, First Circuit. February 4, 1904.)

No. 486.

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

A tug having two laden barges in tow, the entire tow being 2,300 feet long, undertook to pass through a narrow channel between two islands, instead of taking a safer course. After passing around a rock at some distance in front of the entrance of the channel, she was obliged to swing to port to make the entrance, and one of the barges struck a rock at one side of the entrance and was sunk. *Held* that, having exercised her option as to the course, she was bound to the strictest care, and must be charged with liability for the loss, in the absence of evidence to show that the barge was not properly following.

Appeal from the District Court of the United States for the District of Massachusetts.

Eugene P. Carver (Edward E. Blodgett, on the brief), for appellant.

Robert M. Morse and William M. Richardson, for appellee.

Before COLT and PUTNAM, Circuit Judges, and ALDRICH, District Judge.

PUTNAM, Circuit Judge. This is a libel against the steam tug Triton, alleging that she was negligent in rendering towage services, and claiming damages on that account. The decree of the District Court was for the libelant, and the claimant of the tug appealed.

On January 16, 1898, the tug left Clark's Point, below New Bedford, in Buzzards Bay, bound for Boston, with two coal-laden barges in tow. The barge immediately following the tug was the Pine Forest. The length of the entire tow was about 2,300 feet. Everything went well until near 4 o'clock in the afternoon. The weather was clear, with light winds, and with a very moderate set of the current. The normal rise and fall of the tide in Buzzards Bay is only about three feet. The tug, as usual, had the option of determining the courses, within certain reasonable limits. She might have gone to the westward of Cuttyhunk, where she would have had a clear seaway. Instead of that, she undertook to pass through the narrow channel between Pasque Island and Nashawena Island, known as "Quicks Hole." Lying outside of the entrance to Quicks Hole, and the distance therefrom of about the entire length of the tow, is Lone Rock, very nearly in the path of the tug if she had proceeded in a direct line from Clark's Point into the Hole. She might have passed this rock on her starboard, leaving it on the west, thus giving her a larger fairway and a more direct course into the Hole. She left it on her port—that is, on the east—which, as she made her courses, required her to change to her port on entering the Hole. Her course was so far to the westward of Lone Rock that the change which she was required to make involved a considerable sweep for herself and her tow. While

¶ 1. See Towage, vol. 45, Cent. Dig. §§ 11, 20.

it was not unusual to make these various courses, and the tug is not charged directly with fault on that account, yet, as she used her own option in reference thereto, the court is compelled to apply to her with great strictness the usual rules of diligence obligatory on a vessel of her class engaged in waters with which she is presumed to be familiar. Under the circumstances, if she had used the diligence she should have used, she would have passed her tow into the Hole with safety.

As, in passing Lone Rock, the tug swung her course to her port, this left the barges heading, or sagging down, towards the projecting rocky shoal, known as "North Rock," which marks the entrance to Quicks Hole on her starboard. The Pine Forest was wrecked; and it is claimed by the libelant that she was wrecked on what is known as the "Fourteen-Foot Spot," marking the extreme edge of this North Rock. On the other hand, the tug claims that the barge was wrecked on what is known as the "Felix Ledges," which are near the center of the channel after well entering the Hole. The Felix Ledges were not at that time shown on any chart, and had not been disclosed by any surveys of the United States. As the case stands, it can hardly be questioned that, if the barge struck there, the tug was not at fault. But, on the other hand, it can hardly be questioned, and, in fact, is apparently not questioned, that, if she struck on the "Fourteen-Foot Spot" on the North Rock, the decree of the District Court was correct so far as this particular point is concerned.

Another barge was wrecked on the Felix Ledges about the time this disaster occurred, and the two induced a survey by the United States. This disclosed two pointed rocks, or bowlders, which, according to the Coast Survey charts subsequently published and since in use, are 18 feet below the surface of the water at mean low tide. There are other rocks or bowlders between the two, or in their neighborhood; but, so far as the United States survey is concerned, none of them are so shoal as 18 feet, and, moreover, at the time of the wreck, the tide had not fully ebbed. There was an effort made by the Triton to prove that the United States charts are not correct, and that, at certain stages of the tide, there are only about 16½ feet over the Ledges. The District Court found, however, that there is so much water over them that the barge could not have impinged on them. On the whole, the evidence, including the official surveys, justifies this finding, and requires us to agree with it, and to determine that the wreck occurred at the so-called "Fourteen-Foot Spot."

Only one other proposition comes before us. It is claimed that the barge Pine Forest was in fault in not properly following the course of the tug. It is with extreme difficulty that a question of this character can be determined satisfactorily from contradictory proofs, especially when, as in the case at bar, the courts are not assisted by the opinions of well-qualified experts in reference thereto. This proposition, however, is easily disposed of on the well-known rule that in marine cases the judgment of the responsible parties exercised on the spot must ordinarily prevail. Capt. Chase of the tug testified as follows:

"Int. Do you have any signals for calling attention of the tow to their not steering properly? Ans. Yes, sir.

"Int. What are they? Ans. Several short quick whistles to pay attention.

"Int. You say you did not use those signals, or any signals, at that time? Ans. No, sir.

"Int. Why not? Ans. I supposed that the barge had plenty of room to come clear.

"Int. Then you considered that where she was was all right, did you? Ans. After we got by the point, I supposed she would come by all right. It seems, though, that she didn't."

Under the circumstances of the weather and the hour of day, there can be no question that Capt. Chase was at the time able to see and comprehend the situation perfectly. The facts stated by him, that he made no signal to the barge, and that he then supposed she had plenty of room to go clear, and that she would come by all right, make a practical verdict in reference to this proposition of the defense. It is clear that he, as master of the Triton, did not at that time charge the barge with not steering properly, and it is too late for the tug's representatives to do so now. Therefore, on both propositions, we come to the same practical conclusion as the District Court.

The decree of the District Court is affirmed, with interest, and the appellee will recover its costs of appeal.

THE PINE FOREST.

(Circuit Court of Appeals, First Circuit. March 29, 1904.)

No. 487.

1. SALVAGE—RAISING SUNKEN VESSEL—SERVICES RENDERED BY OWNERS OF VESSEL IN FAULT.

The raising of a sunken vessel is not a salvage service for which compensation can be collected, where the sole owners of the vessels employed in the raising were also the sole owners of the one through whose fault the sinking occurred.

2. SAME.

A barge sunk while in tow of a tug was raised and brought into port by other vessels owned by the owners of the tug. Subsequently the tug was libeled for the loss, and then filed a petition for limitation of liability, which prevailed. Afterward her owners brought suit to recover for salvage services rendered in raising the barge. The tug was held solely in fault for the sinking of the barge, and the damages exceeded her stipulated value, without taking into consideration the cost of salvage, and a decree was entered for such stipulated value. *Held* that, whatever may have been the rights of the owners of the tug with respect to salvage if they had surrendered her before performing the service, the proceeding to avail themselves of the limited liability statute, not having been begun until after the service was rendered, could not affect the application of the rule that a salvage reward cannot be claimed by the owners of the vessel through whose fault the services were rendered necessary.

Appeal from the District Court of the United States for the District of Rhode Island.

For opinion below, see 119 Fed. 999.

¶ 1. See Salvage, vol. 43, Cent. Dig. § 44.

Eugene P. Carver (Edward E. Blodgett, on the brief), for appellants.
Robert M. Morse and William M. Richardson, for appellee.

Before COLT and PUTNAM, Circuit Judges, and ALDRICH, District Judge.

PUTNAM, Circuit Judge. This appeal relates to a libel for salvage, following a wreck which occurred under circumstances shown in the record in The Triton, in which case we passed down an opinion and entered judgment on February 4, 1904. 129 Fed. 698. The libel in this case was dismissed by the District Court, and the libelants appealed to us. The Triton was a steam tug which had the barge Pine Forest in tow. The record stipulates into this case the proofs and proceedings in The Triton, where we found that the Pine Forest was wrecked, and that the tug, under her contract of towage, was liable for the damage arising therefrom. The amount now claimed is for raising the Pine Forest and bringing her into a port of refuge. It is agreed that we are to accept $8,750 as a fair value of the services, if they are to be recovered for in this proceeding. It was stipulated in The Triton that, aside from the $8,750 now in controversy, the damage to the Pine Forest and her cargo, for which the Triton was primarily responsible, amounted to $24,784.91. The items making up this total were stated in detail, and included repairs and refurnishings at the port of refuge, damage to the cargo, loss of freight, demurrage, loss of personal effects of the crew of the barge, and small incidental items. Therefore, if the amount now claimed is included with the stipulated damage to the barge and cargo, the total would be $33,534.91. It also appears in The Triton that her owners availed themselves of the provisions for limited liability contained in section 4283 of the Revised Statutes, and sequence; and, for that purpose, the value of their interest in accordance therewith was stipulated at $20,000. Consequently, damages were awarded at that amount, interest, and costs.

The barge was raised and brought into port, not by the Triton, but by the libelants, now the appellants, who were the owners of the Triton, or the representatives of those owners, and also the owners, or representatives of the owners, of the tugs and barges employed in the salving enterprise. Indeed, it is agreed that the libelant in The Triton is to be taken as the claimant in the case now before us, and that the libelants in the case now before us are to be taken as the claimants in the other suit and owners of the tug. The present libelants, however, undertake to make a distinction based on a claim that the employment of the Triton in the towage service for which she was held responsible was under a charter; but this is dismissed from our consideration by the fact that it appears, on cross-examination of the witness who testified that she was under charter, that it was not of the hull of the tug, and that during the towage service she remained under the control of her owners. It cannot be claimed on the proofs before us that her owners pro hac vice were other than the registered owners. Thus the legal identity of the parties in interest in the two litigations is established.

In The Glengaber, L. R. 3 A. & E. 534, 535, decided by Sir Robert Phillimore in June, 1872, a vessel was brought into a position of jeopardy by a steam tug, as in the case at bar. Another steam tug, the

Warrior, of which only a part of the owners were owners of the tug at fault, rescued the tow. It was held that the case was one of salvage. Sir Robert Phillimore concluded as follows:

"I know of no authority for the proposition that a vessel wholly unconnected with the act of mischief is disentitled to salvage rewards, simply because she belongs to the same owners as the vessel which has done the mischief."

It will be noticed that this expression ignored the fact, which was carefully stated in the report of the case, that only some of the owners of the Warrior were owners of the other tug; and the decision has been cited with apparent approval, either without reference to this distinction, or without following it out, by text-writers usually authoritative. Kennedy's Law of Civil Salvage, 74, 75; Carver's Carriage by Sea (3d Ed. 1900) 386, note e. This makes, apparently, a weighty body of authority, all resting on the proposition that we are to look at the conduct of the salving ship only, and that this identifies with her all who are connected with her, whether as officers, seamen, or owners. Nevertheless, this is certainly not now the law in England when the ownership is identical, as in the case at bar.

Authoritative English decisions later than The Glengaber, and also authoritative English text-writers, hold the rule which defeats salvage in the case before us. In The Glenfruin, 10 P. D. 103, decided in 1885, the salving vessel was expressly excluded on the ground of identical ownership with the vessel in fault; and The Cargo ex Laertes, 12 P. D. 187, 190, decided in 1887, laid down the same rule in positive terms. So in Carver's Carriage by Sea (3d Ed.) 386, at the same page where the note refers to The Glengaber, the learned author, who is accepted as high authority, adopts the rule of The Glenfruin; and the work entitled Abbott's Merchants' Shipping and Seamen (14th Ed. 1901), at page 975, says:

"The owners of a salving ship who are also the owners of the salved ship may obtain salvage remuneration from the owners of the salved cargo, provided the circumstances which caused the necessity for the salvage services do not amount to a breach of the contract of carriage between the ship's owners and the owners of the cargo which is on board the salved ship."

This is also accepted as the law in so accurate a work as Williams & Bruce, Admiralty Practice (3d Ed. 1902) 141. The Glenfruin has never been questioned in England by any text-writer, or, so far as the official reports disclose, by the Supreme Court of Judicature in any of its departments, by the Privy Council, or by the House of Lords. These authorities declare the right of the crew of the salving ship to salvage; but this, of course, avoids the difficulties of the case before us. To the same effect, The Clarita and The Clara, 23 Wall. 1, 19, 23 L. Ed. 146, referring to circumstances under which the peril to which a vessel may be exposed is caused by libelants who claim salvage reward, says that "to the rule that such libelants are not entitled to recover there are no exceptions." Therefore, in view of the fact that the parties are identical, as we have explained, the present libelants are positively barred by the authorities everywhere, unless relieved by the statutes of limited liability.

As already stated, the owners of the Triton availed themselves of those statutes, and damages were assessed against her to the full amount at which her liability was limited. Therefore her entire value was exhausted in the proceeding against her. In this connection dates become important, and they are as follows: The wreck occurred January 16th; the work of raising the Pine Forest commenced on January 18th, and was completed on February 27th; on March 5th, the Triton was libeled; and on March 10th, the application was made for a limitation of liability. In the succeeding April the present libel was filed. So it appears that all the services for which compensation is now claimed were performed prior to the application for limitation of liability. Thus the present condition is a complication of artificial results arising from a mere incidental order of succession of dates. If the owners of the Triton had appreciated that she would ultimately be found at fault by the court, they might have surrendered her before commencing the services for which compensation is now claimed, and thus, perhaps, they could have purged themselves, and entitled themselves to a salvage reward. Also, if the services now claimed for had been rendered by some one else than the owners of the Triton, the burden of them would have rested on the claimant of the Pine Forest, without any right of recoupment from the owners of the tug. As it stands, the owner of the barge is receiving $20,000, in addition to services of the value of $8,750, a total of $28,750, thus in excess of the amount at which the Triton was appraised. This is contrary to the underlying purpose of the statute of limited liability. Nevertheless, by force of the rules and authorities to which we will refer, this anomalous result cannot be avoided.

It is to be borne in mind that the claim asserted in this libel is for salvage. But according to the underlying rules of the admiralty law, and aside from the statutes of limited liability, it is clear that the services rendered by the libelants, inasmuch as they were the owners of the Triton, were not salvage services. The authorities are overwhelming that under those rules there can be no salvage reward to a vessel or individual with reference to a condition arising from the fault of that vessel or individual. This is not merely technical, but it is recognized everywhere as fundamental.

In stating this proposition, we must regard as ineffectual the suggestions on the one side and the other with reference to the nature of the alleged stipulations between the owner of the barge and the owners of the Triton, and of the conferences which occurred between them, as to the services which were rendered by the present libelants. Salvage does not ordinarily arise out of a contract, and the most formal agreements for salvage or rescue services do not bar the admiralty from reaching the merits, or from applying its fundamental rules when circumstances justify it. Presumably, at the time of these conferences, the libelants had no belief that the Triton was in fault, or that there was anything in the way of their recovering for the services which the conversations concerned, and to which the present litigation relates. Very likely, also, the owner of the Pine Forest had at that time no decided understanding otherwise. Nevertheless, as well observed by the learned judge of the District Court, this suit "must be determined

from the proof as to the things which were done"; that is, from the event. What we intend by this, a hypothetical illustration from a class of cases which are common will make clear. Two vessels are in collision; No. 1 is seriously damaged and No. 2 only slightly injured, or not injured at all. No. 1 appeals to No. 2 for assistance; and immediately from the decks of the two vessels, the masters agree as to a round sum to be paid for the assistance, if successful. All this is effectual if it is afterwards determined that No. 2 is not in fault, but it goes for nothing if it is finally settled that she was the guilty vessel. Therefore, as we have said, the conferences referred to are not of importance on the appeal before us.

We come to the precise proposition that, at the critical time, the relations of the Triton and the Pine Forest were such that, under the maritime law, no claim could arise on which the libel now before us, which asks salvage, can be based. The Triton was under a contract of towage. She was not released from that contract by the mere fact that the barge required assistance which, under ordinary circumstances, would entitle those rendering it to salvage compensation. The Carbonero, 106 Fed. 329, 333, 45 C. C. A. 314. Also, under all the authorities and on principle, a towage contract cannot be converted under the admiralty law into a salvage service under conditions brought about by the fault of the tug, as in the case before us. This is declared in nearly all the authorities we have cited, and emphatically in The Clarita and The Clara, 23 Wall. 1, 18, 19, 23 L. Ed. 146. A very late reaffirmance of the rule is found in The Duc D'Aumale (1904) P. 560.

These propositions are not dicta, nor limited to special circumstances. They are the logical results of proportions of maritime law, so plain that they need not be detailed, and all the text-writers of authority agree to them. We have no occasion now to discuss the conditions under which officers and crews can become salvors, because there are here no such conditions. The officers and crews of the rescuing tugs and barges were paid their ordinary wages, included in the $8,750. These rules of maritime law would so plainly bar the libelants from maintaining a libel for salvage as salvage that we would not have deemed it necessary to elaborate them, or cite authorities in reference thereto, except that they do not appear to have received special attention in their particular application to the case at bar. They dispose of this case, because, as we have said, it is strictly a libel for salvage.

Nevertheless, it is interesting and worth our while, in order to avoid any impression that we are disposing of this appeal on merely technical grounds, to pursue the relations of the parties to the controversy somewhat further. Section 4283 of the Revised Statutes [U. S. Comp. St. 1901, p. 2943] provides that the "liability of the owner" "shall in no case exceed the amount or value of the interest of such vessel and her freight then pending." If we had only that general declaration of the fundamental rule of adjustment, and the case was not merely a libel for salvage, but one which would enable us to make a complete disposition of all counterclaims and all equities pro and con, we might, perhaps, in the absence of authorities otherwise, administer the statute by holding that the owners of the Triton, in rendering services, in raising the Pine Forest, to the value of $8,750, should be equitably dis-

charged from liability to that extent, and that, in determining all the sums to be awarded against her and her owners, this $8,750 should be deducted; so that ultimately the statutory provision that the liability of owners should in no case exceed the amount or value of their interest could be literally, and also substantially, complied with. But, aside from the fact that the form of proceedings now before us could not, for the reasons we have stated, permit so broad an adjustment, the various statutes of limited liability have not been administered practically in that enlarged manner, and do not contain machinery adjusted thereto.

As sustaining this proposition, the claimant relies on The Benefactor, 103 U. S. 239, 245, 26 L. Ed. 351, where it is said that, in case of payment of a demand against a vessel before proceedings for limited liability are commenced, the court will refuse its aid in compelling return of the money received. This, however, is to be considered in connection with the later case of The City of Norwich, 118 U. S. 468, 6 Sup. Ct. 1150, 30 L. Ed. 134. What is to be met in the case at bar is not a simple proposition like that in The Benefactor, but the possibly logical result of the application of the statutes of limited liability in harmony with The City of Norwich, at page 493, 118 U. S., 6 Sup. Ct. 1150, 30 L. Ed. 134. Speaking of the options given the vessel owner, namely, one of surrendering the vessel and the other of an appraisal, this opinion says that the measure of liability is the same whichever course is adopted. It adds that this "enables the owner to lay out money in recovering and repairing the ship, without increasing the burden to which he is subjected." This has reference to repairs which might be made on the ship in fault before proceedings for limited liability are commenced; and, on broad principles, the owner of the offending vessel ought to be allowed, in the same way, to recover and repair the injured ship without increasing his burden. In other words, in order that the liability of the owner of an offending vessel may not exceed his interest, the rule has been settled by the Supreme Court that the value thereof shall be taken as of immediately after the damage was done; and the point is to meet the proposition that, to give full effect to the logical sequence of that rule, everything else should have relation to that point of time. In other words, the proposition to be met is that, when the application for a limitation of liability had been made by the owners of the Triton, she and they were purged as of the time immediately after the Pine Forest was wrecked.

There is another difficulty which meets the claimant in this case. Under all circumstances, according to the rules of maritime law, no one should be discouraged from rendering assistance to a vessel in distress. Sometimes, as we may well presume to have been the fact in the case at bar, the owners of the offending vessel, by their equipment and adjacency to the place of wreck, are the most competent of all to effect a prompt rescue; but, on the rule asserted by the claimant, and which, by the force of authority, we are compelled to accept, such persons, when situated like the libelants, may well say: "We refuse to expend our moneys in behalf of your property until we have applied for the benefit of the statutes of limited liability, so as to enable us to recover what we may disburse." Such a proposition would not be admissible

where life was involved; but, when it is a mere question of property, there is no unreasonableness in the interests of one party being balanced against those of another.

Notwithstanding these difficulties, we seem, as we have said, to be bound by authority to affirm the decision of the District Court dismissing the libel. Under the English statutes, the point seems to have been directly determined against the owners of the Triton. The Ettrick, 6 P. D. 127, was first decided by Sir Robert Phillimore, and he was affirmed on appeal, at page 132, all in 1881. The case is accepted by so careful an authority as Mr. Marsden in his Collisions at Sea (4th Ed.) 193, which gives the pith of this decision. That under the English statutes, the liability extends to eight pounds per ton of the offending vessel is not essential, as is plain of itself, and as is also emphasized by the fact of the citation of The Ettrick by the Supreme Court, to which we will hereafter refer. The substance of this decision is stated by Marsden as follows:

"The owner of a ship sunk by collision, who, admitting that the collision was caused by the fault of his own ship, obtains judgment for limitation of his liability, and pays into court the statutory amount of his liability, does not thereby escape from the legal consequences of his wrongful act in causing the collision, except so far as the act expressly relieves him. The owner of a ship sunk in the Thames paid into court the statutory amount of his liability. His ship was raised by the Thames Conservators (who have statutory power to raise wrecks and reimburse themselves for the expense of raising them by sale of ship and cargo), he undertaking to pay the cost of raising. It was held that the shipowner was bound to hand over cargo on board to its owner, and that the cargo owner was not able to pay him anything by way of salvage or general average contribution."

In the case as reported, Jessel, the Master of the Rolls, at page 132, states the position of the owner of the offending vessel in such a way as to present the precise difficulty we have suggested. He observes:

"He [that is, the shipowner] says that the payment of the £8 per ton not only prevents his being answerable in damages for any more, but is equivalent to saying that he shall be in exactly the same position as if no negligence had been committed."

That is to say, the Master of the Rolls puts the position of the shipowner as though he had claimed that a compliance with the statutes of limited liability purged his vessel and himself as of the time when the damage was done. Of course, The Ettrick necessarily overrules this proposition, and thus meets all suggestions in the way of the owner of the Pine Forest. There were other propositions considered in the various opinions delivered in the case, but none of them contravene the use we make of the decision. The Ettrick has never been questioned by any judicial tribunal in England. It is accepted by Mr. Justice Kennedy in his work on Civil Salvage, to which we have already referred, at page 183. It is also accepted by the Supreme Court in The Irrawaddy, 171 U. S. 187, 195, 18 Sup. Ct. 831, 43 L. Ed. 130.

The Irrawaddy supports the conclusion we are compelled to announce. That case arose under the "Harter Act," so called; but that, for all the purposes to which we apply The Irrawaddy, there is no distinction between that statute and the statutes on which the Triton relies, is true, and is emphasized by the fact that the Supreme Court used The Ettrick as we have already said. It is true that the issue in The Irra-

waddy was not one of salvage, but of general average, the shipowner claiming to share therein, although the sacrifice which underlay it was made in order to relieve against the fault of his own vessel. General average and salvage, for all the purposes we are considering, are to be spoken of in the same breath; and, indeed, they run together in a great many respects. The pith of what applies to this case is stated at pages 193, 194, 171 U. S., and page 833, 18 Sup. Ct., 43 L. Ed. 130, as follows:

"The act in question [meaning the Harter act] does undoubtedly modify the public policy as previously declared by the courts; but if Congress had intended to grant the further privilege now contended for, it would have expressed such an intention in unmistakable terms. It is one thing to exonerate the ship and its owner from liability for the negligence of those who manage the vessel; it is another thing to authorize the shipowner to do what he could not do before, namely, share in the general average occasioned by the mismanagement of the master and crew."

This, in connection with the citation of The Ettrick, is a declaration that the rules of interpretation as applied in The Ettrick and The Irrawaddy run on parallel lines, and reach in the same way the statutes of limited liability on which the Triton relies as they do the Harter act. The result is that, on the fundamental principles of the maritime law, neither the Triton nor her owners can recover for salvage services to the Pine Forest, and, on the authorities, there is nothing in the statutes which gives them relief in this respect beyond what otherwise existed.

There is much force in the proposition that the statutes of limited liability on which the Triton relies effectuate a privilege, so that, if availed of by a vessel owner, it must be taken with all the burdens of the condition as it exists at the time to which the acceptance has been delayed; in other words, that, unless the shipowner acts at once and promptly, he must stand the consequences thereof. Under some circumstances it would be impossible to escape this proposition in some respects. The opinions of the Master of the Rolls and the Lords Justices in The Ettrick contain several expressions in that direction; especially the former at the foot of page 132, and Lord Justice Brett at page 134, where he speaks of "a new series of events," meaning the raising of the Ettrick and her cargo, "with which, to my mind, the act of Parliament," meaning the statute limiting liability, "has nothing whatever to do." Nevertheless, in view of the various considerations which we have stated, it is not safe to apply this proposition too rigidly or universally. Possibly the circumstances would admit of its application here; but we deem it safer to dispose of this appeal in view of the authorities which we have cited, and which, taken together, result in the proposition that, whatever may be the theory of the statutes, they contain no suitable provision or machinery for working out any salvage compensation for the libelants, now the appellants.

With reference to any services which might be rendered after an application for limited liability has been made by the owners of an offending vessel, the position would probably be different; but, as this case stands, we are led to the conclusion that the libelants can obtain no relief.

The decree of the District Court is affirmed, and the appellee recovers its costs of appeal.

UNITED STATES v. McCABE et al.

(Circuit Court of Appeals, First Circuit. May 4, 1904.)

No. 503.

1. FEDERAL COURTS—OFFICERS—BAILIFFS.
Bailiffs and criers of the federal courts, appointed to attend the same, as authorized by Rev. St. § 715 [U. S. Comp. St. 1901, p. 579], though not constitutional officers, are officers of the court.

2. SAME—CRIERS—BAILIFFS—PER DIEM—ADJOURNMENTS.
Where criers and bailiffs, appointed under Rev. St. § 715 [U. S. Comp. St. 1901, p. 579], attend a Circuit Court on days to which the court is adjourned by written orders of the judge, they are entitled to receive their per diem therefor, though the court was not actually opened by a judge, and they were not specifically directed by the court or judge to attend.

In Error to the Circuit Court of the United States for the District of Rhode Island.

For opinion below, see 122 Fed. 653.

Charles A. Wilson, U. S. Atty.

Rathbone Gardner, for defendants in error.

Before PUTNAM, Circuit Judge, and ALDRICH and LOWELL, District Judges.

PUTNAM, Circuit Judge. In this case the United States brought a suit on the statutory bond of McCabe as marshal for the District of Rhode Island. The matters in controversy are per diem payments made to the crier and the bailiffs of the Circuit Court for that district in July, August, and September, 1899. They were charged in the marshal's account, and he paid into the treasury only the balance shown thereby. This suit was instituted accordingly, the United States claiming that the payments were unauthorized. The trial in the Circuit Court was by the presiding judge, a jury having been waived under the statute, and the judgment was for the defendants. Thereupon the United States took out this writ of error. The learned judge of the Circuit Court gave a full opinion on the merits, with which we agree; but these controversies have been so protracted, and taken so many phases, that we feel disposed to supplement what he said.

The statutes bearing upon this question are as follows: Section 583 of the Revised Statutes [U. S. Comp. St. 1901, p. 478] reads:

"If the judge of any District Court is unable to attend at the commencement of any regular, adjourned, or special term, the court may be adjourned by the marshal, by virtue of a written order directed to him by the judge, to the next regular term, or to any earlier day, as the order may direct."

Section 672 of the Revised Statutes [U. S. Comp. St. 1901, p. 546] reads:

"If neither of the judges of a Circuit Court be present to open and adjourn any regular, or adjourned, or special session, either of them may, by a written order directed alternatively to the marshal, and, in his absence, to the clerk, adjourn the court from time to time, as the case may require, to any time before the next regular term."

Criers and bailiffs are appointed under the following section of the Revised Statutes:

"Sec. 715 [U. S. Comp. St. 1901, p. 579]. The Circuit and District Courts may appoint criers for their courts, to be allowed the sum of two dollars per day; and the marshals may appoint such a number of persons, not exceeding five, as the judges of their respective courts may determine, to attend upon the grand and other juries, and for other necessary purposes, who shall be allowed for their services the sum of two dollars per day, to be paid by and included in the accounts of the marshal, out of any money of the United States in his hands. Such compensation shall be paid only for actual attendance, and, when both courts are in session at the same time, only for attendance on one court."

The act approved on March 3, 1899, c. 424, 30 Stat. 1116, contains the following provision:

"For pay of bailiffs and criers, not exceeding three bailiffs and one crier in each court, except in the Southern District of New York: provided, that all persons employed under section seven hundred and fifteen of the Revised Statutes shall be deemed to be in actual attendance when they attend upon the order of the courts: and provided further, that no such person shall be employed during vacation."

Similar provisions had been enacted in several previous years.

The various days for which the payments in dispute were made were days to which the Circuit Court had been specifically adjourned by written orders. No business was transacted on any of them, except adjournments in accordance with further written orders.

Under section 715 of the Revised Statutes [U. S. Comp. St. 1901, p. 579], criers are appointed by the court, and therefore may well be regarded as constitutional officers. Const. art. 2, § 2, cl. 2. Section 715 gives the other persons appointed under it no designation, but they are described by several statutes as bailiffs, thus securing to them a certain official standing. Criers are not customarily sworn, and bailiffs, not being constitutional officers, are neither customarily nor necessarily sworn. The appointments of the latter are usually made by oral designations by the marshal, without any formal order by either judge or court. They are for no specific periods, and the appointees are removable at will in the most informal manner. Nevertheless, by long-continued usage, supplemented by their recognition in the statutes as bailiffs, they must be regarded as having a connection with the courts, continuous until dissolved by some act of either the judge or marshal. It follows that, while bailiffs are not constitutional officers, they are "officers of the court," by common understanding, and within the meaning of that expression as used in United States v. Pitman, 147 U. S. 669, 671, 13 Sup. Ct. 425, 37 L. Ed. 324.

United States v. Pitman related to the per diem compensation of the clerk for his attendance at both the Circuit Court and the District Court for the District of Rhode Island. It was decided in 1893, and at that time the essential statutory provisions involved were practically the same as in the case now before us. The precise point technically determined was that the clerk was entitled to his per diem for attendance, regardless of any question whether a judge was present or business transacted. No distinction was made between the two courts. United States v. Nix, 189 U. S. 199, 23 Sup. Ct. 495, 47 L. Ed. 775,

related to the attendance of a marshal at courts in the territory of Oklahoma. At page 203, 189 U. S., page 497, 23 Sup. Ct., 47 L. Ed. 775, United States v. Pitman was cited as a pertinent decision; and it was added that, when a court is opened by order of the judge, it is the duty of the marshal to attend, and that there is no reason why he should not receive his per diem. In both cases the per diems claimed were allowed. United States v. Pitman, 147 U. S. at pages 671 and 672, 13 Sup. Ct. 426, 37 L. Ed. 324, observes that attendance when court is opened under sections 583 and 672 of the Revised Statutes [U. S. Comp. St. 1901, pp. 478, 546], which is by written order of the judge, "is put by Congress upon the same footing as if the judge were actually present, and business were actually transacted." This seems to be sufficient of itself; but connection with what was said at pages 670 and 671, 147 U. S., page 426, 13 Sup. Ct., 37 L. Ed. 324, makes it positively clear that the court recognized no distinction between adjournments under sections 583 and 672, such as we have here at bar, and the ordinary adjournments from day to day. In United States v. Aldrich, 58 Fed. 688, 7 C. C. A. 431, decided by this court on September 29, 1893, United States v. Pitman was applied; but the case is not of importance here, except that it shows that favorable presumptions should be made in behalf of its officers when the record states that a court was actually opened under color of some of the statutes cited, and that they were in attendance.

As we understand, the only proposition now made by the United States is that under the act of March 3, 1899, neither the crier nor the bailiffs can receive a per diem unless the court is actually opened by a judge on the day to which an adjournment is made by a written order, except so far as they are specially directed or otherwise designated by the court or judge to attend. The Auditor suspended the account in issue as follows:

"Suspended for the reason that the orders of the courts do not show or require that the bailiffs should be in attendance on the above dates."

The decision of the Comptroller of March 18, 1899 (5 Comp. Dec. 583, 586), relied on by the United States, has a very uncertain sound. He thinks that statutes like that of March 3, 1899, do not refer to an order of adjournment made according to sections 583 and 672 of the Revised Statutes [U. S. Comp. St. 1901, pp. 478, 546], but only to an absence of the judge while the session is suspended awaiting the action of the jury, or for any reason not necessitating a formal adjournment to a given day. He adds:

"It means, as I understand it, an order of instruction personal to the bailiff or crier, relating to services to be rendered during the absence of the judge, and not to an order of adjournment which has been preannounced or predetermined."

This is such a strained and imaginative construction, and so inconsistent with the simple phraseology of the statute in question, that, if the United States rested there, we would not need to give the case further consideration. In justice to the Comptroller, it should be said that seemingly his opinion, at page 587, finally left the matter on the invalidity of nunc pro tunc orders. Moreover, by an opinion of April

5, 1902 (8 Comp. Dec. 699), the same Comptroller apparently reversed his adverse expressions of March 18, 1899, so that we do not perceive any existing effective ruling of the department justifying this defense. In order, however, that we may give every possible consideration to the propositions of the United States, we return to the ruling of the Auditor, and to a substantial repetition thereof at bar to the following effect: The United States contend that "persons" whom, as they say, "the marshal is permitted only upon occasion to appoint," may or may not be necessary to aid him in the discharge of his duties in court. They add that "it is impossible to escape the conclusion that such persons may be altogether unnecessary to the discharge of the marshal's duties, and it would seem to follow that they ought not to be fastened permanently upon the government by the marshal, or by construction, unless their services are necessary; and this necessity ought to be specially found by the court in a definite way."

We may at this point note the peculiar form of the expression in the act of March 3, 1899, "order of the courts." No suggestion has been made, either at bar or by the executive officers, that this is to be literally and technically construed. Everywhere it has been treated as covering not only orders of the courts in session, but orders of absent judges. Congress at times interchanges the words "court" and "judge." This was strikingly illustrated in one of the statutes relating to the removal of Chinese, under consideration by the Circuit Court of Appeals in the Ninth Circuit in United States v. Gee Lee, 50 Fed. 271, 273, 1 C. C. A. 516, where the statutory word "judge" was construed to mean the court. On account of the context, we took a different view in Choy Loy v. United States, 112 Fed. 354, 50 C. C. A. 279, but the uniform practice of the Supreme Court with reference to the statute sustains the Circuit Court of Appeals for the Ninth Circuit We may assume that in this extract from the act of March 3, 1899, the word "courts" was intended to cover not only courts in session, but absent judges. With this explanation, the plain and natural reading of the act of March 3, 1899, brings this case within the rule of United States v. Pitman and United States v. Nix; and there is nothing unreasonable in such a reading, nor anything in any of the statutes, or in any judicial decision or any settled practice, which contravenes it.

Before proceeding further, we must notice an opinion of the Attorney General rendered to the Comptroller of the Treasury under date of April 11, 1903, appended to the brief of the United States, and relied on as supporting their present position. Aside from the fact that the Attorney General is a high officer, we regard his opinions, when rendered to other high officers of the United States for their advice in matters not technically controversial, as quasi judicial and entitled to much respect, but this opinion is not in point. The Attorney General was asked to distinguish the case then before him from United States v. Finnell, 185 U. S. 236, 22 Sup. Ct. 633, 46 L. Ed. 890, where the question was entirely different from that at bar. So far as we understand it, the opinion has no pertinency, because what it had under consideration was not formal orders adjourning the court, but merely directions to the clerk to make certain entries on his journal or dockets, which might well have been made at chambers. The clerk, however, on his

own motion, assumed to open the court and enter adjournments. However this may be, this case is too clear to justify us in resting on anything which has been decided adversely by the Department of Justice or the Comptroller.

The result of the construction now put by the United States on the act of March 3, 1899, is such as to make it read that the persons described in it shall not be deemed to be in actual attendance unless after an order of the court specifically requiring them to be present, and that they shall not otherwise be entitled to compensation. Thus, while its plain reading is affirmative and remedial, the United States make it negative and restrictive, and this constrained interpretation seems to lie at the foundation of their case. Yet United States v. Pitman, 147 U. S., at page 671, 13 Sup. Ct. 425, 37 L. Ed. 324, contains these expressions:

"It is clearly the duty of the officers of the court to be present at the adjourned day, and to obey the written order of the judge with respect to any further adjournment, and there is no reason why they should not receive their per diems therefor as if the judge were actually present."

"We think the court should be deemed actually in session, within the meaning of the law, not only when the judge is present in person, but when, in obedience to the order of the judge directing its adjournment to a certain day, the officers are present upon that day, and the journal is opened by the clerk, and the court is adjourned to another day by further direction of the judge."

The opinion then cites the act of March 3, 1887, c. 362, 24 Stat. 509, 541 [U. S. Comp. St. 1901, p. 640], which impliedly approved payments of per diem to clerks and marshals except for days when the court was opened by the judge, or business actually transacted, or they attended under the sections of the Revised Statutes which we have quoted. The court treated it, not as new legislation, but simply as giving effect to the existing law. This is enforced by turning to the same case as reported in Pitman v. United States (D. C.) 45 Fed. 159, where it appears that the per diems in dispute extended from October, 1854, to December, 1888; and yet the Supreme Court disposed of the marshal's entire account in issue regardless of the date of the approval of the act.

Notwithstanding these decided expressions of the Supreme Court, it is apparent from the opinion of the Comptroller of April 19, 1897 (3 Comp. Dec. 522), that the department had refused to follow them, presumably on the ground that the issue directly involved in United States v. Pitman was only the per diem of the clerk. Thereupon Congress, by the act of March 2, 1895, c. 189, 28 Stat. 958 [U. S. Comp. St. 1901, p. 580], enacted what was, as we have said, afterwards re-enacted, and is now found in the citation made by us from the act of 1899. As we have shown, the United States, in order to sustain their present position, are compelled to construe this statute as though it read negatively instead of affirmatively, while, on the other hand, it is much more reasonable to hold that Congress intended by it to affirm the broad expressions in United States v. Pitman, and make it clear that they applied to criers and bailiffs.

This history of this legislation makes it apparent that the statute of 1895, as re-enacted in 1899, was such as we have characterized it. Nevertheless the highest authorities on the construction of statutes in-

sist that a very useful guide is to ascertain the mischief which it may be reasonably supposed the legislature intended to remedy. The United States criticise the references by the Circuit Court to the congressional debates in regard to the act of 1895, but the criticisms cannot be sustained. It is true that there are some expressions of the Supreme Court which, literally read, would not permit a resort to congressional debates for the purpose of ascertaining the construction of the statutes to which the debates relate, but there are other expressions from a different standpoint. The courts are entitled, not only for the purpose of ascertaining what mischief the legislature intended to remedy, but also for all other purposes which assist in the construction of statutes, to read history, and this is sometimes read better in the legislative debates than anywhere else. Such debates may also be referred to for the purpose of seeking out some fact or suggestion which may give a clue to what is obscure. In the present case, not only the learned judge of the Circuit Court, but also the Comptroller, in 3 Comp. Dec. 522–524, already referred to, justly cited the debates in Congress for the purpose of showing the fact, which they do show, that the mischief which the act of 1895, and subsequent like enactments, sought to remedy, was the refusal of the departments to apply broadly the expressions of the Supreme Court in United States v. Pitman. With the aid of these debates, as well as independently of them, the act of March 3, 1899, must be accepted as remedial.

But we can go deeper. We have shown that, although the persons referred to by section 715 of the Revised Statutes [U. S. Comp. St. 1901, p. 579], are not there designated by any official title, yet they are recognized by the statutes as bailiffs, and that, although appointed by mere word of mouth, and removable the same way, they, in practice, hold a continuous tenure. They are "officers of the court," within that expression in United States v. Pitman, and therefore, without being sought out individually, they must attend on the day to which it is adjourned, according to the citations from that case. When the court is in continuous session and adjourning from day to day, no special order expressly requiring the bailiffs to be present is ever made, formally or verbally, but their attendance on such adjournments is always relied on. As we have shown, no distinction between such adjournments and adjournments to specific days by written orders of an absent judge can be made. It is therefore difficult to understand the origin of the suggestion that bailiffs, in order to receive their per diem, should be specially designated to attend the courts. Nothing of this kind has been known in common practice, either in the federal courts or the state courts, with reference to any of these officers, with the exception of occasional orders which have been entered of late so as to free the courts and their officers from temporary embarrassment arising out of the rulings of the Comptroller to which this opinion refers. Congress knows that, even when courts are opened in the morning with the promise of an idle day, emergencies at times compel the unexpected exercise of all their powers, and demand prompt assistance from every officer over whom they have control. Therefore, as is the general practice, they may well keep equipped, ready on the instant for any such contingency. Consequently an order of adjournment to a specific day

in any judicial tribunal, national or local, is an order that all its machinery shall be in readiness for prompt and efficient action. United States v. Pitman and United States v. Nix were decided on this theory; and no statute directing or providing for the attendance of either marshal or clerk was relied on, or even cited, except the act of 1887, which, as we have shown, was regarded as only declaratory. In neither case, with reference to allowing the clerk or the marshal his per diem, did the Supreme Court rest on any statutory direction to either to be in attendance, or on any specific order in reference thereto. Not a word in either opinion can be found supporting any suggestion to the contrary. The expression in United States v. Pitman, that "it is clearly the duty of the officers of the court to be present at the adjourned day," and the like expression in United Staes v. Nix, 189 U. S., at page 203, 23 Sup. Ct. 497, 47 L. Ed. 775, that, "where the court is opened for business by an order of the judge, it is the duty of the marshal to attend," had reference only to the common practice which we have explained.

Every adjournment to a specific date, whether made in open court or by written order, involves possibility or probability or expectancy that a judge will be present on the day to which the court is adjourned; and in each case expectancy may be resolved into probability or possibility, or be wholly defeated, and possibility or probability may be resolved into expectancy or accomplishment. Under neither condition is a judge, on coming into court, to send out to the neighboring streets or shops for marshal, clerk, crier, or bailiffs, before proceeding to business, if he be so fortunate as to have any one to send. The courts of some states, held at the shire towns of numerous counties, sat formerly only at certain times named by statute, and for brief periods. From time immemorial the business, relating mostly to common-law suits, had been satisfactorily disposed of in this way, although in late years, with the increase on the chancery side, statutory provisions and the rules of the courts have directed that they shall be considered open at all times for the purposes of litigation in equity. With the federal courts the emergencies are so numerous and so various that it has been found impracticable, with justice either to the United States or individual suitors, thus to dispose of judicial business at the stated terms, to be held open only for short periods and then finally adjourned. Consequently some of the federal courts are held open quite continuously, and ordinarily no term is finally adjourned until immediately before the opening of the next statutory term. To meet public emergencies in the districts where the business is most voluminous, the courts are adjourned from day to day, and are always open. In the districts where the volume of business is smaller, adjournments from day to day are not required, but the peculiar emergencies which experience has developed demand frequent open sessions. The practice in this respect is fully explained by the opinion in United States v. Pitman, 147 U. S., at pages 670, 671, 13 Sup. Ct. 425, 37 L. Ed. 324, and this aided the conclusion there reached. The law requires that the statutes on this topic be construed in the light of the presumption that Congress knew the usages of the federal courts, and legislated in harmony therewith.

In United States v. Pitman, 147 U. S., at page 670, 13 Sup. Ct. 425,

37 L. Ed. 324, the court disposes of all the suggestions urged on us by the United States, based upon the assumption that, unless the strict rule of the department is applied, the courts and the marshal might fasten on the United States a body of needless officials and a mass of needless expenses. To that line of reasoning we need no answer except this citation.

We wish it understood that we are dealing only with the precise case before us. By long and well-known usages, in which there has been acquiescence by all concerned, many matters of accounting affecting the courts have been practically settled with reference to conditions as to which the statutes are doubtful, or as to which they make no provision. We are not investigating any such usages, or attempting to unsettle them. Our decision is limited to the proposition succinctly put by the Auditor as we have quoted him, and restated by the United States at bar, to the effect that the only reason given for disallowing the payments under consideration is that the orders directing the adjournments did not specifically require the crier and bailiffs to be in attendance on the days in issue.

To sum up: On the natural and not unreasonable reading of the statutes, so much discussed in this opinion and by the departments, especially that of 1895, and its annual re-enactment to and including March 3, 1899, they contemplate the payments now in dispute. By accepted and necessary usage, the officers of the court, including the crier and bailiffs, attend, without special designation, on any day to which it is specifically adjourned, whether it be by an oral order in open court, or by a written order of an absent judge. Every order of adjournment to a specific day implies an order to the officers of the court to then attend. The underlying rule is as shown in the extracts which we have made from United States v. Pitman and United States v. Nix; and the payments in issue in this case should have been allowed by the department, alike under and independently of the act of March 3, 1899, and nothing in it, or in any other statute, or in any settled usage acquiesced in in the manner we have described, restricts or removes the obligation to make them.

The judgment of the Circuit Court is affirmed, and neither party will recover costs of appeal.

THE DAUNTLESS.

UNION TRANSP. CO. v. KENT.

(Circuit Court of Appeals, Ninth Circuit. February 1, 1904.)

Nos. 952, 953.

1. MARITIME LIENS—WRONGFUL DEATH—STATUTORY ACTION FOR DAMAGES.
Code Civ. Proc. Cal. § 377, gives a right of action for wrongful death "against the person causing the death." Section 813 provides that "all steamers, vessels and boats are liable * * * (5) for injuries committed by them to persons or property." *Held*, that such statutes do not give a

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¶ 1. Maritime liens for torts, see note to The Anaces, 34 C. C. A. 565.
See Admiralty, vol. 1, Cent. Dig. § 285.

lien on a vessel for the damages recoverable under section 377 for a death resulting from collision, and that a suit in rem cannot be maintained in a court of admiralty to recover such damages.

2. EVIDENCE—WEIGHT—RIGHT TO DISBELIEVE WITNESS ALTHOUGH UNCONTRADICTED.

In a suit to recover for the death of a person on a launch which was sunk in collision with a steamer, where the only persons on the launch were drowned, the court is not bound to accept as true the testimony of the pilot of the steamer that the launch suddenly changed its course and ran directly into the steamer, although uncontradicted, the inherent improbability of such action being such as to warrant the court in disbelieving the testimony.

3. COLLISION—STEAMERS MEETING IN NARROW CHANNEL—VIOLATION OF RULES.

A steamer held in fault for a collision in a river with two launches made fast together, in which the launches were sunk, and those on board drowned, on the ground that she did not have a proper lookout, and for violation of article 25 of the inland navigation rules (Act June 7, 1897, c. 4, 30 Stat. 101 [U. S. Comp. St. 1901, p. 2883]), which required her to keep on the other side of the channel.

Appeals from the District Court of the United States for the Northern District of California.

For opinion below, see 121 Fed. 420.

Nathan H. Frank and Campbell, Metson & Campbell, for appellants.

M. B. Woodworth and F. R. Wall, for appellees.

Before GILBERT and ROSS, Circuit Judges, and HAWLEY, District Judge.

HAWLEY, District Judge. Separate appeals were taken in these cases. They were consolidated for trial, and have been argued together in this court. The testimony was all taken before a commissioner. No. 952 is an action in rem brought by the administrator of John T. Doane, deceased, against the steamer Dauntless for damages occasioned by the death of John T. Doane. No. 953 is an action in personam brought by the administrator of David J. Kent, deceased, against the Union Transportation Company for damages occasioned by the death of David J. Kent. Both causes arise out of the same state of facts. Appellee in each case recovered the same amount of damages, to wit, $1,200.

There are only 177 assignments of error in each case. Why counsel should have taken pains to make so many assignments is unexplained. The truth is that there were but three points discussed by counsel, and we shall confine ourselves to these points.

1. There is one point raised which relates exclusively to case No. 952, viz., it is claimed that this case is an action in rem, and that no lien is given under the laws of the state of California, enforceable in an action for damages by death.

This court, in The Willamette, 70 Fed. 874, 878, 18 C. C. A. 366, 31 L. R. A. 715, and in Laidlaw v. Oregon Ry. & Nav. Co., 81 Fed. 876, 879, 26 C. C. A. 665, in construing the statute of Oregon which reads as follows: "Every boat or vessel used in navigating the waters of this state * * * shall be liable and subject to a lien * * * for all * * * damages or injuries done to persons or property by such boat or vessel" (Hill's Ann. Code, § 3690)—held that an action

of this character in rem could be sustained. The question involved in this case is whether or not such actions can be maintained under the statutes of California. It is claimed that the question has been decided in favor of appellants' contention by the Supreme Court of California (Munro v. Dredging Co., 84 Cal. 515, 524, 24 Pac. 303, 18 Am. St. Rep. 248; Morgan v. Southern Pacific Co., 95 Cal. 510, 519, 30 Pac. 603, 17 L. R. A. 71, 29 Am. St. Rep. 143), and by the Supreme Court of the United States (The Albert Dumois, 177 U. S. 240, 257, 20 Sup. Ct. 595, 44 L. Ed. 751), and by the Circuit Court of Appeals, Seventh Circuit (The Onoko, 107 Fed. 984, 986, 47 C. C. A. 111).

These suggestions require an investigation upon new lines. In the construction of state statutes, it is our duty to follow the decisions of the Supreme Court of a state. If no construction has been given to the statute by that tribunal, but has been given by the Supreme Court of the United States, we would be controlled by such decision. The decisions in other circuits are not binding upon this court, but are deserving of respect, and entitled to credit and consideration for the strength of the reasons therein given.

The statute of California (section 377, Code Civ. Proc.) provides, "When the death of a person is caused by the wrongful act or neglect of another, his heirs or personal representatives may maintain an action for damages against the person causing the death." Section 813, Code Civ. Proc., provides, "All steamers, vessels, and boats are liable * * * (5) for injuries committed by them to persons or property."

The California cases above cited did not discuss the questions here presented. All that was there said having any bearing upon the statute was "that the action given by the statute is a new action, and not the transfer to the representative of the right of action which the deceased person would have had if he had survived the injury."

In The Albert Dumois Case, the court said:

"Assuming for the present that the question of lien is material, we are next to inquire whether such lien is given by the local law of Louisiana. We are cited in this connection to two articles of the Civil Code, the first of which (article 2315), as amended in 1884, declares that 'every act whatever, of man. that causes damage to another, obliges him by whose fault it happened to repair it; the right of this action shall survive, in case of death, in favor of the minor children or widow of the deceased, or either of them, and in default of these, in favor of the surviving father and mother, or either of them, for the space of one year from the death. The survivors above mentioned may also recover the damages sustained by them by the death of the parent, or child, or husband, or wife, as the case may be.' It was held by us in The Corsair, 145 U. S. 335 [12 Sup. Ct. 949, 36 L. Ed. 727], a case arising out of a collision which also took place on the lower Mississippi, that this local law did not give a lien or privilege upon the vessel, and that nothing more was contemplated by it than an ordinary action according to the course of the law as administered in Louisiana. Our attention is also called by the owners of the Dumois to subdivision 12 of article 3237 of the Civil Code, which reads as follows: 'Where any loss or damage has been caused to the person or property of any individual by any carelessness, neglect or want of skill in the direction or management of any steamboat, barge, flatboat, water craft, or raft, the party injured shall have a privilege to rank after the privileges above specified.' No reliance was placed upon this article in the case of The Corsair, probably because it was thought to refer only to losses or damages to persons still living, and that an action would lie in favor of the party injured. Certainly, if this article had been supposed to give a remedy for damages occasioned by death, to the representatives of the deceased person,

it would never have escaped the attention of the astute counsel who participated in that case. The question whether 'damage done by any ship,' jurisdiction over which was given to the High Court of Admiralty in England, included actions brought by the personal representatives of seamen or passengers killed in a collision, has been the subject of many and conflicting judicial opinions in the English courts, a summary of which may be found in The Corsair, 145 U. S. 345 [12 Sup. Ct. 949, 36 L. Ed. 727], and was finally settled against the jurisdiction by the House of Lords in the case of The Franconia, 10 App. Cases, 59. * * * The object of article 3237 was not to extend the cases in which damages might be recovered to such as resulted in death, but merely to provide that, in cases of damages to person or property, where such damage was occasioned by negligence in the management of any water craft, the party injured should have a privilege or lien upon such craft. We deem it entirely clear that the article was not intended to apply to cases brought by the representatives of a deceased person for damages resulting in death."

In The Onoko the court said:

"Undoubtedly, in this country, since the decision in The Corsair, the general trend of opinion in the lower courts has been to the effect that the water-craft laws of the various states give a lien upon the vessel for injuries occasioning death. * * * In all these cases, with the exception of The Glendale, the act supposed to grant the lien is an independent act, and in no way connected with the act giving the action for the death. In The Glendale the provision granting the lien is part of the very act giving the right of action."

In referring to The Albert Dumois Case, the court states the fact upon which the case was decided, and gives the views of the court upon the question here under discussion. It was there, as here, urged that the declaration of the opinion upon the subject of the lien is dictum, because it was adjudged that, under the limited liability act, damages by reason of death were recoverable, although no lien upon the vessel was allowed, and the court said:

"We do not think this contention should prevail. The question was, as we read the opinion, whether a moiety of those damages should be charged upon the amount awarded to the owner of the Argo, upon the ground that the interveners had liens upon the Argo, and that, having such liens, the court was justified in deducting from the amount awarded to the owner of the Argo a moiety of the damages awarded to the interveners. We may not consider this declaration of the Supreme Court as merely dictum, but, if the matter were doubtful, we should not feel at liberty to disregard this carefully considered deliverance of the Supreme Court upon the subject."

The court then discussed the Lord Campbell act, and the statutes of the different states with reference thereto, and said:

"It is also to be said that the water-craft law contemplates a lien for direct injuries done by the inanimate thing negligently navigated, and would not seem to comprehend such injury as is contemplated by the act granting a right of action for a death. The injury for which a lien is given is a direct injury by the negligently navigated craft to person or property. By reason of the faulty navigation and consequent collision, no injury was done to the person of the libelant, or to the persons of those he represents. Nor was injury done to his or their property. They had no property right in the person of the deceased. The right of action arose only upon and because of his death. The recovery is allowed as compensation for the supposed support and education which they would have received had he survived. This right of action, arising only upon death, cannot, within the meaning of the water-craft law, be property which could be injured by an inanimate thing negligently navigated. In view of the ruling of the Supreme Court, we are not permitted to follow the decisions upon this question by the Circuit Courts of Appeals rendered before the decision in The Albert Dumois, and are con-

strained to hold that no lien upon the vessel is created by the acts considered for the cause declared in the libel."

We are of opinion that no substantial difference can be drawn between the statutes of the different states upon which The Albert Dumois and The Onoko were based, and the statutes under consideration. If any distinction exists, it must be conceded that the language of section 813 of the Code of Civil Procedure of California is stronger in favor of appellants' contention than the others; and, in the light of these opinions, and in view of the language used in the California statute, we feel compelled to hold that in the Doane Case this court has no jurisdiction. That case (No. 952) is reversed, and cause remanded, with instructions to dismiss the action.

The other case (No. 953) must be considered upon its merits.

The Union Transportation Company was the owner of the steamer Dauntless. Doane was on a launch also named "Dauntless," and was towing another launch called "Viola," and Kent was on this launch. The launches were lashed together side by side. Both Doane and Kent lost their lives, and but one other man was on the launches, and he, too, was drowned. The collision between the steamer and the launches which resulted in their death occurred about 11:10 o'clock p. m., September 14, 1900, on the Mokelumne river, about a mile and a half above Central Landing, on Bouldin Island. The steamer about 10:50 p. m. left Valentine's Landing, which is about seven miles above Central Landing. The night was clear and calm, with a light wind blowing. The steamer was traveling at a speed of from 8 to 12 miles an hour, and drew about 6½ feet of water. The river was about 800 feet wide. The testimony shows that, between 3 and 5 minutes before the collision, lights were first seen from the hurricane deck of the steamer Dauntless. At that time the launches were between one-half and three-quarters of a mile from the steamer, off her starboard bow. The courses of the steamer and the launches made an angle with each other of from 15 to 20 degrees. At the time the light or lights were first seen from the steamer, her pilot, McNeil, thought one of them was "a pale green light." The steamer did not alter her course or speed, or give any signal with her whistle, until within at least 300 feet of the launches. The pilot of the steamer then saw that there were two launches under way, and that a collision was imminent or inevitable. He then gave two whistles, and put his helm to starboard, but the steamer and the launches came together while the steamer was swinging to port; the steamer striking the launch Dauntless on that launch's port side, damaging that side, the only place where any damage was received. The launches went to the bottom at one. The point of contact on the steamer was somewhere between her bow and 25 or 30 feet forward of the gangway of the steamer's starboard side.

Patterson testified that he was bow watchman of the Dauntless, and "was supposed to be on the bow to look out"; that on the night of the collision he was performing other duties; that when the collision took place he "was about fifty feet from the bow," alongside of the boilers on the starboard side; that when he got out on the bow of the steamer he saw a green light on the launches, about 100 yards ahead, and the collision occurred in about 1½ minutes; that as he

went out on the bow of the steamer he heard one bell first, "to stop," followed by two bells, "to back full speed."

Pellett, who was at the outside of the pilot house, testified that he first saw a light about three-quarters of a mile ahead; that he asked the pilot what it was, and "he said he thought it might be a schooner anchored out there," and he thought this was about five minutes before the collision. "Q. About how long was it after you heard this signal of one bell to the engine room before the collision? A. It was so quick that I could not tell how quick it was. * * * I got kind of excited when I seen them coming and see that it could not be avoided, and I could not exactly tell what time."

Rideout testified that there was about 18 feet of water where the launches were sunk, and that about two weeks after the collision the launches were found "between 150 and 200 feet from the left-hand bank of the river, going down."

The court below, in reviewing the testimony, said:

"My conclusion from the evidence is that the steamer Dauntless was in fault in two particulars: First, she did not have a lookout stationed at her bow immediately preceding the collision; second, the steamer, in starboarding her helm, and attempting to pass the launches near the left-hand bank of the river, violated article 25 of the act of June 7, 1897, c. 4" (30 Stat. 101 [U. S. Comp. St. 1901, p. 2883]).

And in referring to the testimony as to the cause of the collision, said:

"The evidence is not very satisfactory as to the precise manner in which the collision occurred, but I am unable to accept the statement of the pilot of the steamer that the launches came 'straight up in the middle of the river, almost, and, when it got just abreast of the steamer, whipped right around and headed straight for the Dauntless.' Although this is not contradicted by any witness, it appears to me to be so unreasonable that the court would not be warranted in finding that such was the fact."

These findings are assailed, and constitute the pivotal points made by appellant, whose contention is that the launches were wholly at fault, that the launches ran into the steamer, and that the steamer did not run into the launches.

If the testimony of McNeil must be taken as true, because uncontradicted, then appellant's contention is made out, but it seems so unreasonable that a man in the small launch would be guilty of such conduct, almost certain to produce instant death to him. It is not impossible that he might have done so, but it is highly improbable. It certainly does not seem natural. Self-preservation is said to be the first law of nature. The lips of Doane and Kent were sealed by death, and the court is thereby deprived of their version of the facts. We have the right, therefore, to look to the common experience of mankind in order to determine whether the statement of McNeil is reasonable or not.

In Thomas v. Railroad Co. (C. C.) 8 Fed. 729, 731, where plaintiff's intestate had been killed in a railroad accident, and the court had instructed the jury that the deceased was bound to that measure of care and prudence which would have been exercised by an intelligent and careful man under the same circumstances, Judge Wallace, in denying a motion for a new trial, said:

"Notwithstanding the testimony of the defendant's witnesses, the jury were at liberty to draw the inference that, owing to the obstructions, the deceased did not see the approaching train, and that, owing to the noise of the factory, he did not hear it. The absence of any fault upon the part of the deceased may be inferred from the circumstances, in connection with the ordinary habits, conduct, and motives of men. The natural instinct of self-preservation in the case of a sober and prudent man stands in the place of positive evidence."

See, also, Allen v. Willard, 57 Pa. 374, 379; Railroad Co. v. Rowan, 66 Pa. 393, 399; Johnson v. Railroad Co., 20 N. Y. 65, 69, 70, 75 Am. Dec. 375.

This court is not bound to accept the statement of any witness simply because his testimony is uncontradicted, nor even when corroborated by other witnesses, if the story they all tell bears the earmarks of inherent improbability and is unreasonable.

The rule in relation to this subject is well expressed by Mr. Justice Field in delivering the opinion of the court in Quock Ting v. United States, 140 U. S. 417, 420, 11 Sup. Ct. 733, 734, 35 L. Ed. 501, as follows:

"Undoubtedly, as a general rule, positive testimony as to a particular fact, uncontradicted by any one, should control the decision of the court, but that rule admits of many exceptions. There may be such an inherent improbability in the statement of a witness as to induce the court or jury to disregard his evidence, even in the absence of any direct conflicting testimony. He may be contradicted by the facts he states as completely as by direct adverse testimony."

This court has announced the same rule. Lee Sing Far v. United States, 94 Fed. 834, 838, 35 C. C. A. 327, and authorities there cited. See, also, Chandler v. Town of Attica (C. C.) 22 Fed. 625, 627, and authorities there cited; Tracey v. Town of Phelps (C. C.) 22 Fed. 634; McLean v. Clark (C. C.) 31 Fed. 501, 504; People v. Milner, 122 Cal. 171, 179, 54 Pac. 833; Anderson v. Liljengren, 50 Minn. 3, 52 N. W. 219.

In Blankman v. Vallejo, 15 Cal. 638, 645, the court said:

"We do not understand that the credulity of a court must necessarily correspond with the vigor and positiveness with which a witness swears. A court may reject the most positive testimony, though the witness be not discredited by direct testimony impeaching him or contradicting his statements. The inherent improbability of a statement may deny to it all claims to belief."

In Haney v. Baltimore Steam Packet Co., 23 How. 287, 291, 16 L. Ed. 562, which was a case in admiralty, where the question raised was very similar to the case in hand, the answer admitted the collision, and the result of it, and it also admitted that the schooner was seen at a distance of 2 or 3 miles; that the steamer was proceeding at a rate of 14 miles an hour, heading due north, and the schooner holding her course nearly due south; but it alleged as an excuse that, while the steamboat and schooner were meeting on parallel lines, the schooner suddenly changed her course and ran under the bows of the steamer. The court said: "This is the stereotyped excuse usually resorted to for the purpose of justifying a careless collision. It is always improbable and generally false."

In examining the testimony of McNeil, we find that he was managing the steamer Dauntless, and responsible for her proper steering.

He was interested in establishing the fact that it was the launches, and not the steamer, that were at fault in causing the collision. He admits that he was mistaken as to the light he saw on the launches. He made no inquiry of others on the steamer, but proceeded downstream on the wrong assumption that the launches were "a schooner at anchor." It is fair to presume that if the lookout had been at his post of duty, on the lower deck, in the forward part of the steamer, he would not have been misled as to the color of the light on the launches; and, if a constant lookout had been maintained, he would undoubtedly have discovered that it was a white light, and that the launches were moving, instead of being anchored, as the pilot supposed, in time to have given the facts to the pilot so as to have avoided the collision.

In The Pilot Boy, 115 Fed. 873, 875, 53 C. C. A. 329, 331, the court said:

"It is the duty of every steamer navigating the thoroughfares of commerce to have a trustworthy lookout, besides the helmsman, and in case of collision the absence of such lookout is prima facie evidence that the collision was caused by the fault of the steamer. The Genesee Chief, 12 How. 443 [13 L. Ed. 1058]. When acting as the officer of the deck, and having charge of the navigation, the master of a steamer is not a proper lookout. The Ottawa, 3 Wall. 269 [18 L. Ed. 165]. Proper lookouts are persons other than officers of the deck or the helmsman, and they should be stationed on the forward part of the vessel. Elevated positions on a steamer, such as the hurricane deck, are not as favorable situations for the lookout as those on the forward deck near the stem."

See, also, Chamberlain v. Ward, 21 How. 548, 570, 16 L. Ed. 211; The Parkersburgh, 5 Blatchf. 247, Fed. Cas. No. 10,753; Heney v. Baltimore Steam Packet Co., supra; Wilder's S. S. Co. v. Low, 112 Fed. 161, 172, 50 C. C. A. 473; Occidental & O. S. S. Co. v. Smith, 74 Fed. 261, 268, 20 C. C. A. 419.

We are of opinion that the steamer Dauntless was at fault in not obeying article 25 of the rules of navigation when she first saw the light of the launches. This rule reads as follows:

"Art. 25. In narrow channels every steam-vessel shall, when it is safe and practicable, keep to that side of the fair-way or mid-channel which lies on the starboard side of such vessel."

It is true that this rule must be taken in connection with the others, when applicable. It is not an absolute rule. The circumstances and situation may change it.

Article 22 is relied upon by appellant. This rule is to the effect that "every vessel which is directed by these rules to keep out of the way of another vessel, shall, if the circumstances of the case admit, avoid crossing ahead of the other." But this rule does not benefit appellant. The steamer had no right to wait until it got so near the launches that it was impracticable to cross ahead of the launches. The launches were on the right side of the middle of the river, going up; and the steamer ought to have been on the right side of the middle of the river, coming down. The launches were where they had the right to be.

Upon the whole case, our opinion is that the steamer's fault was the cause of the collision. If proper care had been taken on board the steamer Dauntless after the launches' light was first seen, it would

seem almost impossible that a collision could have happened, with the launches moving at a rate of two miles an hour through the water, even if it should be conceded that the launches were in some respects at fault as to their lights, or were carelessly or injudiciously managed. There was no necessity for the steamer passing so near to the launches as to create the hazard. The Genesee Chief, 12 How. 443, 461–463, 13 L. Ed. 1058.

The decree of the district court in favor of appellee Kent, in No. 953, is affirmed, with costs.

PHENIX INS. CO. OF BROOKLYN, N. Y., v. KERR.

(Circuit Court of Appeals, Eighth Circuit. March 28, 1904.)

No. 1,966.

1. PRACTICE—PEREMPTORY INSTRUCTIONS—WAIVER OF JURY.
   Where at the close of a trial to a jury each party requests a peremptory instruction in his favor, and the court grants one of the requests, that ruling constitutes a general finding for the successful party by the court, and the only questions it presents in an appellate court are, was the finding without substantial evidence to support it? and, was there error in the court's declaration or application of the law?

2. INSURANCE — UNCONDITIONAL OWNERSHIP — PURCHASER UNDER CONTRACT HAS.
   The interest of a purchaser of property, which he has unqualifiedly agreed to buy and which the former owner has absolutely contracted to sell to him upon definite terms, is the sole and unconditional ownership within the true meaning of the ordinary clause upon that subject in insurance policies, because the vendor may compel the vendee to pay for the property and to suffer any loss that occurs.

3. SAME—OPTION TO PURCHASE—UNCONDITIONAL OWNERSHIP.
   The interest of an owner of property which another holds under his option to purchase, which is irrevocable by the owner, but which the holder of the option has not bound himself to accept, and which he is free to abandon, is the sole and unconditional ownership of the property within the proper interpretation of the clause upon that subject in insurance policies, because the owner cannot compel the holder of the option to take the property or suffer the loss.

4. SAME—PROOFS OF LOSS—DENIAL OF CONTRACT—WAIVER OF PROOFS.
   A distinct denial by an insurance company of liability under a policy after the loss, and within the time prescribed for the proofs, upon the ground that there was no contract of insurance, is a waiver of proofs of loss, because in such a case the proofs do not tend to induce the company to pay the loss, and they are futile.

(Syllabus by the Court.)

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

H. C. Brome (A. H. Burnett, on the brief), for plaintiff in error.

C. C. Wright (John M. Ragan and John F. Stout, on the brief), for defendant in error.

Before SANBORN, THAYER, and HOOK, Circuit Judges.

¶ 2. See Insurance, vol. 28, Cent. Dig. §§ 347, 618.

SANBORN, Circuit Judge. This is an action on a policy of insurance against fire for damages caused by the burning of an elevator. The complaint was in the usual form. The answer was that the policy had been canceled before the fire, that the insured was not the sole and unconditional owner of the property, and that no proofs of loss had been made. The plaintiff replied that the company had denied its liability on the ground that there was no contract of insurance, and had thereby waived the proofs of loss. The case was tried to a jury. At the close of the trial the plaintiff requested the court to give an instruction to the effect that the jury should return a verdict in his favor, the defendant asked the court to charge the jury to find a verdict for the insurance company, and the court told the jury to return a verdict for the plaintiff. This instruction is the alleged error in this case.

Where each of the parties to a trial by jury requests the court to charge them to return a verdict in his favor, he waives his right to any finding or trial of the issues by the jury, and consents that the court shall find the facts and declare the law. An acceptance of these waivers and a peremptory instruction by the court in favor of either party constitutes a general finding by the court of every material issue of fact and of law in favor of the successful party. The case is then in the same situation in which it would have been if both parties had filed a written waiver of a jury and it had been tried by the court. Each party is estopped by his request from reviewing every issue of fact upon which there is any substantial conflict in the evidence, and the only questions which the instruction presents to an appellate court are, was the court's finding of facts without substantial evidence to sustain it? and was there error in its declaration or application of the law? U. S. v. Bishop (C. C. A.) 125 Fed. 181, 183; Bowen v. Chase, 98 U. S. 254, 264, 25 L. Ed. 47; Beuttell v. Magone, 157 U. S. 154, 157, 15 Sup. Ct. 566, 39 L. Ed. 654; The City of New York, 147 U. S. 72, 77, 13 Sup. Ct. 211, 37 L. Ed. 84; Laing v. Rigney, 160 U. S. 531, 16 Sup. Ct. 366, 40 L. Ed. 525; King v. Smith, 110 Fed. 95, 97, 49 C. C. A. 46, 48, 54 L. R. A. 708; The Francis Wright, 105 U. S. 381, 26 L. Ed. 1100; Merwin v. Magone, 70 Fed. 776, 777, 17 C. C. A. 361, 363; Chrystie v. Foster, 61 Fed. 551, 9 C. C. A. 606; Stanford v. McGill (N. D.) 72 N. W. 938, 952; Mayer v. Dean, 115 N. Y. 556, 22 N. E. 261, 5 L. R. A. 540; Provost v. McEncroe, 102 N. Y. 650, 5 N. E. 795.

The first question for consideration, therefore, is, was there any substantial evidence in support of the finding of the court below that the policy in suit was not canceled or surrendered? There was evidence that the plaintiff was the owner and that Rundberg & McCann were the lessees of, and the holders of an option to purchase, the elevator, which was the subject of this litigation, under a contract to keep it insured for the benefit of the plaintiff. McCann had paid the premium—$80—upon the policy in suit, and had caused Rohrer, the recording agent of the defendant, to issue and deliver it to the plaintiff in November, 1900. The policy, by its terms, promised indemnity against loss by the burning of the elevator for the term of one year. On December 5, 1900, Rohrer received an order from Chicago to cancel the policy. On December 12, 1900, after some conversation with McCann and with Coryell, the state agent of the defendant for the state of Nebraska, he wrote, coun-

tersigned, and placed in his safe a policy of the Milwaukee Mechanics' Insurance Company, which by its terms insured Kerr against loss by fire on this elevator. He debited the Milwaukee Company and credited the Phenix Company with the $80 premium upon his account books, and wrote the word "Canceled" across his register of the Phenix policy. He wrote the Milwaukee policy and took the action which has been described for the purpose of substituting that policy for the policy of the defendant upon which this action is founded. While matters were in this situation, and on December 16, 1900, the elevator burned. On the next day Rohrer went to the plaintiff, Kerr, who still held the Phenix policy, told him what he had done, and that, in view of the entries upon his books, he rather thought that the Milwaukee Company was liable for the loss. Thereupon Kerr delivered the Phenix policy to Rohrer, and took from him the Milwaukee policy. Rohrer testified that Mr. Ragan, the attorney of the plaintiff, subsequently told him that he might deliver the Phenix policy to the state agent, Coryell, and they would make no claim under it. But Mr. Ragan denied that he ever made any such statements. Kerr brought an action for his loss against the Milwaukee Mechanics' Company upon the policy which he had taken in exchange for the Phenix policy after the fire, and failed to recover. The judgment in that case was brought to this court, and was affirmed. Kerr v. Milwaukee Mechanics' Ins. Co., 117 Fed. 442, 54 C. C. A. 616. The evidence which conditions the question whether or not the Phenix policy was canceled before the loss in this case does not differ materially from that which was produced and is set forth more at length in the case against the Milwaukee Company. In that case we held that Rohrer had no authority from Kerr to consent to the cancellation of the Phenix policy, and that, as that policy provided that it could be canceled by the company only by a return of the unearned premium after a notice of five days, and no notice had been given to Kerr, who held the policy, and no premium had been returned before the fire, the policy of the Phenix Company was valid and that of the Milwaukee Company was void when the loss occurred. Nothing has been presented in this case to lead us to reverse or modify that conclusion, and we adhere to it. When, therefore, Rohrer went to Kerr with the Milwaukee policy the morning after the fire, that policy was useless and valueless and Kerr had a valid claim against the Phenix Company for about $3,500 on account of the loss of his elevator. The surrender by Kerr of the Phenix policy and his acceptance of the Milwaukee policy in lieu of it neither released, avoided, nor affected this claim, because the exchange was not made or intended for that purpose and there was no consideration for it. The finding of the court below, therefore, that the Phenix policy was not canceled before the loss, and that the plaintiff's claim under it was not avoided or released thereafter, was not without substantial and sufficient evidence to sustain it, and it is affirmed.

Was the interest of the plaintiff, Kerr, in the elevator other than the unconditional and sole ownership? The evidence was that Kerr bought, paid $6,000 for and took the title to the elevator. Thereupon he made a written agreement with Rundberg & McCann to the effect that they should have the possession and use of the property for a monthly rental of $100 and for the payment of the premium on the insurance; that they

should be at liberty to pay more than $100 per month if they saw fit; that, if they failed to pay as much as that amount for two successive months, the contract should cease, and Kerr should retain the moneys he had received, but that, if they should continue to make the payments until they should aggregate $6,000 and interest at 10 per cent. per annum, Kerr would convey the elevator to them. When the loss occurred, Rundberg & McCann were not in default. They had paid about $1,200 under this contract, and they were in the possession of the property. It is contended that this transaction constituted a loan of $6,000 by Kerr to Rundberg & McCann, and that the conveyance by the original vendor to Kerr was in fact a mortgage to secure the payment of this loan. But while there is testimony to the effect that Kerr bought the elevator for Rundberg & McCann with the undoubted expectation that they would use it, and with the hope that they would purchase it, the entire evidence taken together, and especially the written agreements between the various parties, which must, in the end, control, do not sustain the position that this was a loan. Rundberg & McCann never agreed to repay the $6,000 to Kerr, nor did they ever contract to buy and pay for the property. It is improbable that Kerr loaned $6,000 to them without taking any promise or obligation for the repayment of this amount of money. The written agreement between them negatives this idea. It is not an agreement of purchase and sale. It is an option contract—an agreement to give Rundberg & McCann the option to purchase the elevator as long as they failed to make default for two successive months in the payment of the monthly rentals. It is a unilateral contract, because Rundberg & McCann did not bind themselves to purchase the property, or to pay the rentals for any specified time. When they made their first payment under the agreement, the option undoubtedly became irrevocable by Kerr, because he had accepted a consideration for it, and it continued in that condition until the fire because Rundberg & McCann continued to make the specified payments. But Rundberg & McMCann made no irrevocable contract. They never agreed to accept the option or to purchase the property, and they were at liberty to renounce the one and to abandon the other at any time. Was Kerr the sole and unconditional owner of the elevator in this state of the case? The object of the provision in policies of insurance that they shall be void if the interest of the assured in the property is not the sole and unconditional ownership of it is to prevent gambling contracts, and to protect the companies against the claims of those who have no insurable interest in the property injured or destroyed. The purchaser of the property, who is in the possession of it under a contract whereby the former owner agrees to sell and the buyer absolutely binds himself to purchase and to pay an agreed price for the property, is almost universally held to be the unconditional owner of it under the clause under consideration, because the loss from any injury or destruction of the property falls upon him. If the owner has agreed to sell and the vendee has agreed to buy on definite terms, the purchaser is the sole and unconditional owner of the property within the true meaning of the clause upon this subject in insurance policies, because the vendor can compel the purchaser to pay for the property notwithstanding its injury or destruction, and hence to suffer the loss

occasioned thereby. Milwaukee Mechanics' Ins. Co. v. Rhea & Son (C. C. A.) 123 Fed. 9, 11, 13 Am. & Eng. Ency. of Law (2d Ed.) 178, 179, and cases cited; Hough v. City Ins. Co., 29 Conn. 10, 76 Am. Dec. 581; Rumsey v. Phœnix Ins. Co. (C. C.) 1 Fed. 396; Amsinck v. American Ins. Co., 129 Mass. 185; Wainer v. Milford Fire Ins. Co., 153 Mass. 335, 26 N. E. 877, 11 L. R. A. 598; Redfield v. The Holland Ins. Co., 56 N. Y. 354, 15 Am. Rep. 424; Pelton v. Westchester Ins. Co., 77 N. Y. 605; Dupuy v. Delaware Ins. Co. (C. C.) 63 Fed. 680. But if the owner gives to another the option to purchase a piece of property, and the latter does not irrevocably accept the offer and definitely agree to make the purchase, the loss of its injury or destruction falls upon the owner of the property, and not upon the owner of the option, because the latter is not bound to take or pay for the property, and he cannot be compelled to do so. And while the owner of the option may accept it, and compel the owner of the property to comply with its terms, until the owner of the option does so he has no interest in the property. He has nothing but a mere right to acquire an interest, and this is neither the ownership nor any interest in the property which impinges upon its unconditional ownership by him who gave the option. Richardson v. Hardwick, 106 U. S. 252, 254, 1 Sup. Ct. 213, 27 L. Ed. 145; Gustin v. Union School District (Mich.) 54 N. W. 156, 34 Am. St. Rep. 361. The result is that the owner of property who has given an irrevocable option to purchase it to one who has not agreed to accept the option or to buy or to pay for the property still has the unconditional ownership of it within the proper interpretation of the clause upon that subject in policies of insurance, and he may maintain an action upon a policy for injury to it by fire. The plaintiff was in that situation. He was the owner of the elevator. He had given an option to purchase it to Rundberg & McCann. They had paid $1,200 for that option, and in partial acceptance of it, so that it had become irrevocable. But they had not agreed to complete their acceptance, or to buy the property, and they were not bound to take or to pay for it. They had no interest in it, but a mere right to acquire an interest which they were at liberty to enforce or to abandon. The interest of the plaintiff was the sole and unconditional ownership, and his action upon the policy was well brought.

The policy required the insured to furnish proofs of loss within 60 days after the fire. A distinct denial by an insurance company of liability under a policy after the loss, and within the time prescribed by the proofs, upon the ground that there was no contract of insurance, is a waiver of proofs of loss, because in such a case the proofs do not tend to induce the company to pay the loss, and they are useless. Tayloe v. Ins. Co., 9 How. 390, 403, 13 L. Ed. 187; Knickerbocker Life Ins. Co. v. Pendleton, 112 U. S. 696, 5 Sup. Ct. 314, 28 L. Ed. 866. Was there any substantial evidence in this case of a denial of the validity of the policy within 60 days after the loss? Rohrer, the recording agent of the defendant, testified that he issued the policy; that he received an order from Chicago to cancel it on December 5, 1900; that the fire occurred on December 16, 1900; and that on the next day he told the plaintiff what entries he had made on his books; told him that he rather thought that the Milwaukee Company was the one liable, and obtained

from him the Phenix policy in place of the Milwaukee policy which he delivered to him. Mr. Ragan, the attorney for Kerr, testified that Mr. Coryell, the state agent for the Phenix Company, told him that the Milwaukee people were liable, and that his company was not liable, because there had been a substitution of policies. The testimony of Ragan is contradicted by the testimony of Coryell, but the statement of Rohrer is undisputed. It is contended that neither Rohrer nor Coryell had any authority to waive proofs of loss without a written indorsement of the waiver upon the policy under the usual clause therein which requires a waiver to be evidenced in that way. But Rohrer received the order from Chicago on December 5, 1900, to cancel the policy. That order must now be deemed the order of the company itself because the company has ratified the order and founded one of its defenses to the policy upon it. It necessarily follows that Rohrer's acts and sayings while he was engaged in attempting to execute the order were the acts and sayings of the company, and that his declaration to Kerr that the Milwaukee Company was liable was, in effect, a denial of the liability of the defendant, and furnished evidence to sustain the finding of the court below to that effect, as well as its conclusion of law that this denial of liability was a waiver of the proofs of loss.

Our conclusion is that there was no error in the finding or in the conclusions of the trial court, and that the judgment below must be affirmed. It is so ordered.

WESTERN TIE & TIMBER CO. v. BROWN.

(Circuit Court of Appeals, Eighth Circuit. March 28, 1904.)

No. 1,953

1. BANKRUPTCY—TRANSFER TO PREFERRED CREDITOR—PREFERENCE.
   Under section 60a of the bankrupt law of July 1, 1898, c. 541, 30 Stat. 562 [U. S. Comp. St. 1901, p. 3445], as amended (Act Feb. 5, 1903, c. 487, § 13, 32 Stat. 799 [U. S. Comp. St. Supp. 1903, p. 416]), a transfer of the debtor's property may constitute a preference, although the property is not conveyed to the preferred creditor, if the effect of the transfer is to enable the creditor to receive out of the debtor's estate a larger percentage of his claim than others of the same class obtain.

2. SAME—VOIDABLE PREFERENCE—INTENTION TO GIVE—NECESSITY.
   An intention on the part of the insolvent to give a preference by means of a transfer he makes is not indispensable to the existence of a voidable preference, under section 60 of the bankrupt law of July 1, 1898, c. 541, 30 Stat. 562 [U. S. Comp. St. 1901, p. 3445], as amended (Act Feb. 5, 1903, c. 487, § 13, 32 Stat. 799 [U. S. Comp. St. Supp. 1903, p. 416]). It is sufficient that a transfer of the insolvent's property is made, which has the effect to give a preference, and that the party who receives it has reasonable cause to believe that it is intended by the party who procures the transfer, or who gives to the transfer the effect of a preference, that it should have that effect, although the insolvent is innocent of that intention.

3. SAME—VOIDABLE PREFERENCES NOT ALLOWABLE AS SET-OFFS.
   Preferences voidable under sections 60a and 60b of the bankrupt law of July 1, 1898, c. 541, 30 Stat. 562 [U. S. Comp. St. 1901, p. 3445], as amended (Act Feb. 5, 1903, c. 487, § 13, 32 Stat. 799 [U. S. Comp. St.

¶ 2. See Bankruptcy, vol. 6, Cent. Dig. §§ 252, 256.

Supp. 1903, p. 416]), are not allowable as set-offs against claims of the preferred creditors under section 68 (30 Stat. 565 [U. S. Comp. St. 1901. p. 3450]), on the ground that the preferences and the claims constitute mutual debts and credits.

4. SAME—VOIDABLE PREFERENCE—FACTS.

A company was hiring laborers to gather ties. The insolvent was operating stores and supplying the men. For many months an inspector had sent a pay roll once in about two weeks to the company, upon which the name of each laborer, his earnings, and the amount furnished him by the insolvent, appeared. The company had uniformly deducted the price of the supplies from the earnings of each man, had sent him a check for the balance, and had sent the insolvent a check for the supplies furnished. The insolvent owed the company more than $20,000, when, within four months of the filing of the petition in bankruptcy, it retained the amount owing the insolvent for the supplies furnished for three months and credited him with this amount, $2,210.73, on its claim against him.

Held, this was a voidable preference, and the claim of the company against the estate of the bankrupt should be expunged unless it pays to the trustee the amount it thus withheld.

(Syllabus by the Court.)

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

F. H. Sullivan, for appellant.

S. M. Stuckey (M. S. Stuckey and H. L. Ponder, on the brief), for appellee.

Before SANBORN, THAYER, and HOOK, Circuit Judges.

SANBORN, Circuit Judge. This is an appeal from an order of the District Court that the claim of the Western Tie & Timber Company against the estate of S. F. Harrison, a bankrupt, be expunged unless the company pays to the trustee the sum of $2,210.73 which the court below found had been transferred to the company by the bankrupt in such a way that the transaction constituted a preference.

A motion has been made to dismiss the appeal, under rule 11 of this court (90 Fed. cxlvi, 31 C. C. A. cxlvi), because the assignment of errors was not filed at the time of, or before, the allowance of the appeal. The record, however, does not establish the fact upon which this motion is founded. The order allowing the appeal, the citation, the admission of service of the citation, and the bond, are dated June 12, 1903. The approval of the bond and the assignment of errors are not dated. All these papers were filed June 16, 1903. As the assignment of errors was filed at the same time as the other appeal papers, the presumption is that it was presented to the court with them when the appeal was allowed, and the motion to dismiss is denied.

Harrison was adjudged a bankrupt on February 24, 1903. Prior to that time he owned some merchandise in two stores, and he was engaged in forwarding the work of gathering ties from the lands of the tie company, and in selling supplies to the laborers engaged in this work. Once in two or three weeks an inspector sent to the company a pay roll upon which the name of each workman, the amount owing to him for his services, and the price of the supplies which Harrison had furnished him, appeared. The company uniformly deducted from the wages due each workman the price of the supplies Harrison had deliv-

ered to him, sent the workman its check for the balance, and sent Harrison the price of all the supplies he had furnished to the laborers. This course of dealing had been followed for many months on October 24, 1902, four months before the filing of the petition in bankruptcy. On that day Harrison owed to the company more than $20,000. He owed other creditors many thousand dollars. The tie company held a mortgage on his property to secure the payment of $15,000 to it, and he was insolvent. During the month of December he applied to the tie company to advance him more money, and it refused his request. Thereafter, when the pay rolls for December, 1902, and January and February, 1903, came in, the company paid the laborers as usual, but, instead of sending to Harrison, as it had become accustomed to do, the price of the supplies which he had delivered to the men, it credited him with this amount, which aggregated $2,210.73, and in this way secured a payment of this amount upon its claim against him. The referee and the District Court held that this transaction gave to the tie company a voidable preference, and required it to pay to the trustee $2,210.73, as a condition of the allowance of its claim against the estate of the bankrupt.

This ruling is challenged by counsel for the appellant on three grounds: Because no transfer of anything by Harrison to the appellant was shown; because there was no proof that Harrison was insolvent, or that the tie company had any notice of his insolvency, when it withheld the price of the supplies; and because there was no evidence that Harrison intended to prefer the tie company when he delivered the supplies to the men, or that the company had any notice of any such intention.

But the test of a preferential transfer under the bankrupt act of 1898 is not whether or not the debtor has conveyed anything to the creditor, or whether or not the creditor has received anything from the debtor. It is whether or not the debtor has made a transfer of any of his property to any one in any way whereby the enforcement of the transfer will enable one of his creditors to obtain a greater percentage of his debt than any other creditor of his class can secure. So the question in this case is not whether or not Harrison transferred any of his property directly to the tie company, but whether or not any transfer of his property was made in the time and manner denounced by the bankrupt law, so that the tie company was enabled to secure a larger percentage of its claim against him than other creditors of its class can obtain.

One of the main purposes of the bankrupt law is to distribute the unexempt property which the bankrupt has four months before the filing of the petition in bankruptcy, share and share alike, among his creditors. In order to attain this object, the law provides that if a person, being insolvent, has, within four months before the filing of the petition, made a transfer of any of his property, the effect of the enforcement of which will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of his creditors of the same class, he shall be deemed to have given a preference, and that if he has given a preference, and the person receiving it or to be benefited thereby, or his agent acting therein, shall have had reasonable cause to believe that it was intended thereby to give a preference, the claim of

the creditor who has received such a preference shall not be allowed, unless he surrenders it. Bankr. Law 1898, c. 541, §§ 60a, 60b, 57g, 30 Stat. 562, 560 [U. S. Comp. St. 1901, pp. 3445, 3443], as amended in Act Feb. 5, 1903, c. 487, §§ 13, 12; 32 Stat. 799 [U. S. Comp. St. Supp. 1903, pp. 416, 415]; Swarts v. Fourth Nat. Bank, 117 Fed. 1, 3, 4, 54 C. C. A. 387, 389, 390. The uniform practice of the tie company for many months before October, 1902, to pay to Harrison once or twice in 30 days the price of all the supplies which he furnished to the workmen who prepared and hauled the ties for it, warranted a finding and conclusion that, while Harrison delivered the goods to the workmen, he sold them to the tie company, and that company became legally and morally bound to pay him their value. When, therefore, the company refused to pay him, and credited him on account of these goods with $2,210.73 upon its claim of $20,000 against him, the effect of the transaction was to pay $2,210.73 of Harrison's indebtedness to the tie company with these supplies, which were a part of his estate. Moreover, whether the workmen or the tie company were the legal debtors of Harrison for these supplies, the actual result of the transaction was the same. Within the four months before the filing of the petition the supplies were a part of the estate of the insolvent, Harrison. At the end of the four months they had been converted into ties, which were a part of the property of the company. The latter had received in the ties the value of $2,210.73, which had been transferred to it from the estate of Harrison, and for which it had paid nothing to the workmen or to Harrison, except by means of the credit it had given to Harrison upon its claim against him. But every transfer of his property by an insolvent, within four months of the filing of the petition in bankruptcy, which has the effect to "enable any one of his creditors to obtain a greater percentage of his debt" out of the property of the insolvent "than any other of such creditors of the same class," is a preference. Swarts v. Fourth Nat. Bank, 117 Fed. 4, 54 C. C. A. 390. The transfer of the supplies which were a part of the property of Harrison enabled the tie company to obtain about 10 per cent. more of its debt out of his estate than other creditors of its class can secure, and the contention that this transaction did not constitute a preference under the law cannot be maintained.

Was Harrison insolvent when the company secured this preference, and did the latter have notice of this fact? The answer must be in the affirmative. He owed the tie company more than $20,000. It held a mortgage on his property, which had been made in January, 1902, to secure the payment of $15,000. He had frequently made statements of his assets and liabilities to the company which showed the former to be "a little bit more" than the latter. In December he applied for the advance of more money, and the company refused his request because it had received information that his indebtedness was greater than he had represented it to be. Thereupon, on December 28, 1902, the company first applied an installment of its indebtedness to Harrison for the supplies furnished to its workmen to the payment of a part of the bankrupt's indebtedness to it. These facts convince that Harrison was insolvent, and that the tie company knew it before it applied its indebtedness to him in payment of its claim against him.

There is no evidence in the record before us that Harrison ever intended by the sale of the supplies to prefer the tie company to his other creditors. Prior to December, 1902, the company had invariably sent him its checks for the supplies which he delivered, and he probably expected that it would, and intended that it should continue to do so. If it had done so, no preference would have been created. It failed to continue its practice, and, by withholding payment for the supplies from Harrison and crediting him with their price, it secured a payment of $2,210.73 upon its claim against him. Counsel for the company persuasively argue that this transaction did not constitute a voidable preference, because Harrison did not intend to give any preference by means of it. But an intention on the part of the insolvent to give a preference by means of a transfer which he makes is not always indispensable to its existence. It is sufficient if he has given the preference, and the party receiving it has reasonable cause to believe "that it was intended thereby to give" it. The statute does not require that it should be intended by the debtor, but is fully satisfied by the existence of an intention on the part of the actor—the person who procures, brings about, or effects the transfer. The preferences denounced by the statute are often secured by creditors without any desire or intention on the part of the debtors to give them, as in cases in which the creditors obtain judgments against their debtors over defenses made to the actions in good faith, and in cases, like that at bar, where, without the consent of their debtors, creditors appropriate to the payment of their claims the property of their debtors which happens to be under their control. Such transactions are none the less voidable preferences, that the debtors do not intend them to have that effect. If they are conducted within the four months, and if they have the effect to give to the creditors who conceive and execute them larger percentages of their claims than other creditors of the same class receive, they fall as clearly under the ban of the law as transfers made by debtors with the intent on their part to give the preferences. Such a transaction is voidable by the trustee not only when the party receiving it has reasonable cause to believe that it was intended by the debtor, but also when it was intended by the creditor, or by the actor who accomplished the result, to work a preference by means of the transaction. Act July 1, 1898, c. 541, §§ 60a, 60b, 57g, 30 Stat. 562, 560 [U. S. Comp. St. 1901, pp. 3445, 3443], as amended in Act 5, 1903, c. 487, §§ 13, 12, 32 Stat. 799 [U. S. Comp. St. Supp. 1903, pp. 416, 415]. The tie company in this case had reasonable cause to believe that the transaction which it conducted was intended to give it a preference over the other creditors of Harrison in its class. Indeed, it knew that this was the object of the transaction. It knew that its own intention and purpose was to secure such a preference by applying the debt it owed to Harrison for the supplies in part payment of its large claim against him for money advanced, and it attained its object, at least temporarily. The transaction fell fairly within the terms of section 60, and it constituted a voidable preference.

Finally, it is said that this $2,210.73 was a credit to Harrison, and that the company should be permitted to set it off against his debt to it, and should be allowed to prove its claim for the balance remaining, without restriction, on the ground that these claims were mutual debts

and credits, under section 68 of the bankrupt law. But this section must be read and construed with sections 60a, 60b, and 57g, and in the light of the dominant purpose of the law to distribute to the creditors equally all the unexempt property owned by the insolvent four months before the petition in bankruptcy is filed. When it is thus read, it becomes plain that preferences denounced by, and made voidable under, sections 60a and 60b, cannot be permitted to stand as offsets against claims of the preferred creditors against the bankrupt which accrued more than four months before the filing of the petition. If this could be done, any creditor who had a running account with his debtor could secure an unassailable preference by simply receiving and crediting upon this account within the four months sufficient money or property of his debtor to satisfy his claim. The truth is that the law draws a line through the account between the insolvent and his creditor four months before the petition in bankruptcy is filed. All mutual debts and credits which accrue prior to that time may be set off against each other. Credits to the insolvent accruing subsequent to that time which constitute voidable preferences under section 60 are excepted by that section from the subsequent provisions found in section 68 (Act July 1, 1898, c. 541, 30 Stat. 565 [U. S. Comp. St. 1901, p. 3450]), and they cannot be used to offset debts of the insolvent which accrue prior to that date. The mutual debts and credits which accrue within four months of the filing of the petition, and which do not constitute voidable preferences, may be set off against each other, as well as against the respective debts and credits accruing more than four months before the petition is filed. The credit to Harrison of the $2,210.73 constituted a voidable preference, and cannot, therefore, be lawfully set off against the claim of the tie company against him under section 68. There is, however, an item of $75 in the claim against Harrison which may perhaps properly be used to reduce the amount of the preference under section 60c, which provides that a claim for money or property delivered to a debtor under a new or further credit by a creditor after he has been preferred may be offset against the preference. While the evidence is not very satisfactory, it seems to indicate that this $75 was advanced to Harrison after the company had secured a preference to the amount of $1,042.77. The amount to be refunded by it will accordingly be reduced by the sum of $75, and the order of the court below will be modified to the effect that the claim of the Western Tie & Timber Company against the estate of the bankrupt, Harrison, be expunged unless the company pays to the trustee of the estate $2,135.73 within 20 days after the mandate of this court is filed and entered in the court below, and the order thus modified will be affirmed.

It is so ordered.

FINLEY et al. v. ABNER.

(Circuit Court of Appeals, Eighth Circuit. March 29, 1904.)

No. 1,924.

1. DESCENT—KANSAS STATUTE—CONSTRUCTION.

The statute of Kansas relating to descent (Gen. St. 1889, c. 33, §§ 20, 21, 29) which by act of Congress (Act Feb. 8, 1887, 24 Stat. 389, c. 119, § 5) is made to govern the descent of lands allotted in severalty to the members of certain tribes in Indian Territory, provides that, if an intestate leaves neither husband, nor wife, nor issue, his estate shall go to his parents, and, if his parents be dead, shall be disposed of in the same manner as if they, or either of them, had outlived the intestate and died in the ownership and possession of the portion thus falling to their share, or to either of them, and that "children of the half blood shall inherit equally with children of the whole blood." *Held*, that the word "children," as so used, should be construed as meaning "kindred," and that, under such provision, where an Indian woman, whose parents were dead, died unmarried and without issue, but leaving a half-brother, he inherited her land, to the exclusion of her uncles and cousins.

In Error to the United States Court of Appeals in the Indian Territory.

For opinion below, see 69 S. W. 911.

This suit was brought in the United States Court for the Northern District of the Indian Territory by George W. Finley, Alfred F. Barnes, Estella Staton, Mabel Staton, and Claudie Staton against Joseph Abner for the partition of a tract of land. The plaintiffs claim to be the owners of an undivided one-half of the property, and concede to the defendant the ownership of the remaining interest. All of the parties claim title through one Edith Abner, to whom, as an Indian, the land had been allotted and patented by the United States, and who died intestate in April, 1890, without husband, or issue, or other kin nearer than her half-brother. The common father of the defendant, Joseph Abner, and the deceased Edith, was Dennis W. Abner. His first wife was the mother of Joseph; his second wife was the mother of Edith. He outlived both wives, and, dying, left surviving him his only children, Joseph and Edith, half brother and sister. The plaintiffs were uncles and cousins of Edith Abner on the side of her deceased mother. By one of the acts of Congress providing for the allotment in severalty of lands to Indians of the tribe and class to which Edith Abner belonged, the laws of Kansas were adopted as furnishing the rules with respect to the descent and partition of such lands. Act Feb. 8, 1887, 24 Stat. 389, c. 119, § 5. The provisions of those laws, pertinent to this case, are found in sections 20, 21, and 29 of the act concerning descents and distributions (Gen. St. Kan. 1889, c. 33), and they are as follows:

"Sec. 20. If the intestate leave no issue, the whole of his estate shall go to his wife; and if he leave no wife nor issue, the whole of his estate shall go to his parents.

"Sec. 21. If one of his parents be dead, the whole of the estate shall go to the surviving parent; and if both parents be dead, it shall be disposed of in the same manner as if they, or either of them, had outlived the intestate and died in the possession and ownership of the portion thus falling to their share, or to either of them, and so on through ascending ancestors and their issue."

"Sec. 29. Children of the half blood shall inherit equally with children of the whole blood. Children of a deceased parent inherit in equal proportions the portion their father or mother would have inherited, if living."

The claim of the plaintiffs is that upon the death of Edith Abner, both of her parents being dead, one half of her estate went through her father, and thence down to Joseph Abner, the defendant, and the other half went through her mother to her mother's parents, and, they being also dead, thence down

to her uncles and cousins as the sole heirs of her maternal grandparents, as well as the sole heirs of her mother. Joseph Abner relies upon section 21 and the first clause of section 29, supra, and claims that in virtue of the provisions of the latter he occupies the position of a brother of the full blood. He also contends that, as their common father survived the mother of Edith, no inheritance could be traced through the latter, and that he, as the sole heir of the father, takes the entire estate. The cause was submitted upon the pleadings and an agreed statement of facts, and resulted in a judgment for the defendant. The judgment was affirmed by the United States Court of Appeals for the Indian Territory (69 S. W. 911), and is now before this court for review.

S. C. Fullerton and Geo. B. Denison, for plaintiffs in error.
D. W. Talbot and W. H. Kornegay, for defendant in error.

Before SANBORN, THAYER, and HOOK, Circuit Judges.

HOOK, Circuit Judge, after stating the case as above, delivered the opinion of the court.

If Joseph Abner, in respect of capacity to inherit from his deceased half-sister, sustained to her a relation equivalent to that of a brother of the full blood, the conclusion necessarily follows that under the laws of Kansas he takes the entire estate. In the matter of inheritance, a full brother or sister of an intestate takes precedence of uncles and cousins. The crucial question, therefore, is whether a half-brother possesses the inheritable quality of a brother of the full blood. The first clause of section 29 of the Kansas act concerning descents and distributions provides that "children of the half blood shall inherit equally with children of the whole blood." We must agree with counsel that this provision is somewhat obscure, and that the terms employed do not clearly indicate the legislative intent. If the word "children" is to be taken in the sense of "offspring" or "issue of the body," it is difficult to perceive how, in the very nature of things, there could be children of the half blood. Every child is of the full blood of both of its parents. No child can be of the half blood of either of its parents. If a man has been twice married, both wives bearing children to him, those of the first wife are her children of the full blood, but are not of the blood at all of the second one, and so of the children of the second wife. But all of the children are of the full blood of their common father. The phrase "of the half blood" necessarily signifies that the consanguinity is collateral, rather than lineal. The term "children" was not happily chosen for use in connection with collateral kinship, but such an ambiguity or inaptness of words will not justify us in ignoring the force and effect of the clause, when properly construed. It is presumed that every provision was intended to serve some definite purpose. The intent of a statute is its vital, living spirit, and it is the duty of courts, when called upon, to ascertain and give effect to such intent, if possible, having due regard to the language in which it is expressed. In the performance of this duty it is sometimes helpful and always proper to consider the conditions which led to the enactment.

By the common law of England kindred of the half blood were wholly excluded from inheritance, even though such exclusion resulted in an escheat of the estate to the crown. The manifest harsh-

ness of this rule, and the weakening of the ancient doctrine of feudal tenure out of which it grew, led to a modification by an act of Parliament; and, in the spirit of departure from the old institutions, laws have been enacted in nearly all, if not all, of the states of this country, placing kindred of the half blood, in respect of their inheritable capacity, wholly or partly in the class of those of the whole blood. In some states a distinction is made between property acquired by inheritance and that acquired by purchase, the old rule being retained as to the former; in other states a distinction is made between personalty and realty. In some the kindred of the half blood are given a fractional interest in comparison with that which is given to those of the whole blood; and in other states all differences in capacity to inherit are wholly abolished. Gardner v. Collins, Fed. Cas. No. 5,223; Id., 2 Pet. 58, 7 L. Ed. 347; Stone v. Doster, 50 Ohio St. 495, 35 N. E. 208; Baker v. Chalfant, 5 Whart. 477; Appeal of Lynch, 132 Pa. 422, 19 Atl. 281; Oglesby Coal Co. v. Pasco, 79 Ill. 164; Moore v. Abernathy, 7 Blackf. 442; Armington v. Armington, 28 Ind. 74; Clay v. Cousins, 1 T. B. Mon. 75; Petty v. Malier, 15 B. Mon. 591; Keller v. Harper, 64 Md. 74, 1 Atl. 65; Larrabee v. Tucker, 116 Mass. 562; Rowley v. Stray, 32 Mich. 70; Fatheree v. Fatheree, 1 Walk. 311; Prescott v. Carr, 29 N. H. 453, 61 Am. Dec. 652; Deadrick v. Armour, 10 Humph. 588; Chaney v. Barker, 3 Baxt. 424; Marlow v. King, 17 Tex. 177; Stark v. Stark, 55 Pa. 62.

It is worthy of note in this connection that the only provision in the entire body of the laws of Kansas directly touching this subject is contained in the clause under consideration. Upon a view of the ancient rule and the prevailing departure therefrom, we can have no doubt that in its enactment it was the purpose to follow the trend of modern legislation, and consequently that its effect is to permit kindred of the half blood to inherit equally with those of the full blood; the term "children" being construed as meaning "kindred." This being true, what is the result? Joseph Abner is placed in the position of a full brother of the intestate. The law says, in effect, that he shall inherit equally with a brother of the full blood. There is no ambiguity in the measurement of the interest which he would take in that capacity. Larrabee v. Tucker, supra. As a full brother of the intestate, Joseph Abner would take the entire estate of the intestate, to the exclusion of her uncles and cousins. Being a half-brother, with equal rights of inheritance, the same result naturally follows. It is suggested that by this construction effect is not given to the second clause of the same section, which provides that "children of a deceased parent inherit in equal proportions the portion their father or mother would have inherited, if living," and that a proper application of this clause to the case in hand would permit of the inheritance of the plaintiffs as heirs of the mother of the intestate. The purpose of this second clause was to apply a limited rule of representation per stirpes to an appropriate state of facts pertaining to collateral inheritance in cases of intestacy; but there is no condition in the case before us which authorizes the use of the rule. We have, instead, a near relative, who is clothed with all of the rights of a brother, and who, under the law, is entitled to take the entire estate. The existence of a

half-brother of the intestate, possessing the inheritable quality of a brother of the full blood, necessarily precludes an ascent along the ancestral line for the discovery of uncles and cousins, as is authorized by the twenty-first section of the same act. Whenever, in the plan of descent and distribution prescribed by law, there is found a person who possesses the right to take the entire estate of an intestate, the provisions applying to those who are more remote in relationship become of no moment. These conclusions render it unnecessary to consider the effect upon the rights of the parties to the suit which might under different conditions flow from the fact that the common father of Joseph Abner and the intestate survived her mother, through whom the plaintiffs claim.

The judgment will be affirmed.

LEIGHTON v. KENNEDY.

(Circuit Court of Appeals, First Circuit. April 14, 1904.)

No. 502.

1. BANKRUPTCY—ASSIGNMENT OF CLAIMS—EFFECT.

Within four months prior to the filing of a petition praying that the person against whom the petition was brought should be adjudged a bankrupt, the alleged bankrupt had made a general assignment for the benefit of creditors to one M. M., prior to the filing of the petition, purchased the claims of 12 creditors, which were nonnegotiable choses in action, under such circumstances that the alleged bankrupt might have claimed that the purchases were in his interest. Afterwards, and a few days before the filing of the petition, M. assigned each of said claims to a stranger, with the purpose of keeping alive 12 different claims in the hands of 12 different supposed creditors, so that the same might be enumerated as outstanding creditors with reference to any such petition. *Held*, that the claims so purchased merged in M., so as to become a single claim in equity, or are to be regarded as extinguished; that, in either case, the several persons to whom the claims were assigned acquired no equities superior to those of M., as the claims were nonnegotiable choses in action; and that the attempt by M. to create the condition described with reference to enumeration of creditors was an attempt to defeat the scheme of the statutes in bankruptcy, and therefore, in any view, noneffectual.

2. SAME.

Within four months prior to the filing of a petition praying an adjudication in bankruptcy of the person against whom the petition was filed, the alleged bankrupt made an assignment for the benefit of creditors to M. M., within a few days prior to the filing of the petition, purchased with funds of the assigned estate several claims against the alleged bankrupt belonging to creditors who had not assented to the assignment; and thereafter, before the filing of the petition, M. executed formal assignments of each of said claims to a stranger, without receiving any consideration therefor. *Held*, that the claims, if not extinguished through the purchase by M., were by that purchase put under the control of the alleged bankrupt, who held the residuary interest in the assigned estate, and so continued, and therefore must be rejected in computing the enumeration of outstanding creditors with reference to such petition.

Appeal from the District Court of the United States for the District of Massachusetts.

John J. Ryan (Pingree & Ryan, on the brief), for appellant.
Frederick P. Cabot (Hurlburt, Jones & Cabot, on the brief), for appellee.

Before COLT and PUTNAM, Circuit Judges, and ALDRICH, District Judge.

PUTNAM, Circuit Judge. In this case the appellant, Leighton, was adjudicated a bankrupt by the District Court for the District of Massachusetts, and thereupon he seasonably appealed to us. The case turns on the construction, application, and force of the following provision in paragraph "b" of section 59 of the bankruptcy act approved on July 1, 1898, c. 541, 30 Stat. 561, 562 [U. S. Comp. St. 1901, p. 3445]:

"Three or more creditors who have provable claims against any person, which amount in the aggregate, in excess of the value of securities held by them, if any, to five hundred dollars or over, or if all of the creditors of such person are less than twelve in number, then one of such creditors whose claim equals such amount may file a petition to have him adjudged a bankrupt."

A single creditor (Kennedy), who is the appellee, filed on March 28, 1903, a petition in due form, praying that Leighton might be adjudged bankrupt. He alleged that Leighton's creditors were less than 12. Leighton answered, denying this allegation, and prayed that the petition be dismissed. On February 20, 1903, Leighton, being admittedly insolvent, made a general assignment for the benefit of his creditors to one Walter J. Martin. A portion of the creditors came into the assignment, the details as to which ones it is not necessary to state. Twelve of Leighton's creditors who had not come in, on March 12, 1903, assigned their claims to Martin, receiving in payment therefor checks signed by him as assignee. The assignments to Martin were in writing, and in form to him individually; that is, without describing him as assignee, or disclosing on their face anything to show that he obtained them other than in his individual capacity. It appears that at the time these assignments were taken Martin had on deposit to his credit as assignee a certain amount of cash, and on the same day borrowed other amounts, which were credited to him as assignee, and presumably added to his deposit as such. These sums were borrowed, as the case states, for the purpose of aiding him in making payments to the creditors. Subsequent to the petition in bankruptcy the larger portion of the sums so borrowed were paid by Martin by his checks as assignee, but this cannot be regarded as a material fact.

The case contains the following statements agreed to by the parties to the controversy:

"The twelve accounts assigned as aforesaid to Martin were, on March 24, 1903, assigned by said Martin to twelve different persons, who respectively paid to Martin for the several accounts the same amount that Martin had paid for the respective accounts."

"The purpose of Martin and his assignees in making and taking these assignments of March 24, 1903, from Martin, was to keep claims enough alive to prevent a single creditor from maintaining a creditor's petition in bankruptcy against said Albert Leighton, and to prevent these claims from merging in himself, and to exclude the possibility of his being counted as only one creditor in case of bankruptcy proceedings against said Leighton."

It will be noticed that these assignments from Martin were only four days before the petition in bankruptcy was filed. They were in writing; so that if, after the claims had merged in Martin, he could lawfully reassign them, and they were capable of being severed, each of the various persons to whom the assignments were made became, for ordinary purposes, a creditor of Leighton, not only in equity, but at law, as will be seen by the extract from the Massachusetts statutes which we will hereafter make. The parties further agreed as follows:

"Eight claims against said Leighton, aggregating less than $200, and being all but seven of the other claims against Leighton which had not assented in writing to the assignment, were assigned by the holders thereof, creditors of Martin, to different persons for a similar purpose, of which both assignors and assignees were cognizant; but the consideration therefor was furnished by checks drawn by Martin as assignee, under said assignment, on the said bank account hereinbefore described."

Also as follows:

"Unless the above-mentioned twelve claims assigned on March 24, 1903, by Martin, or unless the eight claims assigned for a similar purpose, the consideration for which was paid by Martin as aforesaid, are counted in determining the number of creditors, there were less than twelve creditors at the date of the filing of the bankruptcy petition."

As under an assignment for the benefit of creditors the assigning debtor retains the beneficial interest in the residue of the property, when there is any, and in equity controls it, and as the assignee under such a deed bears trust relations to the debtor as well as to the creditors, it follows that whatever may have been the form of the transactions which resulted in the assignments of various debts to Martin, or to the persons designated by him who paid no consideration therefor, it was at the option of the debtor, Leighton, to ratify Martin's transactions in these respects, and accept the benefit thereof. To the time when the petition in bankruptcy was filed Leighton had not repudiated them; so that, for this case, all the debts thus assigned must be held to have been extinguished by payments from his assets, or on his account. The only alternative would be to hold that Leighton even then retained the right of affirming or rejecting, thus leaving him at his option to play fast and loose with reference to proceedings in bankruptcy, which, of course, could not be permitted. Therefore, according to the settled practice in bankruptcy, those debts are not to be counted in computing the outstanding creditors with reference to the number required to unite in an involuntary petition. Bump's Bankruptcy (10th Ed.) 439. This, of course, would not prevent these creditors from surrendering, after an adjudication in bankruptcy, the cash received by them as unlawful preferences, and from proving their debts. Neither, according to the well-settled practice in bankruptcy (Bump's Bankruptcy [10th Ed.] 439), would it prevent them from uniting in an involuntary petition, and counting as creditors accordingly, unless the petition was based on preferences given them. These propositions together work out an equitable result; while, if preferred creditors should be counted against an involuntary petition, they could, by merely sitting still, give effect to preferences illegally received, and defeat the purposes of the bankruptcy statutes. We find nothing in the present legislation which con-

travenes these rules of practice, although they were settled under previous statutes. The decisions cited in behalf of Leighton for the most part fail to meet these points, and, if to any extent they do not so fail, they are not of sufficient authority to change the previous practice.

Of course, like all other purchasers of nonnegotiable choses in action, the parties who acquired the 12 claims from Martin took them subject to all equities, and therefore to this option on the part of the debtor. In this particular case this is emphasized because, in view of the fact that they and Martin united for the purpose stated in the record, they must be held cognizant of the true condition of affairs. Therefore, for fundamental reasons, these debts cannot be enumerated under paragraph "b" of section 59 of the act of July 1, 1898.

The eight claims which were, by Martin's procurement, assigned to different persons who paid no consideration therefor, are also subject to further observations which easily dispose of them. Unless regarded as discharged from the assigned assets of Leighton in the manner we have stated, they belonged in equity to Martin; and the interests of the several persons to whom they were nominally assigned were unsubstantial, and not cognizable in bankruptcy proceedings, which, as we have several times held, are governed by equitable rules. It is the settled practice in the United States in bankruptcy that choses in action which have been assigned before a petition is filed are to be proved by the assignee as being the substantial party in interest. Bump's Bankruptcy (10th Ed.) 638. It is clear, as ruled in Sandusky v. First National Bank, 23 Wall. 289, 23 L. Ed. 155, that a proceeding in bankruptcy, from the time of its commencement to its final settlement, is one suit. The rule is universal in all litigation except suits at law, whether in equity or admiralty, and therefore in bankruptcy, which is analogous to equity, that interveners come in in the names of the substantial owners of claims, whether they be the original holders or assignees. Consequently, so far as these eight claims are concerned, there was, at the time the petition in bankruptcy was filed, in the best view of the case for Leighton, only a single creditor.

In addition to this, after the purchase by Martin, the claims, if not extinguished, were under the control of Leighton, who had the residuary interest in the estate assigned to Martin, and in whose behalf the latter was subject to a trust, as we have already explained. The reasons why these claims should not count are therefore multiple; and in any view of the policy of the bankruptcy statutes, and of the necessity of an honest administration thereof free from improper control or influence, they must be rejected in computing the number of outstanding creditors under section 59b of the act of July 1, 1898, which we have already quoted.

With reference to these particular claims, we observe nothing in the transaction which could be said to clearly operate in violation of the policy of the Bankruptcy Statutes. If we could assume that they are to be regarded as outstanding debts, the condition was not changed by the assignments made in connection with them, because prior thereto there were eight creditors, and there was, therefore, no unlawful purpose contemplated in the endeavor to maintain that same number. As to the twelve claims, however, the condition was entirely dif-

ferent. Either on the assignments of these claims to Martin they were extinguished, as we have said, or they all merged in Martin, so that he became in equity a single creditor, and, under the Revised Laws of Massachusetts of 1902, c. 173, § 4, a single creditor at law. This reads as follows:

"The assignee of a non-negotiable legal chose in action which has been assigned in writing may maintain an action thereon in his own name."

The subsequent assignments by him constituted an attempt to create artificially a new condition for the specific purpose, assented to by all involved, of defeating the carefully prepared scheme of the bankruptcy statutes with reference to the subject-matter which this proceeding concerns. An attempt to create such a condition, and thus by indirect methods to defeat the scheme of the statute, is unlawful and void, and so clearly so that we need not elaborate the proposition. It is true that there is a class of cases, like In re Strachan, 3 Biss. 181, Fed. Cas. No. 13,519, where, as the result of an ineffectual effort to adjust the affairs of a debtor by voluntary agreement among creditors, the enumeration with reference to proceedings in bankruptcy has been disturbed; but those disclose an honest purpose which the law does not discourage. On the other hand, the present appeal exhibits in connection with the 12 claims no intention of bringing about a voluntary adjustment of Leighton's affairs, but only a purpose, by an artificial array of numbers, to bar the petitioner, Kennedy, from his statutory right, and so no purpose whatever except that of defeating the scheme of the statute. Therefore there is no basis for its approval by a judicial tribunal.

We do not forget that prior to the later statutes in reference to the jurisdiction of the Circuit Courts it was admissible for citizens of different states to acquire property by absolute title although the purpose thereof was to establish jurisdiction in the federal courts; nor do we forget that a gift made for a like purpose to South Dakota was accepted by the Supreme Court as vesting it with jurisdiction against North Carolina. South Dakota v. North Carolina, 192 U. S. 286, 24 Sup. Ct. 269, 48 L. Ed. ——. Neither do we forget that under the prior bankruptcy statutes it was held by at least one District Court that it was legitimate to purchase claims for the purpose of securing the statutory amount required for the bringing of an involuntary petition. In re Woodford and Chamberlain, 13 Nat. Bankr. R. 575, Fed. Cas. No. 17,972. But these attempts to invest courts with jurisdiction were not reprehensible in the sense in which the contrivance at bar was so, in that the latter looked to forcing the petitioner out of the bankruptcy courts, and to depriving him of the right which the statutes carefully sought to secure him; and it should be understood that we do not intend to cover by this decision anything except with regard to the precise facts before us.

The decree of the District Court is affirmed, and the appellee will recover his costs of appeal.

UNITED STATES v. MASON.

(Circuit Court of Appeals, First Circuit. February 24, 1904.)

No. 500.

1. FEDERAL COURTS—CLERKS—FEES COLLECTED.
Moneys in the hands of the clerk of a federal district court are the property of the government, subject only to the payment of his personal compensation and necessary office expenses, including clerk hire.

2. SAME—BANKRUPTCY—BLANKS—PRINTING.
Where a federal district judge decided that bankruptcy forms were reasonably necessary for the proper administration of justice in order to insure uniformity, and thereupon ordered the District Court clerk to have certain approved forms printed and distributed, and to pay for the same from the receipts of his office, the printing of such forms, in so far as they were to be used for records by referees, etc., could not be regarded as stationery or a necessary expense of the clerk's office, within Rev. St. U. S. § 833 [U. S. Comp. St. 1901, p. 642], authorizing clerks of the district courts to retain from the fees of their office all necessary expenses thereof, but the clerk was entitled to pay, as a "necessary expense," for the printing of such portion of the forms as were necessary to inform the referees, etc., of the forms adopted by the court.

In Error to the District Court of the United States for the District of Massachusetts.

William H. Garland, Asst. U. S. Atty., and Henry P. Moulton, U. S. Atty.

William A. Pew, Jr., for defendant in error.

Before COLT and PUTNAM, Circuit Judges, and BROWN, District Judge.

PER CURIAM. This is a writ of error to review the judgment of the District Court in an action upon the official bond of the clerk of the District Court of the United States for the District of Massachusetts. The case was submitted to the District Court upon an agreed statement of facts, supplemented by the testimony of Mason, the defendant. It is agreed:

"That, while acting in the capacity of clerk of said court, defendant purchased, or caused to be printed, by order of the court, certain blank forms, to be used by the referees and clerk in bankruptcy; said forms being adopted and approved by the honorable judge of this court for the purpose of securing uniformity in the various forms used in the court of bankruptcy, and for the convenience of the court in considering the return made to it by the referees, and in dealing with matters of bankruptcy. That said court decided that said forms were reasonably necessary for the proper administration of justice, and ordered the clerk to cause the same to be printed and distributed, and to pay for the same from the receipts of the clerk's office."

The amount in question is $411.14, the government having abandoned its contention as to all other items.

The moneys in the hands of the clerk are the property of the government, subject only to the payment of his personal compensation and his necessary office expenses, including necessary clerk hire. The clerk is the collecting agent for the government. Bean v. Patterson, 110 U. S. 401, 4 Sup. Ct. 23, 28 L. Ed. 190. His duties as collecting agent are prescribed by statutes governing an officer of

a court of the United States. United States v. Hill, 123 U. S. 681, 8 Sup. Ct. 308, 31 L. Ed. 275. By section 833, Rev. St. U. S. [U. S. Comp. St. 1901, p. 642], it is provided that he shall make to the Attorney General returns of the fees and emoluments of his office, and of all the necessary expenses of his office. By section 844, Rev. St. U. S. [U. S. Comp. St. 1901, p. 647], he is required to "pay into the treasury, or deposit to the credit of the Treasurer, as he may be directed by the Attorney General, any surplus of the fees and emoluments of his office, which said return shows to exist over and above the compensation and allowances authorized by law to be retained by him."

To entitle the clerk to credit for the items disallowed, authority must first be found in the statutes. That "necessary office expenses" may be allowed as a proper credit appears from section 833 and section 839, Rev. St. U. S. [U. S. Comp. St. 1901, p. 645]. Passing the questions which arise from the statement that the expense was incurred without previous authority from the Attorney General, we will consider whether the expenditures can be regarded as for necessary expenses of the clerk's office. In this connection, we may consider the facts that the court ordered the blanks that they might be used by the referees and clerks in bankruptcy; that the forms were adopted and approved by the district judge for the purpose of securing uniformity in the various forms used in the court of bankruptcy, and for the convenience of the court in considering the return made to it by the referees and in dealing with matters in bankruptcy, and that the District Court decided that said forms were reasonably necessary for the proper administration of justice; and that all of these blanks, after being filled out, were returned to the clerk, and ultimately became a part of the record of the court in bankruptcy cases, and were the only record.

To regard this expenditure merely as for stationery would be a narrow view. The printed blanks were for the use of the referees, not as mere stationery, but were also directions to them in fulfilling their duties as officers of the bankruptcy court in making up the judgments of the bankruptcy court and its records.

That the most practical means to give instructions to a large number of referees in different parts of the district, to hold them to uniformity in methods, and to provide for orderly and convenient records of the court, was to issue sample forms, adopted and approved by the court, is obvious. To one at all familiar with bankruptcy procedure, it is evident that the preparation of practical blanks involves much more than the promulgating of an ordinary rule of court. The practical way to tell the referees and clerk what to do was not by mere pen-written orders, but by preparing sample blanks with the aid of a printer, who could provide suitable type, and suitable spaces for entries and for signatures, and make a sufficient number of duplicates. All these matters of form, size, and arrangement were most important, and were under the control of the District Court. The purpose of the order was to enable the court to do bankruptcy business in an orderly and proper manner, not to provide stationery for referees.

What was done comprehended, in substance, three things: The issuance, through the clerk, of directions of the judge to the referees; the provision of blank forms for the use of referees, which blanks, when filled, subsequently became the records of the bankruptcy court; and the provision of stationery for the use of referees. So far as the blanks are to be regarded as stationery, it was stationery for the use of referees, and not for the use of the clerk. So far as the blanks were for records, we think they cannot be regarded as for the use of the clerk, or their printing as a necessary expense of his office, within the meaning of the statute. By reference to Bankruptcy Act, §§ 39, 42 (Act July 1, 1898, c. 541, 30 Stat. 555, 556, 557 [U. S. Comp. St. 1901, pp. 3436, 3437], it will be seen that the duty of making up such portions of the record as were made upon blanks furnished to referees is not a duty of the clerk, but of the referees, who are officers whose duties are defined by statute. By General Orders in Bankruptcy, § 35, pars. 2, 4 (89 Fed. xiii, xiv, 32 C. C. A. xxxiv), it appears that the Supreme Court has so interpreted the bankruptcy act as to permit the reimbursement of the referees for necessary expenses out of particular estates. Brandenburg on Bankruptcy (3d Ed.) c. 62. Provision being made for expenses incident to the office of referees, such expenses cannot be regarded as necessary expenses of the clerk's office. The only aspect in which the furnishing of such blanks can be regarded as within the duties of the clerk is that it was a communication to the referees of forms adopted and approved for the regulations of referees.

The United States attorney urges that:

"If the court desired to secure uniformity in returns of referees in bankruptcy cases, he might have prescribed a form, and have directed the clerk to send it to the various referees throughout the district."

For reasons before stated, we are of the opinion that it cannot be said that the printing of sample forms for this limited purpose was not a necessary expense of the clerk's office. While it is true that it might have been possible for a clerk, with pen and ruler, to make by hand a sufficient number of copies, the inconvenience of doing so amounted to a practical necessity for printing, in order to carry out the directions of the court. It cannot be said, as a matter of law, that printing either by rubber stamps or by machine presses can in no instance be a necessary expense of the clerk's office.

As the case comes before us, the only objection properly made by the United States to the allowance of the item of $411.14 is that it was not disbursed for "necessary office expenses." For the reasons that we have shown, evidently a portion of it was not for such expenses; and, as all the circumstances under which the expenditures were made are open on this record, we hold, for the reasons stated, that for such portion the United States is entitled to recover on the bond in suit. But under the assignment of errors, so much of the item of $411.14 as was for "necessary office expenses," on the principles we have stated, cannot be recovered by the United States, and this independently of whether the work was done with the pen and ruler or by printing. We say "under the assignment of errors," because clearly none of them properly raises any distinct question un-

der the regulations of any of the departments, and all of them go to the merits of the expenditures, without regard to any regulation. This is true of the fourth assignment, which contains the expression, "without the authorization of the Department of Justice or of any express provision of law," since it also contains the words, "for the purchase of supplies not required for use in the administration of his office as such clerk." The assignment of errors concludes with a sweeping paragraph, but this, of course, is limited by the context. Therefore, so far as the expenditures in dispute were actually for "necessary office expenses," they should be allowed. As the record stands before us, we cannot, of course, ascertain how much of the item of $411.14 should be appropriated to them, if any.

The judgment of the District Court is reversed, and the case is remanded to that court for further proceedings in accordance with our opinion passed down this day, and neither party recovers costs on appeal.

CLARK v. PIDCOCK.

(Circuit Court of Appeals, Third Circuit. May 2, 1904.)

No. 27.

BANKRUPTCY—CIRCUIT COURTS OF APPEAL—JURISDICTION—PETITION FOR REVIEW.

Under Bankr. Act July 1, 1898, c. 541, § 24b, 30 Stat. 553 [U. S. Comp. St. 1901, p. 3432], providing that the several Circuit Courts of Appeal shall have jurisdiction in equity to revise in matters of law the proceedings of the several inferior courts of bankruptcy within their jurisdiction, which power shall be exercised on due notice and petition by the party aggrieved, where, after a bankrupt's estate has been closed without appointment of a trustee for the reason that the schedule showed no assets, an assignee of a judgment creditor who alone proved his claim applied to have the estate opened on the ground that the bankrupt had assets which he had fraudulently conveyed, on which petition the court discharged a restraining order and refused an injunction to prevent a further transfer of the assets, but appointed a trustee, such petitioner was a party aggrieved, and was therefore entitled to prosecute a petition for review of such order.

2. SAME—TRUSTEES—APPOINTMENT.

Where, at the first meeting of creditors of a bankrupt, called by the referee on November 21, 1899, no creditors were present and no trustee was appointed, and petitioner's assignor was the only creditor who proved his debt, it appearing that there were no assets, and on January 28, 1902, the referee made his final report, reciting that the bankrupt's estate had been fully administered so far as it had been referred to him, and that it was closed, the fact that more than a year elapsed thereafter before such creditor's petition for the appointment of a trustee was filed, which showed that the bankrupt had died leaving assets fraudulently transferred, did not deprive the court of jurisdiction to open the proceedings and appoint a trustee under Bankr. Act July 1, 1898, c. 541, §

¶ 1. Appeal and review in bankruptcy cases, see note to In re Eggert, 43 C. C. A. 9.

44, 30 Stat. 557 [U. S. Comp. St. 1901, p. 3438], providing that, if creditors of a bankrupt shall not appoint a trustee at their first meeting the court shall do so.

Appeal from the District Court of the United States for the District of New Jersey.

George H. Large, for appellant.
R. L. Lawrence, for appellee.

Before ACHESON, DALLAS, and GRAY, Circuit Judges.

GRAY, Circuit Judge. The petition in this case was filed under section 24b of the bankruptcy act of 1898 (Act July 1, 1898, c. 541, 30 Stat. 553 [U. S. Comp. St. 1901, p. 3432]), and seeks the revision in matter of law of an order appointing a trustee in bankruptcy, made by the District Court of the United States for the District of New Jersey, on the 13th day of April, 1903, in the matter of James N. Pidcock, bankrupt.

James N. Pidcock was adjudicated a bankrupt on October 27, 1899, on the filing of his petition in voluntary bankruptcy. The said petition and the schedules filed therewith under oath, show no assets, but debts amounting to upwards of $300,000.

On the 31st day of October, 1899, an order of reference was made to one of the referees in bankruptcy, who, on the 6th day of November, A. D. 1899, called the first meeting of the creditors of the said James N. Pidcock, bankrupt as aforesaid, to be held in Flemington, N. J., on the 21st day of November, 1899. At the said time and place, the first meeting of creditors was held by the referee, and no creditor appearing or being represented thereat, the referee ordered "that no trustee of the estate of the said James N. Pidcock, bankrupt as aforesaid, be appointed."

In the list of creditors of the said bankrupt, as shown in the schedules filed by him, as aforesaid, is the name of Daniel W. Kleinhaus, for the sum of $329.97, the amount of a certain judgment recovered by said Kleinhaus against said Pidcock. On the 5th day of December, 1899, the said Kleinhaus duly filed his proof of claim against the estate of the said bankrupt with the referee, and the same was allowed and is now on file with the papers in the case.

On or about the 17th day of December, A. D. 1899, the said Pidcock, bankrupt as aforesaid, died, without having filed his petition for a discharge in bankruptcy, and on the 2d of February, 1903, letters of administration were granted unto Harriet G. Pidcock, widow of the said James N. Pidcock, deceased, by the surrogate.

On July 9, 1900, the referee made the following certificate:

"I hereby certify that said Pidcock was adjudged a bankrupt on the 27th day of October, 1899.

That the schedules filed herein disclose no assets, nor have any assets come to the hands of the trustee.

That I have rendered all the services required to be rendered to the present time.

That this matter has been closed so far as the payment of fees is concerned under the authority of rule 18 of this court.

Dated July 9th, 1900. Frederick W. Leonard,
Referee in Bankruptcy."

On January 28, 1902, the said referee made the following report:

"In the District Court of the United States, for the District of New Jersey.
In the Matter of James N. Pidcock, Bankrupt. In Bankruptcy.

I, Frederick W. Leonard, referee in bankruptcy in charge of this matter, do hereby make my final report as follows: The estate of said bankrupt has been fully administered to my satisfaction, and so far as the same has been referred to me it has been closed.

I herewith file my book of record of proceedings herein and all papers filed with me.

Dated Newark, N. J., January 28th, 1902.

Respectfully submitted,

Frederick W. Leonard,
Referee in Bankruptcy."

On March 31, 1903, the petition of one Harrison P. Lindabury was filed in the District Court, in which the petitioner, after stating the foregoing facts, all of which appear of record, further states that by a certain deed of assignment bearing date the 11th day of March, A. D. 1903, made and executed by the said Daniel W. Kleinhaus, the judgment recovered by the said Daniel W. Kleinhaus against the said James N. Pidcock, bankrupt as aforesaid, was assigned and transferred unto the petitioner, who now holds the same and offers to produce the same whenever required so to do; that by said deed of assignment, the said petitioner became subrogated to all the rights and privileges of the said Kleinhaus against the estate of the said bankrupt "acquired by virtue of the proof of claim filed by the said Kleinhaus, as above recited, or otherwise"; that no part of the said judgment has ever been paid to the said Kleinhaus, or to the petitioner, but that the whole of said sum, with interest thereon from February 20, 1894, still remains due and unpaid and owing to the said petitioner from the estate of the said bankrupt, as aforesaid.

The petitioner then states that by the schedules filed by the said bankrupt, it appears that the total liabilities of the said bankrupt amounted to the sum of $373,537.01, and that the said bankrupt had no property or assets of any kind or description. The petitioner, then, upon information and belief, states that the petition and schedules filed in the District Court, as aforesaid, by the said bankrupt, did not truly represent the property and assets of the said bankrupt, "but that they were and are false, fraudulent and misleading," and were made and filed by said bankrupt with the intent to defraud his creditors.

The petitioner then proceeds to set out and specifically describe various properties, choses in action, bonds, stocks, and securities, which the said bankrupt has, he avers, "falsely, fraudulently and willfully concealed and withheld from the said petition and schedules filed as aforesaid, with the intent and for the purpose of defrauding his creditors," and further, that the said bankrupt conveyed his property to his three sons and a daughter, who, with others, are charged with the intent to conceal the same from his creditors, and in fraud of the bankrupt law. These alleged fraudulent transactions are set out specifically and in detail, and affidavits tending to support the same are filed with the said petition.

The petition further alleges that the said Kleinhaus never knew of the fraudulent practices and perjuries alleged to have been committed by the said Pidcock, and that he had no knowledge which would lead him

to suspect them, and the petitioner charges and avers that such information had recently, within the then past few weeks, come to his knowledge, and that neither he nor Kleinhaus had been guilty of any laches or undue delay in filing the said petition, having moved therein as soon as the counsel could prepare the proper moving papers and affidavits.

The petition then concludes as follows:

"That this matter should, therefore, the premises considered, be reopened and the said adjudication set aside and for nothing holden if it shall be made to appear that the said James N. Pidcock, bankrupt as aforesaid, was not insolvent, or be re-referred to one of the referees of this honorable court if it shall be made to appear that the said James N. Pidcock, bankrupt as aforesaid, had assets and property which he fraudulently concealed and withheld from the petition and schedules filed by him as aforesaid, to the end that a trustee or trustees of the estate of the said James N. Pidcock, bankrupt as aforesaid, may be appointed, and the said estate administered as contemplated by the statutes in such case made and provided:

Your petitioner, therefore, humbly prays, that an order may be made by this honorable court reopening this matter, and that it be re-referred to one of the referees in bankruptcy of this honorable court to take such action as he may be advised the exigencies of the matter require and as may meet the requirements of equity and good conscience, and that your petitioner may have such other and further relief as this honorable court may deem proper and advisable."

Then follows a prayer for a rule commanding that James N. Pidcock, Jr., and the other sons and daughter of the bankrupt, together with his widow, as administratrix, the First National Bank of Jersey City, the Merchants' Trust Company of the City of New York, and George E. Fisher and Ezra M. Tuttle, appear upon a day certain, and show cause why a restraining order and injunction thereafter prayed for should not be made permanent until the further order of the court.

The petitioner then prays that a restraining order and an injunction may issue, restraining the parties and each of them, their officers, agents and attorneys, servants and assigns, from making any gift, sale or transfer or other disposition of the said stocks, bonds, securities and choses in action, so held by the First National Bank of Jersey City, until the further order of the court.

Upon the reading of the petition, and the affidavits thereunto annexed in support thereof, a restraining order was issued by the court below, March 31, 1903, as prayed for, until the hearing and decision of the order, whereby the parties named in said petition were, on the 13th day of April, 1903, ordered to show cause why the said restraining order should not be continued by a writ of injunction duly issued by the said court.

To this petition, on the said 13th day of April, 1903, an answer was duly filed by the solicitor of the respondents, together with their affidavits annexed thereto, denying all the allegations of fraud and misconduct on the part of the said Pidcock, deceased, bankrupt as aforesaid, or by the respondents. On the said 13th day of April, 1903, the rule to show cause coming on to be heard in the presence of the petitioners and their solicitors, and the respondents and their solicitors, and the petition, answers and affidavits of the respondents being read and filed, and counsel having been heard, it was ordered that the restrain-

ing order be discharged, and that the injunction therein mentioned be refused.

It also appears by the record that on the same day, a separate order was made and filed in the court below, which reads as follows:

"United States District Court, District of New Jersey.

In the Matter of James N. Pidcock, Bankrupt. In Bankruptcy. Order Appointing Trustee.

(Filed April 13, 1903.)

Application being made to the court by Harrison P. Lindabury, a judgment creditor of the said James N. Pidcock's estate, for the appointment of a trustee in the above stated matter.

It is therefore, on this thirteenth day of April, A. D. nineteen hundred and three, on motion of Elmer King, attorney of the petitioner, ordered that John M. Mills, Esq., of Morris county, New Jersey, be and he hereby is appointed trustee of the above-named bankrupt, and that the penal sum of his bond be one hundred dollars. And it is further ordered that said trustee forthwith give notice to all the creditors of the above-named bankrupt of his said appointment. Andrew Kirkpatrick, Judge."

Section 24b of the bankrupt act provides as follows:

"The several Circuit Courts of Appeal shall have jurisdiction in equity, * * * to superintend and revise in matter of law the proceedings of the several inferior courts of bankruptcy within their jurisdiction. Such power shall be exercised on due notice and petition by any party aggrieved."

The appellees contend that this court is without jurisdiction to entertain this appeal, on the ground that the petitioner here cannot be considered a party aggrieved, within the meaning of this provision of the act. We are disposed, however, to give liberal construction to the language used here, and a doubt in regard to the same should be resolved in favor of the petitioner. The petitioner who invokes our jurisdiction under this section, was a judgment creditor of the bankrupt, and so scheduled by him in his bankruptcy petition. Whether he may or may not hereafter be allowed to prove his claim, he has an interest as a general creditor in the estate of the bankrupt.

Entertaining jurisdiction, however, we think the court below had authority under section 44 of the bankrupt act (30 Stat. 557 [U. S. Comp. St. 1901, p. 3438]) and rule 15 of the general orders in bankruptcy (89 Fed. vii, 32 C. C. A. xviii) to make the appointment of trustee here complained of. At the first meeting of creditors called by the referee, on the 21st day of November, 1899, it appears by the record that no creditors were present, and no trustee was appointed, and that but one creditor, to wit, the said Daniel W. Kleinhaus, has proved his debt, and that the schedule of the bankrupt disclosed no assets, and that it was ordered by the referee that "until further order of the court, no trustee be appointed and no other meeting of the creditors be called."

On the 28th day of January, 1902, the referee made the final report above recited, that "the estate of the bankrupt has been fully administered to my satisfaction, and so far as the same has been referred to me, it has been closed, and I herewith file my book of record of proceedings herein, and all papers filed with me."

It is true that from this date to March, 1903, when Lindabury filed his petition in the court below, a period of more than one year, no fur-

ther proceeding was had. The estate, however, was not technically closed, because there was no final meeting of creditors or discharge of a trustee upon the settlement of his accounts. The petition of Lindabury, as it appears in the record and above referred to, must, therefore, be taken as a moving of the court to exercise its jurisdiction under section 44 of the bankrupt act, which provides that "creditors of a bankrupt estate shall, at their first meeting after their adjudication * * * appoint one trustee or three trustees of such estate. If the creditors do not appoint a trustee or trustees, as herein provided, the court shall do so." We do not see that any lapse of time, or at all events the time elapsed in the present case, can have the effect of taking away this discretion to appoint a trustee, conferred by the section quoted upon a court in bankruptcy. The record contains no opinion by the judge from which we can inform ourselves as to the reasons operating upon his mind in making the order appointing the trustee, but, in the absence of anything in the record to impeach the exercise of his discretion, we are not at liberty to question the same. There was but one creditor whose claim had been proved, and who was entitled to notice of such appointment, and it was upon that creditor's petition that the appointment of the trustee was made. We do not think that the fifteenth general order in bankruptcy was framed under any view of the meaning of section 44 inconsistent with the action taken by the court below. In fact, its reasonable interpretation would seem to authorize the view here taken, of the authority of the court in the premises.

The petition to this court is therefore dismissed.

DUNN et al. v. GANS.

(Circuit Court of Appeals, Third Circuit. May 2, 1904.)

No. 9.

1. BANKRUPTCY—PREFERENCES—SURRENDER—STATUTES—CONSTRUCTION.

Bankr. Act, Act July 1, 1898, c. 541, § 57g, 30 Stat. 560 [U. S. Comp. St. 1901, p. 3444], provides that the claims of creditors who have received preferences shall not be allowed unless such creditors shall surrender their preferences. *Held*, that such act should be construed as dealing with the creditors and not with their claims, so that where a creditor had received a preference he was not entitled to segregate the bankrupt's indebtedness according to the notes by which it was evidenced, and apply the preference in payment of some of the notes, and prove the others as separate claims against the bankrupt's estate, without surrendering such preference.

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

Arthur B. Houseman, for appellants.
Julius C. Levi, for appellee.

Before ACHESON, DALLAS, and GRAY, Circuit Judges.

GRAY, Circuit Judge. On the 26th day of June, 1901, the firm of Dunn Bros., bankers, of Philadelphia, filed before the referee their

claim against the bankrupt estate of E. O. Thompson's Sons, upon two promissory notes for $2,500 each, the notes being dated January 2, 1901, and January 14, 1901, and made by the bankrupts to the order of Benjamin Thompson, and discounted by Dunn Bros. On the 2d day of July, 1902, the trustee of said bankrupts' estate, presented his petition to the referee in bankruptcy, representing that Dunn Bros., the said claimants, had received a preference from the bankrupts, within four months prior to the filing of the petition and when the said bankrupts were insolvent, and asking that the whole of said claim, as proved by said claimants, and set forth in the schedule, be disallowed and expunged, unless said claimants should surrender to the petitioner, as trustee, the preference received by said claimants, as thereinbefore set forth. The petitioner also prayed that an order be made and entered, requiring the claimants to show cause why they should not pay or surrender to petitioner, as trustee as aforesaid, the amount of said preference, so unlawfully received by them, as therein set forth in a certain schedule or exhibit, marked "Exhibit A," viz.:

Exhibit A.

Dunn Brothers.

Amount of claim filed			$ 5,004 62
Amount of preferential payments			10,000 00
Dates and amounts of preferential payments are as follows:			
1901.			
January 21.	To cash	$5,000 00	
April 2.	To cash	2,500 00	
April 15.	To cash	2,500 00	
			$10,000 00

No one appearing on behalf of said claimants, this rule was made absolute. On the 20th of March, 1903, more than eight months thereafter, the said claimants filed their petition with the referee, averring that they had instructed their attorneys to take the proper legal proceedings to protect their rights and secure the proper recognition of their claim, and that they had no further notice or knowledge that their claim had not been reinstated, until a short time before the filing of their petition. Petitioners therefore prayed that, in view of the fact that there were just and legal reasons for the allowance of their claim, a rule should be granted upon the trustee, to show cause why the petitioners should not be allowed to file an answer, and show cause therein nunc pro tunc. Upon this petition, the referee, considering the merits of the case set forth by the petition, denied the prayer thereof, and, at the request of the petitioner, certified the matter for review to the District Court for the Eastern District of Pennsylvania. From the decree of that court, confirming the report of the referee, this appeal is taken.

Section 57g of the bankrupt act of 1898 is as follows: "The claims of creditors who have received preferences shall not be allowed unless such creditors shall surrender their preferences." Act July 1, 1898, c. 541, 30 Stat. 560, 561 [U. S. Comp. St. 1901, p. 3444]. The facts appearing from the record, and pertinent to the consideration of this appeal, are as follows: At the time of the making of the two promissory notes by the bankrupts, in favor of the appellants, for $2,500 each, to wit, on January 2, 1901, and January 14, 1901, said bankrupts were also indebted to said appellants in the sum of $10,000, making a total

indebtedness of $15,000 or upwards. On this indebtedness, the said bankrupts, after the giving of said promissory notes, which are the subject of the claim in this appeal, and within four months of the filing of the petition in bankruptcy, and when the said bankrupts were insolvent, made payments as follows: On January 21, 1901, $5,000, on April 2, 1901, $2,500, and on April 15, 1901, $2,500. There can be no question that these were preferential payments under the statute, and that they diminished, pro tanto, the estate of the bankrupts distributable to creditors. The contention of the appellants is, however, that the debt represented by the two notes of $2,500 each, and proved by them before the referee, were separate and distinct claims, upon which no preferential payments had been made; or, in other words, that the payments, aggregating $10,000 above stated, were payments in full, or in part, upon separate and independent claims, which they are not required to surrender by section 57g of the bankrupt act, before receiving allowance of their claim upon said unpaid promissory notes. In support of this proposition, they contend that this section of the bankrupt act of 1898 should not be given a meaning different from that of section 23, chapter 176, of the act of March 2, 1867, 14 Stat. 528, which provides that "any person who * * * has accepted any preference, having a reasonable cause to believe that the same was made or given by the debtor contrary to any provisions of the act of March 2nd, 1867, shall not prove the debt or claim on account of which the preference is made or given; nor shall he receive any dividend therefrom until he shall first surrender to the assignee all property, money, benefit or advantage received by him under such preference" and they therefore rely upon the decisions under the act of 1867 to support their contention here. In this, we cannot concur. If anything is needed to make clear the meaning of section 57g of the act of 1898, it is the difference between that section and the section dealing with a similar subject-matter in the act of 1867. The framers of the latter act must have had before them, and in their minds, the language of the section just quoted from the act of 1867, and the decisions thereon. If they had meant the same thing, it is presumed that they would have used the same or equivalent language. The words "shall not prove the debt or claim on account of which the preference is given," in the act of 1867, are omitted in that of 1898, and no equivalent phraseology is substituted therefor. In the language of Mr. Justice McKenna, delivering the opinion of the Supreme Court, in Pirie v. Chicago Title & Trust Co., 182 U. S. 448, 21 Sup. Ct. 906, 45 L. Ed. 1171, and discussing these very sections of the bankrupt acts of 1867 and 1898, "when the purpose of a prior law is continued, usually its words are, and an omission of the words implies an omission of the purpose."

We agree with the opinion of the court below, that section 57g of the act of 1898 concerns creditors, and not claims. The claim resting upon the two notes for $2,500 each, for which an allowance is here sought, was, at the time of their several dates, part of a larger indebtedness, however evidenced, upon which subsequently, within four months of filing the petition, and when the bankrupts were insolvent, the payment of $10,000 was made. The creditors have thus received a preference, within the meaning of the present bankrupt act, which

bars their right to have their claim allowed for the balance of the indebtedness, without a surrender of said preferential payments. The object and purpose of the bankrupt system, being to secure equality in distribution of the bankrupt's estate among his creditors, it would violate the spirit as well as the letter of the act, were we to allow the estate of an insolvent, within the short period mentioned in the act, prior to the inception of bankruptcy proceedings, to be diminished, by permitting a creditor, who has received payments out of the insolvent estate, to retain the same, and at the same time claim a dividend on the balance, in equality with other creditors not so favored. We do not think that any fair construction of section 57g, would permit a creditor of an insolvent debtor to escape the penalty imposed by that section for receiving a preference, by simply dividing the indebtedness into several amounts or parts, evidenced by several promissory notes. The decision of this court in the case of Gans v. Ellison et al., 114 Fed. 734, 52 C. C. A. 366, is not inconsistent with the view here taken. The case In re Abraham Steers Lumber Co., 112 Fed. 406, 50 C. C. A. 310, much relied upon by appellant, merely decides that "the payment by an insolvent debtor, of an existing debt, either in full or in part, does not constitute a preference as regards a new indebtedness contracted subsequently, to which the payment could have had no relation." It is not necessary to discuss, though we have carefully considered, all the cases cited, which bear upon the question before us.

The decree of the court below is affirmed.

ROBINSON et al. v. BALTIMORE & O. R. CO.

(Circuit Court of Appeals, Fourth Circuit. March 14, 1904.)

No. 500.

1. CARRIERS—RECEIVING GOODS—REGULATIONS.

A common carrier has power to make reasonable regulations governing the manner and place in which it will receive such articles as it professes to carry, and also to change or modify such regulations on reasonable notice to the public.

2. SAME—SHIPMENT OF COAL.

Where a carrier had designated a certain siding as the place at which it would receive coal for transportation, and such siding was not an unreasonable place, a shipper was not entitled to compel the carrier to receive coal from him at another siding, where merchandise other than coal was received, merely because the place so designated was not so accessible to such shipper.

3. SAME—INJUNCTION—PUBLIC NUISANCE.

Where a shipper of coal refused to deliver coal to the carrier at a siding designated for that purpose, and, in his endeavor to compel the carrier to receive coal at another siding, intended for shippers of other merchandise, blocked such siding with teams for the purpose of obstructing traffic, and took possession of cars intended for other shippers, and dumped coal at the siding and station, which resulted in the total suspension of all freight business at the station for two days, and he threatened to continue such acts indefinitely until the carrier submitted to his demands, such acts amounted to a public nuisance, and justified relief by injunction.

Appeal from the Circuit Court of the United States for the Northern District of West Virginia, at Parkersburg.

W. S. Meredith, for appellants.
John Bassel, for appellee.

Before SIMONTON, Circuit Judge, and MORRIS and McDOWELL, District Judges.

MORRIS, District Judge. This is an appeal from a decree of the Circuit Court for the Northern District of West Virginia, dated April 24, 1903, perpetuating an injunction by which the appellants were inhibited from attempting to ship coal against the consent of the railroad company in the city of Fairmont, in Marion county, W. Va., at a point known as "Walker's Siding," or at any depot of the railroad company except the depot or point provided by the railroad company for the reception and shipment of coal. The bill was filed November 20, 1902, by the appellee, the Baltimore & Ohio Railroad Company, a Maryland corporation, complainant, against the appellants, citizens of West Virginia, defendants, alleging that the railroad company maintained at Fairmont, in Marion county, W. Va., a station at which it received, stored, and delivered goods and merchandise, except coal, and also had there certain side tracks, known as "Walker's Siding," where it placed cars to receive and deliver all kinds of goods and merchandise, except coal, and owned and maintained there a roadway about 60 feet wide, over which shippers and receivers of goods, except coal, were allowed to drive teams and wagons in order to deliver and receive goods to and from the cars on said siding, but that the railroad company had forbidden, and had given public notice that it forbade, any one to receive or ship coal from or by the cars at said Walker's Siding, and had designated another siding in said city of Fairmont, called the "Belt Line," as the place where it would receive and ship coal, and had so repeatedly notified the appellants. The bill further alleges that the appellants were not owners or operators of coal mines, and not regular shippers of coal, but had recently engaged in the business of hauling coal in wagons to Walker's Siding, in order to put it on the cars of the railroad company for shipment to various points; that the appellants had been repeatedly warned not to do so, but they had forcibly persisted in hauling large quantities of coal to Walker's Siding, and depositing the same in large quantities on said railroad, and in forcibly taking possession of, and putting the coal upon, the cars placed there for other goods and merchandise, and had forcibly obstructed and were continuing to obstruct shippers and receivers of other goods from using the siding, and said other shippers were threatening to bring suits for damage against the plaintiff railroad company; that the appellants had hauled and dumped large quantities of coal at its freight station, and had blockaded and stopped up one door of the station, and had blockaded the roadway by congregating and keeping standing there horses and wagons, which they refused to remove, and which prevented the railroad company from either receiving or delivering other goods from its

said freight station and Walker's Siding, to the irreparable injury and damage of the railroad company; that the said appellants for some time prior had been loading and shipping their coal from the designated point on the Belt Line, and the railroad company had assigned a certain per cent. of its cars for the use of the said appellants for shipping their coal, and had notified the appellants that they were subject to their use. The prayer of the bill was for an injunction restraining the appellants from obstructing the station, siding, roadway, and approaches thereto in the manner and by the means charged in the bill of complaint.

The answers of the appellants denied that the freight station and siding were maintained by the railroad company for other goods and merchandise, except coal, and averred that the station, and especially the side tracks and switches called "Walker's Siding," had been used and were maintained by the railroad company for the purpose of receiving and shipping coal in car-load lots, and denied that the Belt Line was a proper place to be designated by the railroad for the shipment of coal by the defendants, because it was over a mile farther in distance from defendants' mines, and the increased cost of the haul made the shipment of coal by the defendant at that point unprofitable. The allegations in the bill of complaint that the appellants had defiantly refused to comply with notice from the railroad that coal would not be received for shipment at Walker's Siding were not really controverted by the answers; and the depositions fully established that the defendants had resisted the order with force, and that great disorder had occurred, and an intolerable confusion and disturbance of the regular business of the station had resulted from the intentional blocking and obstructing of traffic by the appellants in order to force a compliance with their claims. The appellants' principal justification was that they had before the notice been in the habit, from time to time, of shipping small quantities of coal at Walker's Siding. The reply to this by the railroad company was that on account of the scarcity of other coal in the winter of 1902, and the rise in price, the quantity shipped at Walker's Siding became so great that it interfered with other merchandise, and the railroad company was compelled, in the reasonable regulation of its business, to provide another place for shipping coal from Fairmont.

Quite recently a case in all points similar to the case in hand was heard on appeal in the Eighth Circuit (Harp v. Choctaw, O. & G. R. R. Co., 125 Fed. 445); and, in a careful opinion by Circuit Judge Thayer, it was held that a railroad company had the right to make reasonable regulations, applicable alike to all shippers, as to the manner in which such a commodity as coal would be received for transportation, and could not be held answerable because it refused to receive coal hauled by wagons to the side tracks of a station, and that the power to make reasonable regulations as to the manner and place where the railroad would receive coal for shipment implied the power to change and modify such regulations from time to time upon reasonable notice to the public. We do not think it necessary to attempt to add anything to the reasoning and citation of authorities by which the ruling in that case is supported. The case of the

appellants depends entirely upon their alleged right to compel the railroad company to receive the appellants' coal at Walker's Siding because other merchandise was received there. This right cannot be sustained. It is not shown that the Belt Line, designated by the railroad company as the place where, on account of the large temporary increase in the shipment of coal, it would receive it, was an unreasonable place in any way. It was a more distant place for the appellants, but it may have been nearer to others. It is not shown that, under all the circumstances, it was not a reasonable provision for the transportation of coal at Fairmont.

The case stated in the bill of complaint, and established by the depositions, was a most proper one for relief by injunction. The depositions showed that the persistent efforts of the appellants to block up the approaches to Walker's Siding with teams, which were kept there for the purpose of obstructing traffic, and the taking possession of cars intended for shippers of other merchandise, and the dumping of coal at the siding and station, had resulted during two days in suspending all freight business at the station, and threatened to continue indefinitely until the appellants had compelled submission to their demands. This amounted to a public nuisance, with immediate danger of irreparable mischief before the tardiness of the law could suppress it. In such cases the jurisdiction of courts of equity to give more adequate and complete relief by injunction has been fully sustained. In re Debs, 158 U. S. 564, 587, 588, 596, 15 Sup. Ct. 900, 39 L. Ed. 1092.

We are of opinion that the decree for a permanent injunction was, in substance, right, and should be affirmed.

KELLEY et al. v. DIAMOND DRILL & MACHINE CO.

(Circuit Court of Appeals, Third Circuit. April 27, 1904.)

No. 1.

1. PATENTS—INFRINGEMENT—COIL CLASPS FOR FASTENING BELTS.
   The Jackson patent, No. 433,791, for a coil clasp for fastening belts, etc., claim 7, construed, and *held* infringed on rehearing.
   Acheson, Circuit Judge, dissenting.

On Rehearing. For former opinion, see 123 Fed. 882.

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

PER CURIAM. Since the reargument, this case has again received the attentive consideration of the court, with the result that the judges respectively adhere to their views as heretofore expressed. 123 Fed. 882, 59 C. C. A. 370. The decree of the court below therefore stands affirmed upon the opinion of the majority of the court on file.

PAUL STEAM SYSTEM CO. v. PAUL.

(Circuit Court, D. Massachusetts. April 20, 1904.)

No. 1,759.

1. CORPORATIONS—NOTICE—KNOWLEDGE OF OFFICERS.

A corporation, having the right under a contract to purchase and own patents which should be granted to an inventor, if it should elect to do so before applications therefor were filed, and should pay the costs of obtaining the same, was charged with notice which required it to make such election where its president and some of its directors had knowledge that applications were to be filed by the inventor; and it was not necessary that its board of directors, as a body, should be given notice of the fact.

2. PATENTS—CONTRACT GIVING RIGHT TO PURCHASE—ABANDONMENT.

Where a corporation, having the right under a contract to purchase and own patents which might be granted to an inventor for a certain class of inventions, if it should so elect before applications were filed for such patents, and should pay the cost of obtaining the same—otherwise the inventor to have the right to obtain them in his own name and for his own benefit—made its election as to certain patents, and paid the preliminary fees, but afterwards advisedly failed to pay the final fees, such failure operated as an abandonment of its election, and left the inventor free to take the patents for his own benefit.

3. PRELIMINARY INJUNCTION—SUFFICIENCY OF GROUNDS.

It is the practice of the federal courts to refuse an injunction pendente lite unless the case shows beyond reasonable question the necessity for such intervention.

In Equity.

Coolidge & Hight and Ernest Howard Hunter, for complainant.
Kenyon & Kenyon, for defendant.

HALE, District Judge. This is a suit in equity brought by the complainant to compel the defendant to assign to it United States letters patent No. 604,335, No. 647,023, and No. 647,024, all of said letters patent having been granted to the defendant; also to assign to the complainant an application for United States letters patent No. 16,808, filed by said defendant in the Patent Office May 15, 1900, and now pending there.

The case is now before the court upon a motion for a preliminary injunction to restrain the defendant from assigning the patents and the application named in the bill of complaint, and from constructing, using, or selling any of the improvements described therein. The bill alleges that prior to October 5, 1894, the defendant and one William P. Skiffington were owners of certain inventions and improvements relating to steam systems and devices for removing the water of condensation from the cylinders of paper drying machines, and of certain other inventions relating to the same subject, and that, being in possession of these patents and inventions, they caused the complainant corporation to be incorporated for the purpose of acquiring all their interest in the said patents and inventions; that on October 5, 1894, an agreement in writing was entered into by the

¶ 1. See Corporations, vol. 12, Cent. Dig. §§ 1748, 1754.

complainant corporation with the defendant and with said William P. Skiffington, whereby the complainant corporation acquired all the interest of the defendant and of Skiffington in the inventions relating to said subject. This agreement is made a part of the bill, and sets out that the defendant and said Skiffington, parties of the first part, are the owners of certain inventions relating to steam heating systems and devices for removing the water of condensation from the cylinders of paper drying machines. The agreement enumerates the patents, and sets out further that the said defendant "owns or controls certain other inventions relating to steam heating systems, for which no applications have yet been prepared." The agreement provides in the first clause that Paul and Skiffington agree to assign and transfer to the company "the entire right, title and interest in and to the above-recited inventions, applications and letters patent, including all the inventions in steam heating systems and devices for removing the water of condensation from the cylinders of paper drying machines heretofore made and contemplated by the said Andrew G. Paul." The agreement further provides for the payment in cash and stock, and makes other provisions, which for the purposes of this case it is unnecessary to enumerate. The fourth clause of the agreement is as follows:

"Fourth. The said Andrew G. Paul agrees that if he shall make any further improvement or improvements on the above-mentioned inventions while he is in the employment of the party of the second part or during a period of two years, after the termination of such employment, the party of the second part shall have the option to purchase or own the said improvement or improvements and patent or patents that may be granted therefor, both in the United States and in foreign countries, the said party of the second part to pay in consideration for said improvement or improvements and patent or patents merely the expenses connected with the securing of said United States and foreign patents. It is understood and agreed that the said party of the second part shall elect whether it shall purchase the said improvement or improvements referred to in this clause and the United States and foreign patents for the same before any application for a patent has been filed for said improvement or improvements in the United States or any foreign country; and if prior to the filing of any such application in the United States or any foreign country the party of the second part shall not elect to purchase and own the said improvement or improvements, then the said Andrew G. Paul shall retain title to the said improvement or improvements free and clear of any claim thereto on the part of the party of the second part, and shall have the right to apply for and obtain in his own name and for his own benefit a patent or patents for any such improvement or improvements both in the United States and foreign countries."

It appears further from the bill and from the testimony in the case that prior to May 1, 1903, the defendant made certain improvements on the inventions referred to in the agreement, and particularly improvements described in letters patent Nos. 604,335, 647,023, and 647,024, and in an application for a patent filed by the defendant May 15, 1900, No. 16,808, and that he now holds for his own use and in his own name the said letters patent and the said application for letters patent.

The bill further alleges that the complainant fears that defendant will transfer the letters patent and the application to a third person, and will cause the complainant irreparable damage, and asks, among other things, for a temporary injunction restraining the defendant

from assigning the patents and the application, and from constructing, using, or selling any of the inventions. It will be seen by an examination of the fourth clause of the agreement, upon which the suit is brought, that the defendant agreed that if he should make any further improvement on the inventions enumerated in the agreement, while he is in the employment of the company, or during a period of two years after the termination of such employment, the company should have the option to purchase said improvement, and the patent or patents that may be granted therefor, the company paying "in consideration for said improvement or improvements and patent or patents merely the expenses connected with the securing of said United States and foreign patents." The testimony shows that the improvements and the application concerning which relief is sought were made during the time set forth in the fourth clause.

The defendant in this suit makes the contention that the claim of the complainant to the patents and the application enumerated cannot be sustained, for two reasons: First, because the inventions claimed in said patents and in said application are not improvements upon the inventions assigned to the complainant company in the contract in suit; and, second, because the complainant company, having full notice of the inventions and of the defendant's intention to file the application, did not elect to own the inventions, as it was bound to do under the terms of the fourth clause of the contract of 1894. Much testimony is offered on the questions of law and fact arising under the first contention, and very able and ample arguments have been submitted on both sides on these questions. The court prefers, however, to address itself first to the consideration of the second contention raised by the defendant, namely, did the complainant company have full notice of the inventions set forth in said patents and in said application, and did the said company have full notice of the defendant's intention to file said application, and, having such notice of the inventions and of the defendant's intention to file the application, did the complainant company elect to purchase the improvements enumerated in said patents and in said application under the terms of said contract? Under this second contention, for the purposes of the case, we may assume the admission that the inventions were "improvements," within the meaning of the contract.

Upon this motion for a temporary injunction, it is incumbent upon the complainant, before it can be entitled to the relief sought, to show that it did exercise its right of election. The testimony with reference to the first two patents enumerated in the bill is different from the testimony on this point in relation to the last-named patent and to the application No. 16,808. With regard to the last-named patent and the application, the testimony fails to satisfy the court that the complainant, after having full notice, did elect to purchase the improvements to which this patent and this application relate. In reference to the application the testimony on this subject is very ample. The testimony of the defendant and of several directors is distinct that the complainant did have full notice that the patent was to be applied for, but the testimony does not satisfy us that they elected to purchase the improvement named in the application. In this peti-

tion for a temporary injunction the court does not consider it necessary or advisable to discuss the testimony in detail. It is sufficient to say that the complainant has not, on this point, met the requirements of the law with reference to showing a clear case for the relief sought. The defendant and his witnesses have clearly shown that the president and certain of the directors of the corporation knew of the fact that an application for a patent was to be made. The point is taken by the complainant that this notice, in order to be conclusive, must have been brought home to the directors of the company in a meeting, and must have been acted upon in a formal way, and must be shown of record. We do not think so. Notice to the acting officers, or to some of them, was sufficient. Corporations act by agents. The whole scope of corporation law is defined on principles of agency. We think that, under the decisions of this court, a notice of this sort, if brought home to some acting officer or agent of the corporation, is sufficient. The testimony upon this point with regard to patent No. 647,024 is of a similar character to that in regard to the application No. 16,808. The court finds that the corporation did not elect to purchase the improvement contained in this patent.

With regard to patents No. 604,335 and No. 647,023 a different state of facts exists. The corporation did elect to own these patents, and did pay for the filing of the applications and for the preliminary work of getting the patents, but failed to pay the final fees. These fees were paid by the defendant, he taking the patents in his own name. While a more difficult question arises in regard to these patents, we think that in regard to them the complainant has not shown a right to the remedy sought upon this motion. The testimony indicates that the complainant corporation acted advisedly in regard to discontinuing their payments, and concluded not to carry out their election, and not to receive and take the patents in their own name. They do not, then, prove a right to the patents under the agreement.

When all the testimony is taken, and the cause comes before the court for a final hearing, it may be that the examination and cross-examination of witnesses may present the case in a new light. The practice in the federal courts, and especially in this circuit, is to refuse an injunction pendente lite unless the case shows beyond reasonable question the necessity for such intervention of the court. The practice of this circuit has been, except in clear cases of necessity, to leave a cause untrammeled by injunctions or decretal orders until the final hearing.

The court is of the opinion in the case at bar that it is its duty to deny the temporary injunction restraining the defendant from assigning the patents and the application, and from constructing, using, or selling the described inventions. The motion for temporary injunction is denied.

SAMPSON & MURDOCK CO. v. SEAVER-RADFORD CO.

(Circuit Court, D. Massachusetts. April 22, 1904.)

No. 1,937.

1. PRELIMINARY INJUNCTION—DISCRETION OF COURT—CONSIDERATIONS AFFECTING.

On an application for an injunction pendente lite, the court should consider the effect on both parties of the granting or refusal of the order; and, where it appears that in either case great or irreparable injury will result to one or the other, the court will take the course which seems most conducive to justice to both parties.

2. COPYRIGHT—SUIT FOR INFRINGEMENT—PRELIMINARY INJUNCTION.

On an application for a preliminary injunction to restrain the publication and sale of a city directory alleged to infringe complainant's copyrighted directory, the master to whom the application was referred reported findings that defendant's directory contained infringing matter; that its sale would not interfere to any great extent with the sale of the copyrighted work, which was published some time previously, but that it would result in large loss to complainant in its general business as publisher of an annual directory, the amount of which could not be well determined; also that defendant's directory was printed and bound and ready for sale; that it was different in size and appearance from complainants, and not likely to be mistaken therefor; that defendant had expended a large sum in its preparation, and had a large amount due for advertising matter therein, which was not collectible until the books had been published and sold; and that its sale would be, to a great extent, lost, if delayed for any considerable time. *Held*, that a preliminary injunction would be refused on condition that defendant should give a bond to secure the payment of damages that might be recovered, and should keep an account of its sales.

In Equity. Suit for infringement of copyright. On motion for preliminary injunction.

This is a suit in equity by Sampson & Murdock Company, a corporation organized under the general laws of the state of Rhode Island, a citizen of that state, against Seaver-Radford Company, a corporation organized under the general laws of the commonwealth of Massachusetts, and a citizen of that commonwealth, having its usual place of business at Boston. The complainant is publisher of "The Boston Directory," which contains a city record, a directory of the citizens' business directory, a street directory, and a map for the year commencing July 1, 1903, upon which it has obtained a copyright, as is alleged in the bill. The defendant corporation has prepared and printed, and, without the consent of the complainant, is about to publish and sell, or offer for sale, a book entitled "The 1904 City Directory of Boston." The bill alleges that this book of defendant, the 1904 City Directory of Boston, is an infringement upon the complainant's publication, the Boston Directory; that the defendant's book is a copy, in whole or in part, of the compiled and copyrighted work of the complainant; that the copying and threatening to publish and sell defendant's book is in violation of complainant's rights in its copyrighted work. The cause is now heard upon the complainant's application for an interlocutory injunction. Upon this application the cause was referred by the court to Frederic Dodge, Esq., as master, who has presented a very complete report. Upon this report the action of the court is based. The allegations of the bill in equity referred to in said report are as follows:

"(1) That on or before the 29th day of June, 1903, and prior to the date of the publication thereof in this or any foreign country, the firm of Sampson, Murdock & Co., of Boston, the predecessors in business of your orator, de-

¶ 2. See Copyrights, vol. 11, Cent. Dig. § 78.

posited in the mails within the United States, addressed to the librarian of Congress, at Washington, District of Columbia, a printed copy of the title of a certain book, entitled 'The Boston Directory,' containing the city record, a directory of the citizens' business directory and street directory, with map No. XCIX, for the year commencing July 1, 1903, in order to copyright the same, and claimed said copyright as authors and proprietors, and that they deposited in like manner the sum of fifty cents for copyright fees, and that thereupon, on the 11th day of July, 1903, and also before the date of publication in this or any foreign country, deposited in the mails within the United States, addressed to the librarian of Congress, at Washington, District of Columbia, two printed copies of such copyright directory, and that the said title so deposited was duly recorded by the librarian of Congress upon the said 29th day of June, 1903, whereby they became entitled to the copyright upon said book under the laws of the United States.

"(2) That on the 1st day of October, 1903, the said firm of Sampson, Murdock & Co., for a valuable consideration, and by an instrument in writing, a copy of which is hereto annexed, conveyed the said copyright to the complainant herein, and that the complainant by the said conveyance became and has ever since been and now is the sole owner of said copyright, and of the exclusive rights thereby conferred under the laws of the United States.

"(3) That the two copies of the said book deposited as above set forth were printed from type set within the limits of the United States, or from plates made therefrom.

"(4) That the said Sampson, Murdock & Co. and the complainant, as their assignee and successor in the business, have given notice of the said copyright by inserting in the several copies of every edition published on the title page thereof the copyright notice required by law, in the following words, to wit: 'Copyright 1903, by Sampson, Murdock & Co.'

"(5) That the defendant corporation, after the recording of the title of the said book, and the depositing of two copies thereof as provided by the laws of the United States, and within the term of copyright limited, and without the consent of the proprietors of the said copyright, in writing or otherwise, has printed, and is about to publish and sell, or expose for sale, many copies of a certain book entitled 'The 1904 City Directory of Boston,' each of which said copies is in whole or in part a copy of the directory compiled and copyrighted by the said Sampson, Murdock & Co.

"(6) That such copying and threatening to publish and sell the same is in violation of the sole liberty of printing, reprinting, publishing, completing, copying, executing, finishing, and vending the book duly copyrighted to the said Sampson, Murdock & Co., the copyright of which has been assigned by them, and is now held by your orator as aforesaid."

The master's report is as follows:

"The report of proceedings before me filed in court on March 7, 1904, is referred to as part of this report. The ruling and order made by me March 3, 1904, as in said report of proceedings appears, having been sustained by the court on March 7, 1904, the hearing before me under the order of court entered March 3, 1904, was continued on March 9, 1904, and on subsequent days thereafter by adjournment. The defendant produced before me the original copy for its proposed directory, according to my said order. It also produced a bound copy of its said proposed directory. Both were submitted to the examination of the complainant. Having now fully heard the parties and their evidence and the arguments of their counsel, according to the order of court of March 3, 1904, I hereby report thereon as below.

"My findings of fact are as follows:

"(1) The allegations of articles 1–4, inclusive, of the complainant's bill, regarding the issuance to it of the copyright upon the book there referred to, the validity of that copyright, and the complainant's title thereto, are established. The evidence in support of them was not contradicted before me by the defendant. A copy of the complainant's copyrighted directory was in evidence before me, and is to be referred to in connection herewith.

"(2) The defendant corporation, organized for that purpose in August, 1903, under the laws of Massachusetts, has prepared and printed, and, without the consent of the complainant, is about to publish and sell, or offer for sale, a

book entitled as stated in article 5 of the complainant's bill; being the book, a copy whereof was produced by the defendant before me, as stated above.

"(3) The defendant's book referred to in the preceding paragraph differs from the complainant's book in shape, size, style of binding, and typography; also in arrangement, in so far as it has three columns upon each page, instead of two. These differences are such as to prevent it from being confused with or mistaken for the complainant's book. They readily appear by inspection of the two books produced. The title of the defendant's book differs from that of the complainant's book.

"(4) The general directory comprised in the defendant's book contains about 50,000 more names than the corresponding division of the complainant's book. The former contains about 318,000, the latter about 268,000, names. Whenever a person mentioned in this part of the complainant's book has a telephone, the fact is stated, which is information not given in the complainant's book. The business directory comprised in the defendant's book is to a large extent arranged under different headings from those used in the corresponding division of the complainant's book. The street directory in the defendant's book contains several hundred more names than the street directory of the complainant's book, and contains also much additional information with reference to the streets. No claim of infringement was made as occurring in the street directory.

"(5) The defendant began its canvass for names and information to be included in its directory on July 7, 1903. This canvass extended over a period of between four and six months. There were employed in making this canvass 75 men, in all, for various lengths of time. The number of days' work expended on it was more than 2,000. Besides the information obtained by canvassers, circulars and return postal cards requesting information were sent out to many societies, associations, and organizations of various kinds. Schedules of employés were also obtained from public departments and employers of large numbers of persons, such as the Jordan Marsh Company and the New England Telegraph & Telephone Company. The original circulars and some of the original schedules used as above were produced before me.

"(6) The results of the canvass described in the preceding paragraph were compared by the defendant's employés with the complainant's general directory, which was divided into sections called 'checkbooks' for the purpose. The names reported by the defendant's canvassers as obtained by them were checked off in black pencil upon the pages of these checkbooks. Of the names in the checkbooks then remaining unchecked, those considered of sufficient importance to be included in the defendant's book were marked with blue-pencil dots. The names thus 'blue-dotted' were then written out, each on a slip of paper, as it appeared in the complainant's book, with the information there given; and these slips, sorted by streets and districts, were given to canvassers, with instructions to go to the places indicated, make inquiries, and obtain the information required for a directory regarding the names indicated; changing the information on the slip when necessary to conform to the information obtained, checking it as correct when found to be correct, and canceling it if the person indicated could not be found. The canvassers employed in this work were five in number, and were selected as the best of the defendant's force of canvassers. No record, however, was kept by the defendant showing which of these five canvassers performed the work of settling any particular question. The slips given to the canvassers were, when returned by them, either checked as correct or changed as above, pasted in their proper alphabetical order among the other slips containing names and information brought in by the original canvassers, upon sheets which form the copy from which the defendant's general directory was printed, and they thus, except perhaps in a few instances, became incorporated into the defendant's book. A similar use was made of the complainant's business directory, except that after checking thereon all names obtained by the defendant's canvassers, and marking for omission certain other names, all the remaining names were copied as above upon slips, with the information given by the complainant as to each, and all but about 25% of them sent out to be verified by canvassers. The 25% not sent out were destroyed. No blue dots were used to indicate the names to be so copied out, as in the case of the

general directory. The process of copying out names and information selected as above from the complainant's directory was referred to by the witnesses as 'drawing questions,' and the process of verifying the information so taken off upon slips was referred to as 'settling questions.'

"(7) It was asserted by the complainant and denied by the defendant that the use made as above of the copyrighted book in compiling the defendant's book was unlawful, even though every one of the questions drawn was properly verified before the information taken in it from the copyrighted book was reproduced by the defendant. This is a question of law upon facts about which there is no dispute, and is dealt with below (page 20, master's report). It was further contended by the complainant and denied by the defendant that, upon the evidence before me, the information taken as above from the copyrighted book had not been properly verified before reproduction in the defendant's book. This is a question of fact, which I next proceed to consider.

"(8) Fictitious Names. For the purpose of enabling it to detect copying, the complainant inserted in its copyrighted book certain fictitious or imaginary names. Three of these names appear in the defendant's book, viz.:

" 'Rogers, Robert L. 312 Maverick.' Copyrighted book, p. 1969, in the business directory, under 'Boots and Shoes.'

" 'Rogers, Robert L. 312 Maverick E. B.' Defendant's book, p. 1774, in the business directory, under 'Shoe Dealers.'

" 'Jones, G. W. 1650 Dorchester Av.' Copyrighted book, p. 2051, in the business directory, under 'Hairdressers.'

" 'Jones, G. W. 1650 Dorchester Av. Dor.' Defendant's book, p. 1613, in the business directory, under 'Barbers.'

"(Neither of the names is in either general directory.)

" 'McKinley Hall, 24 W. Concord.' Copyrighted book, p. 66, under 'Public Offices, Halls, Blocks, &c.'

" 'McKinley Hall, 24 W. Concord St.' Defendant's book, p. 173, under 'Office Buildings, Halls, &c.'

"There were ten such names, in all, in the copyrighted book, three of which were in the street directory. The president of the complainant company, who testified in regard to them, was asked on cross-examination to give the other seven fictitious names, and to state whether or not they also appeared in the defendant's book. He declined to do so, and I ruled that he need not do so unless he chose. To this ruling the defendant excepted. There is no McKinley Hall in Boston, there are no such persons as the fictitious names represent, and there are no such numbers on the streets referred to. The sheets from which the defendant's book was printed show that the matter appearing in the book about Robert L. Rogers and McKinley Hall came in each case from a question on slip checked as if sent out for verification and found correct, and that what appears about G. W. Jones was written upon the sheet, instead of being on a slip. There was testimony tending to show that it was written upon the sheet from a checked slip brought in after the sheets had been made up. Whether no question was ever really drawn, or none ever really sent out to be settled, or none ever really settled, the result is the same, viz., that in these three instances matter from the copyrighted book was transferred to the defendant's book without independent verification.

"(9) Names of Persons Deceased. The copyrighted book was published July 13, 1903. The work of compiling it was therefore substantially completed before the defendant's canvass began, on July 7, 1903 (paragraph 5). There appear in the defendant's book names of persons given by the copyrighted book, but who are shown by the city records to have died either before the defendant's canvass began, or so soon thereafter that no question slips regarding them, drawn from the copyrighted book, could have been checked and returned as correct if the inquiry necessary to a proper settlement had been really made. These are: Suminsby, Rodney F., died June 10, 1903; Fitzgerald, William J., died July 1, 1903; Dexter, George, died May 28, 1903; Murphy, Daniel J., died June 1, 1903; Gerrish, Geo. H., died May 31, 1903; Gearin, Stephen J., died May 27, 1903; Parker, Edward J., died July 3, 1903; Phillips, Charles P., died June 18, 1903; Tully, James, died July 2, 1903; Rosenthal, Joseph, died May 7, 1903. (The widows of two of these persons,

Suminsby and Rosenthal, appear as such in the defendant's book.) In each of these cases, however, the question slip forming part of the copy from which the defendant's book was printed was produced, and found to bear the check indicating that it had been settled as correct. Other instances in which the name of a person deceased before its canvass began appear in the defendant's book are referred to hereafter; the evidence being, as to them, that the slip from which the name was printed was one brought in by an original canvasser, and not one sent out as a question drawn from the copyrighted book to be settled.

"(10) Errors Reproduced. In the following cases errors in the copyrighted book reappear in the defendant's book, although the question slip sent out is found, on the copy sent to the printer, checked as correct.

" 'Abbot, Samuel, engineer, bds. 27 High Shsn.'

" 'Abbott, Samuel, engineer, bds. 27 High Chsn.'

"Both these names are in the general directory of the copyrighted book. The defendant's book repeats the latter name and both addresses as given, although the former name is changed to Samuel S.

" 'Adamson. Thomas W., grocer, 1825 Dorchester Av.' In the business directory this number is 1847. The defendant's general and business directories differ in the same way, though a question was drawn on each, and checked up as correct.

" 'Anderson, Chas. A., salesman, 651 Wash.' This appears in the Gen. Dir., both books. The right name is William C., which both books insert in its proper place, with the residence given as Wakefield. The defendant gives Chas. A.'s residence as Melrose, the copyrighted book giving it at Wakefield.

" 'Austin, George M. & Son.' Copyrighted Gen.

" 'Austin, G. M. & Sons.' Do Bus., 'Provisions.'

"The same discrepancy between Gen. and Bus., under 'Provisions,' occurs in the defendant's book. Defendant's Bus. has also 'Geo. M. and Son' under 'Poultry.'

" 'Ballardville Mills.' So in both books. Gen. Dir. The correct spelling is 'Ballardvale.'

" 'Beane, William M. Mrs. & Co.' Copyrighted Gen.

" 'Beane, W. M. Mrs.' (Do Bus.)

"The same discrepancy between the Gen. and Bus. (under 'Fancy Goods') appears in defendant's book.

" 'Beckwith, Leslie A.' Copyrighted Gen.

"The name so appears in defendant's Gen. The right name is 'Leslie W.' (The defendant also has 'L. W. Beckwith.')

" 'Bullard, George P.'

"Both books (Gen.) give him as president, etc., of 'Eastern Expanding Metal Co.' The correct word is 'Expanded.'

" 'Capen, Walter.' Copyrighted Bus.

"The true name is 'G. Walter,' and is so given in copyrighted Gen. Defendant's Gen. omits the name altogether. Its Bus. gives it without the 'G.'

" 'Enneking, John J. 174 Tremont.' Copyrighted Bus.

"So in defendant's Bus. under 'Artists.' The correct number is 175a. The copyrighted Gen. has the name; the defendant's Gen., not.

" 'Fletcher, Howard F.' Copyrighted Gen.

"Same in defendant's Gen. The right name is 'Howard S. Fielding, John B.'

"Copyrighted Gen. gives the residence as Somerville, whereas it should be Malden. Defendant's Gen. does the same.

" 'Gallivan, Timothy.' Copyrighted Gen.

"Same in defendant's Gen. The right name is 'Galvin,' and this defendant also has.

" 'Gray, Robert B. bds. 81 Arlington.' Copyrighted Gen.

"Same in defendant's Gen. The right number is 8. There is no 81 on the street.

" 'Gibbs, Carrie A.' Copyrighted Gen.

" 'Gibbs, Carrie E.' Do Bus.

"The same discrepancy exists between defendant's Gen. and Bus.

" 'Guild, Willard G.' Gen., both books.

"The right name is 'Willis G.'

" 'Johnson, Adolph O.'

"The copyrighted Bus., under grocers, gives his place of business '498 Summer St.' This, as appears by copyrighted Gen., is his residence, but not his store, which is 487, same street. Defendant's Bus. repeats 498 as his store.

" 'Koritzky, Simon.' Copyrighted Gen.

" 'Kovitzky, Simon.' Do Bus., under 'Grocers.'

"Same discrepancy between defendant's Gen. and Bus. The defendant's Gen. has some information not in copyrighted book.

" 'Levy, Lewis I. & Son.' Copyrighted Gen.

" 'Levy, L. I.' Do Bus., 'Fancy Goods.'

"Same discrepancy between defendant's Gen. and Bus.

" 'Milton Bradley Co.' Copyrighted Gen.

" 'Bradley Milton Co.' Do Bus., 'School Supplies.'

"Same discrepancy between defendant's Gen. and Bus. The first name is the right one.

" 'Morrell, George C. 40 State St.'

"Under lawyers in Bus. of both books. He is not a lawyer, although copyrighted Gen. erroneously describes him as such.

" 'Patten, F. R. Mrs.'

"Her lunchroom is given in Bus. of both books, under 'Restaurants,' as at '2280 Dorchester Av.,' which is wrong according to the Gen. of both books.

" 'Richardson, Earl B.' Copyrighted Gen.

"Same in defendant's Gen. The right name is 'H. Earl,' which both books (Gen.) also have.

" 'Ryan, George T.' Copyrighted Gen.

" 'Ryan, George F.' Do Bus., 'Florists.'

"The same discrepancy is found between defendant's Gen. and Bus.

" 'Trautmann, Louis H., salesman 178 Tremont, rm. 4, bds. 19 Wabeno, Rox.'

" 'Trotman, Louis H., salesman, 178 Tremont, rm. 4.'

"Both these names appear in the copyrighted general directory. They appear in the same manner in the defendant's general directory, except that the defendant spells the first name 'Trautman, Lewis H.'

" 'Wachuset Thread Co.' Copyrighted Gen.

"The name appears in the same way in defendant's Gen. The correct spelling is 'Wachusett.'

" 'Watson, George.'

"Both business directories, under 'Accountants,' give his address as '53 State St., room 705.' The right room is 605, and it so appears in the Gen. of both books.

" 'Weddick, Frank.'

"The Gen. of both books give the surname spelled thus, with the same information, but the defendant has Frank L. instead of Frank. The correct spelling is 'Wedick,' and this the defendant has also; the name spelled with one 'd' appearing to have been obtained on the original canvass, and as 'Frank,' not 'Frank L.'

" 'Wiggin, Henry D., Jr.'

"The Gen. of both books has this name, and both give the residence at Medford. The man left Medford in April, 1903.

"I omit about twenty instances having a similar tendency to show imperfect settling of question slips, but in which there seems to be more possibility that a reasonably careful canvasser might have independently fallen into the error reproduced. As to nearly half of these, also, they are names of nurses, which both parties may, perhaps, have got at secondhand from a list of nurses.

"(11) It will appear from the cases cited on page 20 that if the defendant is permitted at all, by the law of copyright, to reproduce in its own book information based upon the copyrighted book, according to the above-described method of drawing and settling questions, it is only upon condition that it uses the question slips for no other purpose than to direct its canvassers to the sources of information, and there obtains the information reproduced, by its own labor, to the same extent as it would have done without any question slip at all. The defendant employed in superintending the work of preparing its book Mr. George M. Hyde and Mr. Frederick H. Radford, two

persons of large experience in the business of publishing directories; both having been employed for many years by the complainant or its predecessors, and afterwards, in 1902, by a concern called the City Directory Company. While connected with the City Directory Company, Mr. Hyde had consulted counsel regarding the legality of 'drawing questions' from existing copyrighted directories. No counsel were separately consulted upon this point by the defendant with special reference to its canvass. Both Hyde and Radford testified before me (the testimony being objected to by the complainant, and admitted subject to its exception) that they believed they had a perfect right to follow this method of drawing questions described above. I find that they did so believe. The advice from counsel received by Hyde as above was that he had a perfect right to draw off every name and verify it. The fact that Hyde had received such advice was known to Radford and Seaver. The persons who drew the questions for the defendant's directory upon the slips referred to, or many of them, testified before me, as did also all the canvassers who settled them, and many of the persons who afterwards inserted them in the copy from which the defendant's book was printed. The testimony given by all these persons was that, throughout the preparation of the defendant's book, frequent, reiterated, and emphatic instructions were given to all its employés by Mr. Hyde and Mr. Radford, also by Mr. Seaver, the president, to make no use of the copyrighted book except for the purpose of drawing questions from it; also that those instructions were obeyed. It was agreed that all the defendant's employés, if called, would testify to the same effect. (See the stipulation filed before me March 25, 1904.) Defendant employed, in all, between fifty and sixty office assistants, and, including the five canvassers already mentioned, thirty men in all were employed in settling questions, who did, in all, 337 days' work. My conclusion, however, must be, from the facts above found in paragraphs 8, 9, and 10, that the instructions so given were not always obeyed. It is, of course, possible that in some of the instances cited in paragraphs 9 and 10 the canvasser supposed to 'settle' the questions used the slip taken from the copyrighted book only in the manner described at the beginning of this paragraph; that the information thereby obtained by him was wrong, and, in the cases cited under paragraph 10, wrong in the same way that the information taken from the copyrighted book was wrong. It does not seem to be possible that all the instances referred to can be so accounted for. The presumption arising from facts shown, in my opinion, calls upon the defendant to account for each instance by specific proof, and cannot be disposed of by general testimony that the instructions referred to were given and followed. I therefore find that copyrighted information was, upon any view of the law, unlawfully transferred to the defendant's book in all the instances referred to.

"(12) The defendant contended that the evidence before me showed its original canvass to have been made without any use whatever of the copyrighted book, and also to have been such as to correct a very large proportion of the mistakes occurring in that book. I find that in the following instances mistakes occurring in the copyrighted book have been reproduced in the defendant's book, not by means of question slips drawn from the copyrighted book, but by means of slips brought in by the defendant's original canvassers, and made part of the copy from which defendant's book was printed.

" 'Bauer, John W.' This name appears in the general directory of both books. The correct name is 'John N.' The defendant's book gives his residence, which is not in the copyrighted book. The reproduction of the error, however, is not explained.

" 'Dana, Samuel L.' The residence is given in both books (general directory) as '44 Peter Parley Road.' The correct residence is '49.' (The copyrighted book has 'S. L.,' whereas the defendant has 'Samuel,' in the business directory.

" 'Floyd, Ezra B.' The name is so given in the general directory of both books. The correct name is 'Eugene B.' The defendant gives the company whereof Mr. Floyd was treasurer—Glen Almond Mica Mining Company—which the copyrighted book does not.

" 'Langerfeld, John P.' Both books, in their business directories, under 'Bakers,' give his address as '98 Boston.' That address has been wrong since

February, 1903, when he left it. The defendant also gives two other addresses, which the copyrighted book has not.

"'Starbard, Nathaniel W.' The name so appears in the Gen. of both books. The correct spelling is 'Starbird.'

"'Willson, Alexander E.' Both books (Gen.) give his business address as '28 School St. Room 56.' The correct room number is '59.' The defendant gives the middle initial 'W,' in place of 'E.'

"I find also that the following names, also incorporated in the defendant's book by means of original canvassers' slips, are names of persons who had died since the insertion of their names in the copyrighted book, but before the defendant's canvass, viz.: Gensler, William, died July 8, 1903; Leonard, Frank A., died June 22, 1903; Morrison, George G., died July 3, 1903; Ramsay, William H., died May 28, 1903; Scully, Charles H., died June 13, 1903; Sproul, Charles W., died June 17, 1903; Wood, James F., died June 28, 1903. One of the defendant's canvassers testified to having personally canvassed the apartment hotel where Frank A. Leonard last resided, according to the copyrighted book, but not to the specific information he obtained (if any) regarding this name. He did testify that, such information as he got, he got there. Testimony was introduced by the complainant tending to show that Leonard's widow moved away from the hotel before the date of this canvasser's alleged visit. In the other instances the presumption arising is rebutted only by the general testimony of the defendant's employés that they obeyed the instructions given them to make no use of the copyrighted book in their canvass. I find, however, that in the case of William Gensler a sign was found by one of the defendant's canvassers, on March 17, 1904, at the said Gensler's former place of business, reading, 'William Gensler, Hairdresser.' In the case of the name of William H. Ramsay, barber, his name was found upon a doorplate at his address on the same date, but all that was on the door plate was 'W. H. Ramsay.'

"What is said above applies to the name 'Alario Joseph,' which appears in both business directories—under 'Hairdressers' in the copyrighted book, under 'Barbers' in the defendant's. He left the address given July 4, 1903.

"(13) I find, upon the indications afforded by the instances cited in the preceding paragraph, that there has been some copying of names or information contained in the copyrighted book, independently of questions drawn from it or the settlement of such questions. I am unable to find, upon any evidence before me, whether, in the instances above given, the original canvassers, or the persons who transferred their slips to the copy for the printers, or who else, were responsible in these cases. Otherwise than as appears in the instances referred to, I find no evidence of copying independently of drawing questions as explained above (paragraph 6).

"(14) I also find some reason to believe from the indications afforded by the defendant's 'checkbooks' (paragraph 6) that its original canvass was not as full and complete as might have been expected. The total number of copyrighted names checked as not obtained by canvassers has not been counted by either side, and is only to be ascertained by estimate. The president of the defendant company estimated it at one-quarter. Neither has the number of copyrighted names blue-dotted been counted, and this also can only be estimated. The same witness estimated it at one-quarter of the names not obtained by canvassers, which would be 6.25 per cent. of the whole. Mr. Hyde estimated it for the general directory at 22 per page, which would be, in all, 41,162 for the whole number. The estimate on behalf of complainant is 27.2 per page, or 50,891 for the whole. If either of the two latter estimates, which seem to be more likely to approximate the truth than the former, be accepted, the number of copyrighted names not returned by the defendant's original canvassers, which must have been considerably larger still, is not easily accounted for consistently with the theory of a thorough original canvass by the defendant. Other facts leading to the same result are that a large number of prominent and well-known names in the copyrighted general directory and a large proportion of such headings in the copyrighted business directory, as 'Masters in Chancery,' 'Hospitals and Dispensaries,' 'Piano Tuners,' 'Clubs,' 'Artists,' are shown by the checkbooks not to have been obtained by the original canvass. The total number of names in the defend-

ant's general directory being 318,000, as above found (paragraph 4), if Mr. Hyde's estimate of the number of names blue-dotted be deducted, there will be left 276,838, as the number of those obtained by the defendant independently of the use of questions drawn. If the complainant's estimate of the blue-dotted names be deducted, the remainder will be 267,109.

"(15) Not counting the three fictitious names (paragraph 8), there have been indicated above 53 instances which are found to show copying from the copyrighted book. For the purposes of the hearing before me, about 600 cases of error, omission, or discrepancy in the copyrighted book, being about one-fifth of one per cent. of all the defendant's names, were compared on behalf of the complainant with the defendant's book. About 8.8 per cent., therefore, of the entire number compared, are found to be reproduced by the defendant. Thirty-nine of the instances referred to are cases where questions were drawn upon blue-dotted names, or 6.6 per cent. of the whole number examined. If the blue-dotted names be taken as numbering 25 per page, which is 16⅔ per cent. of all the copyrighted names, and if all the questions drawn on blue-dotted names be assumed to show copying in the same proportion as the number examined, the percentage of all the copyrighted names improperly reproduced by blue-dotting would be 1.10 per cent. As above found, however, the process of blue-dotting and drawing questions was not the method of reproducing the copyrighted matter in all the cases where it has been reproduced. In 14 instances (paragraph 12) it must be ascribed to some other part of the work of preparation. The defendant requests the finding that in the case of all the 600 names examined, but not put in evidence by the complainant, errors in the copyrighted book were found not to have been reproduced, or else to have been corrected by the defendant. I find that the defendant corrected the complainant's errors in some of these cases, but I do not think that any further finding regarding such names is warranted by the evidence.

"(16) The complainant has remaining on hand 195 copies of its copyrighted book. The price at which they are regularly sold is $6. It may reasonably expect to sell 75 more copies; one reason why the number is not greater being that it expects, in regular course, to publish a 1904 directory in July. If, therefore, the only damage to the complainant by publication of the defendant's book is the loss of sale of copies of its copyrighted book, such damage will not exceed $450. The damages to the complainant's business, however, which will result from the publication of a rival directory such as the defendant's book, will be much greater, and will be of such a nature that they cannot be estimated at law, and will be in that sense irreparable.

"(17) The defendant has expended, in compiling, printing, and binding its proposed directory, between $35,000 and $40,000. The issue of the injunction prayed for by the complainant will probably result in the total loss of this investment. The advertisements inserted in the book have been inserted under a contract providing for payment when the book is published, and the total amount so paid for advertising is a good many thousand dollars. The book, if published, will be of substantial value.

"(18) The galley proof slip annexed to the third affidavit of Charles D. Marcy, filed in court February 29, 1904, is found not to be a part of the defendant's book as printed. I find, that pages 1617 and 1618, being the pages of the defendant's book whereon the matter appearing on said galley proof slip would have appeared in the book, were, as those pages appeared in the printed proof sheets before me, printed on different type from the remaining proof sheets, and inserted by pasting, in the place of other pages removed, among the proof sheets submitted. I find, however, upon the evidence of the printer who set it up, called as a witness by the complainant, that he was directed by defendant to print no further from the galley proof slip at some time prior to the filing of the bill of complaint. Pages 1617 and 1618, as they appear finally in the defendant's book, omit two of the names referred to in Marcy's affidavit No. 3, and correct the errors pointed out by said affidavit in the four remaining instances.

"(19) Except as set forth in this report, I find no reason to question the good faith or honest intention of any person concerned in the enterprise of preparing the defendant's book.

"My conclusions of law are as follows:

"(1) The question referred to above in par. 7, viz., 'Is it lawful, in the preparation of a directory, to copy, verify, check, and correct copyrighted information, with intent to reproduce it, save as corrected, in a competing book?' is one which does not appear to be settled by any express and controlling decision. The English cases (Kelly v. Morris, L. R. 1 Eq. 697; Morris v. Ashbee, L. R. 7 Eq. 34; Morris v. Wright, L. R. 5 Ch. 279; Moffatt v. Gill, 86 Law Times R. 465) and the following in the United States (Banks v. McDivitt, 13 Blatchf. 163, Fed. Cas. No. 961; List v. Keller [C. C.] 30 Fed. 772; E. Thompson Co. v. American, etc., Co., 122 Fed. 924, 59 C. C. A. 148, 62 L. R. A. 607; Colliery Co. v. Ewald [C. C.] 126 Fed. 843) seem to be those most closely relating to the point to be decided. It does not appear, therefore, to be a clearly settled question of law. My own opinion (of course, submitted with diffidence, under the circumstances) is that the question should be answered in the negative. My conclusion of law, therefore, is that none of the information incorporated in the defendant's book by means of questions drawn as above, whether settled or not, can be published without violating the complainant's copyright.

"(2) The infringement found is clear in law and substantial in amount, whatever be the decision of the question referred to above under 1.

"The validity of the complainant's copyright and its infringement as above by the defendant's proposed book being established, the complainant is entitled, upon general principles, to have the publication of the book enjoined pending further proceedings, at least as to so much of the work as is a plain infringement, and such injunction is granted in the ordinary course. It is, however, granted or refused in every case according to the discretion of the court. The facts which may be supposed to guide the court in exercising such discretion have been found above."

Alexander P. Browne, for complainant.

Gaston, Snow & Saltonstall and Thomas Hunt, for defendant.

HALE, District Judge (after stating the facts). In this case, after a full hearing of the parties and their witnesses, the master has made an ample, detailed, and complete report, embodying a careful analysis of the testimony. We have copied this report in full, as it, with the bill in equity, constitutes the record; and so we need not recite its details.

The master has found that the damage to the complainant, by publication of the defendant's book, will be, in the loss of the sale of its copyrighted book, a sum not exceeding $450. He finds further that the damages to the complainant's business which will result from the publication of a rival directory, such as the defendant's book, will be much greater, and will be of such a nature that they cannot be estimated at law, and will be in that sense irreparable. He further finds that the defendant has expended in compiling, printing, and binding its proposed directory between $35,000 and $40,000; that the issue of the injunction prayed for by the complainant will probably result in the total loss of this investment; that the advertisements inserted in the book have been inserted under a contract providing for payment when the book is published, and the total amount so paid for advertising is many thousand dollars; that the book, if published, will be of substantial value. He states the leading question of law which arises in the case, namely: Is it lawful, in the preparation of a directory, to copy, verify, check, and correct copyrighted information, with intent to reproduce it, save as corrected, in a competing book? And he says that this question is one which does not appear to be settled by any express and controlling decision. He then refers to the leading English and

American cases, and concludes that, in his opinion, none of the information incorporated in the defendant's book by means of "drawing questions," whether settled or not, can be published without violating the complainant's copyright. He further finds that there has been an infringement, whatever may be the decision on the above question.

Since the presentation of this report, our attention is called to Dun v. International Mercantile Agency (C. C.) 127 Fed. 173, a case just decided, in which Judge Lacombe says:

"It is not disputed that defendant made use of complainant's book in preparing its own publications. Thanks to such use, it discovered the names of individuals, firms, and corporations engaged in business, and therefore desirable for inclusion in its book, which names had apparently not been discovered by the investigations of defendant's own canvassers, nor found in some other publication. The names thus obtained from complainant's book aggregated certainly hundreds, possibly thousands. Was this an unfair use of the complainant's book? Had this question been presented to this court a year ago, the answer might not improbably have been in the affirmative. Such use of another's compilation was approved in Moffatt v. Gill, 86 Law Times Rep. 405, but that decision was not controlling here, and for reasons assigned in Colliery Engineering Co. v. Ewald (C. C., Oct. 9, 1903) 126 Fed. 843, it was thought that its conclusions were harsh and inequitable. Nevertheless, propositions which work hardship to the individual are sometimes sustained on grounds of public policy, and the opinion of the Court of Appeals of this Circuit in Thompson Co. v. American Lawbook Co. (July, 1903) 122 Fed. 922 [59 C. C. A. 148, 62 L. R. A. 607], expressly approves the doctrine of Moffatt v. Gill. In view of that decision, which is, of course, controlling here, injunction cannot be granted upon the undisputed facts."

It will be seen that this case, which is the latest American authority, approves and confirms the doctrine of Moffatt v. Gill, in which the court said:

"You cannot, where another man has compiled a directory, simply take his sheets, and reprint them as your own; but you are entitled, taking the sheets with you, to go and see whether the existing facts concur with the description in the sheets, and, if you do that, you may publish the result as your own."

See, also, Pike v. Nicholas L. R. 5 Ch. 251, and other cases cited and commented on in Copping er on Copyrights (3d Ed.) p. 201.

It seems to us that there is strong reason for holding that the publisher of a new directory has a right to take an old directory, and be guided by it to original sources of information, and that if, so guided, he goes to those sources of information and obtains facts, he may publish those facts, even though they consist of names and addresses which are identical with those published by the old directory. But upon this motion for a temporary injunction it is not necessary, nor fitting, for the court to pass upon this question. The master has wisely reported that it is not conclusively settled. We have pointed out also that he has found that there has been infringement, and that the damage to the complainant from the publication of the defendant's work may be, in a sense, irreparable. But these findings, if sustained by the court, do not necessarily lead us to the conclusion that an unlimited interlocutory injunction should be granted. We have pointed out also the finding with reference to the effect upon the defendant if the injunction is granted as prayed for.

It is the business of a court of equity to inquire not only whether serious and irreparable damage is to be done to the complainant if the tem-

porary injunction is refused, but also to inquire whether or not the injury done to the defendant by the granting of an injunction will be disproportionate to the benefit derived by the complainant. In Hanson v. Jaccard Jewelry Co. (C. C.) 32 Fed. 202, the court said:

"On an application for an injunction pending suit, it is proper for the court to consider the harm that would be done to the complainant by refusing such an order, in comparison with the damage that might be sustained by the defendant in consequence of granting the same."

In Trow Directory, etc., Co. v. Boyd (C. C.) 97 Fed. 586, Judge Lacombe said:

"Nevertheless an injunction to the full extent prayed for by the complainant would, if issued now, be practically a judgment in advance of trial, which would work irreparable injury to the defendant, while it seems as if the complainant might be sufficiently protected by a bond and an account of sales."

In West Publishing Co. v. Lawyers' Co-op. Pub. Co. (C. C.) 53 Fed. 265, Judge Coxe said:

"It is the duty of the court in all these cases to take into consideration the situation of both parties, and not to issue the writ except in the plainest cases, where the result will be irreparable injury to defendant, without corresponding advantage to plaintiff."

In Sargent v. Seagrave, 2 Curt. 553, Fed. Cas. No. 12,365, Judge Curtis said:

"The court looks to the particular circumstances to see what degree of inconvenience would be occasioned to one party or the other by granting or withholding the injunction."

In Spottswoode v. Clarke, 2 Phil. Ch. 157, the chancellor said:

"Here is a publication which, if not issued this month, will lose a great part of its sale for the ensuing year. If you restrain the party from selling immediately, you probably make it impossible for him to sell at all. You take property out of his pocket and give it to nobody. In such a case, if the plaintiff is right, the court has some means, at least, of indemnifying him by making defendant keep an account, whereas, if the defendant be right, and he is restrained, it is utterly impossible to give him compensation for the loss he will have sustained. And the effect of the order in that event will be to commit a great and irremediable injury."

Dron on Copyright, p. 516, says:

"The question of granting a preliminary injunction is affected by many considerations. It depends chiefly on the extent of the doubt as to the validity of the copyright, and whether it has been infringed, the damage which will be sustained by the plaintiff if the injunction is withheld, and the injury that will be done to the defendant if it is granted. The court will exercise its discretion in following that course which appears most conducive to justice to both parties."

See, also, Coppinger on Copyright (3d Ed.) p. 269.

In Ladd v. Oxnard (C. C.) 75 Fed. 703, Judge Putnam, in this circuit, has fully considered the subject which is now before us. At page 732 he considers the question of what loss is "irreparable," within the meaning of the law. He cities Parker v. Woolen Co., 2 Black, 545, 17 L. Ed. 333, where the word "irreparable" is held to cover cases "where the loss of health, the loss of trade, the destruction of the means of subsistence, or the ruin of the property must ensue." In the case last cited,

Mr. Justice Swayne, for the Supreme Court, gives further definition of the meaning of the court in the use of the word "irreparable," and quotes the old doctrine that the case must be "one of strong and imperious necessity." In the matter which Judge Putnam had before him in Ladd v. Oxnard, he found that a large proportion of the copyrighted book was plagarized, and that the plaintiff had made out a very strong and striking case; that it did not appear that the defendants had acted in good faith; and that it did appear that an injunction would destroy property of the defendant of very great value. In the case before us the findings of the master in respect to these matters to which we have just referred are much stronger for the defendant than the facts in Ladd v. Oxnard. In both cases there is evidence of infringement consisting of repetition of errors, and in both cases there is no great similarity of books, or danger that the public will mistake one for the other. Ladd v. Oxnard contains the settled and conservative doctrine of this circuit with reference to the granting of interlocutory decrees in copyright cases. At page 733, Judge Putnam says:

"But the law vests in no other individual holding an official position, whether executive, legislative, or judicial, a power more extensive and more capable of evil, as well as of good, without defined rules either as to the law or the facts, than that which a single judge is so often asked to exercise in the manner asked in the case at bar. In view of this fact, and further in view of the varying and inconsistent expressions in relation to the proper occasions for exercising this power, the only true safety is in saying that a temporary injunction ought never to be granted in a case of new impression, like this at bar, if it be possible to effectuate justice in any other way. * * * The case fails to impress the court with the necessity of granting the complainants, for their protection, an unconditional interlocutory order. The respondent is not charged with attempting in any way to pass off his publication for that of the complainants. Indeed, not only the title page and the short name given the respondent's book, but also its size and style of binding, prevent any probability of one being mistaken for the other. There is therefore no threatened injury to come from a counterfeiting of that character, so that we can apply the fact, which is matter of common knowledge, that publications of this peculiar character rely for their acceptance on the reputation of the compilers and publishers, and the circulation of them must ordinarily be the same, whether protected by copyright or not. The court must therefore presume that, while the respondent's publication might obtain some circulation for which he may be liable to account to the complainants in the way of profits, yet such circulation would probably be in addition to any which the complainants would secure, even if they maintained a monopoly, and consequently not of such character as to cause them a substantial loss of trade."

In the case at bar we are governed largely by the considerations which prevailed in this circuit in the case which we have just cited. It is the duty of the court to take a course most conducive to justice to both parties to the controversy. In this attempt we grant a conditional order, which we think will best subserve the ends of justice. It is ordered that there will be an interlocutory decree for an injunction as prayed for, unless the defendant on or before the 10th day of May, 1904, file a bond to the complainant, with sureties approved by the clerk, in the penal sum of $5,000, conditioned for the payment of any sum, except costs, which may be finally decreed against the defendant in this court or on appeal, and keep an account of sales of directories made by it

WILSON v. ATLANTIC COAST LINE R. CO.

(Circuit Court, N. D. Georgia. April 30, 1904.)

No. 1,765.

1. CARRIERS—SPECIAL SERVICES—CIRCUS TRAINS—LIABILITY FOR NEGLIGENCE—SPECIAL CONTRACT—VALIDITY—PUBLIC POLICY.
Where a railroad company agreed to haul certain cars of the proprietor of a circus according to a special schedule, and for a price less than the regular rates for such service, the carrier's servants having no right to direct the loading or unloading, which was in the exclusive charge of the employés of the circus company, an express contract between the parties, exempting the carrier from liability for the negligence of its employés, and releasing the carrier from liability for loss and damage to any of the circus company's property, menagerie, cars, or equipment while in transit, and to indemnify the carrier against damage or injury to any of the circus company's officers, agents, performers, or employés, was not invalid, as contrary to public policy.

2. SAME—PLEADING—DEMURRER.
Where a shipper brought suit on a special transportation contract against the carrier for damages to his property, the contract providing that it was made in consideration of reduced rates granted to the shipper, he could not contend, on demurrer to the petition, that the statement in the contract that a reduced rate was given was false.

3. SAME—ACTION EX DELICTO.
Where a circus proprietor brought suit in tort to recover damages for injuries to a circus train, transported over the line of defendant railroad company under a contract exempting the carrier from liability for negligence, and providing that the carrier's obligation should be that of a private carrier only, a petition alleging such contract as matter of inducement only, and charging that the same was illegal and void as beyond the carrier's corporate capacity, and that the transportation of shows, theaters, and circuses was a part of defendant's regular business as a carrier, was demurrable.

4. SAME—CHARACTER OF TRANSPORTATION—PRIVATE CARRIER.
A railroad company is not required, as a common carrier, to take a circus train, a part of which is loaded with wild animals, and transport the same over its line, but may refuse to transport such train, except under a special contract limiting its liability to that assumed by a private carrier.

Burton Smith and George Gordon, for complainant.
F. G. Du Bignon and R. C. Alston, for defendant.

NEWMAN, District Judge. This suit was brought originally in the city court of Atlanta, and removed by defendant to this court on the ground of adverse citizenship; the plaintiff being a citizen and resident of the state of Virginia, and the defendant a North Carolina corporation. The declaration alleges that the plaintiff is the owner and general manager of the "W. H. Harris Nickle Plate Shows"; that being the trade-name under which the plaintiff carries on his business of showman. Said show is not incorporated. It alleges that the defendant railroad corporation has damaged him in the sum of $15,000. The allegations on which the complaint is founded are as follows:

"That defendant, on the 15th day of September, 1902, entered into a contract with plaintiff, wherein the defendant agreed for a consideration to

¶ 4. See Carriers, vol. 9, Cent. Dig. § 648.

transport plaintiff's show from the city of Montgomery, Alabama, to Valdosta, Georgia, stopping at various places along defendant's line of railroad for the purpose of allowing plaintiff to exhibit his show. A copy of the contract is attached. Plaintiff, relying on the defendant's performance of said contract, arranged dates for exhibiting along the line of defendant's railroad, and went to an expense of one thousand dollars in preparing for and advertising said exhibitions, of which fact defendant had full knowledge. Defendant well knew, when it contracted to transport plaintiff and his show along the line of its railroad, the character of the business in which plaintiff was engaged, the importance of plaintiff's show being transported from place to place at the times specified, and the consequences to plaintiff of delay in such transportation; and plaintiff further shows that defendant undertook to transport plaintiff and his show, with full knowledge of all the facts, and agreed in its capacity of common carrier to transport and care for plaintiff and his property. That on or about October 28, 1902, defendant undertook to move plaintiff's said show from Dothan, Alabama, to Bainbridge, Georgia, when, by reason of the unsafe and defective condition of defendant's track and appliances, and the negligence and carelessness of defendant's servants, two of plaintiff's cars, loaded with plaintiff's animals, wagons, tents, and other paraphernalia used by plaintiff in connection with his said show, were ditched, and his said property broken up and destroyed."

It is alleged that the plaintiff's cars being moved from the siding at Dothan, Ala., into the main track of defendant's road, preparatory to transporting the show to Bainbridge, when, by reason of the defective and unsafe condition of defendant's said track and appliances, and by reason of the negligence and unskillfulness of defendant's servants and employés, plaintiff's cars were wrecked, and his property damaged. It is alleged that defendant's track was defective and unsafe, in that a large rail was joined to a smaller one, and the ends of said rails were not fastened together with fishplates, as safety required, but were simply spiked to the ties, making an extremely crude and unsafe joining of said tracks or rails. It is alleged that the uneven and defective joining of said two rails was on the curve of the track where said side track curved in to join the main track, and was on the outside of said curve, making the place doubly dangerous on account of the fact that at such a place the weight of the cars would be mainly thrown upon said outside rail at the defective joint, thus crowding it out, and allowing the wheels to drop down upon the ties. It is alleged that the defective and unsafe joining of said rails was due to the negligence of the defendant, its officers and agents in charge of its track, and that this defective and dangerous condition of its track defendant well knew, or could by the exercise of ordinary care have discovered; that by reason of the dangerous and defective condition of the track two of plaintiff's cars were derailed, turned over, and broken to pieces, his wagons which were loaded on said cars were thrown off and broken up, his tent poles, seats, and canvas were broken and smashed and otherwise damaged, the wagon known as the "bank wagon" and "lion den" was turned over and demolished. One of plaintiff's lions was so injured that it subsequently died, and another one so injured as to be of no further use to plaintiff. The damage to plaintiff's cars, wagons, seats, poles, canvas, lions, and other property amounted to $4,000. It is further alleged that by reason of said wreck, occasioned by defendant's negligence, the plaintiff was greatly delayed, and was unable to exhibit his show at Bainbridge on October 28, 1902, as he had advertised and arranged to do, and as defendant knew he had arranged to do, whereby plaintiff

lost that day's exhibition, to his damage $800; that by reason of the wreck and the destruction of his wagons and paraphernalia, plaintiff was unable to have any street parade of his show for 22 days following said wreck, and that by losing these parades he lost $200 per day, or an aggregate of $4,400; that the expense occasioned to the plaintiff by the extra men, horses, and wagons necessary for such a street parade as the plaintiff had daily in connection with his show as an advertisement was $200 per day; that this expense was occasioned for 22 days after the accident, to the plaintiff's aggregate damage $4,400; that the daily expense of maintaining plaintiff's show is $400, and for the day plaintiff was scheduled to show at Bainbridge he paid expenses to the amount of $400, being deprived of any return therefor by reason of defendant's negligence. It was then alleged that the defendant is a common carrier, and is obliged by law to accept and transport all goods, animals, and other property offered to it for transportation over its line of railroad, but plaintiff shows that now regarding its duty as a common carrier, defendant refused to receive and transport his show until he should sign the contract heretofore mentioned and fully set out in "Exhibit A." Plaintiff alleges that said contract was forced on him, and that, in so far as it purports to excuse defendant from its legal liability as a common carrier, and to limit its liability unreasonably as to items of damage to be suffered by plaintiff, it is against public policy and void. It is then alleged that the allegations of consideration of reduced rates contained in said contract is false, and that, on the contrary, defendant charged plaintiff double what he had formerly paid defendant for the same service; and that when he objected to the price demanded by defendant on this occasion he was informed that he must pay defendant's price or walk; and, in so far as said contract attempts to limit defendant's liability, it is without consideration.

The contract, which is attached to the declaration, is as follows:

Atlantic Coast Line Railroad Company.

Circus Contract

An Agreement made this 15th day of September, 1902, by and between the Atlantic Coast Line Railroad Company, hereinafter styled and called the railroad company, of the first part, and W. H. Harris (Nickel) Plate Shows hereinafter styled and called a circus company, of the second part.

Whereas, the Circus Company is the owner of a circus and menagerie, including horses, wild animals and other live stock, and tents and other paraphernalia usually used as a part of a circus and menagerie, and is also the owner of certain railroad cars especially designed and made for the carriage and transportation of the circus, its animals, tents, paraphernalia and performers in the said circus and of the agents and servants of the said circus company employed in and about the same, and

Whereas, the Circus Company is desirous to give exhibitions of its said circus and menagerie at various points on the lines of railroad of the Railroad Company, and to that end to have its railroad cars loaded with all of its said circus, paraphernalia, tents, equipments, horses, wild animals, live stock and also its performers, agents and servants moved over the lines of railroad of the said railroad company from point to point where exhibits are to be given by the said Circus Company and upon a schedule different from any in use by the said railroad company; and

Whereas, it has been expressly stipulated and agreed between the said parties that the said railroad company, by reason of the unusual services which it is to perform for the said circus company under the contract, not only in

the manner of transporting of the said persons and property and of the schedules to be used in the said transportation, but also of the reduced and unusual rates charged for such services, makes this contract, not as a common carrier, but as a private carrier, and its liability for any breach of this contract or for any damages arising hereunder, or by reason hereof, shall be that of a private and not a common carrier.

Now Therefore, this Agreement witnesseth That the railroad Company, for and in consideration of the sums of money to be paid to it by the Circus Company, as hereinafter provided, and of the stipulations and agreements herein set forth, agrees with the said Circus Company,

(1) That it will furnish unto the circus company the use of its railroad and all such locomotives engines and train crews as may be necessary to transport and move 3 coaches, 2 stock cars and 3 flat cars. Advertising car, free; cars for said circus company, containing the circus, menagerie, paraphernalia, equipments, performers and employés of the circus company from point to point upon the lines of railroad of the Railroad Company, upon the following proposed itinerary and schedule, to wit;

Leave.	Time.	Date.	To be Hauled for Ex. at	Special Release Rate.
Montgomery	M-night	Oct. 20th	Troy	$129 00
Troy	"	Oct. 21st	Ozark	105 00
Ozark	"	Oct. 22d	Elba	121 00
Elba	"	Oct. 23d	Enterprize	63 00
Enterprize	"	Oct. 24th	Abbeville	137 00
Abbeville	"	Oct. 25th	Dothan	91 00
Dothan	"	Oct. 27th	Bainbridge	135 00
Bainbridge	"	Oct. 28th	Valdosta	185 00
				$966 00

Should it become necessary to change the above routes or dates, the circus company shall have the privilege of making such change by giving the Railroad Company ten days notice beforehand.

(2) The railroad company agrees to furnish the side track necessary for unloading and re-loading the said train at each point in the said schedule at which a stoppage for exhibition is to be made to the extent of the existing side track room at such point, less the space occupied by such freight cars as may be at the station and the space necessary for the free and safe passage of their trains on the main track, and also an engine to shift the cars during the loading and unloading thereof.

(3) The trains shall not be run at a higher rate of speed than fifteen miles an hour over any part of the road, unless by some unforeseen accident or event it shall become necessary to increase such speed in order to arrive at the point of exhibition at the time above specified.

(4) That the railroad company will haul free for the said circus company an advertising car over its road on its freight or accommodation trains between the points named in the above schedule and pass free on its passenger trains bill posters in actual service, baggagemen, advertising agents and baggage and advertising material of the said Circus Company.

In consideration of all of the which and of the greatly reduced rates given by the railroad company to the circus company, the circus company covenants and agrees as follows:

(1) To pay to the said railroad company the sum of Nine hundred and sixty-six dollars and $^{00}/_{100}$ payable as follows at points of shipment and at rates named.

(2) The circus company for the consideration herein set forth agrees to release and discharge and does hereby release and discharge the said railroad company from all liability for loss of, or damage to, any of its property, menagerie, cars and equipments which the same may sustain while in trans-

port over or upon the lines of the railroad company, and to indemnify and save harmless the railroad company for and against any damage or injury to the person of any of its officers, agents, performers servants or employés which may happen or occur upon its line of railroad.

(3) That the railroad company shall have a lien upon any and all of the property of the Circus Company as security for all sums of money due the railroad company by the circus company under the provisions of this contract.

(4) That the railroad company shall not be required to run more than seventy-five miles from one exhibition point to another as specified in its schedule within the usual time, eight hours, or between the hours of 11 p. m. and 9 a. m.

(5) That the railroad company shall have the power and option at any and all times to inspect the cars of the circus company, and to reject any or all the railroad company shall see fit, until such repairs, alterations or additions are made to the said cars as the railroad company may demand for their free and safe transportation over its lines. Such repairs, alterations and additions, and all material furnished and work done upon the said cars while on the lines of the railroad company shall be at the expense of the said circus company, and shall be paid before the said cars can be moved by it off of the lines of the said railroad company.

(6) If any damage shall be done to the cars of the circus company, for which the railroad company may be held legally liable, the circus company shall permit the railroad company to repair such damage at such time and place within ninety days after such damage as the railroad company elect. But the railroad company shall use all reasonable dispatch in making the same.

(7) If the railroad company shall for any cause be held liable for the loss of or injury to any of the animals transported by it under this contract, it is agreed that the said animals shall be valued at their actual value and in no instance at a higher price or value than herein stipulated, as follows:

Elephants, Hippopotami, Giraffes, Rhinoceroses	$500 00
Horses and Zebras	100 00
All other members of the equine species	50 00
Lions and Tigers	100 00
Leopards	50 00
All other members of the feline species	20 00
Buffaloes, and all other members of the bovine species	50 00
Seals	10 00
Monkeys, and all other animals not specified	5 00
Birds, all species of	5 00
Crocodiles, Alligators, Serpents, and other reptilia	5 00
All other animals not specified	5 00

(8) That the circus company shall and will load and unload the said cars at all points of stoppage as per the above schedule, at its own proper cost, expense and risk, and that it shall and will comply with all of the provisions of the Statutes of the United States or of any State through which the said animals and live stock may be moved over the lines of the said railroad company in respect to the periodical loading, unloading, feeding and watering of the said animals and live stock during the transportation.

(9) That the railroad company shall not be liable to the circus company for any damages or loss of profits at any point of exhibition or stoppage upon the said schedule by reason of any violation of the railroad company to transport the cars of the circus company on time as per the above schedule or any agreed variation of the same.

In Witness Whereof, the parties hereto have caused these presents to be executed by their respective agents thereto duly authorized, on the day and year first above written.

Executed in duplicate, of which one part to each of the said parties.

The Atlantic Coast Line Railroad Co.,
By Jas. Menzies, G. O. F.
Chas. O. Wilson, Mgr. Harris Shows.

Witness: C. L. Whaley.

It appears from the foregoing contract that the plaintiff owned the railroad cars in which its circus was to be transported, and that they were specially constructed and designed for that purpose; that among the things to be transported were wild animals and live stock; that a special schedule was arranged by the railroad company for the plaintiff to suit his convenience and desires in giving exhibitions, and that what is called in the contract a "special release rate" was given by the railroad company to the plaintiff for this service to be rendered. It is then specially stipulated and agreed that by reason of the unusual character of the service, and of the rates given, the contract was made by the defendant company not as a common carrier, but as a private carrier, and its liability for any breach of the contract, or any damage thereunder or by reason thereof, should be as a private carrier, and not as a common carrier.

It is then stipulated that for the consideration set forth the circus company releases and discharges the railroad company from all liability for loss and damage to any of its property, menagerie, cars, or equipments which the same may sustain while in transit over or upon the lines of the railroad company; and to indemnify and save harmless the railroad company for or against any damage or injury to the persons of any of its officers, agents, performers, or employés which might happen or occur upon defendant's line of railroad.

The case is now heard on a demurrer to the declaration, and the question for consideration is whether or not this is a valid contract of release, and whether the contract which makes the obligation of the railroad company that of a private carrier, and not that of a common carrier, is valid and binding. Counsel for plaintiff relies largely upon the important case of Railroad Co. v. Lockwood, 17 Wall. 357, 21 L. Ed. 627, which has for a long time been regarded as a leading case upon the subject of the validity of contracts made by railroad companies releasing themselves from liability for negligence in the performance of their duty as common carriers. The conclusions reached by the court in the Lockwood Case, so far as applicable here, were as follows: "(1) A common carrier cannot lawfully stipulate for exemption from responsibility when such exemption is not just and reasonable in the eye of the law. (2) It is not just and reasonable in the eye of the law for a common carrier to stipulate for exemption from responsibility for the negligence of himself or his servants."

It is to be determined here how far these rules apply to a case like the present, where a railroad company undertakes to transport for a circus company a train of cars owned by the circus company on schedules arranged to suit the engagements of the circus company, and with the other stipulations and agreements expressed in this contract. The case of Chicago, M. & St. P. R. R. Co. v. Wallace, 66 Fed. 506, 14 C. C. A. 257, 30 L. R. A. 161, decided by the Circuit Court of Appeals for the Seventh Circuit, was a case very much like this. It was a suit by the owner of a circus against the railroad company for damages caused by the derailment of the circus train, and which the railroad company had undertaken to carry under a special contract, in essential particulars very much like the contract in this case. The decision of the court in that case will appear from the syllabus, which is as follows:

"The C. R. Co. made a special contract in writing with one W., the proprietor of a circus, to haul a special train, consisting of cars owned by W., containing the circus property, equipment, and performers, between certain points, on stated days, at prices specified, which were less than the regular rates of the company for transportation of passengers and freight. It was provided in the contract that, in consideration of the reduced rate and of the increased risks to the property of the railroad company in running such special train, said company should not be liable for any damage to the persons or property of the circus company from whatever cause. It was not the regular business or the custom of the railroad company to haul such special trains of private cars, or to transport persons, animals, and freight on the same trains. Held, that the railroad company, in carrying W.'s property on such special train, acted as a private, and not as a common, carrier; that as such it had the right to make the contract stipulating against liability for damage; and that such contract was binding upon the parties."

In the opinion by Judge Bunn reference is made to the case of Railroad Company v. Lockwood, supra, and this quotation is made from it:

"A common carrier may undoubtedly become a private carrier, or bailee for hire, when, as a matter of accommodation or special engagement, he undertakes to carry something which it is not his business to carry."

Reference is also made to the cases of Coup v. Railroad Co., 56 Mich. 111, 22 N. W. 215, 56 Am. Rep. 374, and Robertson v. Railroad Co., 156 Mass. 525, 31 N. E. 650, 32 Am. St. Rep. 482.

In Coup v. Railroad Co., it is said in the opinion of the court:

"The business of common carrier, while it prevents any right to refuse the carriage of property such as is generally carried, implies, especially on railroads, that the business will be done on trains made up by the carrier, and running on their own time. It is never the duty of a carrier, as such, to make up special trains on demand, or to drive such trains made up entirely by other persons, or by their cars. It is not important now to consider how far, except as to the owners of goods in the cars forwarded, the reception of cars, loaded or unloaded, involves the responsibility of carriers as to the owners of the cars as such. The duty to receive cars of other persons, when existing, is usually fixed by the railroad laws, and not by the common law. But it is not incumbent on companies, in their duty as common carriers, to move such cars, except in their own routine. They are not obliged to accept and run them at all times and seasons, and not in the ordinary course of business. The contract before us involves very few things ordinarily undertaken by carriers. The trains were to be made up entirely of cars which belonged to plaintiff, and which the defendant neither loaded nor prepared, and into the arrangement of which, and the stowing and placing of their contents, defendant had no power to meddle. The cars contained horses which were entirely under control of plaintiff, and which, under any circumstances, may involve special risks. They contained an elephant, which might very easily involve difficulty, especially in case of accident. They contained wild animals, which defendant's men could not handle, and which might also become troublesome and dangerous. It has always been held that it is not incumbent on carriers to assume the burden and risks of such carriage. The trains were not to be run at the option of the defendant, but had short routes and special stoppages, and were to be run on some part of the road chiefly during the night. They were to wait over for exhibitions, and the times were fixed with reference to these exhibitions, and not to suit the defendant's convenience. There was also a divided authority, so that, while defendant's men were to attend to the moving of the trains, they had nothing to do with loading and unloading cars, and had no right of access or regulation in the cars themselves. It cannot be claimed on any legal principle that plaintiff could, as a matter of right, call upon defendant to move his trains under such circumstances and on such conditions, and, if he could not, then he could only do so on such terms as defendant saw fit

to accept. It was perfectly legal and proper, for the greatly reduced price, and with the risks and trouble arising out of moving peculiar cars and peculiar contents on special excursions and stoppages, to stipulate for exemption from responsibility for consequences which might follow from carelessness of their servants while in this special employment. How far, in the absence of contract, they would be liable in such a mixed employment, where plaintiff's men as well as their own had duties to perform connected with the movement and arrangement of the business, we need not consider."

In Robertson v. Railroad Co., 156 Mass. 525, 31 N. E. 650, 32 Am. St. Rep. 482, the decision is stated in the headnote, and reads as follows:

"A railroad company agreed to haul certain cars of the proprietors of a circus according to a certain schedule of time, and for a price less than the regular rates for such service, the proprietors agreeing at their own expense to load and unload the cars, to save the defendant harmless from all claims for damages to persons and property, however accruing, and to 'assume all risk of accident from any cause.' An accident occurred by one of the cars running off the track by reason of its trucks not being in proper condition, and an employé of the proprietors, who was riding in one of the cars, was injured. *Held*, in an action for injuries by the employé against the company, that he could not recover, as the defendant had no control over the condition of the cars, and no power to interfere with them, as the contract was simply to haul the cars as they were, which contract the defendant had a right to make, and as it was under no obligation to draw the cars as a common carrier."

But I think the case of Railway Co. v. Voight, 176 U. S. 498, 20 Sup. Ct. 385, 44 L. Ed. 560, is absolutely controlling on the principal question in this case. That was a suit by an express messenger against the railway company for damages for injuries sustained in a collision between two trains on the defendant's road. The question in the case was certified by the judges of the Circuit Court of Appeals for the Sixth Circuit to the Supreme Court. The facts appearing were that the railroad company had a contract with the express company to furnish cars suitable for transporting express matter, and to transport its employés free, the express company agreeing to protect the railroad company and hold it harmless from all liability the railroad company might be under to the employés of the express company for injuries they might sustain in being transported by the railroad company over its line as express messengers, whether the injuries were caused by negligence of the railroad company or its employés or otherwise. The plaintiff, an express messenger, had made a contract with the express company by which he had assumed all risk of accidents or injuries he might sustain in the course of his employment occasioned by negligence, and whether resulting in death or otherwise, and agreed to indemnify and hold harmless the express company as to any and all claims which might be made against it on his part, whether the injuries resulted from negligence or otherwise, and agreeing to release the transportation lines (the railway) from all claims and demands or causes of action arising out of any injury, and ratifying the agreement made between the express company and the transportation company to the same effect. The question submitted was decided by the Supreme Court in favor of the railway company, Mr. Justice Harlan dissenting. The important part of the case in this connection is the reference made in the opinion of the court by Mr.

Justice Shiras to the cases of Robertson v. Old Colony Railroad, supra, Coup v. Railroad Co., supra, and to the decision by the Circuit Court of Appeals for the Seventh Circuit in Chicago, M. & St. P. R. R. Co. v. Wallace, supra. These cases are cited and referred to in a way which seems undoubtedly to mean an approval of them. This occurs in the opinion:

"Where a railroad company made a special contract in writing with the owner of a circus to haul a special train between certain points at specified prices, and stipulating that the railroad company should not be liable for any damage to the persons or property of the circus company from whatever cause, it was held by the Circuit Court of Appeals for the Seventh Circuit citing Coup v. Railroad Co., 56 Mich. 111, and Robertson v. Old Colony Railroad, 156 Mass. 506, that the railroad company was not acting as a common carrier, and was not liable under the contract for injuries occasioned by negligent management of its trains."

"In its opinion the court quoted the following passage from Railroad v. Lockwood: 'A common carrier may undoubtedly become a private carrier or bailee for hire when, as a matter of accommodation or special engagement, he undertakes to carry something which it is not his business to carry.' Chicago, Milwaukee & St. P. Railroad v. Wallace, 24 U. S. App. 589, 66 Fed. 506, 14 C. C. A. 257, 30 L. R. A. 161."

While, therefore, the immediate question for determination in the Voigt Case was the rights of an express messenger who had released the express company, and the express company had released the railroad company, still I think the necessary effect of the decision, and especially the citation by the court of the authorities named with apparent approval, was to include the cases of special contracts like the one before the court for hauling circus trains, and by so including them to distinguish them from the class of contracts for exempted liability by railroads, covered by the decision in the Lockwood case.

It is alleged in the plaintiff's petition that the statement in the contract that a reduced rate was given by the railroad company is false. The plaintiff contends, therefore, as I understand it, that, as this case is now being heard on a demurrer, it must stand as if no reduced rate had been given, and consequently the basis or consideration for the contract of release does not for present purposes exist. The difficulty about this contention is that the plaintiff sues on the contract. This is manifest from the declaration. I do not see how the plaintiff can sue upon the contract, and then deny its terms, in this respect at least.

It is also alleged in the plaintiff's declaration that the defendant is a common carrier, and is obliged by law to accept and transport goods, animals, and other property offered for transportation over its line of railroad, but that it refused to transport plaintiff's show unless he would sign the contract in question; that the contract was forced on plaintiff, and is against public policy and void. A railroad company is certainly not required, as a common carrier, to take a circus train belonging to a circus company, a part of which is loaded with wild animals, and transport it over its line on a schedule to be arranged by the circus company. This is clearly held in the authorities cited above, and which, as stated, are believed to have received the approval of the Supreme Court.

On Demurrer to Amended Declaration.

(May 21, 1904.)

After the foregoing opinion was filed, counsel for plaintiff, having previously asked leave to do so, filed an amendment to his declaration as follows:

"Now comes the plaintiff in the above-stated case, and, having first obtained leave of court, amends his declaration heretofore filed, and for such amendment says:

"(1) He shows that his action is founded upon the tort committed on him by defendant, as is more fully set out in his said declaration, and not upon the contract mentioned in said declaration and set out in the exhibit attached thereto; that said contract is set out and described by plaintiff, not as the ground and basis of his action, but as a matter of inducement merely, and showing his relation to said defendant; and that he seeks recovery, not for the breach of any contract, but for the tort negligently committed on him and his property by said defendant. He further shows that in setting out said contract in his said declaration he does not ratify nor approve same, nor admit himself bound by the terms thereof.

"(2) He shows further that said contract is illegal and void, in that it is an attempt on the part of a public carrier, which plaintiff alleges defendant to be, to act and contract as a "private carrier," in which capacity, plaintiff alleges, defendant could not, under its charter, by which it was made a public carrier, act or contract; and plaintiff alleges, further, that said contract is an attempt on the part of defendant to make of itself something other and different from that which it is made by its charter, and having different powers, duties, and liabilities from those conferred and imposed upon it by its said charter. Plaintiff alleges that, in so far as said contract attempts to make of defendant a private carrier, it is ultra vires and illegal.

"(3) Plaintiff further alleges that to transport, in their own cars and in the manner in which plaintiff's show was being transported by defendant, shows, theater companies, and circuses from place to place along their lines of railroad, on special schedules arranged for the convenience of both carrier and carried, is a part of the common and ordinary business in which railroad companies in general and this defendant in particular are authorized by their charters to engage, and in which they do in fact engage; that defendant has a printed form of contract prepared, under which it undertakes this branch of its business; and that it was and is customary, and a part of the business of all railroads in general and of this defendant in particular, to transport along their lines of railroad shows and circuses, in their own cars, and in the manner in which plaintiff's show was being transported under the contract set out in plaintiff's declaration heretofore filed."

Thereupon counsel for defendant renewed the demurrer to the declaration as amended, and, after argument, the demurrer, so renewed, was sustained.

ANTHONY v. BURROW et al.

(Circuit Court, D. Kansas, First Division. April 12, 1904.)

No. 8,193.

1. JURISDICTION OF FEDERAL COURTS—FEDERAL QUESTION—LEGALITY OF CONGRESSIONAL DISTRICT.

While the power to fix the number of representatives in Congress and to apportion them among the several states is vested in Congress, the power to divide a state into congressional districts for the election of representatives resides in the Legislature of the state, and the question

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¶ 1. Federal jurisdiction in actions involving federal question, see notes to Bailey v. Mosher, 11 C. C. A. 308; Montana Ore Purchasing Co. v. Mining Co., 35 C. C. A. 7.

whether a county is lawfully included in a congressional district where it was placed by an act of the Legislature does not depend on the construction of any law of the United States, so as to give a federal court jurisdiction of a suit for its determination, but upon the validity of the act of the Legislature, which is a question for determination by the state courts.

2. SAME.
State legislation relating to the selection of candidates for representatives in Congress does not, because of its subject-matter, become a part of the federal law, the construction of which raises a federal question.

3. EQUITY JURISDICTION—REMEDY AT LAW—MANDATORY INJUNCTION AGAINST STATE OFFICER.
A federal court of equity is without jurisdiction to grant an order requiring a state officer to certify the nomination of a certain person as a candidate for representative in Congress, the subject not being of equitable cognizance.

4. FEDERAL COURTS—ENFORCING STATUTORY REMEDY.
The rule that a federal court may enforce a remedy, either equitable or legal, given by a state statute, presupposes that the cause is one of which the federal court has jurisdiction.

5. EQUITY JURISDICTION—POLITICAL RIGHTS—ENJOINING ISSUANCE OF CERTIFICATE OF NOMINATION.
A court of equity has no jurisdiction to enjoin officers of a state, acting under a state statute, from issuing a certificate of nomination to a candidate for representative in Congress, the right involved being purely political, as distinguished from a civil or property right, to which alone the jurisdiction of equity extends.

In Equity. On application for restraining order.

A. E. Crane and Hite & Nichols, for complainant.

C. C. Coleman, Atty. Gen., Eugene Hagan, and J. G. Slonecker, for defendants.

POLLOCK, District Judge. This court is asked to grant a temporary restraining order against defendants upon the face of the bill of complaint filed herein. The controversy arises from political complications now existing in the First Congressional District of this state between two factions of the Republican Party. The real question of merit thought to be involved and sought to have determined here is whether complainant or one Charles Curtis is the regular nominee of the Republican Party in the First Congressional District of this state for the office of representative in the Congress of the United States from said district.

The averments of the bill, in substance, are: That complainant possesses all of the qualifications requisite under the law for such office; that defendants are the Secretary, Auditor, and Attorney General of the state of Kansas; that at a nominating convention, duly called, held at the city of Holton on the 2d day of February last, for the purpose of selecting a candidate of the Republican Party for said office from said district, to be voted for by the electors in said district at the coming November election, a split of said convention into two factions occurred, the one faction nominating complainant, and the other nominating said Charles Curtis; that, by reason of a conspiracy existing among certain of the adherents of the Curtis faction, numerous frauds were perpetrated in many of the counties comprising the district for the purpose of preventing complainant from securing such nomination, and

that such conspiracy resulted in the sending to said convention contesting and fraudulent delegations from certain counties in said district, unlawfully pretending to represent said counties in said convention; that said congressional district, under the act of Congress of February 7, 1891, commonly known as the "Reapportionment Act," at the date of said convention was composed of the counties of Atchison, Brown, Doniphan, Nemaha, Jackson, Jefferson, Leavenworth, and Pottawatomie; that, notwithstanding the fact that under the provisions of said act of Congress said district was so composed of the counties named, the county of Shawnee, not included in or comprising a part of said district, selected a large number of delegates, who appeared in said convention as adherents of the Curtis faction, and, in furtherance of said conspiracy to defeat the nomination of complainant, were wrongfully seated in the convention which nominated said Charles Curtis; that the convention which pretended to select said Curtis as the party nominee of said party in said district was wholly irregular, void, and without authority of law, and did not include a majority of the delegates to said convention entitled under the law to participate therein, but, on the contrary, that complainant secured the vote of a majority of the delegates to such convention entitled by law to participate in the proceedings of said convention; that he is the lawful nominee of the party for said congressional district, and was so regularly declared at said convention, is entitled to a certificate of nomination under the laws of the state of Kansas, and that a majority of the qualified electors of said congressional district favor his election to said office, and, unless precluded therefrom by the unlawful combination and conspiracy of the defendants and others named in the bill, will be elected to such office at the coming November election. It is further averred in the bill that under the provisions of section 2703, Gen. St. Kan. 1901, which provides as follows:

"The certificate of nomination and nomination papers being so filed, and being in apparent conformity with this act, shall be deemed to be valid, unless objection thereto is duly made in writing within three days from the date said papers are filed with the proper officers. Such objections or other questions arising in relation thereto, in case of nominations of state officers or officers to be elected by the voters of a division less than a state and greater than a county, shall be considered by the Secretary of State, Auditor of State, and Attorney General, and a decision of a majority of these officers shall be final. Such objections or questions arising in the case of nominations for officers to be elected by the voters of a county or township shall be considered by the county clerk, clerk of the district court, and county attorney; and the decision of a majority of said officers shall be final. Objections or questions arising in the case of nominations for city or incorporated town officers shall be considered by the mayor and clerk, with whom one councilman, chosen by a majority of the councilmen, shall act; and the decision of a majority of such officers shall be final. In any case where objection is made, notice shall forthwith be given, by the officer with whom the objections are filed, to the candidates affected thereby, addressed to their places of residence as given in the nomination papers, and stating the time when, in no case to be more than five days, if a state or district officer, nor more than three days, if a county officer, and the place where such objections will be considered. All mandamus proceedings to compel an officer to certify and place upon the ballot any name or names, and all injunction proceedings asking that said officers be restrained from certifying and placing upon the ballot any name or names, must be commenced not less than twenty days before the election"—

The defendants constitute the members of the board provided for in such act to pass upon objections to the nomination of any candidate for a public office whose district comprises more than one county in the state; that defendants are the nominees of the Republican Party of the state for re-election to the official positions now respectively held by each; that in order to secure their renomination to the several offices now held by them, at the state convention of the Republican Party held in the city of Wichita on the 9th day of March last, defendants conspired and confederated with the adherents of the Curtis faction in the First Congressional District to defeat the nomination of complainant and to secure their own renomination; that under the provisions of the statute above quoted said Curtis has filed a certificate of nomination with such board, and complainant has been compelled to file objections thereto, and that said objections are now pending and undisposed of before said board. The complainant further avers that, as a part of the fraudulent conspiracy to wrong complainant, the defendants, as members of the tribunal or board provided in said act of the Legislature to hear and determine objections filed to the nomination of said Curtis, have collusively and fraudulently, without hearing the evidence, prejudged said objections against complainant and in favor of the legality of the nomination of said Charles Curtis. It is further alleged in the complaint that the power attempted to be conferred upon defendants constituting said board, by the terms of the said act of the Legislature, to hear and determine the objections to the nomination papers of said Curtis made by complainant, is a judicial power, and that the attempt to confer such judicial power upon the Secretary, Auditor, and Attorney General of the state of Kansas was an unlawful exercise of legislative power, and that said act is, under the Constitution of the state of Kansas, void and of no effect. It is further alleged that defendants, acting as said board, unless restrained by order of this court, will determine the nomination papers of said Charles Curtis regular and valid, and the objections of complainant filed thereto insufficient under said void statutory provision, and that the defendant J. R. Burrow, as Secretary of the state of Kansas, will certify to the county clerks of the counties claimed by said Curtis to constitute the First Congressional District the name of said Charles Curtis as the regular party nominee for said office to be voted for by the electors of said district at the coming November election. The relief prayed is that an order of injunction may issue restraining defendants from acting as a tribunal or board under said void act of the Legislature to hear and determine the objections filed to the nomination of said Charles Curtis, and from determining who is the lawful nominee of the Republican Party for said office, and for an order directing the defendant J. R. Burrow, as Secretary of State, to forthwith certify to the several county clerks of the counties comprising the First Congressional District of the state of Kansas the name of complainant as the candidate of the Republican Party for member of the House of Representatives, to be placed upon the official ballot to be voted for at the coming November election, and general relief.

The first question naturally arising for determination is, does a federal court of equity have jurisdiction to hear and determine a contro-

versy of such nature as that charged in the bill of complainant? The general jurisdiction of this court is invoked, first, on the ground that the controversy involves the jurisdictional amount, and arises under a law of the United States. That law is the act of Congress of February 7, 1891, commonly known as the "Reapportionment Act," which increased the number of representatives in Congress from this state to eight, and section 4 of which act provides:

"That in case of an increase in the number of representatives which may be given to any state under this apportionment such additional representative or representatives shall be elected by the state at large, and the other representatives by the districts now prescribed by law until the Legislature of such state in the manner herein prescribed shall redistrict such state, and if there be no increase in the number of representatives from a state the representatives thereof shall be elected from the districts now prescribed by the Legislature of such state." 26 Stat. 736, c. 116.

By the provisions of section 2, c. 1, p. 1, Laws 1883, the Legislature of the state had provided that the counties of Atchison, Brown, Doniphan, Nemaha, Jackson, Jefferson, Leavenworth, and Pottawatomie should constitute the First Congressional District of the state, and such counties did constitute the First Congressional District at the date of the reapportionment act of Congress above mentioned. While it is not so averred in the complaint, yet it is a well-known fact, of which this court takes judicial knowledge, that the Legislature of the state, at its 1897 session, enacted as follows:

"That section 2 of chapter 1 of the Session Laws of 1883, be and the same is hereby amended so as to read as follows: Sec. 2. The counties of Nemaha, Brown, Doniphan, Jackson, Atchison, Jefferson, Leavenworth, and Shawnee, shall constitute the First District." Section 1, c. 90, p. 181, Laws 1897.

Hence the contention of complainant is that, Congress having declared the counties comprising the First Congressional District at the time of the reapportionment act should constitute the First Congressional District until the state should by act of the Legislature be redistricted into congressional districts, and as the taking of Pottawatomie county out of the First District and the placing of Shawnee county therein was not a redistricting of the state, Shawnee county constituted no lawful part of the First Congressional District at the date of the Holton convention, and the delegates therefrom were not entitled to a voice in such convention.

Does such contention raise a federal question cognizable in this court sitting in equity? By the repeated adjudications of the Supreme Court it is conclusively settled that a case arises under the Constitution or laws of the United States whenever, upon the whole record, there is a controversy involving the construction of either. Cohens v. Virginia, 6 Wheat. 264, 5 L. Ed. 257; Nashville v. Cooper, 6 Wall. 247, 18 L. Ed. 851; Tennessee v. Davis, 100 U. S. 257, 25 L. Ed. 648. In so far, therefore, as the general jurisdiction of this court depends, the question is, does the decision of this controversy depend upon a construction of the reapportionment act of Congress mentioned? The power to determine the number of representatives in Congress and to apportion that number among the several states resides in and can be exercised only by the Congress of the United States. In the exercise of that power the reapportionment act from which the above quotation is made was

enacted, fixing the number of representatives in Congress from the state of Kansas at eight, and providing for their election. But the power to divide the territory of a state into congressional districts, for the purpose of selecting members of Congress apportioned to a state, is a power residing in the Legislature of the state, and not in the Congress of the United States, as is recognized by said act of Congress. In the exercise of that power the act of the Legislature of 1897 was passed, taking the county of Pottawatomie from, and adding the county of Shawnee to, the First Congressional District. Hence it is apparent that the right of Shawnee county to participate in the proceedings of the Holton convention, under the averments of complainant's bill, does not depend upon the true construction of the "reapportionment act" of Congress, but does depend upon the validity of the act of the Legislature of the state placing the county of Shawnee in the First Congressional District; and the validity or invalidity of that act of the Legislature is a question for the determination of the courts of the state, and does not involve a federal question for determination by this court, unless the further contention made by solicitors for complainant may be sustained.

Such further contention is that under section 2, art. 1, of the federal Constitution, the electoral machinery of the state, when employed for the purpose of selecting representatives in Congress from a state, become laws of the United States, and are to be construed the same as though enacted by Congress for that purpose. In other words, if the determination of this controversy depends upon the construction of acts of the Legislature of the state of Kansas employed for the purpose of selecting a candidate for the office of representative in Congress from the First Congressional District of the state, such controversy becomes one cognizable by the federal courts, to the same extent as though the construction of the federal Constitution or laws was directly involved. In support of this contention, Ex parte Yarbrough, 110 U. S. 651, 4 Sup. Ct. 152, 28 L. Ed. 274, Wiley v. Sinkler, 179 U. S. 58, 21 Sup. Ct. 17, 45 L. Ed. 84, and Swafford v. Templeton, 185 U. S. 487, 22 Sup. Ct. 783, 46 L. Ed. 1005, are cited. However, an examination of those cases will show the sole question therein determined was, in the Yarbrough Case, the sufficiency of the federal criminal laws to punish one who unlawfully obstructs a person qualified under state laws from voting for a member of Congress; and, in the other cases, that federal courts have jurisdiction of an action at law brought by one qualified under state laws to vote for a member of Congress, who is wrongfully prevented from voting; and this because section 2 of article 1 of the federal Constitution adopts the qualifications required under state laws to vote for a member of the more numerous branch of the state Legislature as the test of the proper qualifications to vote for a member of Congress. From this it will be seen the claim made by solicitors for complainant, that the above and kindred cases hold the election machinery employed by the state in the selection of candidates for the office of representative in Congress, becomes, when so employed, a part of the federal law, and the construction of the same raises a federal question, is claiming too much for such cases.

As the question at bar is not the right to vote, but the privilege of

being voted for, and as this is not an action at common law for damages, but relief is sought by a bill in equity, the question whether this court in equity has jurisdiction to grant the injunction prayed remains. It must be apparent to any one that the relief sought by complainant under his bill, in so far as it prays an order of this court directing the defendant Burrow, as Secretary of State of the state of Kansas, to forthwith certify to the several county clerks of the counties comprising the First Congressional District the name of complainant as the party candidate to be placed on the official ballot to be voted at the coming November election, is not a proper subject of equity, for such relief can only be afforded in an action of mandamus, which is an action at law, and that a federal court of equity will not grant a mandatory injunction upon a preliminary or interlocutory motion against officers of a state, but, if at all, only upon final hearing, and then only to execute the decree or judgment of the court. Walkley v. City of Muscatine, 6 Wall. 483, 18 L. Ed. 930; Fletcher v. Tuttle (Ill.) 37 N. E. 683, 25 L. R. A. 143, 42 Am. St. Rep. 220; McCauley v. Kellogg et al., 2 Woods, 13, Fed. Cas. No. 8,688; Audenried v. Philadelphia & Reading R. Co., 68 Pa. 370, 8 Am. Rep. 195; Rogers Locomotive Works v. Erie Railway Co., 20 N. J. Eq. 379.

As to the temporary restraining order now asked, the argument made by solicitors for complainant is that the concluding portion of section 2703, Gen. St. Kan. 1901, above quoted, recognizes the right to proceed in equity in the state courts to restrain the action of the board of which the defendants are members. Hence such remedy, under repeated decisions of the federal courts, may be available in this court sitting as a court of equity. Ex parte McNeil, 13 Wall. 236, 20 L. Ed. 624, Davis v. Gray, 16 Wall. 203, 21 L. Ed. 447, Cowley v. Northern Pacific Railroad Co., 159 U. S. 569, 16 Sup. Ct. 127, 40 L. Ed. 263, and many other cases, are cited in support of the contention made. While it is true the rights created and remedies provided by the statute laws of a state may be enforced in the federal courts, either in law or in equity, yet the enforcement of such statutory rights and remedies by the federal courts first presupposes jurisdiction in the federal courts; and while the statute under consideration recognizes the right to obtain relief by injunction in the state courts under certain conditions, yet it creates no such right, and in my judgment no such right exists in this court sitting as a court of equity, and this for the following reasons: The right to become the nominee of a political party for a public office, whether national or state, and as such nominee to receive the votes of the qualified electors voting to fill such office, is a purely political right as contradistinguished from a civil or property right. In Re Sawyer, 124 U. S. 200, 8 Sup. Ct. 482, 31 L. Ed. 402, Mr. Justice Gray says:

"The office and jurisdiction of a court of equity, unless enlarged by express statute, are limited to the protection of rights of property."

"Political rights consist in the power to participate, directly or indirectly, in the establishment or management of the government. These political rights are fixed by the Constitution. Every citizen has the right to vote for public officers, and of being elected. These are the political rights which the humblest citizen possesses. Civil rights are those which have no relation to the establishment, support, or management of the government. They consist in

the power of acquiring and enjoying property, or exercising the paternal and marital powers, and the like. It will be observed that every one, unless deprived of them by sentence of civil death, is in the enjoyment of the civil rights, which is not the case with political rights, for an alien, for example, has no political, although in full enjoyment of the civil, rights." 2 Bouv. Law Dict. 597.

Mr. Justice Fuller, sitting as Circuit Justice in Green v. Mills, 69 Fed. 857, 16 C. C. A. 522, 30 L. R. A. 90, says:

"The jurisprudence of the United States has always recognized the distinction between common law and equity as, under the Constitution, matter of substance as well as of form and procedure. And the distinction has been steadily maintained, although both jurisdictions are vested in the same courts. Fenn v. Holme, 21 How. 481 [16 L. Ed. 198]; Thompson v. Railroad Co., 6 Wall. 134 [18 L. Ed. 765]; Cates v. Allen, 149 U. S. 451 [13 Sup. Ct. 883, 37 L. Ed. 804]; Mississippi Mills v. Cohn, 150 U. S. 202 [14 Sup. Ct. 75, 37 L. Ed. 1052]. It is well settled that a court of chancery is conversant only with matters of property and the maintenance of civil rights. The court has no jurisdiction in matters of a political nature, nor to interfere with the duties of any department of government, unless under special circumstances, and when necessary to the protection of rights of property, nor in matters merely criminal or merely immoral, which do not affect any right of property. In re Sawyer, 124 U. S. 200 [8 Sup. Ct. 482, 31 L. Ed. 402]; Luther v. Borden, 7 How. 1 [12 L. Ed. 581]; Mississippi v. Johnson, 4 Wall. 475 [18 L. Ed. 437]; Georgia v. Stanton, 6 Wall. 50 [18 L. Ed. 721]; Holmes v. Oldham, 1 Hughes, 76 [Fed. Cas. No. 6,643]."

The precise question here under consideration was ruled by the Supreme Court of Illinois in Fletcher v. Tuttle, 151 Ill. 41, 37 N. E. 683, 25 L. R. A. 143, 42 Am. St. Rep. 220. It is there said:

"The question, then, is whether the assertion and protection of political rights, as judicial power is apportioned in this state between courts of law and courts of chancery, are a proper matter of chancery jurisdiction. We would not be understood as holding that political rights are not a matter of judicial solicitude and protection, and that the appropriate judicial tribunal will not, in proper cases, give them prompt and efficient protection, but we think they do not come within the proper cognizance of courts of equity. In Sheridan v. Colvin, 78 Ill. 237, this court, adopting, in substance, the language of Kerr on Injunctions, said: 'It is elementary law that the subject of the jurisdiction of the court of chancery is civil property. The court is conversant only with the questions of property and the maintenance of civil rights. Injury to property, whether actual or prospective, is the foundation on which the jurisdiction rests. The court has no jurisdiction in matters merely criminal or merely immoral, which do not affect any right of property. Nor do matters of a political character come within the jurisdiction of the court of chancery. Nor has the court of chancery jurisdiction to interfere with the public duties of any department of the government, except under special circumstances, and where necessary for the rights of property.' Georgia v. Stanton, 6 Wall. 50 [18 L. Ed. 721]; In re Sawyer, 124 U. S. 200 [8 Sup. Ct. 482, 31 L. Ed. 402]; Sheridan v. Colvin, 78 Ill. 237; Dickey v. Reed, 78 Ill. 261; Harris v. Schryock, 82 Ill. 119, and other cases—are cited in support of the doctrine announced."

Again, in that case, it is said:

"Other authorities of similar import might be referred to, but the foregoing are amply sufficient to show that wherever the established distinctions between equitable and common-law jurisdiction are observed, as they are in this state, courts of equity have no authority or jurisdiction to interpose for the protection of rights which are merely political, and where no civil or property right is involved. In all such cases the remedy, if there is one, may be sought in a court of law. The extraordinary jurisdiction of courts of chancery cannot, therefore, be invoked to protect the right of a citizen to vote or

to be voted for at an election, or his right to be a candidate for or to be elected to any office; nor can it be invoked for the purpose of restraining the holding of an election, or of directing or controlling the mode in which, or of determining the rules of law in pursuance of which, an election shall be held. These matters involve in themselves no property rights, but pertain solely to the political administration of government. If a public officer, charged with political administration, has disobeyed or threatens to disobey the mandate of the law, whether in respect to calling or conducting an election or otherwise, the party injured or threatened with injury in his political rights is not without remedy, but his remedy must be sought in a court of law, and not in a court of chancery."

In Hardesty v. Taft, 23 Md. 513, 87 Am. Dec. 584, it is said:

"On this branch of the inquiry it seems to the court very clear that a court of equity cannot be invoked to prevent the performance of political duties like those committed to the officers of registration under the law. The willful, fraudulent, or corrupt refusal of a vote by judges of election, or a like denial of registration by the officer appointed to register votes, which is the same thing, can be adequately compensated for in damages at law. The writ of injunction will not be awarded in doubtful or new cases not coming within the well-established principles of equity. Bonaparte v. Railroad Co., Fed. Cas. No. 1,617."

In People v. Canal Board, 55 N. Y. 393, it is said:

"A court of equity exercises its peculiar jurisdiction over public officers to control their actions only to prevent a breach of trust affecting public franchises, or some illegal act under color or claim of right affecting injuriously the property rights of individuals. A court of equity has, as such, no supervisory power or jurisdiction over public officials or public bodies, and only takes cognizance of actions against or concerning them when a case is made coming within one of the acknowledged heads of equity jurisdiction."

In Giles v. Harris, 189 U. S. 475, 23 Sup. Ct. 639, 47 L. Ed. 909, it is held:

"A circuit court of the United States in Alabama has not jurisdiction of an action in equity brought by a colored man, resident in Alabama, on behalf of himself and other negroes, to compel the board of registrars to enroll the names upon the voting lists of the county in which they reside under a Constitution alleged to be contrary to the Constitution of the United States."

From an examination of the authorities I am persuaded this court has no jurisdiction to restrain the board of which the defendants are the constituent members, created under the statute above quoted, from acting, upon the ground that such statute is unconstitutional and void, or upon any ground set forth in the bill. The right sought to be enforced under the allegations of the bill filed in this case being a political right, and not a civil or property right, this court has no jurisdiction to entertain the bill, and a temporary restraining order against the defendants as officers of the state constituting such board, under the law above quoted, may not and should not be granted. There is no equity in the bill, and the same will be dismissed.

FIRST NAT. BANK OF COVINGTON v. CITY OF COVINGTON et al.

(Circuit Court, E. D. Kentucky. May 26, 1903.)

No. 2,195.

1. RES JUDICATA—QUESTIONS CONCLUDED BY JUDGMENT—SUBSEQUENT SUIT ON DIFFERENT CAUSE OF ACTION.
   Under the rule of the federal courts, a decision by the highest court of a state that the acceptance by a bank of a statute imposing taxes created a contract with the state by which the bank was exempt from local taxation during the term of its charter renders such question res judicata between the parties to the suit, and it cannot be again litigated between them in a subsequent suit, although it is on a different cause of action, arising under a law subsequently passed.

2. SAME.
   The fact that the judgment of a court might have been based upon a ground other than that on which it was actually based does not prevent the determination that such ground existed from being conclusive in a subsequent suit between the same parties, if its existence was in issue in the former suit, and properly formed the basis of the judgment therein.

3. SAME—FEDERAL COURTS—FOLLOWING RULE OF STATE COURTS.
   Although a judgment of a state court would render a question res judicata in a subsequent suit between the same parties, under the rule of the federal courts, yet a federal court will not give it such effect where it would not be an estoppel under the rule of the highest court of the state.

4. TAXATION—NATIONAL BANKS—KENTUCKY STATUTES.
   Act Ky. March 21, 1900 (Acts 1900, p. 65, c. 23), providing for the taxation of shares of national banks, is valid and enforceable, as applied to taxes for subsequent years, and a bank is not exempted from its operation because of its acceptance of the provisions of the Hewitt act of 1886 (Acts 1885-86, p. 140, c. 1233), which, as has been authoritatively determined, did not create an irrevocable contract with the state.

In Equity. Suit to enjoin collection of taxes.

S. D. Royce, for First Nat. Bank.

F. J. Hanlon, for City of Covington.

COCHRAN, District Judge. The Supreme Court of the United States, upon the appeal from the decree entered herein December 17, 1900 (103 Fed. 523), held that said decree was not final, but interlocutory, and hence not appealable (185 U. S. 270, 22 Sup. Ct. 645, 46 L. Ed. 906). It did so because the decree did not dispose of the entire controversy presented by the pleadings herein. That controversy involves the right of the defendant city of Covington, under the act of March 21, 1900 (Acts 1900, p. 65, c. 23), to collect from complainant any taxes whatever; i. e., taxes for the years after that date until the expiration of its charter, November 17, 1904, as well as taxes for the years prior thereto, since the adoption of the revenue law of 1892. A single ground is urged by complainant for nonliability on its part for taxes under said act for any period of time either before or after its

¶ 1. See Judgment, vol. 30, Cent. Dig. § 1508.

¶ 3. Conclusiveness of judgments between federal and state courts, see notes to Kansas City, Ft. S. & M. R. Co. v. Morgan, 21 C. C. A. 478; Union & Planters' Bank v. City of Memphis, 49 C. C. A. 468.

passage. That ground is that in a former suit brought by it against said defendant in the circuit court of Kenton county, Ky., afterwards transferred to the circuit court of Campbell county, and appealed to the Court of Appeals of Kentucky, to enjoin the collection of city taxes from it for the year 1893 under said revenue law of 1892, it was adjudged by the two latter courts that it had an irrevocable contract with the state of Kentucky, under the Hewitt law of 1886, by which it was exempted until the expiration of its charter, November 17, 1904, from all other taxes than that provided by said law, and because thereof it was not liable for city taxes for said year 1893 under said revenue law of 1892. The opinion of the Court of Appeals rendered in said case is contained in 97 Ky. 590, 31 S. W. 1013. An additional ground is urged for nonliability on complainant's part to defendant for taxes under said act of March 21, 1900, prior to its passage, and that is that said act, in so far as it relates to taxes for that period of time, is discriminatory and repugnant to section 5219, Rev. St. U. S. [U. S. Comp. St. 1901, p. 3502]. Judge Evans held that said portion of said act was invalid on this ground, and, because of this, enjoined and restrained the defendants from assessing complainant's property under said act for said years. 103 Fed. 523. This is as far as the decree goes. He did not determine whether complainant was liable for no taxes at all, on the ground relied on by it in support of its contention that it was not, and hence the decree leaves the controversy as to taxes after March 21, 1900, undisposed of.

The decree not being final, but interlocutory, for the reason stated, I have the power to set it aside if I think that it is wrong, and see fit to do so. But it is one thing for me to have such power, and another for it to be proper for me to exercise that power. The decree was entered by Judge Evans after due consideration of the questions involved. I am of equal rank with him, and have no appellate jurisdiction over his action. Comity requires, therefore, that I should permit it to stand, so far as it goes. In allowing it to stand on this ground, I do not mean to intimate any doubt as to the correctness of the position upon which he based it. I have simply refrained from any consideration of it, being under no necessity to do so. It is incumbent upon me, however, to dispose of so much of the controversy as relates to the taxes after March 21, 1900, which has been left undisposed of by Judge Evans. The liability of complainant for these taxes depends entirely upon the correctness of the position taken by it that it was not liable for any taxes under said act either before or after its passage, because of the adjudication hereinbefore referred to, and, if well taken, it affords an additional reason for permitting Judge Evans' action to stand.

It is certain that if I am free to determine the question whether complainant, by its acceptance of the Hewitt law in 1886, acquired an irrevocable contract from the state of Kentucky exempting it from all other taxation than that provided in said law until the expiration of its charter, on its merits I would have to hold that it did not thereby acquire such a contract. Bank Tax Cases, 102 Ky. 174, 39 S. W. 1030; Citizens' Savings Bank v. Owensboro, 173 U. S. 636, 19 Sup. Ct. 530, 43 L. Ed. 840. And complainant so concedes. Its sole re-

liance is on the adjudication in the former suit. It claims that the question as to whether it so acquired such a contract is res judicata—a thing adjudged—and that it cannot now be claimed that it did not. It is certain that in said suit it was adjudged by the Campbell circuit court, and afterwards on appeal by the Court of Appeals, that such a contract had been made by the state of Kentucky with complainant, and that it was irrevocable. Both courts delivered written opinions, and both opinions are made part of complainant's bill. It is true that the Campbell circuit court also adjudged that the taxes levied by the revenue law of 1892 upon national banks were franchise taxes, and hence invalid, and that on this ground, as well as the existence of the contract, complainant was not liable for the taxes of 1893. But the latter was the main ground of its action, and such was the only ground upon which the Court of Appeals based the affirmation of its judgment.

The defendants urge several reasons why the former adjudication should not be accepted in this suit as conclusive of the existence of such an irrevocable contract in complainant's favor. They say that this suit is upon an entirely different cause of action. It is a suit to enjoin the collection of taxes for subsequent years authorized to be collected by another and subsequent act of the Legislature. This is undoubtedly true. But does this fact make any difference? I think not. It is well settled that a thing adjudged in a former suit cannot be questioned in a subsequent suit between the same parties, although the latter is upon an entirely different cause of action. In the case of Southern Pac. Ry. Co. v. U. S., 168 U. S. 48, 18 Sup. Ct. 27, 42 L. Ed. 355, Mr. Justice Harlan said:

"The general principle announced in numerous cases is that a right, question, or fact distinctly put in issue and directly determined by a court of competent jurisdiction as a ground of recovery cannot be disputed in a subsequent suit between the same parties or their privies; and, even if the second suit is for a different cause of action, the right, question, or fact once so determined must, as between the same parties or their privies, be taken as conclusively established, so long as the judgment in the first suit remains unmodified. This general rule is demanded by the very object for which civil courts have been established, which is to secure the peace and repose of society by the settlement of matters capable of judicial determination. Its enforcement is essential to the maintenance of social order, for the aid of judicial tribunals would not be invoked for the vindication of rights of persons and property if, as between parties and their privies, conclusiveness did not attend the judgment of such tribunals in respect of all matters properly put in issue and actually determined."

This principle has been applied by the Supreme Court of the United States in cases where the two suits related to different years' taxes. City of New Orleans v. Citizens' Bank of La., 167 U. S. 371, 17 Sup. Ct. 905, 42 L. Ed. 202; Baldwin v. Maryland, 179 U. S. 220, 21 Sup. Ct. 105, 45 L. Ed. 160.

In the former case Mr. Justice White points out that:

"The argument that, because a tax of one year is a different cause of action from the tax of a subsequent year, therefore a demand for a tax of a subsequent year can never be concluded by the thing adjudged in the prior year, admits the relevancy of res adjudicata to demands for taxes, but contends that wherein there are different demands the thing adjudged has no applica-

tion, although the last demand may depend upon a question which has previously been determined under the same facts and circumstances."

To this argument he responds thus:

"The proposition that, because a suit for taxes of one year is a different demand from the suit for a tax for another, therefore res judicata cannot apply, whilst admitting in form the principle of the thing adjudged, in reality substantially denies and destroys it. The estoppel resulting from the thing adjudged does not depend upon whether there is the same demand in both cases, but exists even although there be different demands, when the question upon which the recovery of the second demand depends has, under identical circumstances and conditions, been previously concluded by a judgment between the parties or their privies. This is the elemental rule stated in the text-books, and enforced by many decisions of this court."

To the argument that "it would be intolerable to recognize that a judgment as to the tax of one year could be conclusive as to the tax of a subsequent year," and that, "as a matter of public policy and public necessity, the principles of the thing adjudged can never apply to taxation," he responds thus:

"The argument that, as a matter of public policy, the principle of the thing adjudged should be held not to apply to controversies as to taxation, if there be merit in it, should be addressed to the lawmaking, and not to the judicial, department. But if the judicial mind could entertain the suggestion, it seems clear that it is not without real merit. In its ultimate aspect, it asserts that no question concerning government or public authority ought ever to be submitted to judicial investigation. Indeed, the contention is that there is no power in courts of justice to consider any question of taxation, or render any judgment in relation thereto. That this is the result of the proposition is manifest from the fact that the very essence of judicial power is that, when a matter is once ascertained and determined, it is forever concluded, when it arises again, under the same circumstances and conditions, between parties or their privies. To admit the judicial power on the one hand, and to deny on the other the very substance and essence of such power, is not only contradictory, but destructive of the fundamental conceptions upon which our system of government is based. Under this theory, the case under consideration should not be entertained, but should be dismissed. Accepting this argument in its full consequence, every judgment rendered by this court from the foundation of the government, declaring a particular tax or burden unconstitutional, imports no efficacy whatever. Every decree of this court enforcing taxation in order to discharge obligations previously contracted, where the right to the tax was a part of the obligation, is deprived of the sanctity of the thing adjudged, for, manifestly, if the estoppel of the thing adjudged does not arise from a judgment preventing taxation, such an estoppel cannot also result from a judgment enforcing taxation."

In the latter case Mr. Justice Brewer said:

"The controversy in the case reported in 85 Md. 145, 36 Atl. 764 [Baldwin v. County Com'rs, etc.], was one between the estate of the ward and the state of Maryland. In that case the right of the state to compel a payment by the estate of the ward of taxes levied thereon for the years 1893 and 1894 was settled. * * * The matter has become res judicata between the estate and the state. There is no pretense that the taxes of 1895 stand in any other condition, as to the matter of fact, than the taxes of 1893 and 1894, which were, in terms, included within the litigation settled by the decision referred to. The ruling, therefore, as to the taxes for 1895 comes within the force of that decision, and is determined by the conditions in respect to the taxes of 1893 and 1894. Johnson Steel R. Co. v. Wharton, 152 U. S. 252 [14 Sup. Ct. 608, 38 L. Ed. 429]; Last Chance Mining Co. v. Tyler Mining Co., 157 U. S. 683 [15 Sup. Ct. 733, 39 L. Ed. 859]; New Orleans v. Citizens' Bank, 167 U. S. 371 [17 Sup. Ct. 905, 42 L. Ed. 202]."

And it has been applied by the Circuit Court of the District of Kentucky and the Supreme Court of the United States in cases exactly like the one in hand, save in a particular hereinafter referred to. Bank of Kentucky v. Stone (C. C.) 88 Fed. 394; Northern Bank v. Stone (C. C.) 88 Fed. 413; Farmers' Bank v. Stone (C. C.) 88 Fed. 987; Louisville Banking Co. v. City of Louisville (C. C.) 88 Fed. 988; Third National Bank v. City of Louisville (C. C.) 88 Fed. 990; Stone v. Farmers' Bank, 174 U. S. 409, 19 Sup. Ct. 880, 43 L. Ed. 1027; Stone v. Bank of Kentucky, 174 U. S. 408, 19 Sup. Ct. 881, 43 L. Ed. 1187; City of Louisville v. Louisville Banking Co., 174 U. S. 408, 19 Sup. Ct. 881, 43 L. Ed. 1027; Stone v. Deposit Bank, 174 U. S. 408, 19 Sup. Ct. 881, 43 L. Ed. 1027.

Again, defendants urge that this suit is not only to enjoin the collection of different years' taxes, but taxes imposed on the shares of stock of national banks by the act of March 21, 1900, whereas the former suit was to enjoin the collection of taxes levied on the franchise of national banks by the revenue law of 1892, which law, by reason of the fact that the taxes were so imposed, was invalid, and the collection of which taxes complainant was entitled to have enjoined on this ground alone, without reference to the question whether it had an irrevocable contract exempting it from other taxes than those imposed by the Hewitt law (Acts 1885–86, p. 140, c. 1233). This, too, is undoubtedly true. Owensboro Nat. Bank v. Owensboro, 173 U. S. 664, 19 Sup. Ct. 537, 43 L. Ed. 850. It is in this particular that this case is unlike the cases hereinbefore cited, which otherwise are, as stated, exactly like it. In all of them, except that of Third National Bank v. City of Louisville, 88 Fed. 990, the banks involved were state banks, and in that case the Circuit Court for the District of Kentucky held that the revenue law of 1892 was valid in so far as it affected national banks, basing its judgment entirely on the former adjudication as to the existence of an irrevocable contract under said Hewitt law in favor of said bank; and the Supreme Court of the United States affirmed said judgment on the ground that said revenue law of 1892 was invalid as to national banks, and waived a consideration of the effect of said former adjudication. City of Louisville v. Third National Bank, 174 U. S. 435, 19 Sup. Ct. 874, 43 L. Ed. 1037.

Does, then, the fact that said revenue law was invalid as to national banks, and complainant was entitled in the former suit to an injunction against the collection of the taxes for the year 1893 imposed by said law, on this ground alone, without reference to the question as to whether it was invalid as to complainant, also, because it impaired the obligation of an irrevocable contract between it and the state, under the Hewitt law, make any difference? I do not think that it does. The fact that the judgment of a court in a suit might have been based upon another ground than that on which it was actually based does not prevent the determination that such ground existed being conclusive as to its existence in a subsequent suit between the same parties, if its existence was in issue in the former suit, and properly formed the basis of the judgment therein. Likewise, if a judgment in a suit is properly based upon two grounds, the determination therein that both grounds exist is conclusive as to the existence of either

ground in a subsequent suit between the same parties. In Black on Judgments, vol. 2, p. 604, it is said that one of the two main rules which govern the law of estoppel by judgment, as the same may be deduced from the general result of all the authorities, is as follows:

"A point which was actually and directly in issue in a former suit, and was there judicially passed upon and determined by a domestic court of competent jurisdiction, cannot be again drawn in question in any further action between the same parties or their privies, whether the cause of action in the two suits be identical or different."

And again, on page 729, it is said:

"It is a fundamental and unquestioned rule that a former judgment, when used as evidence in a second action between the same parties or their privies, is conclusive upon every question of fact which was directly involved within the issues made in such former action, and which is shown to have been actually litigated and determined."

No exception is stated to this general rule, growing out of the fact that other points or facts were directly in issue in the former suit, and were or might have been litigated and determined therein, and formed the basis of the judgment therein. As a counter rule it is stated on page 733 that the judgment is not conclusive "of any matter which was incidentally cognizable in that action, or which came collaterally in question, nor of any matter to be inferred by argument and construction from the judgment." And on page 734 it is said that an important analogy to this counter rule "is found in the case of opinions of the appellate courts considered as authoritative statements of the law. A point may be considered and passed upon by the court which comes only incidentally in question, and is not necessary to the determination of the case. In that event the decision, so far as concerns that point, is merely obiter dictum, and not entitled to the weight of a precedent." "But," he adds, "where the record in an action of which the court has jurisdiction fairly presents two points, upon either of which the decision might turn, and the court fully considers and determines both, the decision of neither can be considered as an obiter dictum, and the judgment is authorized on both points."

This latter statement of the law as to the authoritativeness of a decision of an appellate court upon two points involved in a case before it, upon either of which the decision might turn, in subsequent cases involving either one of them, finds support in the case of Hawes v. Water Co., 5 Sawy. 287, Fed. Cas. No. 6,235. The question decided in that case was whether the court, in construing a state statute involved therein, was bound to follow a decision of the higher court of that state construing that statute. It is well settled that the federal court must follow the construction put upon a statute by the highest court thereof, and equally well settled that it is not bound to do so if the decision of the state court is a mere dictum. The subquestion in that case was whether the decision of the state court which it was claimed the federal court should follow was a dictum or not. Judge Sawyer said:

"There were two grounds relied on to show that this was not a proper case for exercising the jurisdiction: (1) That the board of supervisors is a legislative body, having a discretion to pass ordinances, and that the court ought not to interfere with its legislative discretion in advance, on the hypothesis

that it intends to pass an alleged ordinance, especially when it cannot be known in advance what its intention as a legislative body is; (2) that the city had a right to the water claimed, and a right to take the measures alleged to secure it in case the petitioner should shut it off, and for that reason, also, there was not a proper case for the prohibitory writ. Both grounds were distinctly and squarely presented by the record, and relied on, and the latter more especially fully argued by counsel. The court might just as well have rested its decision on the second ground, if found good, without noticing the first, as upon the first without noticing the second, or it might, if thought proper, have decided both, as it did. It is a matter of almost everyday occurrence that the record presents two or more points, either of which, if sustained, would determine the case, and the court decides them all. In such cases it can no more be said that one, rather than another, is obiter. In this case the court was earnestly pressed by counsel on both sides to decide the case on its merits, and give an authoritative construction of the statute. The great anxiety was to ascertain the right of the respective parties, and the mode was of no consequence. * * * To say now that the construction of the statute was merely obiter is to say that a vast amount of labor, research, energy, and anxiety was expended by counsel and court to no real purpose. * * * It is the very point upon which nearly all of the effort and research of counsel and court were actually expended. This discussion did not in any wise serve to illustrate the other point. Indeed, it had no relation whatever to it. It was a distinct, separate, and independent point, and the only one in the case that counsel or parties practically cared anything about. * * * I regard the construction put upon the clause in controversy by the Supreme Court in the prohibitive case cited as authoritative, and, being so, I rest my decision upon that case, without examining the question as an original proposition."

If, then, a decision by an appellate court of a point upon which a case turns, when there is another point upon which it might equally turn, or of both points, is authoritative in subsequent cases in the one instance as to the one point, or in the other as to either point, on the principle of stare decisis, or on the principle which governs federal courts in following the highest court of a state in construing its statutes, it is equally authoritative on the principle of res judicata in a case involving that principle. In the former suit between complainant and defendant city of Covington, the case turned on either of the two grounds hereinbefore stated. It was made to turn by the Campbell circuit court on both grounds—mainly, however, on the ground that complainant had an irrevocable contract, and by the Court of Appeals solely upon that ground. The decision therein that complainant had such a contract must therefore be accepted as conclusive in this state, notwithstanding the fact that the former suit could have been made to turn solely on the other ground, to wit, that the revenue law of 1892 was invalid as to national banks, because the taxes which it imposed on them were upon their franchises, which the legislature of Kentucky had no power to do. Had the state courts in the former suit granted complainant the relief which it sought therein, without giving any intimation as to the ground upon which they granted it, then the judgment therein would not have been conclusive herein upon the question as to whether complainant had an irrevocable contract. For then it could not be told upon what ground complainant had been granted that relief, and it is well settled that estoppels must be certain. In the case of Russell v. Place, 94 U. S. 606, 24 L. Ed. 214, Mr. Justice Field said:

"It is undoubtedly settled law that a judgment of a court of competent jurisdiction upon a question directly involved in one suit is conclusive as to that

question in another suit between the same parties. But to this operation of the judgment it must appear, either upon the face of the record, or be shown by intrinsic evidence, that the precise question was raised and determined in the former suit. If there be any uncertainty on this head in the record—as, for example, if it appear that several distinct matters may have been litigated, upon one or more of which the judgment may have passed, without indication which of them was thus litigated and upon which the judgment was rendered —the whole subject-matter of the action will be at large, and open to new contention, unless this uncertainty be removed by intrinsic evidence showing the precise point involved and determined. To apply the judgment, and give effect to the adjudication actually made, when the record leaves the matter in doubt, such evidence is admissible."

But no such uncertainty exists here. The sole ground upon which complainant in the former suit sought to have the revenue law of 1892 declared invalid as to it, and to enjoin collection of taxes by the defendant city under it for the year 1893, was the existence of said irrevocable contract; and the Campbell circuit court granted it that relief on that ground, though it did so on the other ground also, and the Court of Appeals affirmed its judgment on that ground alone. This is made clear by the records in the former suit, and there is no uncertainty whatever in regard to it.

Still further, defendants urge that the courts of Kentucky, if this suit were pending therein, would give no such effect to the adjudication in the former suit relied on herein, and therefore this court should not give it any such effect. In support of their contention that the courts of Kentucky would give no such effect thereto, they cite the following cases, to wit: City of Newport v. Commonwealth, 50 S. W. 845, 51 S. W. 433, 45 L. R. A. 518; Louisville Bridge Co. v. City of Louisville, 58 S. W. 598; Negley, Sheriff, v. City of Henderson, 59 S. W. 19; Bell County C. & I. Co. v. City of Pineville, 64 S. W. 525; City of Frankfort v. Deposit Bank, 65 S. W. 10; Louisville Bridge Co. v. City of Louisville, 65 S. W. 814. The case of City of Newport v. Commonwealth was a suit by the state against the city of Newport to recover taxes under the revenue law of 1892 for the year 1894 on the franchise of said city to operate waterworks. Several defenses were made to the suit. Amongst others was a plea of res judicata. It was alleged that suit had been brought against the city to recover taxes under said law of 1892 for the year 1893 on said franchise, and same had been dismissed by the circuit court, which judgment had never been set aside or reversed. It was claimed that this judgment made the question as to the liability of said city for franchise taxes under said law a thing adjudged, and was conclusive on the question. It was held by the court that the judgment in the former suit did not have this effect. And it would seem that the judgment of the majority of the court was placed upon the broad ground that in no case and to no extent could a judgment in a suit as to one year's taxes be res judicata as to another year's taxes. Judge Du Relle, in stating the opinion of the majority of the court, based the holding on this reasoning, to wit:

"The authorities seem to hold that when a court of competent jurisdiction has, upon a proper issue, decided that a contract, out of which several distinct promises to pay money arose, has been adjudged invalid in a suit upon one of these promises, the judgment is an estoppel to a suit upon another promise founded on the same contract. But taxes do not arise out of contract. They are imposed in invitum. The taxpayer does not agree to pay, and the right

to litigate the legality of a tax upon all grounds must, of necessity, exist, regardless of former adjudications as to the validity of a different tax." And again: "In our opinion, it would be against public policy to hold that a judgment of a circuit court upon a question of taxation is forever binding upon this court, not only as to the taxes there in litigation, but also as to taxes for all subsequent years, merely because counsel for the commonwealth failed to bring the question here. Such a ruling would seem to be open to the objection that it would hold the commonwealth bound by the laches of its officer."

It appears, from his response to a petition for rehearing, that the minority of the court, composed of three out of the seven judges, desired an extension of the opinion so as to include the qualification upon the general rule laid down as to the application of the doctrine of res judicata in tax cases, to wit:

"But whether the state is bound by a former adjudication that there exists a contract exempting from taxation, or as to the construction of such contract, is a question not necessarily involved here, and to the decision of which it may be that different principles apply. There would seem to be an essential difference between the commonwealth exercising the highest of its sovereign powers—a power necessary to its very existence—and the same commonwealth, its sovereignty laid aside, binding itself as a mere corporate entity by a sealed instrument. But it is not necessary, in our judgment, to go into this question, nor even to decide that there is a difference."

The two cases, styled alike "Louisville Bridge Company v. City of Louisville," were two suits by said city against the bridge company—the one, to recover city taxes on its bridge (its tangible property) for the years 1890, 1891, 1892, 1893 and 1894; the other, to recover same on same for the years 1895 and 1896, and also city taxes on its franchise (its intangible property) for the years 1894, 1895, 1896 and 1897. In the case of Louisville Bridge Company v. City of Louisville, 81 Ky. 189, which was a suit by said city against said bridge company to recover city taxes on its bridge for the year 188–, it had been held that the said bridge was not liable to city taxes, because it was not the recipient of the benefits of municipal government. This former adjudication was relied on as a bar in the two subsequent suits to recover taxes for the latter years. It was held that it was not a bar. In the former of the two cases, Judge Burnam said:

"In response to appellant's plea of res judicata, it may be said that this identical question was before the court in the case of Henderson Bridge Co. v. City of Henderson, decided June 24, 1896 [90 Ky. 498, 14 S. W. 493], and in the very recent cases of Newport v. Masonic Temple Ass'n, 45 S. W. 881, 46 S. W. 697, and City of Newport v. Com., 50 S. W. 845, 51 S. W. 433 [45 L. R. A. 518]. It was held that a judgment as to the validity of taxes for one year is not conclusive as to the validity of taxes on the same property for another year, and, as the question is fully considered in these cases, it is unnecessary to elaborate it again."

In the latter of the two he said:

"The plea of res judicata relied on for reversal has been decided so frequently adversely to the contention here made, in recent decisions of this court, that it is unnecessary for it to consider this question; it having been expressly decided that a judgment by a court of competent jurisdiction in a suit for taxes of one year did not constitute a bar in a subsequent suit between the same parties under the same law for another year's tax. See Henderson Bridge Co. v. City of Henderson, 90 Ky. 498, 14 S. W. 493; Same v. Com., 99 Ky. 623, 31 S. W. 486, 29 L. R. A. 73; City of Newport v. Com. [Ky.] 50 S. W. 845, 45 L. R. A. 518."

In regard to these two cases, it is to be noted that as to all the taxes involved therein, save for the years 1890 and 1891, there was not the same question as was adjudged in the earlier case in 81 Ky. 189, and as to those two years it was held that the bridge company was not liable. As to the other years, there was not the same question, because it had been held in previous cases referred to in said two cases that section 174 of the Constitution of Kentucky, adopted September 28, 1891, which applied to all years after 1891, had changed the rule in regard to the liability of property in cities and towns not enjoying the benefits of municipal government. The bridge company was held not liable for the years 1890 and 1891, not on the ground of said former adjudication, but because it had acted on it, and not collected taxes from its tenants for those years, who were under an obligation to it to pay all its taxes. As to the cases cited by Judge Burnam in said extracts from his opinions in support of the proposition there laid down, none of them are to that effect, save the Newport Case, to which we have already referred. The Henderson Bridge Cases do not involve any question as to res judicata, except that one decided June 24, 1896, and in that case its decision was expressly waived. The question in the case of Newport v. Masonic Temple Ass'n was the same as that involved in the Louisville Bridge Company Cases as to taxes after 1891. The charter of the Masonic Temple Association, passed March 29, 1880, exempted its property from taxation. It had been sued for taxes for several years prior to the new Constitution of 1891, and held not liable, because of this exemption. In a suit for taxes after the adoption of that Constitution, it was held that that instrument repealed said exemption, and that hence the former adjudication was no bar to suit for said taxes. The only case so cited which was in point was the Newport Waterworks Case, which is the pioneer and leading authority in Kentucky upon the question under consideration.

The case of Negley, Sheriff, v. City of Henderson was a suit by said city against the sheriff of Henderson county to enjoin collection of state and county taxes for the years 1896 and 1897 on its franchise to operate waterworks in said city. In support of its claim not to be liable for taxes on said franchise, the city alleged in its petition that, in a former suit by it against the sheriff, the circuit court of Henderson county had enjoined the collection of taxes on its tangible property for the years 1894 to 1897, inclusive. It was held that the former adjudication was not conclusive of the city's right to enjoin said franchise taxes. Judge Du Relle said:

"This brings us to consider the question of res judicata. It was, in City of Newport v. Commonwealth, supra, distinctly and emphatically held that an adjudication as to the tax of one year did not create the estoppel of res judicata against the tax for another year. It seems to us equally clear that it does not create an estoppel against the collection of a different tax upon different property for the same year. If the one proposition be true, the other must be true also."

The case of Bell County C. & I. Co. v. City of Pineville was a suit by said company against said city to enjoin collection of taxes upon its property within said city for the years 1895 to 1898, inclusive, on

the ground that it was used for farming purposes, and derived no benefit from the city government. A judgment in a similar suit of the Bell circuit court enjoining the collection of taxes for the year 1891 on the same ground was pleaded by the company as concluding the question of its liability for the subsequent year's taxes. It was held that it had no such effect. Judge Du Relle said:

"The case of City of Newport v. Com., 50 S. W. 845, 51 S. W. 433, 45 L. R. A. 518, is decisive of the question raised by this plea of res judicata."

It will be noted here, though not referred to in the opinion, that the rule as to liability of property in a city, not enjoying the benefits of municipal government, to city taxation, was changed between the year 1891, taxes for which were involved in the former suit, and the years 1895 to 1898, inclusive, taxes for which were involved in the suit in hand, by the Constitution of 1891, so that in no event was the doctrine of res judicata applicable to the case.

The case of City of Frankfort v. Deposit Bank is somewhat novel in its character. The Franklin circuit court, in a suit by the city against the bank for taxes for the years 1893 and 1894 under the revenue law of 1892, adjudged, under authority of the decisions of the Court of Appeals in the first Bank Tax Cases, that the bank was not liable therefor, because it had an irrevocable contract, under the Hewitt law of 1886, exempting it from taxation other than under said law. Thereafter, in a suit by the bank against the city in the United States Circuit Court for the District of Kentucky, the latter was enjoined from collecting taxes under said revenue law of 1892 for the years 1895 to 1898, inclusive, on the ground of the adjudication that it had such a contract in the former suit in the Franklin circuit court; and that notwithstanding that the Court of Appeals, in the second Bank Tax Cases, had overruled its decision in the first Bank Tax Cases, on authority of which the judgment of the Franklin circuit court had been rendered. This judgment was affirmed by the Supreme Court of the United States on an appeal therefrom by the city. Stone v. Deposit Bank of Frankfort, 174 U. S. 408, 19 Sup. Ct. 881, 43 L. Ed. 1027. After the decision of the Court of Appeals in the second Bank Tax Cases, time for an appeal from said judgment of Franklin circuit court not having elapsed, an appeal was taken therefrom to the Court of Appeals, and it reversed the judgment on authority of its decision in the second Bank Tax Cases. On the return of the case to the Franklin circuit court, the bank pleaded the judgment of the United States Circuit Court, affirmed by the Supreme Court, as to taxes from 1895 to 1898, inclusive, which had been based upon said former judgment of Franklin circuit court as to years 1893 and 1894, in bar of the city's right to recover taxes for said years in said suit. It was held that the plea was not good, and, on appeal to the Court of Appeals, it affirmed the ruling of the lower court. In the opinion, after showing that the doctrine of res judicata could not be applied in such a case, Judge Paynter added:

"However, we do not hold that the judgment of the federal court is not a bar to a recovery of the taxes for the years 1893 and 1894. This court, in City of Newport v. Com., 50 S. W. 845, 51 S. W. 433, 45 L. R. A. 518, and Louisville Bridge Co. v. City of Louisville, 58 S. W. 598, held that an adjudication as to

one year's taxes is not a bar to a recovery in the litigation as to any other year's taxes."

This detailed examination of the cases relied on by defendants in support of their contention that, according to the law as laid down in the state courts, the former adjudication relied on herein is not conclusive of complainant's exemption from liability for the taxes involved herein, because they are taxes for years different from and subsequent to the year for which the taxes involved therein were levied, leads to the conclusion that the contention is correct, though some, if not most, of said cases, for the grounds stated, are not in point, and in none of them was the former adjudication based upon an exempting contract covering all of the years' taxes involved in both suits. I think that there can be no question as to this. Complainant cites the cases of Thompson v. Louisville Banking Co., 55 S. W. 1080; Hardwicke v. Young, 62 S. W. 10, decided by the Court of Appeals of Kentucky, as being contra to defendants' contention in the matter under consideration. These cases, however, are not against that contention. In each case the same year's taxes were involved in that court on a second appeal. Of course, a decision of the Court of Appeals that a certain year's taxes are invalid is binding as to the validity of that year's taxes on a second appeal of that case to that court. And a holding that its former decision in that same case is binding is not an authority in favor of the position that a decision that one year's taxes rendered in one case is binding in another case as to another subsequent year's taxes.

It must be accepted, therefore, that the state courts, in view of said decisions, would not give the effect to the former adjudication relied on herein by complainant which it contends for, and which this court, under the decision of the Supreme Court of the United States hereinafter cited, would otherwise be bound to give it. It remains to be considered what effect is to be given to this fact. And here we are not without authority proceeding from the Supreme Court. In the case of Union & Planters' Bank v. City of Memphis (decided April 13, 1903) 189 U. S. 71, 23 Sup. Ct. 604, 47 L. Ed. 712, it was held that a former adjudication in the state courts between the parties thereto in relation to the liability of the former to the latter for taxes for the years 1889 to 1891, inclusive, was not conclusive as to such liability for the year 1899, because it was not conclusive in the state courts. Mr. Chief Justice Fuller, in delivering the opinion of the court, said:

"It is enough that in Tennessee the doctrine of res judicata is not applicable to taxes for years other than those under consideration in the particular case, inasmuch as what effect a judgment of a state court shall have as res judicata is a question of state or local law, and the taxes involved in this suit are taxes for years other than those involved in the prior adjudication. Phœnix Fire & Marine Ins. Co. v. Tennessee, 161 U. S. 174 [16 Sup. Ct. 471, 40 L. Ed. 660]. In New Orleans v. Citizens' Bank, 167 U. S. 371 [17 Sup. Ct. 905, 42 L. Ed. 202], referred to by appellant's counsel, no claim was made that the judgment relied on would not have been res judicata in the state courts, and attention was particularly called to the fact that the rule in Louisiana was in accord with the conception of res judicata expounded in that case. As the judgment pleaded had no force or effect in the Tennessee state courts, other than as a bar to the identical taxes litigated in the suit, the courts of the United States can afford it no greater efficacy. Cooper v. Newell, 173 U. S.

555 [19 Sup. Ct. 506, 43 L. Ed. 808]; Metcalf v. Watertown, 153 U. S. 671 [14 Sup. Ct. 947, 38 L. Ed. 861]; Chicago & Alton R. R. Co. v. Wiggins Ferry Co., 108 U. S. 18 [1 Sup. Ct. 614, 27 L. Ed. 636]; Rev. St. § 905 [U. S. Comp. St. 1901, p. 677]."

This case is binding upon me, and settles the matter in accordance with defendant's contention. It is true that in the cases hereinbefore cited the Supreme Court held, as to certain of the banks involved along with the complainant in the litigation which resulted in the decision in 97 Ky. 590, 31 S. W. 1013, that they were exempted from other taxation than under the Hewitt law by an irrevocable contract; that said decision made the question res judicata as to subsequent years. But at the time it so held, there had been no decision by the Court of Appeals of Kentucky as to the effect of an adjudication in relation to one year's taxes upon other years' taxes. Since then, as we have seen, that court has taken the position that such adjudication is not a bar to a consideration of the question of the liability for the other year's taxes on its merits. That being so, I feel bound by the decision of the Supreme Court in the Tennessee case to hold that the former adjudication relied on herein is not a bar to a consideration of complainant's liability for the taxes involved herein on the merits. And so considering it, I am bound by the decision of the Kentucky Court of Appeals in the second Bank Tax Cases, and of the Supreme Court in the Owensboro Case, to hold, also, that complainant has no irrevocable contract under the Hewitt law, and that therefore the complainant is liable under the act of March 21, 1900, to the taxes which have accrued or will accrue since its passage.

A decree will therefore be entered dismissing complainant's bill as to said taxes, and permitting the decree entered pursuant to the opinion of Judge Evans in relation to former years' taxes to stand as entered.

SIMS v. UNION ASSUR. SOC.

(Circuit Court, N. D. Georgia. September 30, 1903.)

No. 1,571.

1. BANKRUPTCY—ACTION BY TRUSTEE—JURISDICTION OF CIRCUIT COURT.
Where a bankrupt absconded a short time before the bankruptcy proceedings were instituted, but his family remained in the same place, he continued a resident there in such sense as to give a Circuit Court of the United States for that district jurisdiction of an action by his trustee against a foreign corporation to collect a demand in favor of the bankrupt involving the jurisdictional amount, under Bankr. Act July 1, 1898, c. 541, § 23b, 30 Stat. 552, 553 [U. S. Comp. St. 1901, p. 3431], which provides that suits by the trustee shall be brought only in the courts where they might have been brought by the bankrupt, if the proceedings in bankruptcy had not been instituted.

2. INSURANCE—PROOFS OF LOSS—AUTHORITY OF RECEIVER TO MAKE.
Proofs of loss under a fire insurance policy running to a bankrupt who had absconded may lawfully be made by a receiver appointed by the court of bankruptcy, and expressly authorized and directed by the order making the appointment to make such proofs.

3. SAME—RIGHT OF ACTION ON POLICY—FAILURE OF INSURED TO COMPLY WITH CONDITIONS.

Provisions of a policy of fire insurance, that "the insured * * * shall * * * submit to an examination under oath by any person named by this company and subscribe the same," and that no action shall be maintainable to recover on the policy until after full compliance by the insured with all its requirements, give to the company a substantial right, and the failure of the insured to appear for examination after a loss, in compliance with its demand, defeats an action on the policy, although such failure was due to the fact that the insured had absconded, and the action is brought by his trustee in bankruptcy.

4. SAME—CONSTRUCTION OF POLICY—RIGHTS OF RECEIVER.

A provision in an insurance policy that, where the expression "insured" is used therein, it shall include the "legal representatives" of the insured, does not entitle a receiver to take the place of the insured in answer to a demand by the company that the insured shall appear for examination under oath respecting a loss, as required by the policy, although the receiver was appointed for the express purpose of collecting the insurance; the insured having absconded and having been adjudged a bankrupt.

Action on Policy of Fire Insurance. Trial to the court by stipulation.

Gray, Brown & Randolph and Felder & Rountree, for complainant.
King & Spalding, for defendant.

NEWMAN, District Judge. George H. Sims, as trustee in bankruptcy, brings this suit against the Union Assurance Society on a policy of fire insurance issued to the bankrupt. By written stipulation of the parties the case is submitted to the court for trial upon the issues of law and fact raised therein without the intervention of a jury, and there is an agreed statement of facts. The property covered by the policy sued on was located in Macon, Ga., and was destroyed by fire on May 20, 1900. On May 29th, thereafter, E. G. Coffman, the insured, who resided with his family in Atlanta, absconded, and his whereabouts was unknown at the time the proceedings occurred which give rise to the questions raised in this case. Just prior to Coffman leaving Atlanta, a warrant was sworn out against him charging him with embezzlement of the funds of the Southern Agricultural Works, a concern with which he was connected in Atlanta, and which had failed. On the 8th day of June a petition in involuntary bankruptcy was filed against Coffman. Upon the filing of this petition in bankruptcy, George H. Sims was appointed receiver for the property of the bankrupt. On motion of counsel for petitioning creditors an order was entered, a part of which is as follows:

"That George H. Sims be, and he is hereby, appointed receiver as prayed, with authority and direction to hold and preserve the assets until this bankruptcy proceeding is dismissed or a trustee is qualified; that the said receiver be authorized and directed to make proofs of loss, and to comply with all the conditions of said policy of insurance, so far as he can, and to do everything that may be deemed necessary for the preservation and protection of the assets of said bankrupt, until the further order of the court."

Sims, as receiver, soon after his appointment as such, made up and furnished to the insurance company proofs of loss, verified by himself and B. E. Willingham, who was president of the B. E. Willingham Plow Company, which company had sold the property covered by the

policy of insurance to Coffman, and which company has an interest in the policy to the extent of the amount of purchase money due it by Coffman. An affidavit was also made to the truth of the proofs of loss by M. B. McAfee, who in his affidavit stated that:

"At the time the said policy was issued, and from that time until after the fire referred to in the foregoing proof of loss, the assured, E. G. Coffman, resided in Atlanta, Georgia, and from the 10th day of April, 1900, to the 29th day of June, 1900, and during the time when said fire occurred, deponent, as agent for the said Coffman, had charge and supervision of said property. That deponent was familiar with the same, having done considerable work on the machinery referred to in said proof of loss. That the allegations contained in said proof of loss are true, to the best of deponent's knowledge and belief."

Daniel W. Rountree, Esq., as attorney for Coffman, joined in the proof of loss. The agent of the insurance company acknowledged receipt of this proof of loss, but denied the right of the receiver to make the proof, claiming that it should be made by E. G. Coffman, the insured. No other objection was made to the proof of loss. The representative of the company also notified Mr. Sims and Daniel W. Rountree, Esq., as attorney for Coffman, that the company demanded the right to examine Mr. Coffman under oath at the time specified in the demand. Some correspondence ensued between Sims and the representative of the company, which simply set out the respective contentions as to the right of the company to require an examination of Coffman, under the circumstances. Coffman failed to appear at the time and place named for examination, but George H. Sims, receiver, was present with his counsel, and the counsel then and there tendered Sims to be examined by the defendant, or its agent or counsel, if they so desired. The insurance company, through its counsel, refused to examine Sims, and insisted on its right to examine Coffman.

The first question raised in this case is as to the right of the trustee in bankruptcy to sue in the Circuit Court of the United States for this district. Section 23 of the bankruptcy act controls in this matter, and that section reads as follows:

"(a) The United States Circuit Courts shall have jurisdiction of all controversies at law and in equity, as distinguished from proceedings in bankruptcy, between trustees as such and adverse claimants concerning the property acquired or claimed by the trustee, in the same manner and to the same extent only as though bankruptcy proceedings had not been instituted and such controversies had been between the bankrupts and such adverse claimants.

"(b) Suits by the trustee shall only be brought or prosecuted in the courts where the bankrupt, whose estate is being administered by such trustee, might have brought or prosecuted them if proceedings in bankruptcy had not been instituted, unless by consent of the proposed defendant. * * *"

Act July 1, 1898, c. 541, 30 Stat. 552, 553 [U. S. Comp. St. 1901, p. 3431].

I think, under the facts shown here, this case is cognizable by the Circuit Court for this district. While it is true that Coffman had absconded a few days before the bankruptcy proceedings were instituted, it is agreed that his family continued to reside in Atlanta until some time after such proceedings were instituted and after this suit was brought against the insurance company by the trustee. The defendant is a foreign corporation, and it must be held that Sims was a resident

of this district at the time the right of action accrued, and the action is maintainable here by the trustee in bankruptcy.

The next question is as to the sufficiency of the proof of loss. Counsel for the insurance company earnestly contend that there is no authority on the part of the receiver in bankruptcy to make the proofs, and that, even with the affidavits of Mr. Willingham and Mr. McAfee, the proofs are still insufficient. I do not agree with this contention. The court by its order directed the receiver to make proofs of loss. The order to this effect was made in an ancillary proceeding in the bankruptcy case. It was a proceeding on the equity side of the bankruptcy court, and looking to the collection of the amount claimed to be due on this policy of insurance, and the preservation of the same for the benefit of the creditors. On such a proceeding, the court, in my opinion, could make an order appointing a receiver, who could be authorized, as this receiver was, to take preliminary steps looking to the collection of the loss on this policy. These proofs were strengthened, after they were sworn to by Sims, by the affidavits of Mr. Willingham and Mr. McAfee, as has been stated.

A more difficult question, however, is as to the right of the insurance company to require an examination under oath of the insured, and to set up the failure of the insured to appear for such examination as a defense in this action. A provision in the policy is that:

"The insured * * * shall * * * submit to an examination under oath by any person named by this company, and subscribe the same."

A further provision of the policy is that:

"No suit or action on this policy, for the recovery of any claim, shall be sustainable in any court of law or equity until after full compliance by the insured with all the foregoing requirements. * * *"

This question was before the Supreme Court of Georgia in Insurance Company v. Sims, Trustee, 115 Ga. 939, 42 S. E. 269. From a careful examination of this decision, with the authorities therein cited, and quite a number of other pertinent authorities, I am satisfied that the decision of the Supreme Court correctly determines the law of this case. Reference to the able opinion in that case by Justice Cobb, and to the authorities cited by him, renders any further discussion of the question here unnecessary.

The right of the insurance company to have the insured himself appear for examination under oath is a substantial and important one. It is entirely different, in my opinion, from the right to make the preliminary proof of loss. There is a claim in the declaration in this case that the insurance company paid to the Willingham Plow Company the amount due the plow company by Coffman, being the interest of the plow company in the policy. This claim is met in the defendant's answer by the statement that the payment to the Willingham Plow Company was by way of compromise and settlement of its claim. There is nothing whatever in the agreed statement of facts upon this subject. It must be taken as a fact, therefore, that whatever was paid the plow company was by way of compromise of its claim; and even if a settlement in full of a claim of a third party to a part of the proceeds of a policy would be a recognition of liability on the whole policy, it cer-

tainly would not be so where the payment is made to such third party by way of compromise.

There is a provision in the policy that, where the expression "insured" is used, it shall include the "legal representatives" of the insured. I do not think a receiver, even when appointed, as in this case, for the particular purpose of collecting the insurance, can, in respect to the right of the company to an examination under oath, take the place of the insured.

Controlled by the provisions of the contract of insurance, and by the overwhelming weight of authority bearing thereon, I am compelled to hold that the failure of the insured to appear for examination under oath on the demand of the insurance company is a bar to a right of action in this case; and upon that ground judgment will be rendered in favor of the defendant.

THE JAMES T. FURBER.

(District Court, D. Maine. April 25, 1904.)

No. 98.

1. ADMIRALTY JURISDICTION—SUBJECT-MATTER OF SUIT—STATE STATUTE CREATING LIENS.

A state statute giving a lien on domestic vessels in certain cases cannot enlarge the admiralty jurisdiction of the federal courts, which depends on whether the subject-matter of the suit is maritime in its nature.

2. SAME—MARITIME CONTRACTS—LEASE OF WHARF.

A lease of space at a wharf for use by a vessel at a fixed annual rent is a lease of real estate, and not a maritime contract on which a suit in admiralty can be maintained for the collection of the rent, since it has not necessarily any connection with navigation or the commerce of the seas.

In Admiralty. Suit in rem to recover rent for wharf.

James C. Fox, for libelant.
Benjamin Thompson, for claimant.

HALE, District Judge. This is a libel in rem, filed in this court on the 19th day of September, 1903. It is brought by the libelant, a corporation, the owner of Long Wharf, against the steamer James T. Furber, for alleged wharfage. The third article of the libel alleges that on May 30, 1902, Edward A. Baker, as master of the steamship James T. Furber, made and executed a contract with the libelant for the use of a landing on Long Wharf; also for wharf room for the erection of a waiting room on said wharf; and agreed to pay for the same the sum of $200 a year as rent. Said article further alleges that the libelee has continued to occupy said wharf up to the time of the filing of the libel, and that the accrued rent amounts to $250. By a seventh article, added by amendment, the libel further alleges that at the time

¶ 1. Maritime liens under state statutes, see The Anaces, 34 C. C. A. 565.
¶ 2. See Admiralty, vol. 1, Cent. Dig. § 141.

of furnishing said wharfage or landing and wharf room the steamship James T. Furber was a domestic vessel, and that a lien exists thereon as security for the libelant's claim. The libelant introduces in evidence a written agreement or lease, which is as follows:

(Lease, Common Form.)

This Indenture, Made the thirtieth day of May in the year of our Lord one thousand nine hundred and two,

Witnesseth, That the Proprietors of Portland Long Wharf of Portland, Maine, do hereby lease, demise and let unto Freeport and Portland Steamboat Co. a landing for their steamer James T. Furber, above the landing of the Brunswick and Portland Steamboat Company, also wharf room for the erection of a waiting room or shelter opposite the landing, but not so as to obstruct free passage to and from the said steamer landing below. Said steamer to have the landing as above when running and free dockage at the wharf when not running.

To hold for the term of one year from the first day of June in the year one thousand nine hundred and two, yielding and paying therefor the rent of Two Hundred Dollars.

And said Lessee do promise to pay the said rent in four payments viz. Fifty Dollars on July 15, 1902, Fifty Dollars on August 1/02, Fifty Dollars on August 15/02, and Fifty Dollars on Sept. 1/02, and to quit and deliver up the premises to the Lessor, or their attorney, peaceably and quietly at the end of the term aforesaid, in as good order and condition,—reasonable use and wearing thereof, or inevitable accident, excepted,—as the same are, or may be put into by the said Lessor, and to pay no taxes duly assessed thereon during the term, and for such further time as the Lessee may hold the same, and not make or suffer any waste thereof; and that he will not assign or underlet the premises or any part thereof, without the consent of the Lessor in writing, on the back of this Lease. And the Lessor may enter to view and make improvements, and to expel the Lessee if they shall fail to pay the rent aforesaid, whether said rent be demanded or not, or if they shall make or suffer any strip or waste thereof, or shall fail to quit and surrender the premises to the Lessor at the end of said term, in manner aforesaid, or shall violate any of the covenants in this Lease by said Lessee to be performed.

And the premises shall not be occupied, during the said term, for any purpose usually denominated extra-hazardous, as to fire, by Insurance Companies.

In Witness Whereof The parties have hereunto interchangeably set their hands and seals, the day and year first above written.

Edward A. Baker. [Seal.]
Signed, Sealed and Delivered Proprietors of Portland Long Wharf.
in Presence of By Daniel Chase, Clerk. [Seal.]
Frederick E. Berry.

The testimony shows that the James T. Furber was a small steamer, used exclusively in Casco Bay, and that at the time of making the lease she was in winter quarters at Merrill's Wharf, and had not been to Long Wharf; that she was then owned by some outside parties, not concerned in making the lease; that she was purchased on June 25, 1902, by the parties who had taken the lease of the libelant's wharf, and was taken to Long Wharf sometime between June 25 and June 28, 1902, and that she later began to run between Portland and South Freeport as a passenger and freight steamer; that some time in the following July the parties having the lease erected a small building for a waiting room and freight shed in connection with the business in which the steamer was engaged; that the steamer continued to run on her route until August 28, 1902, when she was hauled off on account of a breakdown, and did not resume her trips again that year; that on September

6, the steamer was sold by the parties operating her to Charles H. Baker, who, on October 27, 1902, sold her to his wife, Etta R. Baker, the present owner; that the steamer remained at Long Wharf during the winter of 1902 and until April 18, 1903, when the present owner put her in commission, and ran her on his own account, carrying passengers to the forts in Portland Harbor; that the steamer continued landing at Long Wharf from April 18, 1903, to June 7, 1903, when, owing to the inability to get in and out of the dock, and the odors arising from the dock, she found wharfage elsewhere; that the lessee under the lease continued in possession of the leased premises until the filing of the libel, and that the building and a boiler, gangway, signs, and other property are still upon that part of the wharf covered by the lease; that, after the original lease expired by limitation, the lessee continued to hold over, and up to the time of the filing of the libel was still in the enjoyment of the premises leased as a tenant at will. It appears also that during the time the steamer landed at Long Wharf during the season of 1903 she occupied the berth covered by the lease.

The question which lies at the threshold of the case is, does the suit involve such a "maritime contract" as to give the court jurisdiction? Chapter 287, p. 255, of the Laws of 1889, now found in the Revised Statutes of the State of Maine, c. 93, § 7, reads as follows:

"All domestic vessels shall be subject to a lien to any part owner or other person to secure the payment of debts contracted and advances made for labor and materials necessary for their repair, provisions, stores, and other supplies necessary for their employment, and for the use of a wharf, dry dock, or marine railway, provided, that such lien shall in no event continue for a longer period than two years from the time when the debt was contracted or advances made."

It will be seen that the state law above quoted gives a lien "for the use of a wharf, dry dock, or marine railway." In the above enumeration the Legislature evidently intended to embrace and group certain maritime matters over which it created a lien upon domestic vessels. By the term "use of a wharf" it is evident that nothing more was intended than "wharfage," which distinctly and obviously relates to the navigation, business, or commerce of the sea, and has always been regarded as among the usual and necessary port charges of a vessel. "Wharfage" is the use of a wharf furnished in the ordinary course of navigation. A contract relating to "wharfage," as understood in the laws and usages of maritime affairs, is clearly a maritime contract. But there is a distinct difference between a claim for "wharfage" and a claim for "rent of a wharf." Under such a lease as in the case at bar the rent is payable, even though the vessel which is the subject of the lease should never come near the wharf, and should never require "wharfage" or "the use of a wharf." The contract, in the case at bar, relates to real estate, and arises out of the relation of landlord and tenant. The lease, which we have quoted, is in form and substance a lease of real estate. It does not present a "maritime contract," and cannot be enforced by the admiralty court. The intention and the effect of the state statute can be only to provide a remedy under a contract which is distinctly and wholly "maritime." In The H. E. Willard, 53 Fed. 599, in this district, Judge Webb said:

"That State Legislatures cannot restrict or extend the admiralty jurisdiction exclusively vested in the federal courts has been often decided, and is conclusively settled. It follows, necessarily, that a lien given by a state statute is not a test of jurisdiction. If it were, a State Legislature might, at pleasure, modify the jurisdiction of courts of admiralty by creating or abrogating liens not given by the maritime law. The distinction between cases in which the cause of action is itself within the admiralty jurisdiction and cases in which the admiralty, independently of the local law, has no jurisdiction, must not be forgotten or neglected."

The case was affirmed by Mr. Justice Gray, Circuit Justice, and Judge Putnam, Circuit Judge. Mr. Justice Gray, speaking for the Circuit Court, said (52 Fed. 389):

"The admiralty jurisdiction is conferred on the courts of the United States by the Constitution, and cannot be enlarged or restricted by the Legislature of a state. When a right maritime in its nature has been created by the local law, the admiralty courts of the United States may doubtless enforce that right according to their own rules of procedure. * * * But no state legislation can bring within the jurisdiction of those courts a subject not maritime in its nature."

In Boon v. The Hornet, Fed. Cas. No. 1,640, Judge Hopkinson, speaking for the court, said:

"A lien given by a state law may be enforced by a suit in rem in the admiralty. But it must be such a suit as the admiralty can entertain; in other words, in cases where the contract and service are maritime, or of the admiralty and maritime jurisdiction, although they are not such as would authorize a proceeding in rem in the admiralty, because there was no lien by them, yet when the state law supplies this deficiency, and gives a lien, a court of admiralty will enforce it. This is not enlarging the jurisdiction of the court, but the remedy of the party. It does not authorize a suit in the admiralty on the subject-matter not of admiralty jurisdiction, but only gives to the party a particular proceeding or remedy for the recovery of his debts."

In Plummer v. Webb, 4 Mason, 380, Fed. Cas. No. 11,233, Judge Story held "that, in order for a contract to be cognizable in admiralty it must be maritime in all its elements; that a contract of a special nature is not so cognizable merely because the consideration of the contract is maritime service. The whole contract must in its essence be maritime." In his opinion he says:

"I cannot see that the whole contract is here of a maritime nature. There are mixed up in it obligations ex contractu not necessarily maritime, and so far the contract is of a special nature. In cases of a mixed nature it is not a sufficient foundation for admiralty jurisdiction that there are involved some ingredients of a maritime nature. The substance of the whole contract must be maritime. * * * In such a mixed contract the whole would most appropriately belong to a court of common law. * * * I have no desire to strain the jurisdiction, so as to reach cases of an ambiguous character. Let them be left to the common forum of the litigant parties."

In The Advance (D. C.) 60 Fed. 766, Judge Brown said:

"In the present case the wharfage was not furnished in the ordinary course of navigation, nor upon the request or upon any contract of the master or any other officer of the ship. The evidence leaves no doubt that it was furnished in accordance with the terms of an unsigned memorandum of agreement, which had been previously drawn up upon negotiations between the libelant and the president of the steamship company some two years before. * * * The agreement provided for the payment of thirty dollars a day for the entire use of the Robert Pier for loading and discharging outward

and inward cargoes, and also for receiving and storing freight on the pier pending the arrival of any of the company's steamers. * * * During the occupancy of the ships it was 'optional to use the pier for any and all purposes which may be construed for the best interests of said steamship company or any of its patrons.' The agreement also gave the right 'to use, free of charge, for outward freight on the ground floor, one of the libelant's stores.' * * * The agreement, it is obvious, embraced considerably more than ordinary wharfage rights. The contract rates were very much in excess of the statutory rates, evidently in consideration of the storage and other facilities offered. The contract was, in fact, rather a contract for the exclusive use of the wharf and a partial use of the stores. * * * The price was not according to tonnage, like the usual wharfage rates. * * * I am constrained to find that there is no maritime lien in this case, (1) because whatever wharfage privileges were furnished were furnished under a contract which for a single price per day embraced other valuable considerations, the supply of which would give no lien upon the ship, and it is impossible to divide the price per day into different parts; (2) because the evidence indicates beyond doubt, as it seems to me, that the dealings were upon a personal contract between the two companies, which did not look to any credit of the ship, but only to the personal responsibility of the steamship company."

In 71 Fed. 987, 18 C. C. A. 404, Judge Wallace, in affirming the above decision, speaking for the Circuit Court of Appeals, made this finding:

"Where wharfage, together with the use of warehouses and piers for receiving and storing freight, were furnished to several vessels belonging to a domestic corporation for a single price per day under a contract with it, held that no lien arose, first, because the contract embraced other valuable considerations, the supply of which would give no lien against the ship, and which could not be separated from the wharfage proper; and, second, because the contract did not look to the credit of the ship, but only to the personal responsibility of the owner."

See, also, the elaborate opinion upon this subject of Chief Justice Alvey in Upper Steamboat Co. v. Blake, 2 App. D. C. 51.

It has been repeatedly decided that, to give the court jurisdiction over a contract as maritime, such contract must relate to the trade and business of the sea; it must be essentially and wholly maritime in its character; it must provide for maritime services, maritime transactions, or maritime casualties; and the provisions of a state statute, the intention of which is to give a party a remedy under his contract, cannot be enlarged by construction, analogy, or inference. The Paola (C. C.) 32 Fed. 174; The Steamship Yankee Blade, 19 How. 82, 15 L. Ed. 554; Scott v. The Morning Glory, Fed. Cas. No. 12,542; The Lottawanna, 21 Wall. 558, 22 L. Ed. 654; The Corsair, 145 U. S. 335, 12 Sup. Ct. 949, 36 L. Ed. 727. In Campbell v. H. Hackfeld & Co., 125 Fed. 696 (a case just published), the Court of Appeals in the Ninth Circuit decides "that the employé of a contracting stevedore has no remedy in the admiralty court against his principal for personal injuries, while discharging a vessel, through the alleged negligence of said contracting stevedore." In an elaborate opinion Judge Ross shows the tendency of the courts of this country in late cases to restrict admiralty jurisdiction. He says:

"The fundamental principle underlying all cases of tort, as well as contract, is that, to bring a case within the jurisdiction of a court of admiralty, maritime relations of some sort must exist, for the all-sufficient reason that the admiralty does not concern itself with non-maritime affairs."

In the case at bar the contract is a lease of real estate. The contract itself and the evidence relating to it do not present any question

relating to navigation or to the commerce of the seas. Such a contract as is presented in the case before us is not within the jurisdiction of an admiralty court.

Upon examination of the evidence in the case the court finds, too, that, if the case were within our jurisdiction, even then the clear intention of the parties as shown by the proofs indicates that the rent of the landing and wharf room was furnished solely upon the credit of the owner, and not upon the credit of the vessel. In the case of The Iris, 100 Fed. 104, 40 C. C. A. 301, Judge Putnam has construed a similar statute, and has held that it is not essential to the right of a lien that material or repairs should be furnished under a mutual understanding between the contracting parties that credit should be given to the vessel. He says:

"We are therefore to look at the terms of the statute, which contain no requirements beyond that the supplies and labor be furnished to a domestic vessel on the order of the owner, or of somebody representing him or employed by him."

He puts the statute in the same group "with the ordinary statutes giving liens on buildings, as to which it is clear that no evidence is required that either of the parties contemplated credit to the property." He says further, however:

"Of course, with reference to all property domestically located, whether buildings or vessels, circumstances may be such * * * as to show that the parties intended that credit should be given solely to the purchaser."

The case at bar comes within the exception just quoted which Judge Putnam makes in The Iris, and which he discusses in Cuddy v. Clement, 113 Fed. 454, 51 C. C. A. 288. In this case last cited he fully states the principle. In Prince v. Ogdensburg Transit Co. (C. C.) 107 Fed. 978, Judge Colt found that the conduct of the parties proved "that the dealings are not with the ship, or upon her credit, but upon the personal responsibility of the owners." In Ex parte Lewis, Fed. Cas. No. 8,310, Judge Story referred to a series of authorities which decided "that, where the parties enter into a personal contract for a specific sum, it is a discharge of the implied lien resulting by operation of law." Taylor v. The Commonwealth, Fed. Cas. No. 13,787; The J. M. Welsh, Fed. Cas. No. 7,327; N. Y. Mail Steamboat Co. v. The Baltic, Fed. Cas. No. 10,213.

In the case before us the lease itself and all the proofs tend to show that a personal credit was intended, and that a lien upon the vessel was not within the contemplation of the parties. The whole testimony is inconsistent with such a lien, either for the time covered by the lease or after the expiration of the lease; for the evidence leads the court to believe that the parties to the contract intended that credit should be given solely to the lessee named in the lease, whose agent Baker appears to have been in signing the contract. The steamer had not been at the libelant's wharf at the time the lease was made, and, indeed, had not been purchased, so far as the testimony shows; so that it is difficult to see how credit to the steamer could have been within the minds of the parties to the contract. It was the clear intention of the lessor to give credit to the owner of the steamer, and not to the steamer itself, under and during the life of the lease. No other intention is

proved as to the time after the expiration of the lease. The case is then brought within the exception referred to in The Iris, supra, and within the rule in Cuddy v. Clement, supra, and in The Electron, 74 Fed. 689, 21 C. C. A. 12. The court is, then, of the opinion that the libel must be dismissed. As the court finds, however, that it has no jurisdiction, it must order the dismissal of the libel without costs.

The decree may be entered. Libel dismissed, without costs.

THE MARY F. CHISHOLM.

(District Court, D. Maine. April 26, 1904.)

No. 74.

1. ADMIRALTY JURISDICTION—GROUNDS—STATE STATUTE ENLARGING REMEDY.
A state statute giving a lien on vessels cannot enlarge the jurisdiction of a court of admiralty, which depends upon whether or not the subject-matter of the suit is maritime.

2. SAME—MARITIME CONTRACT—SALE OF SUPPLIES TO FISHERMEN.
A sale by a merchant to fishermen, who are about to go on a fishing voyage under a lay contract, of tobacco, clothing, and other articles for their personal use, is not a maritime transaction, and a court of admiralty is without jurisdiction of a suit to enforce collection therefor, although a lien is claimed on the vessel under a state statute.

3. MARITIME LIEN—SUPPLIES—MAINE STATUTE.
Clothing, tobacco, and other articles for personal use sold to fishermen about to start on a fishing voyage under a lay contract are not "supplies necessary for the employment" of the vessel, within the meaning of the Maine statute giving a lien for such supplies.

4. ADMIRALTY—COSTS—DISMISSAL FOR WANT OF JURISDICTION.
Where a suit in admiralty is dismissed for want of jurisdiction of the subject-matter, costs cannot be allowed.

In Admiralty. Suit to enforce statutory lien for supplies.

William H. Gulliver, for libelants.
Benjamin Thompson, for claimant.

HALE, District Judge. This is a libel in rem, filed on the 14th day of July, 1903, by Rosenberg Bros., clothing dealers in the city of Portland, against the fishing schooner Mary F. Chisholm, hailing from the port of Portland, and owned by residents of Portland, to recover for certain articles furnished and delivered to 14 members of the crew of that vessel on the 20th day of September, 1902. The libel alleges that the schooner Mary F. Chisholm is a domestic vessel, of the burden of 70 tons, belonging to the port of Portland; that on the 20th day of Sep-

¶ 1. Admiralty jurisdiction as to enforcement of liens under state laws, see note to The Electron, 21 C. C. A. 21.
See Admiralty, vol. 1, Cent. Dig. § 194.

¶ 2. Admiralty jurisdiction as to matters of contract, see notes to The Richard Winslow, 18 C. C. A. 347; Boutin v. Rudd, 27 C. C. A. 530.

¶ 3. Maritime liens for supplies and services, see note to the George Dumois, 15 C. C. A. 679.

tember, 1902, said schooner was in the port of Portland, and in need of supplies for her crew; that the libelants, at the request of the master, furnished to and for said vessel necessary supplies, clothes to her crew, and other articles which were necessary for her employment; and that all of said materials and clothing were necessary for the crew of said vessel, were furnished on the credit of said vessel, and became a lien thereon under the statutes of the state of Maine. The libel further sets out that the master and owner of said vessel have refused to pay for such supplies.

The evidence shows that at the time of the furnishing of the alleged supplies the Mary F. Chisholm was a domestic vessel, owned by several responsible persons living in Portland; that she was, and for some time prior thereto had been, engaged in seining for mackerel; that during the season of 1902 she made three mackerel trips; that the crew of said vessel on said trips consisted of six men, all told; that the libelants were, at the time of furnishing the alleged supplies, engaged in the clothing and furnishing business at No. 377 Fore street, in the city of Portland; that they had been engaged in such business for about 15 years, and during that time had been owners of fishing vessels, and interested in furnishing supplies to that class of vessels; that they were familiar with the custom which exists in Portland respecting the manner in which that class of vessels were sailed, and had seen settlements made between crews and owners for the fish taken on such vessels; that the master of this vessel had traded with the libelants for many years, and, after completing a voyage, he had been in the habit of settling with them for such supplies as the crew had purchased; that the crew of the Chisholm were shipped under the usual lay, and by the usual shipping articles, for the mackerel fishery, in and by which it was agreed that the owners, at their own expense, should equip the schooner with all necessary tackle and apparel for the carrying on of the mackerel fishery, and that the vessel should be so equipped and fitted during the fishing season; that the master and the several fishermen comprising the vessel's crew agreed to pursue the mackerel fishery in said schooner; that the shipping articles further provided that the fish caught, or the proceeds thereof, should, after deducting the expense of the "great general charges"—which were to consist of "packing, hoisting, towage, and commissions"—be divided as follows: To the owners of the vessel, for their share, one-half part thereof, the residue to be divided among the fishermen, including the master, they agreeing to pay for water, medicines, all canned goods, eggs, and pickles, cook's wages, and for tarring and hanging the seine; that some time in July, 1902, prior to the schooner going out on her second trip, the master and some of the schooner's crew went to the libelants' store and obtained certain outfits, such as rubber boots, oilskins, mittens, and tobacco; that the libelants made out a bill for each lot of goods to the men to whom the goods were delivered; that upon her return from the fishing voyage, some time in September, the master paid the libelants the amount coming due from the respective men, and deducted it from their share of the catch; that about September 22, 1902, a few days after the settlement for the supplies purchased in July, Capt. Ellsworth went to the libelants' store with 13 or 14 men who were going out in the schooner for another trip; that the libelants

furnished the crew with the following articles as called for, which were to be charged as on the last trip:

Tobacco,	of the value of		$23 60
Two pairs of slippers,	"	"	2 00
Stockings,	"	"	1 25
Mittens,	"	"	10
Three pairs rubber boots,	"	"	9 00
One pair of leather boots,	"	"	4 00
One pair of shoes,	"	"	2 00
One lot of oilclothes,	"	"	3 25
One hat,	"	"	50
Two blankets,	"	"	2 00
One quilt,	"	"	1 00
One shirt,	"	"	1 25
One mattress,	"	"	75

The answer alleges that the schooner was being fitted out for a mackerel voyage on the customary lay; that the supplies in question were furnished to the various members of said vessel's crew who desired to make purchases for their own personal use; that the payment therefor was to be deducted from the shares coming due to the various members of the schooner's crew upon the settling up of said fishing voyage. It denies that any of the goods in question were supplied upon the credit of the vessel, or were in any way necessary for her employment in said business; and that, as no fish whatever were taken on the voyage in question, no moneys became due to the crew.

The court must first consider whether the subject-matter of the suit is within its jurisdiction. Jurisdiction is conferred upon the admiralty court, as upon all the federal courts, by the Constitution, and cannot be enlarged by our state Legislature. In The James T. Furber, 129 Fed. 808, this court has quite fully discussed the law pertaining to jurisdiction over contracts where a lien is claimed under the state statute; in that case we have cited many authorities touching this general subject. It is perfectly clear that the subject-matter presented by a suit must be distinctly, essentially, and wholly maritime in order to give the court jurisdiction. The test, then, to be applied, is, does the suit arise from the necessities of navigation or from any matters relating to the commerce of the sea? In Diefenthal v. Hamburg-American Packet Co. (D. C.) 46 Fed. 397, Judge Billings said:

"It [the contract before the court in that case] is, after all, not a contract where, until supplies are actually furnished, the contractors relied upon any ship, but upon the other contracting parties. * * * It was a general contract for the sale and delivery of provisions. * * * The objection to the jurisdiction, which it seems to me must prevail, is that this contract, though relating remotely to navigation and maritime commerce, is separated so far from them that it did not spring from the necessities of navigation, and is not within the considerations which make it essentially and distinctively maritime."

The court found that the contract in that case was personal in its character, preliminary in its nature, and not within the admiralty jurisdiction.

In Scott v. The Morning Glory, Fed. Cas. No. 12,542, Judge Hoffman said:

"It is impossible not to recognize, in the recent decisions of the Supreme Court, a disposition to confine the admiralty jurisdiction within narrower

limits, and restrict maritime liens to fewer cases than is desired by its more ardent advocates. * * * To give the court jurisdiction over a contract as maritime, it must relate to the 'trade and business of the sea,' or must be essentially maritime in its character. * * * If the jurisdiction be construed to embrace not only matters directly connected with maritime commerce, but those tending toward or conducive to it, a large and indefinite field would be opened."

In The Perseverance, Fed. Cas. No. 11,017, Judge Betts said:

"The essential requisite of a contract, to bring it within the jurisdiction of an admiralty court, is that it must be one which is to be performed on the high seas, or which has relation to a maritime service. The most enlarged interpretation of the term 'maritime,' as applied to the jurisdiction of this court, has not been extended beyond subjects or engagements which are necessarily connected with services to be rendered on tide waters, or supplies furnished to vessels in aid of a voyage, or labor, or materials, or cash advanced to obtain such supplies."

In The Kingston (D. C.) 23 Fed. 200, Judge Nixon said:

"There has been much conflict in the courts as to the meaning of the new rule, but since its adoption the Supreme Court, in The Lottawanna, 21 Wall. 580 [22 L. Ed. 654], held that the District Courts of the United States, having jurisdiction of the contract as a maritime one, might enforce laws given for its security, even when created by the state laws. The inference is plain that the court meant to affirm that no such jurisdiction existed when the contract was not of a maritime nature."

See, also, the decision of Judge Webb in The H. E. Willard (D. C.) 53 Fed. 599; the decision of Mr. Justice Gray and Judge Putnam in the same case (C. C.) 52 Fed. 387; The Corsair, 145 U. S. 335, 12 Sup. Ct. 949, 36 L. Ed. 727; The Orleans, 11 Pet. 175, 9 L. Ed. 677; People's Ferry Co. of Boston v. Beers, 20 How. 393, 15 L. Ed. 961; Campbell v. Hackfeld & Co., Ltd. (C. C. A.) 125 Fed. 696. In the late case, Reliance Lumber Co. v. Rothschild (D. C.) 127 Fed. 745, the court, Judge McPherson, treats in a very complete manner of the subject which we are now discussing, and at page 749 he cites the controlling decisions relating to undertakings which are merely personal or preliminary in their character, and which, while they lead to maritime contracts, do not themselves relate to the business and commerce of the sea. The same case also decides that, where a libel is dismissed for want of jurisdiction of the subject-matter, costs cannot be allowed. This decision in reference to costs is upon the authority of Citizens' Bank v. Cannon, 164 U. S. 324, 17 Sup. Ct. 89, 41 L. Ed. 451. It is clear, then, that the jurisdiction depends upon the nature of the subject-matter of the contract, and not upon the existence of a lien. The lien affects only the form of the proceedings and the character of the remedy.

In the case before us, the court is of the opinion that there is not sufficient in the proofs before it—the material part of which has been stated—to give jurisdiction to the court. The articles which were to be furnished to the fishermen were tobacco, clothing, rubber boots, and other articles relating to the personal use of the fishermen who were to sail the boat upon shares. The goods were delivered to the fishermen, nearly all of them, on the land, in the store of the libelant. There is not enough in the evidence to bring the case within the rule which we have cited, that supplies must be for the ship, in aid of the voyage. If we should hold that the furnishing of these goods was a maritime contract,

then the furnishing of a single fisherman, in a common fishing boat, with wearing apparel, might, under the same rule, be held to pertain to navigation, and to be within admiralty jurisdiction. The contract appears to the court to be one of the undertakings which courts have classed as personal and preliminary, and not within the jurisdiction of the admiralty court.

Another question is raised, by the language of the statute, as to whether, even if the court had jurisdiction, the supplies furnished were "necessary" supplies. The state statute, which is found in chapter 287, page 255, of the Laws of 1889, and in the Revised Statutes of the state of Maine, chapter 93, § 7, is as follows:

"All domestic vessels shall be subject to a lien to any part owner or other person to secure the payment of debts contracted and advances made for labor and materials necessary for their repair, provisions, stores, and other supplies necessary for their employment, and for the use of a wharf, dry dock, or marine railway, provided, that such lien shall in no event continue for a longer period than two years from the time when the debt was contracted or advances made."

Under this statute the lien is given to vessels to secure the payment of "stores and other supplies necessary for their employment." Were the supplies furnished in this case necessary for the employment of the vessel? The courts have repeatedly held that a state statute giving a lien for supplies furnished at a home port must be construed strictly, and cannot be sustained by construction, analogy, or inference. The Steamship Yankee Blade, 19 How. 82, 15 L. Ed. 554; The Paola (C. C.) 32 Fed. 174; The Kiersage, Fed. Cas. No. 7,762; The Red Wing (D. C.) 14 Fed. 869. In The Cabarga, Fed. Cas. No. 2,276, Mr. Justice Nelson, sitting upon the circuit, said:

"Where the materialman or ship chandler has parted with the materials and stores, and the ship has received the benefit of them, * * * in those cases only the lien attaches. In the case of materials and repairs, the articles furnished enter into and give value to the ship itself; and in the case of stores, they are necessary to enable her to earn her freight."

In the case at bar, we have already said that the effect of a state statute cannot be to enlarge the jurisdiction of the court, but only to furnish a remedy which did not exist before the statute was passed. Boon v. The Hornet, Fed. Cas. No. 1,640. We are of the opinion that the remedy within the contemplation of the state statute must be limited to such articles as are for the benefit of the ship, in aid of the voyage, and necessary in order to make the ship accomplish her undertaking. We do not think the supplies furnished in the case before us are supplies, within the meaning of the statute, which were necessary for the employment of the vessel. These supplies all relate to the personal needs and convenience of men who are preparing to enter upon a fishing voyage. Even though the crew would not have shipped if they could not have had these supplies furnished them, still this fact cannot enlarge the statute, and make the articles which were furnished them "necessary" within the meaning of the law. The articles furnished were useful and convenient for the personal needs of the fishermen, but were not, in our opinion, "supplies necessary for the employment of the vessel."

The decree may be entered: Libel dismissed, but without costs.

LAKE STEAM SHIPPING CO., Limited, v. BACON.

(District Court, S. D. New York. May 2, 1904.)

1. SHIPPING—CHARTER PARTY—DISABLING OF VESSEL BY STRANDING.
A steamship was chartered for a voyage and return at a stipulated hire per month. The charter required her to be tight, staunch, and strong, and in every way fitted for the service. It also contained a provision that in the event of loss of time from "breakdown of machinery, stranding, fire, or damage preventing the working of the vessel for more than twenty-four running hours the payment of the hire shall cease until she be again in an efficient state to resume her service." On the return voyage the ship stranded, and was several days on the rocks, receiving such injury to her hull that two of her holds containing cargo were partly filled with water, and remained so through the remainder of the voyage, which was completed only by the use of extra pumps, which were procured at a port to which she deviated after the accident. *Held* that, the vessel not having been in an efficient state after the stranding, no charter hire could be recovered after that time, except for the time taken in discharging.

2. SAME—HARTER ACT.
The Harter Act, Act Feb. 13, 1893, c. 105, 27 Stat. 445 [U. S. Comp. St. 1901, p. 2946], does not affect the rights of parties under a charter party.

In Admiralty. Suit to recover charter hire.

Convers & Kirlin, for libellant.
Wheeler, Cortis & Haight, for respondent.

ADAMS, District Judge. This action was brought by the Lake Steam Shipping Company, Limited, as owner of the steamship Avonmore, to recover from Daniel Bacon, the charterer, the hire of the steamship from April 16, 1903, to May 13 following, amounting, it is claimed, to $2545.14. It is admitted by the libellant that the hire was properly suspended from April 11, 1903, at 7 A. M. until April 16, at 10:30 A. M., the period during which the vessel was stranded on Anegada Reef, Virgin Islands. The amount originally claimed was $2526. There was an error in the libel as to the time the vessel was removed from the reef, which the testimony shows was April 16th at 10:30 A. M. instead of 4 P. M. as first claimed. A correction of the error involved an additional claim of $19.14.

The steamship was in the service of the charterer, under a charter party dated January 28, 1903, which provided "for one round trip to the West Indies and/or Mexico" and further:

"4. That the Charterers shall pay for the use and hire of the said vessel five hundred and eighty pounds (£580) British Sterling per calendar month, commencing on and from the day of her delivery, as aforesaid, and at and after the same rate for any part of a month; hire to continue until her delivery, with clean holds to the Owners (unless lost) at a port in the United States north of Hatteras at charterers option. * * *

6. Payment of the said hire to be made in cash half monthly in advance in New York. * * *

15. That in the event of the loss of time from deficiency of men or stores, breakdown of machinery, stranding, fire or damage preventing the working of the vessel for more than twenty-four running hours, the payment of the hire shall cease until she be again in an efficient state to resume her service, but

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¶ 2. Statutory exemption of shipowners from liability, see note to Nord-Deutscher Lloyd v. Insurance Co., 49 C. C. A. 11.

should she, in consequence, put into any port, other than that to which she is bound, the Port Charges and Pilotages at such Port shall be borne by the Steamer's Owners, but should the vessel be driven into port, or to anchorage by stress of weather, or from any accident to the cargo, such detention or loss of time shall be at the Charterer's risk and expense."

The defense of the respondent is stated in the answer as follows:

"Sixth. Further answering the libel herein, the respondent alleges that by reason of the stranding of the Steamship 'Avonmore' on the 11th day of April, 1903, she sustained very serious damage, and when finally floated, her bottom plating had been entirely perforated in several places to such an extent that No. 1 hold was practically flooded, and No. 2 hold, partly so. After said steamer was floated she made her way to St. Thomas where temporary repairs were made, but said repairs were not sufficient to render the vessel fit for service under the provisions of the charter party, and she was not in condition to load or discharge cargo without damage to same and was not in many ways tight, staunch, strong and fit. On account of this fact the Master deviated from the direct course to be as near as possible to land in case he was unable to control the leaks by the use of special pumps placed aboard at St. Thomas.

On said voyage to New York, the sugar cargo was still further damaged by reason of the leaky conditions of the steamer, and upon her arrival at that port all of the sugar stowed in No. 1 compartment had entirely melted; and the sugar stowed in No. 2 compartment was seriously damaged. By reason of the damage sustained to cargo in the No. 1 and No. 2 holds, the respondent was unable to collect a large part of the freight to which he would have otherwise been entitled. By reason of the damaged condition of the cargo, the discharge of the said steamer was also very seriously delayed at New York, and the respondent incurred extra expense. After said discharge the steamer was dry docked and repaired at the port of New York, said repairs, as respondent is informed and believes, having required an expenditure of $48,000 before the steamer could be again put in a fit condition for service. Respondent has paid hire in full to the 11th of April, 1903, at 7 A. M. when the steamer stranded, and has refused to pay all hire since that date under the provisions of clause 15 of the charter."

The testimony shows, that on a return trip of the steamer to New York from Port of Spain, Trinidad, for which voyage she was subchartered by the respondent herein to the Trinidad Shipping and Trading Company, Limited, which had loaded her with a cargo of sugar in bags, stowed in the five holds of the vessel, she sailed from Port of Spain on April 9th, 1903, at 5 P. M. On the 11th, at 7 A. M., she stranded on the reef stated, which is on the westerly side on the Anegada Passage, owing to the existence of an uncharted westerly current which set the vessel out of her course and led to the disaster. After efforts were made to float the vessel by the use of her own steam and anchors, it was found necessary to place a part of the cargo in small boats and to jettison a considerable quantity, by which means the vessel was removed from the reef on the 16th of April at 10:30 A. M. The bottom of the vessel was seriously injured by pounding on the reef and she began to leak shortly after she stranded. When she floated off the reef she had 19 feet of water in the fore-hold and about 3 feet in the No. 2 compartment. She then proceeded towards St. Thomas, 45 miles distant, for the purpose of having the damage examined and to get assistance. She arrived there on the 16th of April, about 5:45 P. M., and was then about 2 feet by the head, but had no more water in her than when she started after the stranding, it having been kept down by pumping. When the harbor master at St. Thomas

learned that the vessel carried a foul bill of health, owing to small pox having existed at Port of Spain at the time of her departure from there, she was quarantined and all personal communication with the shore forbidden for eight days. At the expiration of such time, the master and chief engineer were permitted to go ashore but the vessel was not granted full pratique. Subsequently steps were taken towards holding a survey and it was recommended that the cargo be discharged as soon as practicable but the recommendation could not be carried out because nobody would work on the vessel owing to her foul bill of health.

On arrival at St. Thomas, the master cabled the position to the respondent but he gave no orders.

A subsequent survey was held by two ship masters, different persons from those constituting the first board, but the recommendation made by the last board that the vessel be dry docked for repairs could not be carried out and the master, having consulted the other officers of the steamer, including the chief engineer, concluded to proceed to New York. At this time the water in the fore-hold had been reduced from 16 to 10 feet. The water in the main-hold was being kept down to about 14 inches by pumping. Extra pumps were taken aboard, with men to work them, to assist the ship's engines, and the surveyors having had the assistance of divers who went under the bottom of the vessel and reported favorably as to her seaworthiness, concluded that she was in a fit condition to proceed with safety to her destination and gave a certificate to that effect. The pumps were set up in the holds and the vessel proceeded. At this time there were only 10 feet 3 inches in No. 1 hold and 4½ inches in No. 2. The other parts of the ship were dry. She was then drawing 22 feet aft and 16 feet forward. During the voyage, the pumps became somewhat choked at times, and although the hand pumps were kept working continually, the water increased in the holds, so that when she arrived in New York, she had 19 feet in No. 1 and 8 inches in No. 2.

Upon arrival at New York, May 6th, she was ordered by the respondent to a dock, and he provided stevedores and delivery clerks for discharging purposes. When the cargo was delivered in due course, the respondent collected $6,084.65 freight.

The vessel was then docked and her bottom repaired at a large expense, about $49,000, some part of which was probably due to injuries which could not have caused the leaks in the bottom.

The question to be determined is, whether the charterer was justified in refusing to pay hire for any part of the period from April 16th at 10:30 A. M., the time the vessel was removed from the reef after the stranding, and can appropriate for his own benefit the freight collected, without accounting in any way to the ship owner, to whom he denies that anything is due.

The respondent contends that the steamer was never in a fit condition for service after the stranding until the repairs in New York were made and that he was excused from paying any hire under the 15th clause of the charter party, which provided that in the event of loss of time from breakdown of machinery, stranding * * * damage preventing the working of the vessel for more than 24 running hours, the payment of hire should "cease" until she should "be again in an efficient state to

resume her service." He argues that the word "again" has a distinct meaning, because the contract provided in the beginning that the steamer should be placed at the disposal of the charterer "being on her delivery, ready to receive cargo, and tight, staunch and strong and in every way fitted for the service."

It is admitted by the libellant that the obligation of the charterer to pay hire ceased by reason of the stranding and it is argued by the respondent that unless she subsequently was in a condition to be tendered to him under the charter, the contract to pay hire did not again become operative.

On the other hand, the libellant argues with much force that as the vessel actually rendered services to the charterer, in bringing a part of the cargo home, payment should be made for it.

The determination of the controversy is difficult owing to the equity of the libellant's position but it must be determined according to the law. The case has been presented on the theory of hire being due, and resisted upon the ground that legally none was due.

The authorities seem to be with the charterer. It is apparently well settled that where the provisions of a contract of this kind have not been complied with by the owner of a vessel, there can be no recovery of hire, even though the charterer has had some benefit from her services in the carriage of the goods. The general doctrine will be found discussed in Parsons' Ship. & Admy. 319; Donahoe v. Kettell, 1 Cliff. 35, Fed. Cas. No. 3,980; Cook v. Jennings, 7 Durn. & East. 381, and Hogarth v. Miller, App. Cas. 1891, 48, 7 Aspinall, Mar. Cas. N. S. 1. In the last case, a charter containing a clause substantially like the one involved here was under consideration. The vessel there started on her return voyage from the west coast of Africa to Harburg on the Elbe. En route, her high pressure engine broke down and she had to put into Las Palmas in the Canary Islands. Eventually, the voyage was completed by the use of her low pressure engine and with the aid of a tug, which was partly paid for by the vessel. An action for the hire was instituted and allowed in the lower court, excepting one and a half days' detention from her damaged condition. On appeal to the Court of Session—16 Sess. Cas. (4th) 599—the judgment was reversed, the court holding that the ship was not in an efficient state and that the owner had no claim for hire after the accident, excepting for a part of the time occupied in discharging cargo at the place of destination. On appeal to the House of Lords, supra, the decision of the Court of Session was affirmed, excepting that the owner was allowed full time for the discharging on the ground that the ship was in an efficient state for that particular employment.

The libellant here divides his claim for hire into 4 parts: (a) The time occupied in proceeding from the reef where she stranded to St. Thomas, (b) the delay in St. Thomas, (c) the period of the voyage from St. Thomas to New York and (d) the period while the vessel lay in New York occupied with the discharging, claimed to be from May 6 at 11:30 A. M. until May 16 at 4 P. M., when she was delivered to her owner.

(a & b) The accident caused a deviation from the vessel's course to New York and what occurred during such deviation, is attributable to the disaster, which includes the voyage to St. Thomas and the deten-

tion there. The fact that the vessel was quarantined at St. Thomas on account of having come from an infected port has no bearing, although ordinarily the charterer is bound to furnish a clean bill of health. The Shadwan (D. C.) 49 Fed. 379; affirmed, sub nom. Donkin v. Herbst, 55 Fed. 1002, 5 C. C. A. 381. Here, it does not appear that the absence of such a bill would have made any difference, if the vessel had not deviated from her course on account of her injuries.

(c) During the voyage to New York, the ship was in a crippled condition and not entitled to hire under the contract. The libellant is not aided by the Harter Act, which was designed to modify the relations previously existing between vessels and their cargoes. The Delaware, 161 U. S. 459, 471, 16 Sup. Ct. 516, 40 L. Ed. 771.

(d) The time occupied in discharging in New York, however, is directly within the ruling of Hogarth v. Miller, supra, and the libellant is entitled to recover in such respect. If the parties can not agree upon the amount due hereunder, a reference may be had to determine it.

Decree for the libellant, with an order of reference.

UNITED STATES ex rel. DRURY et al. v. LEWIS, Jail Warden.

(Circuit Court, W. D. Pennsylvania. April 28, 1904.)

1. FEDERAL COURTS—JURISDICTION—HABEAS CORPUS.
A court or judge of the United States has jurisdiction to grant a writ of habeas corpus for the purpose of reviewing the legality of the restraint of liberty of any prisoner held in custody under the authority of a state, whenever it is alleged that he is in custody for an act done or omitted in pursuance of a law of the United States, or in violation of the Constitution or of a United States law or treaty.

2. UNITED STATES SOLDIERS—OFFENSES—STATES—CIVIL JURISDICTION.
Under Rev. St. § 1342, art. 59 [U. S. Comp. St. 1901, p. 955], providing that when any officer or soldier is accused of a capital crime, or of an offense against the person or property of any citizen of any of the United States punishable by the laws of the land, the commanding officer and the officers of the regiment, troop, battery, etc., to which the person so accused belongs, except in time of war, shall, on application duly made, use their utmost endeavor to deliver him to a civil magistrate in order to bring him to trial. *Held*, that such enactment was a distinct recognition by Congress of the general jurisdiction in time of peace of the civil courts of the state over persons in the United States military service accused of offenses against citizens of the state.

3. SAME—HOMICIDE—MILITARY GUARD—ARRESTS.
Where, on a writ of habeas corpus to obtain the discharge of two members of the United States army from an indictment for murder, found by the courts of the state where the offense was committed, it appeared that the shooting of deceased occurred in the streets of a city, outside the military reservation, while petitioners were endeavoring to arrest deceased for depredations committed on such reservation, but the evidence was conflicting as to whether the shooting was done while deceased was endeavoring to escape or after he had stopped, thrown up his hands, and offered to surrender, the determination of whether the shooting was justifiable was within the exclusive jurisdiction of the state courts.

¶ 1. Jurisdiction of federal courts in habeas corpus, see note to In re Huse, 25 C. C. A. 4.

John C. Haymaker and John Marron, for the Commonwealth of Pennsylvania.

James S. Young, U. S. Atty., for respondents.

ACHESON, Circuit Judge. On the 8th day of February, 1904, the date of the issuing of this writ of habeas corpus, and at the time the writ issued, the petitioners, Ralph W. Drury and John Dowd, were in the custody of Edward Lewis, warden of the jail of Allegheny county, Pa., by virtue of a commitment issued on that day out of the court of oyer and terminer for the county of Allegheny and commonwealth of Pennsylvania. This commitment was based on an indictment found on December 16, 1903, in the said court of oyer and terminer, which indictment charges these petitioners, in the first count thereof, with the murder of one William H. Crowley, and in the second count thereof with the manslaughter of the said Crowley, on September 10, 1903. The petitioners had been at large on recognizance in the sum of $5,000, taken by the court of oyer and terminer, conditioned for their appearance in that court to answer the indictment. With the consent of the petitioners, and by prearrangement with their bail, they were surrendered by their bail on the 8th day of February, 1904, for the purpose of enabling them to apply for and prosecute this writ of habeas corpus.

The case disclosed by the evidence submitted on the hearing of this writ is as follows: On September 10, 1903, Ralph W. Drury was a commissioned officer of the United States army, of the rank of second lieutenant, and had under his command a detachment of 20 enlisted men, of whom John Dowd was one, stationed at Allegheny Arsenal, in the city of Pittsburg, in Allegheny county, Pa.; this arsenal being a subpost of Ft. Niagara, N. Y. From time to time before September 10, 1903, some copper down spouts and eave-troughs had been stripped from some of the buildings on the arsenal grounds, and the material stolen, and other depredations, such as the breaking of window lights, had been committed on the arsenal property. Lieut. Col. Robertson, the commanding officer at Ft. Niagara, on the occasion of an inspection of Allegheny Arsenal in July, 1903, had directed Lieut. Drury to use his best endeavors to stop the depredations, and to that end ordered him to establish a patrol of the guards day and night upon the arsenal grounds, and to apprehend and arrest any person or persons committing depredations on the arsenal property. Shortly before 10 o'clock on the morning of September 10, 1903, having received word that some persons were stealing copper from one of the buildings on the arsenal grounds, Lieut. Drury took John Dowd, then on guard duty, and another private soldier (each of the latter being armed with a rifle and ammunition), and, passing out of the arsenal grounds through the gate on Butler street, the three proceeded by way of Butler street and Almond alley toward the Allegheny Valley Railroad. Drury informed the two men of the reported stealing of copper, and instructed them to continue down Almond alley and arrest any person coming from the arsenal. Drury himself left Almond alley at the corner of Willow street, and went by Willow street to Fortieth street (which runs along, but outside of, the arsenal wall), and proceeded down Fortieth street to its foot, where were congregated three or four half-grown boys or young

men, among whom was William H. Crowley, aged about 19 or 20 years. These persons fled in different directions when they saw Lieut. Drury approaching. Crowley ran from the foot of Fortieth street away from the arsenal property in the direction of Forty-First street, keeping on or near the Allegheny Valley Railroad. When he was about 100 yards from the arsenal wall, Crowley was shot by Dowd, who aimed and fired his rifle at Crowley. At the time of the shooting, Drury, Dowd, and Crowley were all off the ground belonging to the United States. Each one of the three then stood either upon a street of the city, on the Allegheny Valley Railroad, or on private property. The rifle ball struck Crowley's left thigh, inflicting a mortal wound, from which he died on the evening of the same day, September 10, 1903.

Thus far the facts are not open to dispute under the testimony. But as to the circumstances attending the shooting of Crowley the evidence is conflicting, and leads to opposite conclusions of fact as one or other version of the affair given by the witnesses is accepted. Dowd testifies, and the petitioners have produced other evidence tending to show, that as Crowley fled he was called on several times by Dowd, who followed him, to halt, with warning that unless he halted Dowd would fire; that Crowley did not halt, but continued his flight, and to prevent his escape behind or through a lumber pile Dowd fired, and that Drury did not order Dowd to fire, and was not connected with the shooting save by the fact that he ordered the arrest of any person coming from the arsenal. On the other hand, two witnesses who were present (Mrs. Long and Miss Terwillerger) testify that before the shot was fired Crowley stopped, turned around, and, facing the pursuing soldier (Dowd), threw up his hand, said, "Don't shoot," "I will come back," or "I will give up," and just then Lieut. Drury said "Fire!" and Dowd fired the shot that killed Crowley. The testimony of at least one other witness tends to corroborate the account of the transaction given by the two named women as above recited. It is not for me to say whether or not the witnesses who have testified thus on the part of the commonwealth are mistaken.

In view of all the evidence herein, should this court interfere to prevent the trial of the petitioners upon the indictment in the state court—take the petitioners out of the custody of the authorities of the state, and discharge them finally without trial by any civil court in the regular administration of justice? This is the question which confronts me. Undoubtedly, a court or judge of the United States is authorized to grant a writ of habeas corpus for the purpose of inquiring into the cause of the restraint of the liberty of any prisoner held in custody under the authority of a state, whether by virtue of an indictment or otherwise, whenever it is in due form alleged that he is in custody for an act done or omitted in pursuance of a law of the United States, or is in custody in violation of the Constitution or of a law or treaty of the United States, and to proceed in a summary way to determine the facts, "and thereupon to dispose of the party as law and justice require." But in the exercise of this authority the courts and judges of the United States are to be governed by the principles laid down by the Supreme Court in the cases of Ex parte Royall, 117 U. S. 241, 6 Sup. Ct. 734, 29 L. Ed. 868, Whitten v. Tomlinson, 160 U. S. 231, 16 Sup. Ct. 297, 40

L. Ed. 406, and Baker v. Grice, 169 U. S. 284, 18 Sup. Ct. 323, 42 L. Ed. 748. The doctrine of those cases is that, except in instances of peculiar urgency, or where there is no jurisdiction in the state court to try the prisoner for the offense charged (as were the cases In re Neagle, 135 U. S. 1, 10 Sup. Ct. 658, 34 L. Ed. 55, In re Waite [D. C.] 81 Fed. 359, and Ohio v. Thomas, 173 U. S. 276, 19 Sup. Ct. 453, 43 L. Ed. 699), the court or judge should not discharge the prisoner in advance of his trial in the state court; and even after the final determination of the case in the state courts should generally leave him to his remedy by writ of error from the Supreme Court of the United States.

As the primary question here is whether the petitioners are amenable to the state court upon the indictment found therein, it is proper to quote at length one of the articles for the government of the armies of the United States prescribed by section 1342 of the Revised Statutes of the United States [U. S. Comp. St. 1901, p. 955], viz.:

"Art. 59. When any officer or soldier is accused of a capital crime, or of any offense against the person or property of any citizen of any of the United States, which is punishable by the laws of the land, the commanding officer, and the officers of the regiment, troop, battery, company, or detachment, to which the person so accused belongs, are required, except in time of war, upon application duly made by or in behalf of the party injured, to use their utmost endeavors to deliver him over to the civil magistrate, and to aid the officers of justice in apprehending and securing him in order to bring him to trial. If, upon such application, any officer refuses or willfully neglects, except in time of war, to deliver over such accused person to the civil magistrates, or to aid the officers of justice in apprehending him, he shall be dismissed from the service."

This enactment is a distinct recognition by Congress of the general jurisdiction in time of peace of the civil courts of a state over persons in the military service of the United States who are accused of a capital crime, or of any offense against the person of a citizen committed within such state. Such criminal jurisdiction has always been exercised by the state courts. Coleman v. Tennessee, 97 U. S. 509, 514, 24 L. Ed. 1118. Clearly, the indictment against the petitioners presents a case prima facie cognizable by the state court. Does the evidence disclose any ground to defeat that jurisdiction, or show a case requiring interference by this court to prevent the trial of the petitioners upon the indictment? I feel constrained to answer negatively. The shooting of Crowley did not take place upon the land purchased by the United States for military purposes by consent of the Legislature of the commonwealth of Pennsylvania, but outside the arsenal property. It occurred within the territorial jurisdiction of the state court in which the indictment is pending—the only civil court which could have jurisdiction to try the petitioners for the alleged unlawful killing of Crowley. The shooting was not done in obedience to a command to fire given to Drury and Dowd by their superior officer. It will be remembered that the shooting which Dowd did and Drury is alleged to have directed was, according to the testimony for the commonwealth, of a man who had ceased flight and offered to surrender. It may be conceded that it was the right and duty of the petitioners to pursue and arrest Crowley, who was suspected (justly, it now seems) of being concerned in the larceny of some pieces of copper taken off one of the arsenal buildings, but it

by no means follows that the homicide, as testified to by the witnesses for the commonwealth, is not rightfully the subject of judicial investigation in the orderly course of procedure by the civil courts having jurisdiction of such offenses as are charged in this indictment. Crowley, moreover, was a citizen of Pennsylvania. He was not in military service, nor subject to military law. The case is wholly unlike the cases of United States v. Clark (C. C.) 31 Fed. 710, and In re Fair (C. C.) 100 Fed. 149. In the former of these cases the shooting occurred within a military reservation of the United States, and was of a military convict (a soldier) by a military guard to prevent the escape of the convict. In the other case (In re Fair) the person shot was a military prisoner held in a fort of the United States under a charge of desertion, who, with violence, had overcome his military guard, and was immediately pursued beyond the fort by soldiers on guard duty, who fired to prevent his escape. Moreover, in each of those cases, and, indeed, in every case brought to my attention wherein a United States court or judge upon habeas corpus has discharged a prisoner in custody under state authority, the facts entitling the prisoner to exemption from state control were undisputed. This was so in the cases In re Neagle, supra; In re Waite, supra; In re Lewis (D. C.) 83 Fed. 159; United States v. Fuellhart (C. C.) 106 Fed. 911; In re Turner (D. C.) 119 Fed. 231; and Ohio v. Thomas, supra. But in the present case there is a serious conflict of evidence involving an important issue of fact, namely, whether Crowley was shot while fleeing to escape arrest, or after he had stopped and turned around, and virtually had surrendered. It is very clear that on a habeas corpus hearing such as this it is not competent for the court to determine upon conflicting evidence whether the person under indictment in the state court is guilty or innocent of the offense of which he is accused. Ex parte Crouch, 112 U. S. 178, 180, 5 Sup. Ct. 96, 28 L. Ed. 690. Whether the shooting of Crowley was justifiable or excusable must be determined by the state court to whose jurisdiction the petitioners are subjected. That the petitioners will be protected by that court in all their legal rights is not to be doubted.

An order will be made discharging the writ of habeas corpus, and remanding the petitioners to the custody of the warden of the jail of Allegheny county.

In re MILGRAUM & OST.

(District Court, E. D. Pennsylvania. May 6, 1904.)

No. 1,804.

1. BANKRUPTCY—DISCHARGE—OBJECTIONS—SPECIFICATIONS—VERIFICATION BY ATTORNEY.

   Though specifications of objection to a bankrupt's discharge should not ordinarily be signed and verified by attorneys in fact or at law for objecting creditors, they may be so signed under exceptional circumstances.

2. SAME—JOINDER OF CREDITORS.

   Where several creditors of a bankrupt desired to urge the same objections to the bankrupt's discharge, they were not required to sign separate specifications of objection by bankrupt order No. 32, providing that "a

creditor shall enter his appearance," etc., but were entitled to join in the same specification.

3. SAME—AFFIDAVITS—SUFFICIENCY.
Affidavits to specifications of objection to a bankrupt's discharge, sworn to "to the best of affiant's knowledge, information, and belief," were sufficiently verified.

4. SAME—FAILURE TO KEEP BOOKS OF ACCOUNT.
A specification of objection to bankrupts' discharge, that such bankrupts, with intent to conceal their financial condition, destroyed, concealed, or failed to keep books of account or records from which such condition might be ascertained, was not sufficiently specific.

5. SAME—CONCEALMENT OF MERCHANDISE.
A specification of objection to bankrupts' discharge alleging that, within four months immediately preceding the filing of the petition, the bankrupts transferred, removed, destroyed, or concealed their property, with intent to defraud their creditors, in that, about a week prior to the filing of the petition, and at other times, they concealed large quantities of merchandise in a certain house, with intent to hinder, delay, and defraud their creditors, and thereafter, on a day specified, removed and concealed other large quantities of merchandise from their place of business with like intent, was sufficient.

In Bankruptcy. Motion to Dismiss Specifications of Objection to Discharge.

Henry N. Wessel, for bankrupts.
Keator & Johnson and Reber & Downs, for objecting creditors.

J. B. McPHERSON, District Judge. One ground of complaint against these specifications of objection to the bankrupts' discharge is that they are signed and sworn to by attorneys in fact and in law, and not by the creditors themselves. I cordially agree to the proposition that affidavits of agents and attorneys are usually objectionable, and should be discouraged. The practice of this court forbids them ordinarily, and I have no intention of relaxing the rule on this subject; but exceptional circumstances occur when they seem to be necessary, and I think this is such a case. Clause 9 of section 1 (Act July 1, 1898, c. 541, 30 Stat. 544 [U. S. Comp. St. 1901, p. 3419]) recognizes the possibility of such a situation by providing that " 'creditor' shall include anyone who owns a demand or claim provable in bankruptcy, and may include his duly authorized agent, attorney or proxy."

The specifications are also attacked because they are signed by four creditors, acting by their attorneys; the argument being that objections to a discharge can only be made by a creditor acting singly. This contention rests largely on the grammar of order No. 32—"*A* creditor * * * shall enter *his* appearance," etc. It seem needless to take up much time over this argument. If two or more creditors see fit to adopt the same objections, I can see no reason why they may not reach that result by signing the same paper, for they could certainly do so by signing separate copies of the original. Their action is equivalent to the execution of as many copies of the specifications as there are signers, and each signer is individually liable for his own act. There is nothing joint about the paper. It is simply a device to avoid the multiplication of copies.

¶ 4. See Bankruptcy, vol. 6, Cent. Dig. § 714.

Neither do I see any force in the objection to the affidavits because they declare that the facts are true "to the best of [affiants'] knowledge, information, and belief." This phrase is objected to as vague and uncertain, and in some connections it may perhaps deserve these epithets. Usually, however, it is as far as any man should be asked to go in taking an oath—the instances are infrequent, I think, when an assertion that facts are true can be properly made without qualification of any kind—and the Supreme Court of the United States has thought the phrase to be unobjectionable, as may be seen by examining the affidavit to form No. 2. No doubt, it was expected that this affidavit would ordinarily be taken by a principal; but, if the principal is permitted to be thus cautious, I think that his agent, who is only allowed to take his place under exceptional circumstances, ought not to be obliged to assume a heavier burden.

The first specification, however, is plainly insufficient. It is merely a general statement, following the language of the act (chapter 541, § 14b, 30 Stat. 550 [U. S. Comp. St. 1901, p. 3427]), "that said bankrupts have, with intent to conceal their financial condition, destroyed, concealed, or failed to keep books of account, or records from which such condition might be ascertained." This has been so often decided to be bad, that nothing more need be said upon the subject.

But the second specification, in my opinion, is sufficiently specific. It declares:

"That said bankrupts have, within a time subsequent to the first day of the four months immediately preceding the filing of the petition against them, transferred, removed, destroyed, or concealed, or permitted to be removed, destroyed, or concealed, their property, with intent to hinder, delay, and defraud their creditors, in this: that said bankrupts did on or about December 1, 1903, or about one week prior to the filing of the petition against them, and at other times, remove and conceal large quantities of their merchandise to the house of Leon Wiesen, No. 529 N. Sixth street, in the city of Philadelphia, with the intent to hinder, delay, and defraud their creditors; and in this: that said bankrupts did further, on the 19th day of November, 1903, and at other times, remove and conceal, or permit to be removed and concealed, large quantities of merchandise, consisting of toys, notions, and pens, from their place of business, at 303 Market street, Philadelphia, with the intent to hinder, delay, and defraud their creditors."

This is definite enough to advise the bankrupts clearly what they may expect to meet, and, if they receive information of that quality, they are treated as fairly as the bankrupt act requires. As it seems to me, to compel nicety of pleading in specifications of objections to a discharge is more likely to lead to the escape of dishonest men from their liabilities, than to protect honest debtors from the spiteful attack of disappointed creditors.

The clerk is directed to send the second specification to the referee for investigation and report.

KELLY v. GRAND CIRCLE, WOMEN OF WOODCRAFT.

(Circuit Court, D. Washington, E. D. May 2, 1904.)

No. 1,131.

1. FEDERAL COURTS—REMOVAL OF CAUSE—SPECIAL PROCEEDINGS—MANDAMUS.
A proceeding for mandamus under 2 Ballinger's Ann. Codes & St. § 5765, authorizing such proceedings to be commenced by the filing of a motion supported by affidavits, and authorizing the assessment of damages and costs when a judgment is given in favor of the applicant, together with the issuance of a peremptory writ, is a special proceeding, and not a suit "of a civil nature at common law or in equity," and, not being ancillary to any other case of which the federal court had acquired jurisdiction, was not removable to such court.

Special proceeding, by motion and affidavit for a writ of mandamus to compel the respondent, a fraternal society, to restore the applicant to membership in the society, and to her alleged rights as holder of a certificate of life insurance, and to pay damages for her wrongful expulsion. Heard on a motion to remand the case to the state court in which it was commenced. Motion granted.

S. S. Bassett, for applicant.

Denton M. Crow and A. D. Stillman, for respondent.

HANFORD, District Judge. This case was commenced in the superior court of the state of Washington for Spokane county by filing a motion, supported by an affidavit, for a writ of mandate, to redress alleged wrongs by compelling the respondent, which is a fraternal society, to restore the relator to her rights as a member of the society and holder of a certificate of life insurance, and to pay her $11,000 as compensation for injuries alleged to have been suffered in consequence of an illegal and unjustifiable attempt to exclude her from the society, and forfeit her rights as holder of said certificate. The procedure by which the case was initiated is the procedure provided by the Code of Washington for mandamus cases, and the relief prayed for, including the recovery of damages, is sought through and by means of a writ of mandate. The respondent caused the case to be removed from the state court in which it was commenced into this court, and now resists a motion to remand on the ground that there is included in the case an action to recover damages.

The case is not an action for damages in any form of action known to the common law, and it lacks the requisites as to pleadings and jurisdictional process prescribed by the Code for the commencement of a civil action. Provision is made in the chapter of the Code relating to mandamus proceedings for assessing damages and costs when a judgment is given in favor of the applicant, and in such cases a peremptory writ must issue without delay. 2 Ballinger's Ann. Codes & St. § 5765; Pierce's Code, § 1419. Under this statute the right to recover damages is made dependent upon a right to have a peremptory writ of mandamus; hence a case commenced as a special proceeding cannot be converted into an ordinary civil action to recover

¶ 1. See Removal of Causes, vol. 42, Cent. Dig. § 16.

damages by repleading, and severance of the demand for damages from the application for a writ of mandamus. The case is not ancillary to any other case of which this court has acquired jurisdiction, but is an original independent case, not cognizable in this court, because it is not a suit of a civil nature at common law or in equity, and a writ of mandamus is not necessary to the exercise of the jurisdiction of this court. 18 Encyc. Pl. & Pr. 171; Bath County v. Amy, 13 Wall. 244–251, 20 L. Ed. 539; In re Vintschger (C. C.) 50 Fed. 459; Gares v. Building Association (C. C.) 55 Fed. 209; Indiana ex rel. City of Muncie v. Railway Company (C. C.) 85 Fed. 1; Hair v. Burnell (C. C.) 106 Fed. 280.

Motion to remand granted

MASON v. CONNORS et al.

(Circuit Court, D. Vermont. April 21, 1904.)

1. PROCESS—SERVICE ON NONRESIDENT—VERMONT STATUTE.
   The statutes of Vermont do not authorize service of summons on nonresident defendants by leaving copies thereof with a codefendant who is served within the state, where there is no attachment of property or credits.

2. SAME—NONRESIDENT TEMPORARILY IN STATE.
   Under the laws of Vermont, personal service of summons on a defendant within the state gives the court jurisdiction to render a personal judgment against him, although he is a nonresident, and was only temporarily within the state, unless his presence there was for a purpose which rendered him privileged.

3. PARTIES—ACTION AGAINST PARTNERS—SERVICE ON SINGLE DEFENDANT.
   The fact that a summons describes the defendants named therein as "partners" will not prevent the action from proceeding against one, who alone was served, where the declaration does not show a joint cause of action.

At Law. On plea to jurisdiction.

Rufus E. Brown and R. W. Taft, for plaintiff.
Edmund C. Mower and Cassius R. Peck, for defendants.

WHEELER, District Judge. The plaintiff, of Burlington, Vt., took out a writ of summons and attachment in an action of assumpsit against "E. F. Connors, D. E. Connors, and T. H. Connors, doing business, under the firm name and style of Connors Bros., at Newport," Vt., demanding damages in $5,000, summoning the Pauly Jail Building Company, a corporation of Missouri, trustee, and returnable to Chittenden county court of the state. The sheriff served the writ at Newport on the second vice president and general eastern manager of the trustee, and by "giving J. H. Connors one of the defendants within named, a true and attested copy of the original writ with my return thereon endorsed," and by leaving with John H. Connors, "for E. F. Connors and D. E. Connors each who reside without this State and have no known agent or attorney within this State upon whom to

¶ 2. See Process, vol. 40, Cent. Dig. § 70.

make service thereon, true and attested copies of this original writ with my return hereon thereon endorsed for said defendants."

The defendants, citizens of Massachusetts, appeared specially to plead to the jurisdiction, removed the cause to this court, and here John H. Connors specially pleads to the jurisdiction of the state court, and says that he is not and never has been resident of the state of Vermont, and has no authorized agent resident there; that the trustee never had a place of business, or office, or agent resident there, but is now, and has for more than five years been, in Boston, in the state of Massachusetts; that no attachment was made of the defendants' property there, nor any service of copies made on the trustee for either of the defendants; and "that said John H. Connors was in the said state of Vermont temporarily, and for the special purpose of superintending the building of a courthouse, customhouse, and postoffice for the United States at said Newport, with the intention of returning to his domicile and residence in said Boston, in said state of Massachusetts, as soon as said superintendence was ended"; wherefore he moves the court to abate the writ, dismiss the action, allow the defendants their costs, and "make such other orders and judgments as the circumstances require." The trustee has been discharged by the plaintiff, and no service has, according to the face of the proceedings, been made, otherwise than as stated, and the question of jurisdiction has been heard upon them.

The John H. Connors appearing and filing this plea submits himself as, and is taken to be, the J. H. Connors mentioned in the sheriff's return, and the same person named as D. H. Connors in the writ, and he is to be so considered. The difference in initials may be a clerical mistake in making the copies entered in this court.

In this state, when suit is commenced against a nonresident defendant by trustee process, constructive service may be made upon the defendant by copy left with the trustee for the defendant (V. S. 1319), and if the trustee is discharged such service fails (Id. 1321). In this case, there having been no service of copies on the trustee for the defendants, and, if there had been, the trustee being discharged, there is nothing in that behalf to affect the defendants as parties. When personal property of a nonresident is attached, substituted service may be made by copy left with a known agent or attorney, and, for want thereof, at the place of the attachment. Id. 1109. But here was no such attachment or service, and there was no service upon Edward F. or Dennis E. Connors but by leaving a copy for each with John H. Such leaving of a copy with one defendant for another, without any attachment of property, or credits as a basis for it, is not any mode of service provided for by the laws of the state, or known to exist under them. There was nothing resembling legal service upon those defendants, and they had nothing to do to avoid becoming parties but to keep away. As their appearance was limited to objecting to the jurisdiction, it did not make them parties for any other purpose. They cannot be held, and the suit must be dismissed as to them.

The writ required the sheriff to attach the goods, chattels, or estate of the defendants to the value of $5,000, and then notify thereof according to law, and also to notify them to appear before the court,

and to cause their appearance to be entered with the clerk, on or before a day named, to answer to the plaintiff in a plea of the case set forth by the common counts in assumpsit. This notification, apart from the attachment, was a summons, and the writ in that respect was a writ of summons. The law of the state provides (V. S. 1095): "A writ of summons shall be served on the defendant by delivering him a true and attested copy of the writ with the officer's return thereon, or," etc. This writ of summons appears to have been exactly served upon the defendant John H. Connors by delivering to him a true and attested copy of the writ, with the return thereon, according to the statute, within the jurisdiction. This made him a party, liable to any personal judgment that could be rendered in the action, without reference to any attachment, whether a resident of the state or not, unless he had some personal privilege from being sued that he could avail himself of. The difference between making a defendant a party liable to a personal judgment by direct service upon him, and making his property within the jurisdiction liable by constructive service, was well shown by Judge Peck in Price v. Hickok, 39 Vt. 292, and by Mr. Justice Field in Pennoyer v. Neff, 95 U. S. 714, 24 L. Ed. 565. As to such personal judgments, not residence, but personal service on the defendant within the jurisdiction only, is required. There are privileges from suit even, on coming into a jurisdiction for some purposes (Bridges v. Sheldon (C. C.) 18 Blatchf. 507, 7 Fed. 17, but coming for superintendence of a public work does not appear to be one of them. That employment was merely his voluntary private business which took him, but did not compel him, to go there. As the case stands, the defendant John H. Connors appears to have been well made a party to the suit, liable to such personal judgment, if any, as the plaintiff may recover therein against him alone.

The writ described the defendants as partners, but the declaration does not set up any joint liability. Whether there may be question about the several liability of this defendant upon any cause of action on which recovery may be sought is not now material. The only questions considered relate to the right of the plaintiff to proceed to trial upon such cause of action as he may claim to have against this defendant, and upon the views stated he appears to have that right.

Plea of John H. Connors to the jurisdiction overruled, and other defendants dismissed.

UNITED STATES v. CUNNINGHAM et al.

(District Court, D. Oregon. April 21, 1904.)

No. 4,741.

1. UNITED STATES—CONSPIRACY TO DEFRAUD—PUBLIC LANDS—FRAUDULENT ENTRIES.

Where an indictment charged that defendants did unlawfully conspire together to defraud the United States out of a portion of its public lands on homestead entry, etc., such allegation included all proceedings as a whole necessary to complete the transfer of the title.

2. SAME—PRESUMPTIONS.
It would be implied from such allegation that the affidavits and proofs were such as were required by law to entitle the entryman to a patent, and that such affidavits and proof were false.

3. SAME—INCONSISTENT ALLEGATIONS.
An allegation in an indictment that defendants did unlawfully conspire to defraud the United States out of a portion of its public land, by means "of procuring persons" to make false and fraudulent entries on such land, was not inconsistent with a further allegation as to the overt acts charged, showing that the false proofs and entries were made by defendants themselves, and not by others procured by them.

On Demurrer to the Indictment.

John H. Hall, U. S. Atty.
John J. Balleray and J. H. Raley, for defendants.

BELLINGER, District Judge. The demurrer is overruled, upon the authority of the case of Dealy v. United States, 152 U. S. 539, 14 Sup. Ct. 680, 38 L. Ed. 545. In that case the Supreme Court of the United States holds an indictment good that charges that the defendants did falsely, unlawfully, and wickedly conspire to defraud the United States of the title and possession of large tracts of land by means of false, feigned, illegal, and fictitious entries of said lands under the homestead laws of the United States; the said lands being then and there public lands of the United States, open to entry under said homestead laws, etc. That case is identical with the present case in its essential features.

This indictment charges that the defendants did unlawfully conspire together to defraud the United States out of a portion of its public lands, upon homestead entry, etc., by means of procuring persons to make false and fraudulent entries upon such lands, at the United States Land Office at La Grande, Or., by causing and procuring persons fraudulently to make proof of settlement and improvement upon said lands, etc. The allegation that the defendants conspired to defraud the United States by making false and fraudulent entries upon the public lands thereof includes all the proceedings as a whole necessary to complete the transfer of title. It is implied from this allegation that the affidavits and proofs were such as are required by law to entitle the entryman to patent, and that these affidavits and proofs were false.

It is objected to the indictment that the allegation that the defendants intended to carry out their conspiracy by means of procuring persons to make the false and fraudulent entries is negatived by the overt acts charged, which show that the false proofs and entries were not procured to be made by other persons, but were made by the parties to the conspiracy themselves. The overt acts charged to have been done may be innocent in themselves. They may not follow the particular description of what was proposed, and yet be sufficient for the purposes of the indictment. I am of the opinion that the words "procure persons" to make false proofs, etc., are not inconsistent with the making of such proofs by the conspirators themselves.

WILSON v. FREEDLEY.

(Circuit Court, D. Vermont. May 10, 1904.)

1. NEW TRIAL—NEWLY DISCOVERED EVIDENCE.
Where alleged newly discovered evidence with reference to damages, alleged as a ground for a new trial, was in defendant's possession, and might have been produced at the trial except for defendant's oversight, and the evidence offered would not change the verdict to one for defendant, but would at most only mitigate the damages, the motion will be denied.

At Law.

For former opinion, see 125 Fed. 962.

Orion M. Barber, for plaintiff.

Fred M. Butler, for defendant.

WHEELER, District Judge. This is a motion for a new trial for newly discovered evidence filed since a remittitur of damages required to save the verdict on a motion to set it aside as against the evidence, and for excessive damages. Wilson v. Freedley, 125 Fed. 962. The issue to which the alleged newly discovered evidence would be applicable was as to the value of the uncovering of good marble by tunneling into poor marble above it, and making room for channeling machines for taking out the good. The plaintiff was stopped by the defendant December 31, 1901, and the tunneling remained as the plaintiff had left it in the possession of the defendant from that time to the time of the trial, October 13, 14, and 15, 1903. The plaintiff had tunneled above and taken out marble, under his contract, in other parts of the quarry near by, as designated with this part by the defendant.

As to the value of this work, the plaintiff testified that the tunneling above and taking out the marble in the other parts of the quarry showed that of the 45 cents, the contract price per cubic foot of good marble obtained, and from which 10 cents per foot for monthly deficiencies was to be deducted, about 15 cents per foot was required for the tunneling, 15 cents for the quarrying and removing, leaving 15 cents profit; and that he estimated the amount of good marble that would be produced by quarrying this part that had been uncovered at 26,640 cubic feet; that it had cost him $3,996 to uncover.

The defendant has owned these quarries many years, and works them, and was working some of them near by under charge of an experienced superintendent while the plaintiff was working these, and both observed the plaintiff's work. As to this tunneling and uncovering, sometimes called "stripping," the defendant did not question the plaintiff's estimate of the relative cost of stripping and quarrying, or the relative amount of both to profits under the contract, and testified:

"It is incomplete now, and would require at least two or three weeks with a crew and steam drill to complete the stripping."

His superintendent testified:

"Q. What remains to be done to complete that? A. There is some squaring up of the corners, and a little work in blasting on the back side of it."

¶ 1. See New Trial, vol. 37, Cent. Dig. §§ 202, 206, 226.

And on cross-examination:

"Q. You say it would take two men and a drill a week or two to finish the stripping of it? A. Yes, sir. Q. The wages of those men would be about how much? A. Oh, somewhere like $3 or $3.25 per day; that is, the two of them. Q. That would be $3 or $3.25 a day, for two weeks, and the use of a machine? A. Yes, and a boiler, and another man to fire that. Q. And when that was incurred, running a couple of weeks, the stripping would be finished? A. Yes."

The alleged newly discovered evidence is mainly to the effect that there is a horizontal seam, above where the plaintiff tunneled in these quarries, to which he did not go, but left a scale likely to fall, which has come down in one of the other places that he worked, which should have been taken down when the tunneling was done, and which must be taken down now at greater expense to complete the stripping. The scale that has come down in the other part of the quarry appears to have been blasted down since the plaintiff left, and the estimate that he made in comparison with the other tunneling did not include that. The value of the work done under such circumstances must have reference to the contract price. Gilman v. Hall, 11 Vt. 510, 34 Am. Dec. 700; Merrow v. Huntoon, 25 Vt. 9; Kelly v. Bradford, 33 Vt. 35. As this work would have to be done to get the good marble, and was what the defendant wanted done, and the deficiency in fulfilling the contract for 50,000 feet was to be compensated for by deduction from the price monthly, the value of the work under the contract would be what it would cost at the contract price. The plaintiff's estimate of the proportion for profits seems large, but the larger it was the less was left for the work. The quantity and character of the work was in issue in this suit ever after it was brought, and the seam and the scale below it were in evidence there within the defendant's control and view all the while, and within the observation of the defendant and his superintendent when examining into the deficiencies of the work at the corners and back, about which they testified, as well as they have ever been since or are now. The examination since by the defendant, his superintendent, and other witnesses desired is new, but the evidence afforded by the seam and scale are not new. That was at all times within the reach of the defendant, and the diligence used since the trial to procure the affidavits in support of this motion could have produced the witnesses at the trial. The plaintiff is not shown to have known any more about the seam or the necessity of working to it than the defendant, and there is nothing to show that the plaintiff concealed anything in this behalf from the defendant which has since been brought to light. The omission of this evidence may have been an oversight, but, if so, it was the defendant's oversight. To open the case for it would allow, perhaps, better preparation of the defense, but it would be because this part of the defense is better appreciated. In the interest of ending litigation, the law does not allow this to be done. This evidence could not change the verdict to one for the defendant, but only mitigate it. All anticipated profits have been excluded on the motion to set aside the verdict for excessive damages, and this part, with another small item, only remains. It may be large, but it is the jury's finding within their province, and it is better that it stand than that the rules of law applicable should be departed from.

Motion denied.

BRENNAN v. UNITED STATES.

(Circuit Court, D. Massachusetts. April 23, 1904.)

No. 1,342.

1. CUSTOMS DUTIES—CLASSIFICATION—PICKLED LIMES—FRUIT IN BRINE—PICKLES.

"Pickled limes," or "limes in brine," are more specifically provided for under the enumeration of "limes," in Tariff Act July 24, 1897, c. 11, § 1, Schedule G, par. 266, 30 Stat. 172 [U. S. Comp. St. 1901, p. 1651], than under the provision in paragraph 559 of said act, for "fruits in brine, not specially provided for," or that in paragraph 241 of said act, for "all vegetables, prepared or preserved, including pickles and sauces of all kinds, not specially provided for."

Application by the Importers to Review a Decision of the Board of United States General Appraisers.

These proceedings were brought by William F. Brennan to review a decision of the Board of General Appraisers in Re Brennan, G. A. 5,307 (T. D. 24,320), which affirmed the assessment of duty by the collector of customs on certain so-called "pickled limes," or "limes in brine," imported by him at the port of Boston.

See Reiss v. United States (C. C.) 126 Fed. 578.

Hatch, Keener & Clute, for petitioner.

Henry P. Moulton and William H. Garland, for the United States.

HALE, District Judge. This is a petition for review of a decision of the Board of General Appraisers sustaining the action of the collector of customs at Boston in assessing a duty on certain merchandise imported by the petitioner, and entered at Boston January 22, 1902. The collector assessed the duty on the merchandise in question under paragraph 266 of the tariff act of July 24, 1897 (chapter 11, § 1, Schedule G, 30 Stat. 172 [U. S. Comp. St. 1901, p. 1651]), the merchandise having been returned by the appraiser as "limes in brine." Paragraph 266 reads as follows: "Oranges, lemons, limes, grape fruit, shaddocks or pomelos, one cent per pound." The importer protested against the classification and assessment, and claimed that the goods were free of duty, under paragraph 559 of the tariff act of 1897 (chapter 11, § 2, Free List, 30 Stat. 198 [U. S. Comp. St. 1901, p. 1683]). This paragraph reads: "Fruits or berries, green, ripe or dried, and fruits in brine, not specially provided for in this act." The importer claimed further that, if it should be determined that the limes in brine are not free of duty, under paragraph 559, then they should be held classifiable and dutiable at 40 per cent. ad valorem, under paragraph 241 of the tariff act of 1897 (chapter 11, § 1, Schedule G, 30 Stat. 170 [U. S. Comp. St. 1901, p. 1649]), as "pickles." The portion of paragraph 241 under which the importer makes this claim is as follows: "* * * All vegetables, prepared or preserved, including pickles and sauces of all kinds, not specially provided for in this act, and fish paste or sauce, forty per cent. ad valorem." The Board of General Appraisers, on June 13, 1903, overruled the protest of the importer, affirming the collector's assessment of a duty of one cent per pound upon both the fruit and brine. From this

decision of the Board of General Appraisers, the importer has appealed to this court.

The question, then, before the court, is, was the merchandise in question properly classified under paragraph 266 of the tariff act of 1897, or should it have been classified under paragraph 559, as being "fruits in brine," or, if not classified under this last-named paragraph, should it have been classified under paragraph 241 of the same act, as "pickles"? The opinion of the Board of General Appraisers, which now comes before the court, is clearly stated, and puts the decision upon proper grounds. In Roche v. United States (C. C.) 116 Fed. 911, "pickled limes," or "limes in brine," were held to be dutiable under the classification of paragraph 266 of the tariff act of 1897, providing for "oranges, lemons, limes, grape fruit, shaddocks, or pomelos." The Board of Appraisers are correct in saying that the effect of the construction given by the court in the case just cited is to make paragraph 266 provide for limes in brine as fully as if it had read "limes, including limes preserved in brine." This decision was under the clearly recognized principle that articles are not dutiable under general terms where there is a duty imposed under specific language which can be applied to nothing else. Arthur v. Stephani, 96 U. S. 125, 24 L. Ed. 771; Reiche v. Smythe, 13 Wall. 162, 20 L. Ed. 566; Movius v. Arthur, 95 U. S. 144, 24 L. Ed. 420. In Homer v. The Collector, 1 Wall. 486, 17 L. Ed. 688, the object of the suit was to ascertain whether, under the tariff act of 1857 (Act March 3, 1857, c. 98, § 2, 11 Stat. 193), almonds were placed in the category of "dried fruit," upon which a small duty was imposed, the tariff act of 1846 (Act July 30, 1846, c. 74, 9 Stat. 42) having imposed a larger duty upon certain articles enumerated, among which were "almonds." Mr. Justice Nelson, speaking for the Supreme Court, said:

"The argument is that almonds are dried fruit, and hence are provided for in the second section of the act of 1857; and evidence was offered on the trial to show that such was the commercial sense of the term. But this inquiry had nothing to do with the question, and, indeed, it is difficult to see how any such inquiry could take place, except as matter of curiosity and speculation; for certainly such proof could not exist or be found in the sense of commercial usage under any of the tariff acts, as a duty has been imposed on almonds eo nomine almost immemorially, at least since the duty act of 1804 [Act March 27, 1804, c. 57, 2 Stat. 299]."

In Reiche v. Smythe, supra, Mr. Justice Davis said:

"If it be true that it is the duty of the court to ascertain the meaning of the Legislature from the words used in the statute and the subject-matter to which it relates, there is an equal duty to restrict the meaning of general words, whenever it is found necessary to do so, in order to carry out the legislative intention."

The case at bar is clearly within the rule announced by the Supreme Court in the cases to which we have just referred. The specific provision of paragraph 266 of the tariff act of 1897, imposing a duty on "limes" eo nomine, must be held to override the general provision of paragraph 559 of the same act, which admits free of duty "fruits in brine not specially provided for." The merchandise in question upon which the duty was assessed must be held to have been "specially provided for," under the specific provision of paragraph 266; hence the general provision of paragraph 559 cannot apply. Following the same rule, we

must conclude that the merchandise could not have been properly classed as "pickles" under the general provisions of paragraph 241.

In this view of the case it is unnecessary to decide whether a commercial designation making a distinction between "limes" and "limes in brine" has or has not been proved in the record before us. Such proof would be immaterial under the principles of the Supreme Court which we have cited.

A decree, therefore, may be entered that the decision of the Board of General Appraisers is affirmed. Decree of Board of General Appraisers affirmed.

O'CONNELL v. BOSTON HERALD CO.

SAME v. COURIER-CITIZEN CO.

(Circuit Court, D. Massachusetts. March 16, 1904.)

Nos. 1,377, 1,378.

1. LIBEL—PRIVILEGE—EVIDENCE OF CARE.

Under the rule that on a question of privilege with respect to an alleged libelous publication, where there was an inaccuracy, defendant is entitled to show that reasonable care was used, a defendant charged with libel in publishing an inaccurate report of judicial proceedings is entitled to show that the statements published were made from the written opinion of an appellate court, although such opinion was not a part of the record in the cause.

At Law. Actions for libel. On motions for new trial.

Bernard D. O'Connell, pro se.
Melvin O. Adams and Karl Adams, for the Boston Herald Co.
John J. Pickman, for the Courier-Citizen Co.

PUTNAM, Circuit Judge. These are suits against the various companies publishing the newspapers named, growing out of an attempt to report certain judicial proceedings. The part of the publication complained of by the plaintiff is, in one issue of one of the newspapers, the words, "and that he has fraudulently altered the will," and, in the others, the words, "the petitioner had made alterations in it afterwards." The question here is about the propriety of admitting in evidence in behalf of the defendants the opinion rendered in behalf of the Supreme Judicial Court of Massachusetts affirming the verdict of the jury as to certain portions of the alleged will. That opinion is reported in O'Connell v. Dow, 182 Mass. 541, 66 N. E. 788.

The verdict of the jury contained no such finding as is stated in the alleged libels. In some portions of the opinion it does not go beyond the verdict. Other portions, especially at page 545, 182 Mass., page 789, 66 N. E., as the opinion is reported, read alone, might justify the statements in the defendant newspapers to which the plaintiff objects, or, rather, might, under all the circumstances, be held by the court or the jury to justify those statements. It appears by the evidence of the young man who made the report for the newspapers in question that he examined the opinion on file in the office of the official reporter of

the Supreme Judicial Court in Boston, and that he made up his statement from it. It does not appear that he examined the bill of exceptions or the record proper. The plaintiff claims that in making his report he should have limited himself to the proper record of the case or to the bill of exceptions, and should not have examined, or drawn inferences of fact from, the opinion. He contends that the opinion is no part of the record, and that it is not the source from which the true facts of the case are to be drawn. Therefore, he says, inasmuch as there were inaccuracies in the opinion, and as the opinion, in certain portions of it, departed from the findings of the jury as shown by the record, it should not have been admitted for the purpose of protecting the defendants.

There is no doubt of the fact that the opinion is not a part of the record. In that respect the practice of the local courts conforms to the practice of the federal courts. Of course, there are exceptions where the court makes the opinion a part of the record; but in this case it is clear that it was not so made a part. It is also clear that the true source from which is to be derived an exact statement of the facts is the record itself; and therefore the plaintiff claims, as we have said, that the newspapers were not justified in publishing anything which was not shown by it, or in publishing what appeared in the opinion of the court which did not conform to it. If the defendant newspapers had restricted themselves accordingly, it is quite apparent that this particular expression of which the plaintiff complains would not have been published, because the basis of it is found only in the opinion, and no basis for it is found in the record proper.

The plaintiff relies, in reference to this proposition, on the discussion in Burt v. Advertiser, 154 Mass. 238, 28 N. E. 1, 13 L. R. A. 97, but the difficulty is that Burt v. Advertiser was not a case of privilege in the technical sense of the word, while published reports of current judicial proceedings are so privileged. They are so treated by all the authorities. It is not a matter of absolute privilege, like discussions in court, and in Congress, and in the jury room; but a privilege subject to certain limitations. So far as Burt v. Advertiser says anything with reference to cases of privilege, the observations are entirely against the plaintiff, who maintains that a report of public proceedings in a newspaper, to be justified, must be strictly and technically accurate. On the other hand, the Supreme Judicial Court in that particular decision points out at least one class of cases where accuracy is not required, but where all that is required is good faith. However that may be, in a case of privilege like this, we must follow the Circuit Court of Appeals in this circuit in Douglass v. Daisley, 114 Fed. 628, 52 C. C. A. 324, 57 L. R. A. 475, where it is apparent that it meant to hold that, on a question of privilege in connection with a publication, where there is inaccuracy, it is the right of the defendant to show that reasonable care was used, and that the inaccuracy arose notwithstanding it. On the whole question of reasonable care, looking at this also as a practical question, where should a newspaper reporter go for his information as to the history of legal proceedings, and of the nature of the decision in which the proceedings terminated? Probably the most accurate source of information would be a verbal

statement from the judge to the reporter personally. It seems to us that, under the rule of Douglass v. Daisley, if this reporter had taken as the basis of his information an oral statement by the judge, these newspapers could not be held responsible, because the judge, although informally and orally, stated to him the facts and conclusions of law as he understood them, and yet inaccurately. That probably, in the use of due care, would be the most satisfactory way of ascertaining the facts. In our judgment, the next most satisfactory way is to examine the official opinion of the court; and the least satisfactory way would be for a reporter to undertake to go through the record and the bill of exceptions, voluminous, and containing much irrelevant and inconsistent matter, and get out in that way what he should furnish the public. We can see no practical solution of this case, nothing which ought practically to guide us, except to say that, in our view, knowing the difficulty of understanding prolix and complicated legal proceedings, the opinion of the judge, written in behalf of the court, is ordinarily the best source of information for the public, and that, therefore, as it appears that this reporter examined the opinion which was offered in evidence, and the reporter based his statement in the newspapers on that, it was properly admitted in evidence.

In re GIRARD GLAZED KID CO.

(District Court, E. D. Pennsylvania. May 5, 1904.)

No. 1,767.

1. BANKRUPTCY—INVOLUNTARY PROCEEDINGS—QUALIFICATION OF PETITIONER.
   A creditor is not disqualified from filing a petition in bankruptcy against the debtor because of the receipt of a payment more than four months previously, which, if made within that time, would have been preferential, but is not so under Bankr. Act July 1, 1898, c. 541, § 60a, 30 Stat. 562 [U. S. Comp. St. 1901, p. 3445], as amended by Act Feb. 5, 1903, c. 487, § 13, 32 Stat. 799 [U. S. Comp. St. Supp. 1903, p. 416].

2. SAME—REHEARING—GROUNDS.
   A rehearing will not be granted on pretense of reconsidering a case on the merits, but for the real purpose of reviving the petitioner's right of appeal, the time for taking an appeal having expired. If entitled to relief for that purpose, the facts must be shown in the petition.

In Bankruptcy. On certificate from special referee recommending adjudication.

Edward H. Weil and Arthur E. Weil, for petitioner.
Crawford & Loughlin, for bankrupt.

J. B. McPHERSON, District Judge. In the division of certain corporate assets pro rata among the bankrupt's creditors by virtue of the agreement of January 20, 1903, it is clear that Barbara Swartz and all the other creditors, except Clara Illingsworth, received more than their proper share, because the claim of the last-named person had been improperly reduced on the books of the company by the entry of a false credit in the sum of $3,200, and therefore the dividend she ought to have received upon that amount was divided among the other credit-

ors. This improper credit was made or sanctioned by the president of the company, who was Clara Illingsworth's father, and her representative in all her dealings with the company, and by the secretary and treasurer, who was the son of Barbara Swartz, and in like manner her representative. The participation of the president in the transaction is a disputed point, but the question is one of fact, and I see no reason to disagree with the finding of the referee upon this subject. The result has been to prefer Barbara Swartz, among other creditors; and, as she is the single petitioner, the question is presented whether she is so far disqualified from filing a petition that the proceeding must be dismissed. The petition was not filed until October 28, 1903, and, as the last payment to the creditors seems to have been made on March 27th of that year, the preferential payment is now, by the lapse of time, secure from attack. If the payment had been made within four months, I should follow the course adopted by several other district judges, and require the petitioner to surrender her preference under penalty of having the petition dismissed, but, as the facts are, I do not feel at liberty to impose that condition. The bankrupt act itself protects these payments, for it draws an arbitrary line at four months preceding the filing of the petition, and, by declaring payments on one side of that line to be voidable, it necessarily implies that payments on the other side cannot be successfully assailed. In other words, Barbara Swartz is not a "preferred creditor," within the meaning of that phrase as it is used in the bankrpt act, and, this being so, I am unable to see upon what ground I can properly hold her disqualified to file a petition against the corporation. She may be under a moral obligation to repay a certain sum of money to Clara Illingsworth, because she has profited by the act of her son at the other's expense, but she is under no legal obligation to anybody, and she has done no wrong of any kind or degree to the bankrupt or to any other creditor except to Clara Illingsworth. I can discover no reason for the application of the doctrine of "clean hands," and no other ground, legal or equitable, why the petitioner should not be permitted to begin and carry on this proceeding.

The exceptions to the report of the referee are dismissed, and the clerk is directed to enter an order adjudging the company to be a bankrupt.

Petition for Rehearing.

(May 19, 1904.)

This petition is upon its face an ordinary application for a rehearing on the merits, and presents no reason that has not already been fully considered. Its real purpose, however, is to regain the right of appeal, which has been lost by a failure to act within the 10 days prescribed by the statute. Judge Lowell disposed of a similar application in Re Wright, 3 Am. Bankr. R. 184, 96 Fed. 820, and I fully agree with what he there said:

"The court is satisfied with its original decision upon the merits of the case, and will not grant a rehearing in order to give those merits further consideration. To grant a rehearing upon the pretense of reconsidering the merits of the case, but really to revive the petitioner's right of appeal, would be the employment of an unworthy fiction. The record should show the true purpose for which the rehearing was sought and granted."

This petition, therefore, must be refused, as the court is satisfied with its previous decision on the merits, and does not desire to hear further argument thereon. If a petition is presented, however, setting forth the reasons for the failure to appeal in due season, their sufficiency will be considered, and it can then be determined properly and directly whether the petitioner is entitled to relief.

THE LYNDHURST.

(District Court, S. D. New York. May 4, 1904.)

1. TOWAGE—FASTENING OF TOWLINE—DUTY OF TUG.
   It is the duty of a tug taking in tow a canal boat which has but one man on board to see that the towline is sufficient and securely fastened, and it cannot escape liability for damages arising from the insufficient securing of the line on the tow by delegating such duty to the master of the boat.

2. SAME—LIABILITY OF TUG FOR COLLISION OF TOW WITH VESSEL AT WHARF.
   A tug *held* liable for injury to her tow from collision with a moored vessel caused by the towing line slipping off the cleat on the tow and permitting her to be carried against the other vessel, on the ground that the line was either not properly fastened or became loose from the effect of a prior collision due to the negligent navigation of the tug.

In Admiralty. Suit against tug for injury to tow from collision.

James J. Macklin, for libellant.

Carpenter, Park & Symmers, for claimant.

ADAMS, District Judge. This action was brought by the libellant John D. Myers, the owner of the canal boat Phillip Rafferty, to recover from the tug Lyndhurst, the damages suffered by him on the 13th of March, 1897, through injury to the Rafferty, caused by a collision in the North River, with a carfloat moored to the wharf at 12th Street. The boat had been lying stern out, light, outside of two other boats fastened on the upper side of 13th Street and was taken in tow there, about 7 o'clock in the morning, by the tug, to be towed to Edgewater, New Jersey, for a load of coal, on a hawser, furnished by the tug and leading from her stern. The loop of the hawser was put by the master of the boat over her stern cleat, under directions from the tug, but it shortly afterwards slipped off, letting the boat go adrift and come in contact with the float, causing the damage complained of. The tide was ebb and the wind of some force from the north-west.

The tug's liability turns principally upon the question whether she was negligent in making the boat fast. The libellant contends that the hawser was frozen and stiff and it slipped off for that reason. Also that the tug was in fault in several other particulars, among them, that the tug failed to see that the tow was properly fast and permitted her to come in violent collision with a lighter. The claimant contends that the accident was wholly produced by the negligence of the master of the boat in that he did not properly fasten the hawser to his cleat.

The weight of the testimony seems to show that the hawser was not frozen. The weather had been cold but not freezing, although by

the Weather Records the thermometer got down to 30 degrees about 8 o'clock. Prior to that hour it had ranged from 45 degrees at 1 o'clock A. M. to 31 at 7 o'clock A. M., and for the several prior days, the mean temperature was not under 45. I do not see, in view of the evidence, how the theory that the hawser was frozen can be sustained. Nevertheless, the tug apparently did not perform her duty. It was said in The Quickstep, 9 Wall. 665, 671, 19 L. Ed. 767:

"It was the duty of the tug, as the captains of the canal-boats had no voice in making up the tow, to see that it was properly constructed, and that the lines were sufficient and securely fastened. This was an equal duty, whether she furnished the lines to the boats, or the boats to her. In the nature of the employment, her officers could tell better than the men on the boats what sort of a line was required to secure the boats together, and to keep them in their positions. If she failed in this duty she was guilty of a maritime fault."

The claimant insists here that the tug had a right to assume that the master of the boat had securely fastened the hawser and relies upon the case of Pederson v. John D. Spreckles & Brothers Company, 87 Fed. 938, 31 C. C. A. 308, to sustain his contention. That was an action of negligence brought by Pederson, who was the mate of a schooner, for injuries caused to him by the breaking of a chock upon her, which he had selected to run the towing line through. The schooner was in charge of her own officers and crew. It was held that the bitts upon which the line was placed, and which required the use of the broken chock, were the wrong ones, and the libellant could not recover. The general principle which governs these actions was recognized and the case in hand distinguished from ones of that character. It was said (page 943, 87 Fed., page 313, 31 C. C. A.):

"This testimony, instead of showing that the tug was towing at an excessive speed, tends to show that the line, after passing through the breast chock, was fastened to the wrong bitt, and that the negligence was upon the part of the officers and crew of the schooner, instead of upon the part of the tug. It is shown by the testimony that the tug was fully adequate to the work. It was managed with reasonable care, judgment, and skill. It performed its duty in an ordinary, careful, and prudent manner, and did its entire duty, unless, as is claimed by appellant, it was its duty to see that the line was properly placed and fastened on the schooner before it started to tow. A vast number of authorities are cited by the appellant to the effect that the tug dominates, guides, and directs; that the tow keeps in her wake, and conforms to her directions; that the tug must furnish the motive power, and direct the location of the tow; how she shall be lashed; with what fastening she shall be secured; to see that her tow is properly made up, and secured with lines of proper strength. Many of these cases are in relation to the duties of the tug in the towing of canal boats and barges, which have no life, voice, or control in making up the tow; and in all these cases it is held that it is the duty of the tug to see that the lines of the tow are properly, sufficiently, and securely fastened, and that if the tug fails in this duty, she is guilty of a maritime fault. But such cases have no application to a case like this, where the schooner had its own officers and crew on board, and, in pursuance of the custom in this respect, took full charge, management, and control of these matters. The distinction between the cases is too manifest to require extended discussion, and is clearly illustrated in the decision of the court in The Quickstep, 9 Wall. 665, 670 [19 L. Ed. 767], which is one of the leading cases relied upon by the appellant. In the course of the opinion the court said:

'If the tug, in constructing the tow, used the lines furnished by the different boats, yet, as each boat was independent of the other, no responsibility can attach to either for the breaking of the line which she did not provide, and had nothing to do with making fast.'

The testimony shows, without conflict, that it is the custom, in all cases where the tow has its own officers and crew on board and in charge, for the officers of the vessel to arrange all the preliminary matters, such as placing and making fast the towline; that such matters were within the duty of the appellant to perform; and that he did in fact perform that duty."

One man only formed the crew of this boat and it was evidently the duty of the tug to see that the hawser was properly made fast. She was not relieved from her obligation by the turning of the duty over to the master of the barge, who, it would seem, became the agent of the tug in handling the hawser. The fact that the loop held in the beginning of the towing, and only slipped off after the tug had permitted the boat's starboard side to come, with some violence, in contact with a lighter, lying near the foot of Little 12th Street, the next street below, tends to show that the hawser was sufficiently made fast in the beginning and came off in consequence of this collision. When it came free, so that it had no further towing power, the boat was about 50 feet clear of the wharf and had been towed with the hawser probably about 150 feet. One of the claimant's witnesses, a boatman, testified that the loop was put over the cleat "all right." I conclude that the accident was either due to the tug's omitting to see that the loop of the hawser was carefully put over the cleat—The Sweepstakes, 23 Fed. Cas. 541—or to its being shaken loose by collision with the lighter, which was due to negligent towing.

Decree for the libellant, with an order of reference.

SHALLUS v. UNITED STATES.

(Circuit Court, D. Maryland. December 14, 1903.)

1. CUSTOMS DUTIES—CLASSIFICATION—HAIR SWEEPINGS—SUBSTANCE FOR MANURE—WASTE.

Certain waste of hog hair, consisting of sweepings in factories, which is used solely in the manufacture of artificial fertilizers, although not suitable in its imported condition for use as fertilizer, is subject to classification under Tariff Act July 24, 1897, c. 11, § 2, Free List, par. 569, 30 Stat. 198 [U. S. Comp. St. 1901, p. 1684], providing for "substances used only for manure," and not as "waste, not specially provided for," under paragraph 463 of said act (section 1, Schedule N, 30 Stat. 194 [U. S. Comp. St. 1901, p. 1679]).

Appeal by the Importer from a Decision of the Board of United States General Appraisers.

Note Magone v. Heller, 150 U. S. 70, 14 Sup. Ct. 18, 37 L. Ed. 1001.

T. Spence Creney, for appellant.

John C. Rose, for the United States.

MORRIS, District Judge (orally). This is an appeal by Frank H. Shallus, the importer, from a decision of the Board of General Appraisers dated November 19, 1902, overruling the protest of the importer, and affirming the action of the collector. The merchandise in question is principally pig or hog hair, and is the accumulation of sweepings in mills at which curled hair is manufactured, and in some cases of

the sweepings of brush factories. It contains a large per cent. of dust, scruff, and some particles of the skin of the hog or other animal from which the hair was taken. It was assessed for duty at the rate of 10 per centum ad valorem under paragraph No. 463 of the tariff act of July 24, 1897 (chapter 11, § 1, Schedule N, 30 Stat. 194 [U. S. Comp. St. 1901, p. 1679]), as "waste, not specially provided for." It is claimed by the importer to be free of duty under paragraph No. 569 of said act (section 2, Free List, 30 Stat. 198 [U. S. Comp. St. 1901, p. 1684]), which paragraph is one of the subparagraphs in the free list, and reads as follows: "569. Guano, manures, and all other substances used only for manure."

There was no question here, as there was none before the Board of Appraisers, that the article would be a valuable ingredient for the manufacture of artificial fertilizers. The Board of General Appraisers, however, found that, in order that such merchandise should be held to be within the provisions of paragraph No. 569, it was necessary that the importer show that the sole use of it was as such ingredient. At the hearing before the board the importer offered no evidence, and consequently the action of the collector was affirmed. In this court, the importer, availing himself of his right under the statutes, has taken evidence, and has shown without contradiction that the importation is valueless for any other purpose except as an ingredient for an artificial fertilizer. The government, however, contends that the language of paragraph 569, properly construed, does not include substances which by themselves cannot be used for manures, but is limited to those substances which can, in the state in which they are imported, be used only as manure. With this contention I do not concur. I am of opinion that the framers of the law, in providing as they did in section 569 that the articles included under that section should be admitted free of duty, wished to encourage agriculture, or at all events were desirous that no unnecessary burden should be placed upon it. It would therefore seem that the section should be so construed as to give effect to its obvious purpose. Where, as in this case, the testimony conclusively establishes that the article brought into the country has no other use or value except that of forming, together with other things, a manure, it seems to me to be within both the spirit and letter of paragraph 569. The decision of the Board of General Appraisers should therefore be reversed, and the protest of the importer sustained.

THE IDLEWILD.

(District Court, S. D. New York. May 5, 1904.)

1. COLLISION—PASSING TOW AND ANCHORED YACHT—VESSEL ANCHORED OUTSIDE ANCHORAGE GROUNDS.

   A yacht *held* in fault for a collision with a passing scow in tow while she was at anchor in New York Bay, in the night, on the ground that she was anchored outside the anchorage grounds without necessity, and the tug having the scow in tow also *held* in fault for failure to see and avoid the yacht.

In Admiralty. Suit for collision.

James J. Macklin, for libellant.
John F. Foley, for claimant.

ADAMS, District Judge. This action arose out of a collision which occurred in the morning of October 4th, 1899, about 12:15 o'clock, between the libellant's schooner yacht Coronet and a scow in tow of the tug Idlewild, by which the yacht was considerably injured. The yacht was at anchor off Quarantine, Staten Island, and the tug proceeding to sea with a tow of four scows, on a hawser. The third one of the scows did the injury complained of. The tide was ebb.

The testimony makes it clear that the yacht had anchored, without sufficient excuse, outside of the anchorage limits. The wind was light but there would have been no great difficulty in getting out of the channel. She was, therefore, in fault. The Ailsa (D. C.) 76 Fed. 868, affirmed 86 Fed. 475, 30 C. C. A. 203; The James D. Leary (D. C.) 110 Fed. 685, affirmed 113 Fed. 1019, 51 C. C. A. 620.

There is a controversy as to whether the tug was also in fault. I conclude that she was, because the yacht, though considerably outside of the anchorage limits, was fully lighted and easily to be seen by a careful observer. She was avoided by a number of other tows going to sea on the same tide.

The mate of the tug, who was in charge of her navigation at the time, testified that a lookout was stationed forward but the person was not produced and if he were there, he made no reports and was evidently not attending to his duties. The mate did not see the yacht's lights until after the collision, when he looked back in consequence of it and then saw the anchor light. Before reaching the yacht he had been looking back to watch his tow. He claims that he could not have seen the yacht's lights before he did, because of the electric lights of a large steamer, but it is not sufficiently explained how such lights could have interfered, as the nearest steamer was several hundred feet to the westward and somewhat below the yacht. The tug should also be found in fault. The Steamboat New York, etc., et al. v. Rae, etc., 18 How. 223, 15 L. Ed. 359.

Decree for the libellant for half damages.

In re EASTERN COMMISSION & IMPORTING CO.

(District Court, D. Massachusetts. May 6, 1904.)

No. 8,705.

1. BANKRUPTCY—PROCEEDINGS AGAINST DEBTOR—STAY.

Where within four months prior to the filing of an involuntary bankruptcy petition a creditor of the alleged bankrupt had brought suit in a state court on a debt dischargeable in bankruptcy against the bankrupt, and threatened to obtain an attachment, and, in order to prevent the attachment, the bankrupt gave bond with surety, and to protect the surety had pledged its property, the bankruptcy court would restrain the creditor from proceeding therewith until after adjudication.

In Bankruptcy.

Robert Homans, receiver, pro se.
Elder & Whitman, for creditor.

LOWELL, District Judge. Pending adjudication upon an involuntary petition, a receiver appointed by the court of bankruptcy filed a petition alleging as follows: That within four months a creditor had brought suit in the state court against the respondent in bankruptcy, and had obtained or threatened to obtain an attachment upon its property; that, in order to prevent the execution of the threat or to dissolve the attachment, the debtor had given a bond, with surety, and to protect the surety had pledged its property to him in order to secure him from loss; that the suit was based on a debt dischargeable in bankruptcy; that, if the creditor's suit was allowed to proceed, execution would be levied either (1) upon the debtor's goods, or (2) upon the surety, who, upon payment of the debt and satisfaction of the bond, would realize on his pledge, and so in either case the estate to be administered by the court of bankruptcy would be diminished; that there was now no one with clear right to defend the suit. It was held by the Supreme Court in Jaquith v. Rowley, 188 U. S. 620, 23 Sup. Ct. 369, 47 L. Ed. 620, affirming In re Franklin (D. C.) 106 Fed. 666, that this court could not enjoin one who had already recovered judgment against the bankrupt from taking out execution against the surety on a bail bond given to release the bankrupt, where the surety held in pledge the bankrupt's property to indemnify him for his liability on the bail bond. So here, if the creditor had recovered judgment, and were now seeking to enforce his bond against the surety, this court could not stay him. Again, if, after adjudication, he were seeking to proceed with his suit in order to obtain a special judgment, as in Rosenthal v. Nove, 175 Mass. 559, 56 N. E. 884, 78 Am. St. Rep. 512, this court might refuse to exercise its discretion to stay him. Prior to adjudication, however, the statutory stay is peremptory. It is in the interest not only of the bankrupt, but of his estate, that there should be some one to defend the suit. If the creditor gets judgment, he will be able not only to enforce the bond, but to prove the amount of his judgment against the estate in bankruptcy, and other creditors are interested that the judgment shall be as small as possible. They have now no trustee to represent them. While it may be possible to authorize the receiver to undertake the defense of the suit, yet for obvious reasons this is not ordinarily desirable. An injunction will issue restraining the creditor from suit until after adjudication. If further stay is deemed necessary by any party, it must be applied for.

WESTERN UNION TELEGRAPH CO. v. PENNSYLVANIA CO.

(Circuit Court of Appeals, Third Circuit. May 2, 1904.)

No. 24.

1. CONTRACTS—DURATION—PRESUMPTION.

If a contract is not revocable at the will of either party, or otherwise limited as to its duration, by its express terms, or by the inherent nature of the contract itself with reference to its subject-matter or its parties, it is presumably intended to be permanent and perpetual in the obligation it imposes.

2. SAME—RIGHT TO TERMINATE AT WILL—AGREEMENT FOR CONSTRUCTION AND OPERATION OF TELEGRAPH LINE.

A contract between a railroad company and a telegraph company provided for the construction, maintenance, and operation of a telegraph line along the right of way of the railroad company, which was to furnish and place the poles and cross-arms, while the telegraph company was to furnish the wire, insulation, and instruments, and operate the line, sending messages relating to the railroad business free, and having itself the commercial business. The railroad company was given the right to string a wire for its own business, and the telegraph company an additional wire, and provision was also made for the repair and renewal of the line. The line was built and operated under the agreement for many years, during which time it became an important part of the general system of the telegraph company, which, by mutual agreement, largely increased the number of its wires, and parol modifications were also made as to the expense of repairs and reconstruction. *Held*, that the relations created between the parties by the contract were not merely personal, as in cases of partnership, master and servant, and the like, but that rights of property and the user thereof, in the nature of an easement, were conferred on the telegraph company, and that, in the absence of any express provision therefor, no right in the railroad company to determine or revoke the same at will could be inferred from the silence of the contract in that respect, or from its terms, purpose, or inherent nature.

3. SAME—VALIDITY—INVALID PROVISION.

The fact that such contract contained a provision that the railroad company should not permit any other telegraph company or individual to build or operate a line of telegraph along its road, which was valid at the time the contract was made, but was rendered invalid by act of Congress of 1866, giving any telegraph company accepting its provisions the right to construct its line along any post road, does not affect the validity of other provisions for which it did not constitute the main consideration, nor the right to a specific enforcement of such provisions.

4. SPECIFIC PERFORMANCE—CONTRACTS ENFORCEABLE—NATURE OF RELIEF REQUIRED.

A court of equity is not precluded from decreeing the specific performance of a contract because it is continuous in its operation, where the principal, if not the only, relief required is injunctive, to preserve the status quo which has existed between the parties for nearly 50 years, and to prevent the threatened termination of the contract by the defendant.

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

For opinion below, see 125 Fed. 67.

¶ 4. Enforcement of contracts requiring continuous acts, see note to Berlinger Gramaphone Co. v. Seaman, 49 C. C. A. 103.

Rush Taggart, for appellant.
George B. Gordon, for appellee.

Before ACHESON, DALLAS, and GRAY, Circuit Judges.

GRAY, Circuit Judge. This is an appeal from the decree of the Circuit Court for the Western District of Pennsylvania, entered upon a demurrer to an amended bill of complaint filed by the complainant below, the appellant here. The decree sustained the demurrer, and dismissed the amended bill of the complainant.

The suit is founded upon a written contract, entered into in the year 1856, and certain parol modifications thereof set forth in the bill, between the Western Union Telegraph Company and the Cleveland & Pittsburg Railway Company. The written contract filed as an exhibit and made part of the bill, is as follows:

"An agreement made and entered into this ——— day of October, 1856, between the Western Union Telegraph Company, of the first part, and the Cleveland & Pittsburg Railroad Company, of the second part, witnesseth as follows:

1st. The said Railroad Company is to put up, as soon as the work can be reasonably done, along the line of its road, from Cleveland to Rochester via Alliance and Wellsville, and also from Wellsville to Bellaire, a line of telegraph poles or posts of good timber, stripped of the bark, and permanently and securely set in the ground, thirty to the mile, not less than eighteen feet high above the ground, and not less than nine inches in diameter on an average, at the surface of the ground when set, with cross arms suitable for two or more wires, well and securely fastened to the poles.

2nd. The said Telegraph Company is to furnish wire, insulators, instruments, patents and everything except the posts or poles and cross arms, and complete said line with one wire and extend it upon the poles now up, or upon other poles equally good, along the Ohio & Pennsylvania Railroad, from Rochester to Pittsburg, and put said line in operation as soon after the poles are set as is reasonably practicable, and open offices at Cleveland, Hudson, Ravenna, Alliance, Wellsville, Rochester, Pittsburg, Steubenville and Wheeling, and such other places on the line as the said Railroad Company may designate and furnish instruments for; and the said Railroad Company is to pay to the said Telegraph Company the loss, if any, at any office on said line where the expenses amount to more than the receipts of the office for said line; and the said Telegraph Company is to send, free of charge, over said line, during ordinary business hours, all messages strictly pertaining to the business of said Railroad, including the ordinary family communications of its officers and agents, that may be required by any of the officers or agents, giving preference to messages of emergency or pertaining to accidents.

3d. The said Railroad Company is to pay to the said Telegraph Company, as soon as the said line is completed and in working order, thirty dollars a mile for the length of the wire, including that from Rochester to Pittsburg, and also to pass or convey, free of charge, over its said road all men and materials used or employed in building and operating said line.

4th. The said Railroad Company is to have the right at any time to put upon said posts, or cross-arms, a telegraph wire and work the same for its exclusive use, but not to send any messages thereon other than those pertaining to the business of the said railroad and the ordinary family communications of its officers and agents, at or from points where the said Telegraph Company may or shall have an office.

5th. The said Telegraph Company is also to have the right to string another wire for its own use upon said posts or poles at any part thereof.

6th. When the wire of the said Railroad Company, as provided for in article fourth, is down or out of order, the said Telegraph Company is to do the telegraph business of the said Railroad Company upon its wire or wires,

or any parallel wire it has or may have, and when the wire or wires of the said Telegraph Company is, or are, down or out of order it is to have the right to send its business free over the wire of the said Railroad Company, but not to interfere with or delay the telegraph business of the said Railroad Company.

7th. After the telegraph line is completed with one or more wires, the same is to be kept in repair by the said Railroad Company, and maintained in first rate working order, so far as practicable. But the said Telegraph Company is to furnish, or pay, to the said Railroad Company, the cost of the wires and insulators used and necessary in maintaining the wire or wires of the said Telegraph Company in good working order.

8th. The said Railroad Company is not to allow any other Telegraph Company or individual to build or operate a line of telegraph on or along its said railroad, or any part thereof.

9th. The said Railroad Company is not to be liable to the said Telegraph Company, or to any of the employés thereof, for any accidents or injuries to the said employés while traveling on the cars, free of charge, under this contract. Nor is the said Telegraph Company to be liable to the said Railroad Company for any damage or mistake in the transmission or delivery of messages.

In witness whereof," etc. (Executed by the seals of the companies and the hands of their presidents respectively.)

"It is understood that if the poles between Steubenville and Bellaire will answer for that line, new poles will not be required during the life of those poles. Also, that No. 9, good wire, shall be used, and that the poles shall be of sufficient size. Cleveland & Pittsburg Railroad Company,

[Seal. C. & P. R. R. Co.]
[Signed] By C. W. Rockwell, President.
[L. S.] [Signed] E. Rockwell, Secretary."

"At a stated meeting of the Board of Directors of the Western Union Telegraph Company, held at the office of the Secretary, in the City of Rochester, on the 21st day of January, 1857, the following preamble and resolution were passed:

'Whereas, In the month of October, last past, this Company on its part, executed a contract between this Company, of the first part, and the Cleveland & Pittsburg Railroad Company, of the second part, providing among other things for the construction of a telegraph line along the route of the said railroad.

'And Whereas, the said Railroad Company has executed the said contract with the following supplementary clause, and in the following form, that is to say: "It is understood that if the poles between Steubenville and Bellaire will answer for the line, new poles will not be required during the life of these poles. Also, that No. 9, good wire, shall be used, and that the poles shall be of sufficient size."'

The Cleveland & Pittsburg Railroad Company,
[Signed] By C. W. Rockwell, Prest.
[L. S.] [Signed] E. Rockwell, Secy."

"Resolved, That this Company assent and agree to said supplementary clause, and that the President and Secretary, on behalf of this Company, execute any paper necessary to verify the said assent to said clause."

"This certifies that the foregoing is a true extract from the records of the Western Union Telegraph Company.

June 22, 1857. [Signed] H. Sibley,
Prest. of the W. U. Tel. Co.
[Signed] I. R. Elwood,
[Seal W. U. T. Co.] Secy. of the W. U. Tel. Co."

The material allegations of the bill are as follows:

In paragraphs 2 and 3, the complainant sets forth that the "Western Union Telegraph Company," the complainant, is a telegraph company and a corporation duly organized under the laws of the state

of New York, and that the "Pennsylvania Company," the defendant, is a corporation organized under the laws of the state of Pennsylvania, and in possession of and operating a line of railroad known as the "Cleveland & Pittsburg Railroad," extending from the town of Rochester, in the state of Pennsylvania, through the states of Pennsylvania and Ohio to the city of Cleveland; also from the mouth of Yellow creek, near Wellsville in the state of Ohio, via Steubenville, to Bellaire; and also from Bayard to New Philadelphia in the state of Ohio; that the said Cleveland & Pittsburg Railroad is a corporation organized under the laws of the states of Pennsylvania and Ohio, and in October, 1871, it executed a lease, for the term of 999 years, of its said line of railway to the Pennsylvania Railroad Company, a corporation organized under the laws of the state of Pennsylvania; that in the year 1873 this lease was assigned to the defendant, the Pennsylvania Company, which has ever since operated the said railroad under the same.

Paragraph 4 of the bill sets forth that the complainant was organized as a telegraph company in the year 1851, and has been continuously since that time engaged in the work of constructing and operating telegraph lines, and has acquired a continuous system of telegraph lines, which now extends through all the states and territories of the United States and into portions of the Dominion of Canada, and connects with telegraph lines of Central and South America, and by submarine cables with the telegraph systems of foreign countries; and that among the lines of telegraph forming an important part of said system of said complainant, and connecting with its main office in the city of New York, and with other lines of telegraph leading to the important commercial centers of the West and Southwest, are the lines of telegraph over and along the said Cleveland & Pittsburg Railroad.

In paragraph 5, complainant states that the lines of telegraph along the said Cleveland & Pittsburg Railway were originally constructed by the complainant under the contract entered into in October, 1856, between complainant, the Western Union Telegraph Company, and the Cleveland & Pittsburg Railroad Company, above recited as Exhibit 1, attached to and made a part of said bill of complaint.

In paragraph 6 of the bill, complainant alleges that at the time of the making of said contract, and for many years thereafter, the said complainant controlled within the territory covered by said Cleveland & Pittsburg Railroad, and the territory contiguous thereto, the patents controlling the art of telegraphy, without which no person or corporation could lawfully engage in sending messages by telegraph; that after the construction of the said telegraph line, as provided in said contract, complainant and the said Cleveland & Pittsburg Railroad Company carried out all its provisions, and complainant furnished the wires, insulators and patents, and extended the said line of telegraph from Rochester to Pittsburg, as provided therein, and continuously maintained offices, as provided in and by said contract; that it furnished telegraphic facilities for the use of said railroad company, as provided by the said contract, and the valuable patent rights owned and controlled by it as aforesaid, and that the said railroad company availed itself of all the rights and privileges secured to it in and by said contract, and used

said telegraph lines in connection with the operation of its said railroad; that in addition thereto, complainant furnished thereafter, continuously, the use of its main batteries for the wires of the railroad company, at all times, day and night, and at many places opened offices for public business, and transmitted by its operators the messages of the railroad company and of its officers, without charge, and thereafter the said railroad company and complainant carried out and observed the provisions of the said contract, and continuously operated the lines of telegraph as provided therein, until the said Cleveland & Pittsburg Railroad Company, as hereinbefore set forth, leased its said line of railroad to the said Pennsylvania Railroad Company, in October, 1871.

In paragraph 7, it is alleged that in the said lease, the Pennsylvania Railroad Company expressly covenanted and agreed with the said Cleveland & Pittsburg Railroad Company to carry out and perform the said contract with the complainant, and did fully perform and observe the same until the transfer by the said Pennsylvania Railroad Company to the defendant, the Pennsylvania Company, of the possession and control of the said line of railroad, by the assignment of said lease, as hereinbefore set forth, in the year 1873; that the defendant, the Pennsylvania Company, in accepting the assignment of said lease, expressly covenanted and agreed with the said Pennsylvania Railroad Company to perform all and singular the covenants, agreements and undertakings of the said Pennsylvania Railroad Company.

In paragraph 8 of said bill of complaint, it is alleged that the defendant, the Pennsylvania Company, after receiving possession and control of the said Cleveland & Pittsburg Railroad, under said assignment of lease in the year 1873, continued thereafter to recognize the rights of complainant and to observe the obligations of said contract, "save and except that by the consent and acquiescence of your orator and the defendant the provisions of the seventh article were modified in that your orator furnished all the material for the repair or reconstruction of said telegraph lines and the defendant furnished the labor therefor."

In paragraph 9, it is alleged that at all times since the making of the said contract, complainant has observed all the obligations and requirements thereof, both as originally written and as modified, as hereinbefore set forth, and has faithfully carried out all the provisions thereof, and expended large sums of money upon the faith of said contract, amounting in the aggregate to many thousands of dollars, and that the said defendant, the Pennsylvania Company, since its possession of the said line of railway, has at all times availed itself of the facilities thus afforded by complainant, without complaint on its part that complainant was in any respect delinquent, in failing to render to said Pennsylvania Company all the service and benefits that it was entitled to receive and enjoy under each and every of the provisions of the said contract.

In paragraph 10 complainant sets forth, that since the assignment of the said lease to the defendant, both complainant and defendant, by mutual consent, have, at their own several cost and expense, strung additional wires upon the said line of telegraph constructed and maintained under the provisions of the said contract, so that at present there are in place upon portions of the said Cleveland & Pittsburg Railroad

a large number of additional wires belonging to complainant and to the defendant railroad company respectively, which wires have been maintained and operated by complainant and said railroad company under the provisions of said agreement, and their maintenance and reconstruction have been carried on in conformity with the requirements thereof, as modified, to wit, complainant furnishing all the material for the repair and reconstruction of said lines, and defendant furnishing the labor therefor.

In paragraph 11, complainant avers that on or about the 2d day of June, 1902, the defendant caused to be transmitted to complainant a written notice, expressing its desire to terminate the agreement above recited, which said notice is attached to the bill as an exhibit and made a part thereof. Said notice, after referring to the agreements under which the telegraph lines, located upon the right of way of the various railroads controlled by the Pennsylvania Company, are operated by the Western Union Telegraph Company, concludes as follows:

"Whereas said telegraph company furnishes the material and said railway companies the labor for the construction and maintenance of said telegraph lines, thereby establishing a joint ownership in same;

Now therefore, the said Pennsylvania Company hereby gives to said Western Union Telegraph Company notice of its desire to terminate said agreements, and all supplements to or extensions of same—whether written or verbal—and that the same will be terminated on June 2, 1903, and we respectfully request that you select representatives of the telegraph company to meet our representatives at a date, previous to August 1, 1902, that will be mutually satisfactory, for the purpose of adjusting the ownership of your company and this company in the property comprising the telegraph lines referred to.

Will you kindly acknowledge receipt of this letter and oblige,

The Pennsylvania Company,
By James McCrea, Vice President.

To Mr. R. C. Clowry,
President Western Union Telegraph Company,
New York City, New York."

The bill then recites and refers to certain correspondence which ensued upon the reception of the said notice, which is set forth in exhibits attached to the bill and made a part thereof. The result of this correspondence was, in substance, that the said complainant declined to acknowledge the right of the defendant to revoke the said contract, under and pursuant to which the said telegraph lines had been maintained along the line of the railway of the said defendant since 1856, and insisted that the agreement referred to could not be terminated by either party without the consent of the other.

In paragraph 12 are recited certain sections of an act of Congress, approved July 24, 1866, entitled "An act to aid in the construction of telegraph lines and to secure to the government the use of the same for postal, military and other purposes." 22 Stat. 221.

In paragraph 13, complainant avers that it complied with the provisions of the said act of Congress, on or about the 8th day of June, 1867, by filing its written acceptance with the Postmaster General of the United States, of the restrictions and obligations of said act, a copy of which is annexed as an exhibit and made a part of the bill of complaint.

In paragraph 15, complainant avers that in compliance with the act of Congress, approved June 10, 1872, it has transmitted the messages of the government of the United States over lines situated along the railway of the defendant company, and upon its other lines connected therewith, at all times since the passage of said act, at rates far below the usual rates paid by individuals for similar services.

In paragraph 16, complainant recites the act of Congress by which each and every railroad within the limits of the United States is declared a post route.

In paragraph 17, complainant avers "that all the telegraph lines along and upon the said line of railway operated by the defendant, as hereinbefore described, have been constructed thereon with the express consent of the defendant railway, or of its predecessor in title, the Cleveland & Pittsburg Railway Company, with the well-understood purpose that the same should form a part of and be connected with the other lines of telegraph belonging to your orator, and with the knowledge of the said railway company were erected and incorporated in and became part of and were operated as a part of the general system of telegraph lines owned and controlled by your orator."

In paragraphs 18, 19, 20 and 21, complainant sets forth its understanding and contention as to the rights and privileges conferred upon it by the acts of Congress before recited, in reference to the maintaining of its line of telegraph as now existing along the railroad and over the right of way of the defendant.

In paragraph 22 complainant alleges that it stands ready, and is able and willing to perform, and thereby tenders performance of, said agreement to the said defendant company, of the conditions and obligations imposed upon said complainant by said agreement, and is entitled to specifically require from the defendant company the performance on its part of all the provisions of the said contract.

In paragraph 23, complainant says that the said lines constructed and maintained under said contract, constitute some of the main lines of communication for the transmission of telegraphic messages between the city of New York and foreign countries, and the larger cities of the West and Southwest, Mexico and South America, and that the defendant, the Pennsylvania Company, is threatening by its notice of June 2, 1902, and in portions of its correspondence above referred to, to sever the lines of telegraph of complainant, situated upon the said lines of railway, from their connection with the other telegraph lines owned and operated by complainant, and avers that the said defendant, unless restrained by the order of this court, will carry such threats into execution.

In paragraph 24, complainant avers that by carrying such threats into execution, and refusing to perform and observe the provisions of said contract, the defendant will inflict irreparable injury upon complainant and practically destroy the entire value of all the telegraphic property of complainant now constructed, maintained and operated along and upon the right of way of said railways of defendant. It also avers that the said telegraph lines along and upon the said right of way of the railways of said defendant, do not interfere with the ordinary

operation of said railways, and that the continuance of said lines will not be of any detriment to the said defendant.

In paragraph 25, complainant avers that the determination of the defendant to remove the telegraph lines of the complainant, together with the offices and instrumentalities appurtenant thereto, from its said line of railway, and to forbid the further operation thereof, under the provisions of said contract, was not caused by any delinquency of the said complainant in the service furnished by it under the said contract, or by reason of any interference of the said lines of telegraph, or the operation thereof, with the operation of the said railroad, or by any compulsion or necessity to use the space occupied by said telegraph lines, for railroad purposes. As evidence of this, complainant shows, that the said defendant company has entered into, or intends to enter into, a contract with the Postal Telegraph & Cable Company, a rival of said complainant, by the terms of which it undertakes to compel the removal of complainant's lines of telegraph from its premises, and its instruments and fixtures from its stations and buildings, and to install instead thereof the lines, poles, fixtures and instruments of said Postal Telegraph & Cable Company, the said lines of said Postal Telegraph & Cable Company to occupy substantially the same location now occupied by complainant's lines of telegraph, and to be used in the same, or substantially the same manner, to the end that the defendant may transfer and vest in said competing company all the rights and privileges now vested in complainant.

In paragraph 26, complainant avers that the termination of said agreements by the said defendant, as set forth in said notice of June 2, 1902, and the termination of complainant's right to maintain and operate telegraph lines along said line of railway, as contemplated and threatened by the said defendant, is contrary to the stipulations and obligations of the said contract, and is contrary to, and will be destructive of, the rights of complainant, as secured to it under and by virtue of said agreement, and is contrary to the intent and purposes of said act of Congress, and would work irreparable loss and injury to the complainant, to the public, and to the government of the United States.

Complainant then prays:

(1) That defendant may make a true answer, not under oath;

(2) That defendant may be required to specifically perform said agreement, said complainant being ready and willing, and hereby offering specifically, to perform said agreement in all things on its part and behalf;

(3) That the court will order and decree a perpetual injunction against the defendant, the Pennsylvania Company, "restraining it from in any manner violating any of the provisions of said contract on its part, or in any manner interfering with the location, construction, maintenance and operation of your orator's said lines of telegraph, under and in accordance with the provisions of said contract, upon the road or right of way of said defendant";

(4) That complainant's right under the said acts of Congress, to construct, maintain and operate its said line of telegraph, be established;

(5) That a temporary injunction may be issued;

(6) Other and further relief.

As the case made by the allegations of the amended bill must be accepted by the court, the foregoing extended statement of the same is necessary to a clear understanding of the questions raised by the demurrer of the defendant thereto. The demurrer is general and special. The special grounds of the demurrer are, in substance:

(First) That under the terms of the contract, the defendant had the right to revoke the contract, upon reasonable notice; and that the notice given was such a reasonable notice;

(Second) That the relationship existing between the plaintiff and defendant, as shown by the bill, is the joint ownership and operation of a line of telegraph for their joint benefit. That plaintiff and defendant, by said contract and the parol modifications thereof, became partners, and that such partnership was determinable by the notice given by defendant for that purpose, and that as the bill avers full performance by both plaintiff and defendant, of the obligations of said contract, there is no ground for equitable relief;

(Third) That the subject-matter of the contract, as set forth in the bill, is of such a character that a court of equity will not undertake to supervise the specific performance thereof;

(Fourth) That the essential provisions of the original contract are illegal and void, in that it was intended thereby to create a monopoly in the telegraph business, and for that reason, the contract is not such as a court of equity will enforce;

(Fifth) That it appears by said bill that said written contract has been in essential particulars modified by parol, and that the relation between the plaintiff and defendant, if not a partnership, is one based upon a parol contract, which is contrary to the statute of frauds, and void.

Defendant further demurs specifically to those portions of the bill which refer to or aver any rights alleged to be vested in plaintiff by reason of the acts of Congress set forth in said bill. The court sustained the demurrer, and entered a decree dismissing the bill.

The grounds of this decree appear, in the opinion of the learned judge of the court below, to be, that the said agreement of October, 1856, did not convey to complainant an easement or grant of real estate in perpetuity, but was an undertaking for the furtherance of a joint enterprise, and was therefore terminable at the option of either party, upon reasonable notice, and the reasoning and argumentation of the opinion is in support of this conclusion. There is an implication in this, that if an easement of support over the lands of the railway company, upon the poles affixed to said lands, was, in effect, granted to complainant, by the contract of 1856, there being no words of limitation therein, the interest of complainant under said contract was in perpetuity. But it does not follow that, if the said contract is not to be interpreted as granting an interest in realty, but as being only an undertaking of a joint enterprise, for the benefit of the parties thereto, it is necessarily revocable at the will of either of the contracting parties.

There is in this case much to support the contention, that the contract of 1856 was, in effect, the granting of an easement in gross, by the railway company to the complainant, and imposed a perpetual servitude, in favor of said complainant, upon the lands of the railway com-

pany. The poles, with their cross-arms, which, by the express terms of the contract of 1856, were to be securely and permanently fixed in the ground by the railway company, along its railroad, and were to be by it maintained and repaired indefinitely, were assuredly part of the real estate of said company. It was upon and over these poles and cross-arms, to be thus indefinitely maintained and renewed by said company, that the telegraph company were given the right, by said contract, to string its wires. There is no express limitation in the contract itself, as to the duration of the rights created by said contract, and it is a recognized doctrine of equity, that no technical words of conveyance are necessary to create the interest intended to be created, if such intent clearly appears by the whole scope and tenor of the writing. Being in writing, there is no ground for objection, that the effect claimed for this agreement is in contravention of the statutes of fraud, of either of the states, whose statutes in that respect would be applicable.

If complainant, under the agreement in question, has a right to claim an easement in the lands owned or possessed by the railroad company, it is conceded that, it is one of perpetual duration, and therefore nonrevocable by the owner of the servient estate. So also regarding the agreement of 1856 as a mere license in writing, to complainant, to occupy the lands owned or possessed by the railroad company, for the purposes of its telegraph line, which, by the erection of said lines and the expenditure of money in other respects, as incident thereto, has become a license executed, and, not being within the denunciation of the statutes of fraud, has ripened into an interest in realty, the same, by reason and authority, must be considered nonrevocable. Le Fevre v. Le Fevre, 4 Serg. & R. 241, 8 Am. Dec. 696; Rerick v. Kern, 14 Serg. & R. 267, 16 Am. Dec. 497; Swartz v. Swartz, 4 Pa. 353, 45 Am. Dec. 697; Huff v. McCauley, 53 Pa. 206, 91 Am. Dec. 203; Thompson v. McElarney, 82 Pa. 174; Pierce v. Cleland, 133 Pa. 189, 19 Atl. 352, 7 L. R. A. 752; Hornback v. C. & Z. R. Co., 20 Ohio St. 81; Wilson v. Chalfant, 15 Ohio, 248, 45 Am. Dec. 574; U. S. v. B. & O. R. R. Co., 1 Hughes, 138, Fed. Cas. No. 14,510; Messicks v. Midland Ry. Co., 128 Ind. 81, 27 N. E. 419; Baker v. C., R. I. & P. Ry., 57 Mo. 265.

It is not necessary, however, in the view here taken of this case, to discuss the question, whether a technical easement, appurtenant or in gross, has been, in effect, granted by the railway company to the complainant, by the provisions of the contract of 1856, nor is it important that we should call the interest of complainant, founded on its contract with the predecessor of defendant, a license executed, or otherwise label the claim set up and founded upon the allegations of the amended bill of complaint.

Accepting the conclusion at which the court below arrived, that no easement or interest in realty, as such, was created in favor of the complainant, we think it still remains to consider whether a correct interpretation of the contract, set forth in the bill of complaint, does not exclude the existence of any power of revocation, at the mere will of either party to the contract. Contractual relations of a permanent character may have been established, in the matter now before us, even though no easement or interest in realty were granted. What these contractual relations are in the present case, and whether they are revocable at the

mere will of either complainant or defendant, are the underlying questions in this case. A proper interpretation of the contract is necessary to their solution.

Referring, then, to the contract as set out in the bill of complaint, we find that its provisions are contained within a narrow scope, and free from complication. The general purpose of the contract is easily arrived at. The telegraph company was extending its lines from the East to the West, and was naturally desirous, for that purpose, of obtaining a right of way, as direct as possible, one that would be protected, and form a link between its lines, east and west of the said Cleveland & Pittsburg Railway. The line of an established railway, like the Cleveland & Pittsburg Railway, would accomplish both these objects. It ran in the right direction, and its occupation and use for railway purposes afforded a protection not otherwise to be obtained, without great expenditure of capital. Moreover, the use of the right of way by the telegraph company created no possible interference with the operation of the railway. On the other hand, a telegraphic service was obviously necessary to the successful management of the railway. It needs no argument to show that this telegraphic service could be more economically obtained by an arrangement with a telegraph company that needed a right of way along its line, which could be maintained and used without any detriment to railroad operations, than by the expenditure of capital necessary to erect and equip, for its own use, a line of telegraph. So the railroad company agreed to fix and maintain a line of poles along its roadway, to be used by the telegraph company for stringing its wires, and the telegraph company agreed to furnish wire, insulators, instruments, patents, and everything except the posts and poles and cross-arms, and to complete said line with one wire and extend it upon the poles then up, or upon poles, equally as good, along the Ohio & Pennsylvania Railroad from Rochester to Pittsburg, and put said line in operation as soon after the poles were set as was reasonably practicable, and to open and equip offices at such places on the line as the said railroad company should designate. And the said telegraph company further agreed to send, free of charge, over said line, all messages appertaining to the business of said railroad, including the ordinary family communications of its officers and agents, giving preference to messages of emergency or pertaining to accidents.

These are the general and salient features of the contract made in 1856, between the complainant and the Cleveland & Pittsburg Railway Company, as the same are set forth in the bill of complaint. Other and minor features are, that the railroad company is to pass or convey, free of charge, over its said road, all men or materials used and employed in building and operating said line. Also, that the said railroad company is to have the right at any time to put upon said posts or cross-arms a telegraph wire, and work the same for its exclusive use, and the telegraph company is also to have the right to string another wire, for its own use, upon said posts or poles.

The seventh paragraph of said agreement provides that, "after the telegraph line is completed with one or more wires, the same is to be kept in repair by the said railroad company, and maintained in first rate working order, as far as practicable. But the said telegraph com-

pany is to furnish or pay to the said railway company the cost of the wires and insulators used and necessary in maintaining the wire or wires of the said telegraph company in good working order."

The amended bill of complaint, as hereinbefore recited, in its eighth paragraph, states a modification of this written contract, which is, that after the assignment of the lease of the Pennsylvania Railroad Company to the defendant, in February, 1873, by the consent and acquiescence of complainant and defendant, the provisions of the seventh article were modified, in that, complainant furnished all the materials for the repair or reconstruction of the said telegraph lines, and the defendant furnished the labor therefor. This modification is not a great or radical one, and amounts to only this, that the telegraph company, instead of paying to the railroad company the cost of material necessary to the maintenance of the line, was to furnish the materials themselves, the railway company furnishing the labor, as theretofore. It is not to be overlooked in this connection, that some of the essential averments of the amended bill cover any supposed enlargement of the scope of the original contract, by the parol agreements of complainant and defendant, therein stated. In paragraph 10 of the amended bill, it was averred, that subsequent to the assignment of the said lease of the Cleveland & Pittsburg Railroad to the defendant, the Pennsylvania Company, by mutual agreements between complainant and defendant, additional wires for the special use, and at the cost and expense, of the parties respectively, had been strung upon said line of telegraph "constructed and maintained under the provisions of the said contract," and that the additional wires belonging to the defendant railroad company, have been maintained and operated by complainant and the said railroad company "under the provisions of said agreement, and that the maintenance and reconstruction of said lines have fallen under the provisions of said contract, as modified as hereinbefore set forth." It is significant that, by the averments of paragraph 8 and paragraph 10, "reconstruction" was included within the obligation for maintenance and repair, by mutual understanding between complainant and defendant.

In the seventeenth paragraph of the amended bill, complainant avers as follows:

"Your orator further says that all the telegraph lines along and upon the said line of railway operated by the defendant, as hereinbefore described, have been constructed thereon with the express consent of the defendant railway company or of its predecessor in title, the Cleveland & Pittsburg Railroad Company, with the well understood purpose that the same should form a part of and be connected with the other lines of telegraph belonging to your orator, and with the knowledge of the said railway company, were erected and incorporated in and became part of and were operated as a part of the general system of telegraph lines owned and controlled by your orator; that the said lines of telegraph have been at all times operated and maintained, not only as connected with all the lines of telegraph along and upon the said railroad owned and operated and controlled by the defendant company, but also as an integral part of the general system of telegraph lines owned, controlled and operated by your orator within the United States and Dominion of Canada, and the other lines of telegraph connected therewith, as hereinbefore more fully set forth."

In the view taken by the court below, that no interest in realty was granted by the agreement of 1856, and that the contract between

the parties was merely for a joint enterprise, which, so far as it concerned property, concerned personal and not real property, there is no reason why the contract, with its modifications, as stated in the bill, and which have been in part performed, should not be recognized in a court of equity, as the foundation for a suit for specific performance, or for injunction. Leake on Contracts, 306.

Such being the nature of the contract, and the circumstances surrounding it, as stated by the amended bill of complaint, we come to the question, is it in the power of either party, without the consent of the other, to terminate said contract, and free itself from all obligation under it? We think it will sufficiently appear, from a careful consideration of the contract, with its modifications, as set forth in the bill, the circumstances attending its origin, the purposes had in view, and the conduct of the parties throughout the long period during which those purposes seem to have been accomplished, that there was no intention entertained by the parties to the contract, to limit its duration, or confer upon either party, without the consent of the other, the right of revocation. If a contract is not revocable at the will of either party, or otherwise limited as to its duration, by its express terms, or by the inherent nature of the contract itself, with reference to its subject-matter or its parties, it is presumably intended to be permanent and perpetual in the obligation it imposes. That the life of a contract should depend on the mere will of either party thereto, without the consent of the other, is a limitation so important and drastic, that it is hard to conceive why, if the parties intended it, they should not express that intention in the contract itself.

The contractual relations established between complainant and defendant, as we gather them from the averments of the amended bill, (which, for the purposes of this demurrer, must be taken as making the case before us), involve mutual covenants, which are mutual considerations. It is true, that some of these are executory in their character, but many most important stipulations have been executed by the complainant. The installment of the telegraph line and plant, by complainant, was an initial and executed consideration, involving not only a large expenditure of money, but the orderly and successful establishment of its system east and west of the lines of the defendant, and has had an important influence on the situation of the parties. The scope and purposes of the contract were, we think, within the powers of both corporations. It has been an important, useful and economical means of advancing the public ends, for which both were created. That the railroad company has found it to be most convenient and economical to make such an arrangement with an established telegraph company, rather than to incur the expense of building and equipping telegraph lines for itself, is evidenced, as we have already said, by the statement in the bill, that a rival telegraph company is to be installed in its place, to perform the same service, and in the same manner, as is now performed by the complainant under its contract. The essential nature of the service is such as to indicate that permanency in contractual relation was intended by the contract under which these parties have lived for nearly half a century. We certainly find nothing in the character of the relation established between these parties so long ago, as would indi-

cate that it was terminable at the will of either party, without the consent of the other. If a power of revocation was intended by the parties to this contract, it would seem the natural and logical course, that such power should have been expressly incorporated in the contract itself. Apart from those contracts, which, from their inherent nature, imply a power of revocation, it would seem that the intention of parties to an agreement, that it should be perpetual and without limit as to duration, could not be more properly expressed than by silence as to any time limit, or power of revocation. Reason and authority would seem to concur in support of this doctrine, and we find no direct and controlling authority to controvert it. The reasoning of the court below has apparently been on a contrary presumption, that is, that every written contract, vesting no interest in realty, and silent as to the time or method of its duration, is to be presumed revocable at the will of either party, upon reasonable notice.

The case of Great Northern Ry. Co. v. Manchester, Sheffield, etc., Ry. Co., 5 De Gex & Smale's Chan. Rep. 138, is interesting upon this point. The opinion delivered by Vice Chancellor Parker, is interesting, and its reasoning is not inapplicable to the case before us. The syllabus of the case, which correctly summarizes the points decided, is as follows:

"Two directors of a railway company (the plaintiffs) met two directors of another railway company (the defendants), and entered into an agreement in writing, signed by all four directors on behalf of their respective companies, whereby it was mutually agreed that each of the companies should, interchangeably, use the railway of the other company, on certain specified terms. The agreement contained no words of succession or of restriction: Held, that these contracts were not mere licenses determinable at will, but conferred rights of a permanent nature on the companies. Held, also, that the terms of the contract were not too vague, but that the user conceded was one consistent with the proper enjoyment of the railway, the subject matter of the contract, and within the rights of the granting party. Held, also, that this court will grant an injunction restraining the defendants from acting contrary to a negative agreement, although it cannot specifically enforce the performance of the whole of the agreement."

The Vice Chancellor, in describing the right conferred by the contract, upon the complainant, uses this language:

"If, for valuable consideration, a party says that another shall have the right of using a thing, a right in the nature of an easement, I think that, prima facie, the inference to be drawn from that language, would be that it was not a mere license, determinable at the will of the party who had granted it."

The case of Llanelly Ry. & Dock Co. v. London & N. W. Ry. Co., L. R. 7 H. L. 550, is instructive on this point. The judgment of the House of Lords was unanimous, and affirmed the unanimous decision of the Lord Justices of Chancery Appeal. L. R. 8 Ch. App. 942. The facts of the case are, briefly, as follows: The Llanelly Company being in want of money to complete an extension line, applied to the N. W. Railway Company for a loan of £40,000, and it was agreed that the N. W. Company should lend the money and have running powers over the lines of the Llanelly Company. An agreement under seal was entered into, not referring to the loan, by which it was agreed, (1) that, subject to such by-laws and regulations of the Llanelly Company as

should from time to time be in force, the N. W. Company might run over and use the railways of the Llanelly Company, and their stations, sidings, and conveniences; (2) that the receipts from through traffic should be apportioned between the two companies according to mileage proportion, with a certain allowance per cent. to the N. W. Company out of the Llanelly Company's share; (3) that the N. W. Company might have their own staff at the stations on the Llanelly Company's lines; (4) that, whether the running powers were exercised or not, there should be a complete system of through booking and through fares from the stations of each company by the lines of the other; (5) that, if the running powers were exercised, the fares should be fixed by the N. W. Company, and if the Llanelly Company objected to any of them, then by arbitration; (6) that the N. W. Company should not carry the local traffic on the Llanelly lines, but should, if required by the Llanelly Company, carry local passengers for 15 per cent. of the local fares; (7) that the companies should send by each other all traffic not otherwise consigned to and from stations on the lines of each other whenever such lines formed the shortest route; (8) that any difference under the agreement should be settled by arbitration under the Railway Companies Arbitration Act 1859. The N. W. Company advanced the £40,000, and the agreement as to running powers was acted upon for some time, but afterwards the Llanelly Company gave three months' notice to determine it.

The opinion of the Court of Chancery Appeals was delivered by Lord Justice James, holding that evidence of the advance of the £40,000 having been the consideration for the agreement, was admissible, but not on the ground that it was a consideration for the contract, because, apart from this evidence, the agreement was not determinable, and saying:

"In my opinion, the evidence is not material, because, independently of that, it appears to me that there is sufficient consideration expressed in the agreement itself, and that the agreement, on the face of it, without any reference to that evidence, is conclusive upon the parties."

As to the main point in the case, the language of Lord Justice James is as follows:

"The contention on the part of the Llanelly Company, is, that this is an agreement determinable at will, or by reasonable notice. The contention of the London and North Western Railway Company is, that it is, as it is expressed to be, an agreement without any limit whatever in point of time. The case is in many respects similar to the case of the Great Northern Railway Company v. Manchester, Sheffield and Lincolnshire Railway Company (1), in which there were running powers given interchangeably between the railway companies, and the Vice Chancellor held that they were given in perpetuity. In my opinion this case is not distinguishable on any sufficient ground from that case, which was decided as far back as the year 1851, and has been considered to be law from that day to this. As that, however, was only the decision of a Vice Chancellor, and as it has been contended before us that a great part of the ratio decidendi in that case does not apply to this case, it is incumbent upon us to express our own opinions upon the matter as if no such authority existed; and upon general principles I have formed a very decided opinion that I should have arrived at the same conclusion as the Vice Chancellor did in that case; and I should, if the thing were res integra, arrive at a similar conclusion in this case. I start with this proposition, that prima facie every contract is permanent and irrevocable, and that

it lies upon a person who says that it is revocable or determinable to show either some expression in the contract itself, or something in the nature of the contract, from which it is reasonably to be implied that it was not intended to be permanent and perpetual, but was to be in some way or other subject to determination. No doubt there are a great many contracts of that kind; a contract of partnership, a contract of master and servant, a contract of principal and agent, a contract of employer and employed in various modes—all these are instances of contracts in which, from the nature of the case, we are obliged to consider that they were intended to be determinable. All the contracts, however, in which this has been held are, as far as I know, contracts which involve more or less of trust and confidence, more or less of delegation of authority, more or less of the necessity of being mutually satisfied with each other's conduct, more or less of personal relations between the parties.

But I am of opinion that no such consideration applies to a case in which there is a grant, or an agreement in the nature of a grant, of a wayleave, or of running powers, which is only another mode, according to my view of it, of expressing a wayleave. * * *

That would seem to me to be the principle with which we must start in considering whether this agreement, which is in indefinite terms, means that the London and North Western Railway Company shall have power from time to time, and at all times, to run over and use with their engines, carriages, vehicles, and servants the lines of the Llanelly Company and their conveniences, or that they shall have power only during the pleasure of the Llanelly Company. Then, when we come to look into the agreement, it appears to me that almost every line of it is full of permanence and adverse to the notion of its being revocable."

An appeal was taken to the House of Lords, and the judgment and opinion of Lord Justice James were expressly and unanimously affirmed, Lord Chancellor Cairns and Lords Chelmsford, Hatherly and Selbourn delivering concurring opinions.

As the learned judge of the court below, as well as the counsel for appellee, seeks to distinguish this case from the one in hand, by observing that a present and valuable consideration, to wit, the loan of £40,000, had passed to the party that afterwards sought to terminate the contract; it is to be observed, that this so-called "valuable consideration" was a loan, and not a payment of money, for the privileges obtained. The £40,000 was the consideration of the contract of loan, and was advanced on the faith of debenture securities bearing four per cent. interest. But it is sufficient to call attention here to the fact, that Lord Justice James, in the Court of Chancery Appeal, expressly disclaims the admissibility of the contract of loan, as evidence of consideration for the principal contract then before the court, and distinctly says, as already quoted:

"In my opinion, the evidence is not material, because, independently of that, it appears to me that there is sufficient consideration expressed in the agreement itself, and that the agreement, on the face of it, without any reference to that evidence, is conclusive upon the parties."

So also, in the House of Lords, Lord Chancellor Cairns, in delivering the principal opinion, says, speaking of the contract:

"The later sections, and especially that seventh section, appear to me clearly to carry a consideration which would be amply sufficient, as a matter of consideration, to support this agreement upon the face of it, and without reference to the loan to which I have already referred."

But whether the loan of £40,000 was an essential part of the consideration, or not, the ground upon which the nondeterminability of such

a contract at the will of one of the parties, is placed, is that there had been an executed consideration, which had altered the situation of the parties, to the loss of the one against whom the contract was sought to be determined, and not the mere fact that there was a paid up money consideration. In other words, the essential requirement is a real and valuable consideration, executed in whole or in part, and not a particular kind of consideration. In the case of the Great Northern Ry. Co. v. Manchester, Sheffield, etc., Ry. Co., above referred to, there was no consideration beyond the part performance of the mutual covenants of the contract.

Learned counsel for appellee contend that the relationship established between the parties under this contract, was really a partnership, and therefore comes within the rule applicable to partnership contracts containing no time limit, and so is revocable at the will of either party. We do not think this contention a sound one. The contractual relation between complainant and defendant did not embrace the elements of a partnership. The several contributions of the parties to what, if you please, was a joint enterprise, was each for its own benefit, and did not, and was not intended to, result in the product of a common fund, to be shared as profits. Nor was there the incident of joint and individual liability for the debts incurred in the business by one of the parties without the consent of the other, growing out of the implied agency of each partner to act for the others, which is commonly characteristic of a partnership. The language of the Lord Chancellor, in his opinion, is pertinent to this contention of the counsel for the appellee. It is as follows:

"My Lords, reference was made to the well-known cases of contracts of hiring service and contracts of partnership. These cases appear to me to have no analogy whatever to the present. With regard to contracts of hiring and service the law is well settled as applied to different kinds of hiring and service, assigning to each of them certain notices by which they can be terminated; and they are, besides, engagements which depend upon the personal confidence which one of the parties reposes in the other, and which in their nature cannot be supposed to be of a personal character. With regard to contracts of partnership, they also are already ruled and settled, by law, to be capable of termination at any moment unless a definite limit is prescribed upon the face of them. And, the law being well settled, when you have a contract of that kind, you apply the understood law, and you hold that the parties, knowing what the law was, must be supposed to have intended to enter into a partnership which could at any time be terminated, if they did not provide upon the face of their contract that it should be a continuing partnership. But your Lordships have to decide here without any rule of law already laid down, with regard to agreements of this kind, upon the nature of the agreement itself, and upon the construction of that agreement as we find it expressed; and, applying the considerations which I have pointed out to your Lordships, I should humbly suggest to you, that those considerations clearly lead to the conclusion that an agreement of the kind which I have read, entered into under the circumstances which I have mentioned, must, in its nature, be an agreement which should have a continuing operation, unless some power is given on the face of it to the parties to terminate the agreement."

If the agreement in the case now before us were one terminable at the will of either party, without the consent of the other, then it could have been revoked by the railroad company as soon as the line had been established and the offices equipped by the complainant. We do not

believe that such a power can be fairly inferred from the nature of the contract, the circumstances that attended the making of it, or the situation of the parties.

The judgment of the Supreme Court of the United States, in the case of Franklin Tel. Co. v. Harrison, 145 U. S. 459, 12 Sup. Ct. 900, 36 L. Ed. 776, seems fully to support the position here taken. In that case, the telegraph company had given to Harrison the right to put up, at his own expense, and maintain and use a wire upon the poles of the company, between New York and Philadelphia, the company to have the use of the wire when not so employed. The company agreed to keep and maintain the wire, and to bear all expenses connected with its working, and to permit such use by Harrison for a period of ten years. At the end of that time, the wire was to be the property of the company, the company agreeing to lease the same to Harrison for his own use, for the sum of $600 per annum, payable quarterly, and upon the same terms, in all other respects, as if the wire had not been given up to the company. The wire was put up by Harrison, and used by him for a term of 10 years, without compensation, and after that, at the agreed compensation. The company then notified Harrison, that the use of the wire by him had become such as to exclude the company from all use of it, which was not contemplated by the original contract, and that the agreement would be terminated by the company. The bill was filed by Harrison, to restrain the company from so doing. It had been contended in the circuit court, as it was contended in the Supreme Court, that the agreement to lease the line, at the expiration of 10 years, to Harrison, for a yearly rent of $600, was revocable, because, no term being mentioned, the use of the word "lease" imported a contract revocable from year to year. The decree of the Circuit Court, which was held by Mr. Justice Bradley and Judge Butler, ordered and adjudged that Harrison was entitled, so long as the defendant, the Franklin Telegraph Company, their successors or assigns, should keep up and maintain the line of telegraph between the cities of New York and Philadelphia, mentioned in said agreement, or any telegraph line between said cities, to an irrevocable license, subject to the payment of $600 per annum, payable quarterly, etc. This decree was affirmed by the Supreme Court, and the right of the complainant to a decree for specific performance, fully sustained.

The case of Texas, etc., Ry. Co. v. Marshall, 136 U. S. 393, 10 Sup. Ct. 846, 34 L. Ed. 385, much relied upon by appellee, and cited by the learned judge of the court below as a leading authority in support of his conclusions, originated in a suit brought by the city of Marshall, Tex., to enforce specific performance of a contract of the railway company, to "permanently establish its eastern terminus and Texas office at the city of Marshall, and also to establish and construct at said city the main machine shops and carworks of said railway company." In consideration of this engagement on the part of the railroad company, the city of Marshall conveyed to the said company, a lot of ground suitable for said buildings, containing about 66 acres, and in addition, donated to said company county bonds to a large amount. The case went on to final hearing, upon bill, answer, exhibits and testimony on both sides. It appeared that, pursuant to the contract, the railway com-

pany did establish its eastern terminus and Texas office at the said city of Marshall, and did locate and construct there its main machine shops and carworks, and so maintained them during a period of eight years. At the end of that period, the railroad company removed its office and shops to other cities at a considerable distance from the city of Marshall. The railway company introduced evidence tending to show that the exigencies of its business required the change thus made, and that it would have been hindered and disabled in the performance of its public service, by longer maintaining its office and shops within the limits of the said city. Mr. Justice Miller, in delivering the opinion of the Supreme Court, maintaining the right of the railway company to make the said change, does not place that right upon the ground that the said contract was one determinable or revocable at the mere will of the railway company, but upon the ground that it had been fully executed and performed by said company, by the original location of the said office and shops, and their maintenance at the said city during a period of eight years, as will clearly appear from the opinion of the court. The ratio decidendi sufficiently appears in the following extracts from the opinion:

"The object of the city might very well be supposed to have been attained by the selection of the city as a terminus of the railroad, the construction and establishment there of its offices, its depot, its car manufactory and other machinery, since there was hardly any ground to suppose that the railroad company would ever have inducements enough to justify it in removing all these things to another place. * * * It appears to us, so far from this, that the contract on the part of the railroad company is satisfied and performed when it establishes and keeps a depot, and sets in operation car works and machine shops, and keeps them going for eight years, and until the interests of the railroad company and the public demand the removal of some or all of those subjects of the contract to some other place. This was the establishment at that point of the things contracted for in the agreement. It was the fair meaning of the words 'permanent establishment,' as there was no intention at the time of removing or abandoning them. The word 'permanent' does not mean forever, or lasting forever, or existing forever. The language used is to be considered according to its nature and its relation to the subject matter of the contract, and we think that these things were permanently established by the railway company at Marshall."

There is here no discussion of the right of the railway company to terminate an existing contract, but a decision by the court that the contract in question must be considered as having been sufficiently performed by the railroad company, by the location and maintenance of its office and shops, with no present purpose otherwise than permanently to maintain them. It is clear that the grounds of this decision differ materially from those upon which the present case must be determined.

On the whole, we are of opinion that the relations created between the parties by the agreement in question, were not merely personal, as in cases of partnership, agency, master and servant, and the like, but that rights in property and the user thereof, rights in the nature of an easement, were conferred upon the appellant, and that no right in the appellee to revoke or determine the same, in the absence of express stipulation to that effect, is to be inferred from the silence of the contract in that respect, or from its terms, purpose, or inherent nature.

This brings us to the other main contention of the appellee, to wit, that this is not such a contract as will be enforced specifically, because,

as alleged, first, the contract was intended to create a monopoly, and is therefore illegal and void. In support of this contention, the appellee refers to the eighth paragraph of the agreement of 1856, which is as follows:

"8th. The said Railroad Company is not to allow any other telegraph company or individual to build or operate a line of telegraph on or along its said railroad, or any part thereof."

This stipulation of the contract was undoubtedly valid, when made. But it is contended, that the act of Congress, entitled "An act to aid in the construction of telegraph lines," etc., passed 10 years thereafter, struck the stipulation with nullity, by providing that any telegraph company, then or thereafter organized under the laws of any state, which shall have accepted the provisions of the act, shall have the right to construct, maintain and operate lines of telegraph over and along any of the military or post routes of the United States, which have been or may hereafter be declared such by act of Congress. Undoubtedly, the act of Congress renders nugatory the restraint imposed upon the railroad company by the 8th paragraph of the contract referred to. It does not follow, however, as contended by appellee, that the invalidity of this eighth paragraph, after 1866, strikes also with invalidity the other provisions of the contract made 10 years prior to the passage of the act referred to. It does not constitute the main consideration of the contract. It has never, during the long period of the existence of this contract, been sought to be enforced, nor is it sought to be enforced now. Neither the Postal Telegraph Company, nor any other telegraph company has been made a party to this suit. No prayer in the bill asks for any relief against any other telegraph company, or that any other telegraph company should be prevented from constructing, maintaining or operating lines of telegraph over or along the railroad of the defendant. All it asks, is that it, the Western Union Telegraph Company, shall not be disturbed in the possession of its right of way over and along said railroad, and in the possession of its offices and equipment, as secured to it by contract.

It is perfectly well settled, that where one provision in a contract, which does not constitute its main or essential feature or purpose, is void for illegality, or otherwise, but is clearly separable and severable from the other parts which are relied upon, such other parts are not affected by the invalid provision, and may be enforced as if no such provision had been incorporated in the contract. The case of the U. S. v. The Union Pacific Railway Co., supra, relied upon by counsel for appellee to support the contention, that the whole contract between plaintiff and defendant is invalid, by reason of paragraph 8 thereof being in contravention of the act of Congress, is not inconsistent with the views just enunciated. The suit in that case proceeded on the ground that the Union Pacific Railway Company was conducting its business under certain contracts and agreements with the Western Union Telegraph Company, that were not only repugnant to the provisions of the act of Congress, of 1888, but were inconsistent with the rights of the United States. The relief given was a decree, annulling these contracts and agreements and compelling the railway company to maintain and operate telegraph lines on its roadways, as required by the act. The

first section thereof provides, that all railroad companies to which the United States have granted any subsidy, etc., and which, by the acts incorporating them, were required to construct, maintain, or operate telegraph lines, "shall forthwith and henceforward, by and through their own respective officers and employés, maintain and operate, for railroad, governmental, commercial and all other purposes, telegraph lines, and execute by themselves alone all the telegraph franchises conferred upon them and obligations assumed by them under the acts making the grants, as aforesaid." The case is a long one, and the facts complicated. In regard to the contract of July 1, 1881, between defendant and the Western Union Telegraph Company, Mr. Justice Harlan, delivering the opinion of the court, uses this language:

"But that agreement is illegal, not simply to the extent that it assumes to give to the Western Union Telegraph Company exclusive rights and advantages in respect of the use of the way of the railroad company for telegraph business; but it is also illegal, because, in effect, it transfers to the Western Union Telegraph Company a telegraphic franchise granted it by the government of the United States. The duty to maintain and operate a telegraph line between the points specified in the Act of 1862 was committed by Congress to certain corporations which it named, and neither they, nor any corporation into which they were merged, could, without the consent of Congress, invest a state corporation with exclusive telegraphic privileges on the line of the roads it then owned or thereafter acquired. The United States was not bound to look to the Western Union Telegraph Company for the discharge of the duties, the performance of which, in consideration of the aid received from the Government, the Union Pacific Railroad Company, and other named companies, undertook to discharge, for the benefit of the United States and of the public. No agreement with the telegraph company, to which the assent of the government was not given, could take from the railroad company its right at any time, to itself maintain and operate the telegraph line required by the act of 1862 for the use of the government and of the public, nor impair the power of Congress to require the performance by the railroad company itself of the duties imposed by that act."

We have quoted at length this passage from the opinion of the court in this case, because it is thereby abundantly apparent why the court held that those illegal provisions of the contract were its very meat and essence—the essential part of the agreement, and therefore struck the whole contract with invalidity.

As another reason why this contract will not be enforced specifically, it is alleged that it calls for continuing contributions of money and property, and exercise of judgment and skill, and no decree that could be entered by the court would be final. This contention is much insisted upon, and requires careful consideration. A prayer for a specific performance always appeals largely to the discretion of the court whose jurisdiction is invoked. In the exercise of this discretion, courts have, it is true, in many cases declined to enforce a contract, whose provisions are multifarious, and whose obligations are continuing, so that a final decree cannot be made, which will end the matter, but will require constant supervision and supplemental proceedings to enforce the performance of constantly recurring duties. Each case, however, must depend upon its own circumstances.

The case of Marble Co. v. Ripley, 10 Wall. 339, 19 L. Ed. 955, cited by appellee in support of its contention, illustrates very well the principle upon which courts will exercise their discretion in refusing a decree

for specific performance. That was a case where one owner of a quarry conveyed the quarry lands to his co-owners, reserving a right in the grantor to enter and keep possession, and take the marble himself, if grantees did not furnish marble of a certain kind and under certain conditions named in the contract. The court said, that the specific performance of a contract will not be decreed, where the duties to be fulfilled by the grantee are continuous, and involve the exercise of skill, personal labor, and cultivated judgment, as e. g., to deliver marble of certain kinds and in blocks of a kind that the court is incapable of determining whether they accord with the contract, or no. There were other reasons given by the court for refusing a decree for specific performance, such as a want of mutuality in the contract, and that there existed a complete remedy at law. But the reason first given, that the duties to be specifically performed were not only continuous but involved the exercise of skill, personal labor and cultivated judgment, sufficiently indicate the line of demarcation between such continuous duties as can be, and such as cannot be, the subject of a decree for a specific performance. The use of individual skill, the performance of personal labor, or the exercise of a cultivated judgment, are matters clearly beyond the reach of a judicial decree, and cannot be efficiently compelled by a mandatory process.

So also, the case of Port Clinton R. R. Co. v. Cleveland & Toledo Ry. Co., 13 Ohio St. 544, which was, as stated by appellee, an action for specific performance of a contract to operate a railway. We can well understand, upon the principle laid down in the case of Marble Co. v. Ripley, why the decree was refused in this case.

The case of Texas & Pacific Ry. Co. v. Marshall, supra, is much relied upon as to this point also. This, as we have seen, was an action to compel the Texas & Pacific Railway Company to maintain its offices and shops in the city of Marshall, under a contract to that effect. Mr. Justice Miller, having already decided that the contract did not require a perpetual maintenance of the shops and offices in the town of Marshall, and that it had been substantially performed by the railway company, proceeds to decide that, even if the contract were to be otherwise construed, it is not one to be enforced in equity, and, founding his opinion upon the decision of Marble Co. v. Ripley, says:

"If the court had rendered a decree, restoring all the offices and machinery and appurtenances of the road, which have been removed from Marshall to other places, it must necessarily superintend the execution of this decree. It must be making constant inquiry as to whether every one of the subjects of the contract which have been removed has been restored. It must consider whether this has been done perfectly and in good faith, or only in an evasive manner. It must be liable to perpetual calls in the future for like enforcement of the contract, and it assumes, in this way, an endless duty, inappropriate to the functions of the court, which is as ill calculated to do this as it is to supervise and enforce a contract for building a house or building a railroad, both of which have in this country been declared to be outside of its proper functions, and not within its powers of specific performance."

So also, it has been held in the cases cited by the appellee, that a contract to build a railroad will not be specifically enforced in equity, because there cannot be one decree made which would end the matter, but

that it would necessarily require various supplemental proceedings. We do not see that any of the cases cited in behalf of this contention by the appellee, are applicable to the case in hand. The specific performance which is sought here, is that the defendant should observe the contract under which both parties have lived for nearly half a century, by not interfering with complainant's rights under said contract, and by not compelling complainant to remove its wires and dismantle its offices along the line of defendant's road. It thus appears that specific performance, in the proper sense of those terms, is not the main relief sought by the bill. The prayer which, if granted, will be operative and efficient to give to complainant the remedy it demands and requires in this case, is the injunctive process of the court. It asks that the defendant company may be enjoined from interfering with the location, construction, maintenance and operation of complainant's said lines of telegraph, under and in accordance with the provisions of said contract, upon the roadway or right of way of the said defendant. So that, when the court has determined that the contractual relations which have existed so long between the parties, are not determinable merely at the will of the defendant, it means nothing more than that those relations shall continue as they have heretofore existed. Such a determination does not involve any change in the present situation. Nothing is required to be done by either complainant or defendant, other than they have been doing for nearly half a century, and are still continuing to do. It does not require, as in the case of Texas & Pacific Ry. v. Marshall, that extensive workshops and office buildings should be moved from one location to another and distant one. It does not require the defendant to build or operate a railroad, or even to build or operate a telegraph line. All that is required, is that the status quo should be preserved, and the complainant not interfered with. Injunctive relief is the principal, if not the only, relief required. If, however, after a decree giving such relief, difficulties should develop in the relations heretofore existing under the contract, such difficulties may be dealt with as they arise. We are not to assume that the mandate of the court will not be respected and obeyed, or that there will be any real difficulty in simply maintaining the old-time and existing relations between complainant and defendant.

A number of cases have been cited by the appellant, which maintain to the fullest extent the views we have here expressed. Without intending to discuss them at length, we will refer briefly to the case of Joy v. St. Louis (C. C.) 29 Fed. 546. A railroad company claimed, under certain contracts, a right to the use of the terminal facilities of another railroad company, for the use of its trains. The provisions of the contract were many and complicated. A bill was filed for specific performance. The case was tried before Judge Brewer, then Circuit Judge, who entered a decree in accordance with the prayer of the bill. In the course of his opinion, he says:

"I see no satisfactory reason why courts may not also hold sufficient and valid a mere contract for the right, and, determining the right, also settle and prescribe the terms of the use. It is true, that such a decree cannot be executed by the performance of a single act. It is continuous in its operation. It requires the constant exercise of judgment and skill by the officers of the corporation defendant; and, therefore, in a qualified sense, it may be

true that the case never is ended, but remains a permanent case in the court, performance of whose decrees may be the subject of repeated inquiry by proceedings in the nature of contempt. * * * So, when a decree passes in a case of this kind, it remains as a permanent determination of the respective rights of the parties, subject only to the further right of either party to apply for a modification upon any changed condition of affairs."

An appeal was taken to the Supreme Court of the United States, and the decree of the Circuit Court was unanimously affirmed. In delivering the opinion of the Supreme Court, Mr. Justice Blatchford says:

"In the present case, it is urged that the court will be called upon to determine, from time to time, what are reasonable regulations to be made by the Wabash Company for the running of trains upon its tracks by the Colorado Company. But this is no more than a court of equity is called upon to do, whenever it takes charge of the running of a railroad by means of a receiver. Irrespective of this, the decree is complete in itself and disposes of the controversy; and it is not unusual for a court of equity to take supplemental proceedings to carry out its decree and make it effective under altered circumstances."

See, also, Chicago, R. I. & Pac. Ry. Co. v. Union Pac. Ry. Co. (C. C.) 47 Fed. 15; Franklin Tel. Co. v. Harrison, supra; Wolverhampton & Walsall Ry. Co. v. London & N. W. Ry. Co., L. R. 16 Eq. Cas. 343; Greene v. West Cheshire Ry. Co., L. R. 13 Eq. Cas. 44; P. P. & C. I. R. R. Co. v. C. I. & B. R. R. Co., 144 N. Y. 152, 39 N. E. 17, 26 L. R. A. 610.

It must be borne in mind, that the demurrer brings before us only the case as made by the allegations of the bill. These set out the written contract, its parol modifications, the circumstances attending the making thereof, the situation of the parties, and the full performance on both sides of its covenants and stipulations during a period of nearly 50 years. There is no suggestion as to any changed conditions, imposing hardship upon the defendant in the continuance of those contractual relations, or of a situation which would make it intolerable for the railroad company to continue the contract. Neither in the notice of June 2, 1902, expressing the desire and intention of the railroad company to terminate the contract, nor in the correspondence between the parties, which ensued thereafter, was there any reason given by the railroad company for its action in the premises. It simply asserted its right under the contract to terminate it at will. The averment, that at different times, by the consent and acquiescence of both parties, the scope of the contract was enlarged, and modifications of its terms agreed to, affords ground for the inference of a renewed and continuing satisfaction on the part of the defendant with the established contractual relations. It was open to defendant, if it were dissatisfied with the contract, to refuse modification or change therein, and thus possibly have compelled an abandonment of the same by the telegraph company. All such matters, however, are at this stage of the case matters of conjecture. We must now decide the equities of the case upon the allegations of the amended bill.

We do not think that the act of Congress, of July 24, 1866 (14 Stat. 221), has any bearing on the situation in which the complainant finds itself, but, in view of the opinion hereinbefore expressed, it is unnecessary to discuss the contention of complainant in this behalf.

For the reasons hereinbefore given, the decree of the Circuit Court is hereby reversed, and the cause is remanded to that court for further proceedings in accordance with this opinion.

THE SURPRISE.

ROBINSON et al. v. WHITCOMB.

(Circuit Court of Appeals, First Circuit. March 29, 1904.)

No. 495.

1. MARITIME LIENS—SUPPLIES—DISTINCTION BETWEEN CASES WHERE SUPPLIES WERE ORDERED BY OWNER AND WHERE BY MASTER.
   The rule restated that there is a broad difference, in the facts necessary to create a lien for repairs or supplies furnished to a vessel in a foreign port, between repairs or supplies ordered by the master, in which case, their necessity being shown, everything else is presumed in favor of a lien; but, when they are ordered by the owner, whether registered or pro hac vice, while there may be an agreed lien under the modern American rule, there is no presumption in its favor.

2. SAME—SUPPLIES ORDERED BY MASTER—NECESSITY OF CONSULTING OWNER.
   Where supplies furnished a vessel in a foreign port on the order of the master are such as are used in the ordinary navigation of the vessel, the necessity for which must have been known to the owner, there is not the same necessity of consulting the owner as where extraordinary expenditures are required.

3. SAME—DEMISED VESSEL—CONDITIONS OF CHARTER.
   It is immaterial, to the right to a lien for ordinary supplies furnished on the order of the master of a vessel being navigated by a charterer, whether or not there is a formal charter party expressly providing that the charterer shall make all disbursements and protect the vessel from liens, since that is an implied condition of every such charter.

4. SAME—AUTHORITY OF MASTER.
   The master of a vessel, although she is being navigated by a charterer who is bound to make all disbursements and to protect the vessel from liens, has authority, as representing, not only the owner and charterer, but also the crew and passengers and cargo, to procure the necessary wharfage at ports other than the home port, and also such provisions and other supplies as are necessary for immediate or everyday use in the navigation of the vessel. Those furnishing such wharfage or supplies on the credit of the vessel are entitled to a lien therefor; and it is immaterial whether or not they knew of the charter or its conditions, it being a presumption of law, from consideration of the convenience and necessities of commerce, that the owners consented that the ordinary requisites of the voyage should be obtained on the credit of the vessel.

Appeal from the District Court of the United States for the District of Massachusetts.

Benjamin Thompson (Alvah L. Stimson, on the brief), for appellants.
Walter Bates Farr (M. F. Dickinson, on the brief), for appellee.

Before COLT and PUTNAM, Circuit Judges, and ALDRICH, District Judge.

¶ 1. Maritime liens for supplies and services, see note to The George Dumois, 15 C. C. A. 679.

PUTNAM, Circuit Judge. This is an appeal against a decree of the District Court for the District of Massachusetts, taken by two joint libelants of the steamer Surprise, owned and registered at the port of Boston, in the state of Massachusetts. One libelant, Robinson, alleges that he was engaged in the general grocery and provision business at Portland, in the state of Maine, and that, on sundry days, which he names, in August and September, 1902, the Surprise, being then in the port of Portland, and standing in need of supplies to enable her to continue the prosecution of her business, he, on the orders of her steward, furnished her the same, amounting, in the whole, to $732.68. He further alleges that the supplies were delivered on the credit of the steamship; but he does not allege that she was without funds, or that there was any necessity for pledging her credit, or that he was entitled to an admiralty lien on account of the premises.

The other libelant is a corporation known as "The Proprietors of Union Wharf." It alleges that it is the owner of Union Wharf, at Portland; that the wharf is specially arranged for the landing of passengers and freight; and that, between September 11 and September 26, 1902, the Surprise, while making regular passages between Portland and Boston, was needing the use of a wharf and dockage in order to land and receive her passengers and freight, and to enable her to continue the prosecution of her business. It is further alleged that The Proprietors furnished this wharfage and dockage "at the special request of the agent of said steamship and upon her credit," for which is claimed $73.33. The same defects exist with reference to allegations of lack of funds, necessity of credit, and right to a lien. The defense, however, as to both libelants, seems not to have noticed these omissions. Neither does the defense make any claim on account of the use of the word "agent," without further defining; and the case does not come down to such close issues that we require to dwell on these peculiarities.

The Surprise was under charter, and the appellee, who is the claimant of the steamer and her registered owner, apparently relies on the theory that The Kate, 164 U. S. 458, 17 Sup. Ct. 135, 41 L. Ed. 512, and The Valencia, 165 U. S. 264, 17 Sup. Ct. 323, 41 L. Ed. 710, apply, although, as we have explained heretofore, The Kate and The Valencia have no relation to dealings with a master. We have also explained that, with dealings such as occurred in this case, although not done personally by the master, being, nevertheless, under his eye, and relating to the usual minor incidents of a maritime voyage, the legal effect is the same as though they had involved his personal acts. In The Kate there was a continuous current account between the proprietors of a line of steamers and the furnishers of coal, the bargain having been made at the principal office of the furnishers, and under such circumstances that the case might well have been put on the ground that there never was any expectation of holding the vessel; so that it was, in substance, like Cuddy v. Clement, decided by us and reported in two opinions, one passed down on January 16, 1902 (113 Fed. 454, 51 C. C. A. 288), and one passed down on April 10, 1902 (115 Fed. 301, 53 C. C. A. 94). However this may have been, the court in the later case, The Valencia, is careful to say at page 265, 164 U. S., page 323, 17 Sup. Ct., 41 L. Ed. 710, that none of the coal there in controversy was deliv-

ered by the order of the master, or by his procurement, or with his consent. On the other hand, in The Philadelphia, 75 Fed. 684, 686, 21 C. C. A. 501, 503, we said:

"The supplies were delivered to the steamers libeled, at their respective wharfs at their ports of touch, on their round trips, in small quantities, as needed for daily use, in the presence of the masters of the respective steamers, and while they were in control of them, and in the absence of both their owner and their charterers. Therefore the transactions were in the usual course of business by which ordinary supplies are commonly furnished to vessels by the order of the master, and away from the port where the owners reside. It would be intolerable, and entirely contrary to the practice of the courts, to hold that persons furnishing vessels such supplies in small quantities, to meet the requirements of the law for effectuating a lien, must prove express orders by the master. It is prima facie sufficient in such cases that the supplies are of the character which we have described, and come aboard under such circumstances that the master can properly be assumed to acquiesce in their purchase and reception; and this, without reference to whether or not the immediate orders for them came from some person occupying a subordinate position.

"The supplies having thus been furnished under such circumstances that we ought to presume that they were obtained on the express or implied orders of the master, the parties furnishing them were also entitled, at the time the supplies were furnished, to the benefit of the same presumption; and, if the owner of either steamer would rebut the case as thus made, he must show that the orders came from the charterers themselves, and that the parties furnishing the supplies knew that they so came, and thus knew that the course of business was other than that apparent on the face of the transactions, and other than that which they had a right to presume it to be. The record fails to furnish any proof of this character."

In The Iris, 100 Fed. 104, 106, 107, 40 C. C. A. 301, 303, 304, we said:

"By the maritime law, no lien for supplies or labor furnished a vessel is presumed to arise on a contract made by the owner, and proof is required that the minds of the parties to the contract met on a common understanding that such a lien should be created. Neither is it sufficient that the party who furnished the labor or supplies gave credit, so far as his own intentions were concerned, to the vessel, or would not have furnished them except on the belief that he was acquiring a lien for them. In this respect the status is different from what it is with reference to liens for labor and supplies furnished a vessel on the order of her master. This general rule is stated in The St. Jago de Cuba, 9 Wheat. 409, 417, 6 L. Ed. 122; Thomas v. Osborn, 19 How. 22, 29, 40, 43, 15 L. Ed. 534; The Grapeshot, 9 Wall. 129, 136, 137, 19 L. Ed. 651; The Kalorama, 10 Wall. 204, 214, 215, 19 L. Ed. 941; The Emily B. Souder, 17 Wall. 666, 671, 21 L. Ed. 683; and The Stroma, decided by the Circuit Court of Appeals for the Second Circuit, and reported in 53 Fed. 281, 283, 3 C. C. A. 530. It is expressly stated to the same effect in The Valencia, 165 U. S. 264, 270, 271, 17 Sup. Ct. 323, 41 L. Ed. 710.

"This distinction has been emphasized with regard to alleged liens for supplies furnished on the order of the charterers of a vessel, especially where there was no apparent necessity for pledging her credit. The Kate, 164 U. S. 458, 17 Sup. Ct. 135, 41 L. Ed. 512; The Valencia, 165 U. S., at page 271, 17 Sup. Ct. 325, 41 L. Ed. 710; and The Samuel Marshal, decided by the Circuit Court of Appeals for the Sixth Circuit, reported in 54 Fed. 396, 4 C. C. A. 385, and cited in The Valencia, 165 U. S., at pages 271, 272, 17 Sup. Ct. 325, 41 L. Ed. 710. In The Philadelphia and The Baltimore, 75 Fed. 684, 21 C. C. A. 501, decided by the Circuit Court of Appeals for the First Circuit, where it was maintained that the facts were similar to those in The Kate and The Valencia, the question which arose in those cases was laid aside, because the court found that the supplies were obtained under such circumstances that they were to be held as furnished in a foreign port on the orders of the master, thus bringing the circumstances within The Patapsco,

13 Wall. 329, 20 L. Ed. 696, and within the supposed hypothetical case stated in The Kate, 164 U. S., at pages 470, 471, 17 Sup. Ct. 140, 41 L. Ed. 512. In respect to this entire subject-matter, there is a distinction recognized throughout between supplies on the one hand, and seamen's wages and contracts of affreightment on the other, as to which liens presumptively arise."

In Cuddy v. Clement, 113 Fed. 454, 461, 462, 51 C. C. A. 288, 295, 296, we said:

"The rule that an owner of a vessel, who is not also the master, may create an implied lien on her for supplies, is a modern one, confined to the United States, and not a part of the maritime law. This is historically well known, and it is, also, stated by so eminent an authority as Flanders on Maritime Law, § 241. Mr. Flanders understood this proposition to be supported by the opinion of Mr. Justice Johnson in The St. Jago de Cuba, 9 Wheat. 409, 416, 6 L. Ed. 122. The fact that the owner may hypothecate a vessel by an implied lien, without bottomry, must be regarded as established in the United States by The Grapeshot, 9 Wall. 129, 19 L. Ed. 651, The Guy, 9 Wall. 758, 19 L. Ed. 710, and The Kalorama, 10 Wall. 204, 214, 19 L. Ed. 941. The rule has been recognized in other cases, but it originated with those to which we have referred. It happens that, as the rule was developed, no proper distinctions or limitations have been given concerning it, except those explained by the extracts we have made from The Iris, and there shown to have been fully sustained by the Supreme Court.

"In the case of supplies and repairs ordered by a master in a foreign port, their necessity being shown, everything else is presumed prima facie in favor of a lien, and the burden is thrown on whomsoever disputes its validity; but, with reference to supplies ordered by the owner, it is difficult to say what the presumptions are. At one stage of the maritime law, it seems to have been understood that the owner might bottomry a vessel, under circumstances which would make the bottomry valid although there were no maritime necessity therefor. Flanders on Maritime Law, § 251. If such were the law, it might follow that, by a clear understanding, the owner might in like manner impress the vessel with an implied lien although there were no maritime necessity therefor. On that hypothesis, there could be no inquiry, when repairs or supplies are ordered by the owner, whether a credit to the vessel was requisite. The true rule, however, undoubtedly is, with reference to implied liens created by the owner, as well as to express liens created by him, in the form of bottomry or respondentia, that there must be a maritime necessity. This implies both a need of repairs, or supplies, and a reasonable impracticability of obtaining the same on the credit of the owner. The law is thus stated in the last edition of Abbott's Law of Merchant Shipping (London, 1892) 165. In The Kalorama, 10 Wall., at page 214, 19 L. Ed. 941, this is also implied by the observation that 'undoubtedly, the presence of the owner defeats the implied authority of the master; but the presence of the owner would not destroy such credit as is necessary to furnish food to the mariners, and save the vessel and cargo from the perils of the seas.'"

We thus distinguished fully and definitely between cases like The Kate and The Valencia, where goods are ordered by the owner pro hac vice, and cases like those at bar, where the orders are by the master, either in fact or in theory of law. We also enforced the proposition that the lien for supplies obtained on the order of the owner, whether registered or pro hac vice, is of modern growth, peculiar to the United States, and is not supported by presumptions; while, with reference to supplies obtained under the circumstances stated in The Philadelphia and in the case at bar, it appearing that apparently what was obtained was reasonably needed by the vessel, all the presumptions are supplied by the law, and the burden of negativing them rests on the claimant of the vessel.

In addition to the cases referred to in our prior opinions with regard to the presumptions in favor of merchants who supply vessels on the orders of the masters, we may well cite The Lulu, 10 Wall. 192, 197, 19 L. Ed. 906, where we believe they were first stated by the Supreme Court as now thoroughly understood. It is there said:

"Contracts for repairs and supplies, under such circumstances, may be made by the master to enable the vessel to proceed on her voyage, and if the repairs and supplies were necessary for that purpose, and were made and furnished to a foreign vessel or to a vessel of the United States in a port other than a port of the state where the vessel belongs, the prima facie presumption is that the repairs and supplies were made and furnished on the credit of the vessel unless the contrary appears from the evidence in the case."

We wish, also, before taking up the detailed facts on this appeal, to lay aside another element. What were furnished by these libelants were hand to mouth necessities, and of such a character that, according to the course of maritime affairs, and according to maritime ordinary conditions requiring instant action, the law does not always insist that the owners, either pro hac vice or registered, should be first consulted. The case in that respect comes within the observation in the Eliza Lines (C. C.) 61 Fed. 308, 317, affirmed by the Circuit Court of Appeals, 114 Fed. 307, 52 C. C. A. 195, referring to a bottomry bond, as follows:

"There is not a syllable in the record impeaching the transaction, except it is the testimony of Andreasen that he failed to communicate with his owners in advance. In this case this omission was immaterial. The amount taken up was moderate, at a fair rate of maritime interest, and covered only the ordinary port disbursements. The transaction was touching the ordinary course of the management of the vessel, with reference to particulars which the owners foresaw, and could easily have provided for otherwise, if they had so desired. The cases familiar in the decisions arose from unforeseen disasters, involving large amounts at remote points, where the lenders of money were few, and could make their own terms, and all under circumstances which the owners could not anticipate or provide for. It is this class which the courts have considered when laying down so strictly the rules requiring prior communication with owners."

In all the particulars named, this appeal is parallel to The Eliza Lines, especially with respect to the fact that the transactions were in the ordinary course of the navigation of the vessel, and to the fact that they concerned particulars which the owners of the Surprise foresaw must be provided for. Therefore, we have no occasion to comment upon, or lay down any rules with reference to, circumstances involving unusual expenditures, and with regard to which there would be ample opportunity to consult the owners in the ordinary manner. What, in such event, would be required, in view especially of the fact that the Surprise was a chartered vessel, is not now relevant.

We should also observe that much has been made of the fact that, in The Kate and The Valencia, there were formal charter parties which expressly provided that each charterer should disburse the vessel for ordinary current expenses, and protect her from all liens on account thereof. There seems to be an impression that there was something in this fact of special importance; and it has apparently appealed to the legal imagination. It was, however, absolutely immaterial, because, on every charter of the hull of a vessel, the substantial relations of the par-

ties are the same as those specially provided in The Kate and The Valencia. The charter is bound to disburse the vessel and protect her from liens, and impliedly agrees to do so, an agreement as effectual in law as an express one. Moreover, so far as concerns knowledge on the part of a merchant of a charter party or its terms, or the duty arising on a merchant to inquire, there is no essential distinction; because, if a merchant knows that the hull is chartered, though orally and informally, he knows as a matter of course, and must be held to know, that the usual obligations pro and con exist; and he could know no more if the whole was expressed in a formal instrument. We emphasize this fact because all the decisions we will hereafter cite relating to vessels where the hull was chartered, bear on The Kate and The Valencia, regardless of the fact whether there was a formal charter, or only an oral one without any express statement of the terms thereof.

Coming to the merits of the appeal, it will be found that, for each libelant, it is disposed of by The Philadelphia, except only so far as a distinction can be made, if one can be, arising from the fact that in The Philadelphia it did not appear that the merchant knew, or ought to have known, that there was a charter, while, at bar, the claimant of the steamer insists that the libelants were expressly informed of the charter and its terms, or were put on notice in reference thereto. The conclusion which we reach will concede that additional element.

The Surprise was engaged in making regular voyages between Boston and Portland, her home port being Boston, as we have already said. She was running as an ordinary steam packet, carrying passengers and freight, and the frequency of her voyages is plain from the fact that, during the period over which the demands in issue extend, she was at Portland on the 25th, 27th, and 29th days of August, and the 1st, 3d, 5th, 8th, 10th, 12th, 15th, 17th, 19th, 22d, 24th, and 26th days of September. The claim of The Proprietors of Union Wharf is a small one, and only a very few dollars for each dockage. The record fails to bring up to us a convenient statement of the details of Robinson's claim. The amounts must have been moderate for each particular landing. The record covers, however, three formal requisitions for supplies, apparently filled out on printed blanks framed for that purpose. They were signed by the steward of the Surprise, and began as follows:

"Please deliver to S. S. Surprise the following articles, and send bill for the same to us."

The "us" is not responded to except as appears from the signature to which we have already referred, namely: "E. Thompson, Steward." The requisitions cover fresh meats, fresh vegetables, fish, clams, butter, brooms, tacks, tomato ketchup, soap, olive oil, sulphuric acid, toilet paper, coarse salt, articles as necessary at local points for steamships engaged in the business in which the Surprise was engaged, and as immediately consumable, as would be daily supplies of water, hay and grain for a horse during a long drive. They are all in the class, and furnished under such circumstances, as to which the law necessarily favors presumptions of a just credit to the vessel, so far as possible for such presumptions to exist.

It is claimed that Robinson did not intend to credit the Surprise, but that he relied solely on one or more of the charterers. The claimant

offered some evidence to that end. This proposition, however, is not sustained. The requisitions which were the foundation of the transactions contained no direction to charge the supplies to any individual, but only an order for delivery to the "S. S. Surprise." They effectually laid the basis for credit to the steamer. The matter is made positive, because, when Mr. Robinson testified, he produced his original book of entries, that is, his order book, and stated, with the book before him, that the original charges were to the steamer.

The steward testified to some preliminary conversations with Robinson, but not to enough to establish any formal or fixed contract for supplies during the season, or a portion of it, or even any informal arrangement for the account current. The conversations left the parties without any obligations on one side or the other; so that, aside from an expression on the one part, not binding, of a disposition to purchase of Robinson, and, also, an expression on the other part, not binding, of a willingness to give credit if the steamer needed it, the subsequent purchases were taken up as for supplies from hand to mouth in an intermediate port in the same way as in The Philadelphia, 75 Fed. 684, 21 C. C. A. 501, already cited. Therefore, we have an ordinary case of minor supplies furnished to a vessel in a foreign port, of the class of which she had immediate need, and a large part of which she could not take up conveniently except at the place where needed; a case with circumstances under which, prior to The Kate and The Valencia, no admiralty court ever refused a lien, unless the owners showed that there was no necessity for credit to the vessel, and that the merchant knew that fact, or had very good reason to know it, or was in some way clearly put on inquiry. Moreover, according to the universal practice of the admiralty courts prior to the decisions referred to, such liens have uniformly been sustained, at least since Thomas v. Osborn, 19 How. 22, 15 L. Ed. 534, decided at the December term, 1856, without regard to any question whether the vessel was navigated by her registered owner or by charterers.

Referring again to the claim of The Proprietors of Union Wharf, nothing could be more contrary to the spirit of the maritime law, the great purpose of which is to enable vessels to plow the sea and perform their voyages, than the suggestion that a steamship, arriving from an Atlantic voyage, long or short, with passengers and freight, or either, should lie in the stream pending investigation by the owners of a dock or wharf as to the terms of her charter party, or pending communications with her charterers or owners at a port more or less distant. According to the general mercantile practice, wharfage, pilotage, wages to crew, the cost of discharging, and other necessary minor inward expenses, are furnished or disbursed without hesitation, relying in part, of course, on their being made good from the inward freight when collected. If not so made good from the inward freight, they retain their liens, being presumed to have been furnished on the credit of the vessel as well as on the reliance of payment from freight. The same presumption applies with regard to prompt fresh provisioning on arrival, which was included in what was sold by Robinson. Except in the case of shipowners of wealth, who maintain bankers' accounts at important points throughout the world, the usual course is to thus dis-

burse and supply the immediate wants of a ship on arrival, relying partly on the inward freight, but always on the credit of the vessel. For us to sustain the conclusion of the District Court in this case would be to reverse the continuous course of the admiralty courts, recognizing this universal commercial practice, and based on it.

The position of the owner of the Surprise on this appeal overlooks two crucial propositions: First, it is in line with the confused thought which exists to a considerable extent, that the maritime law runs parallel with the rules of the common law as to the relations of master and servant. The maritime law is not based on the common law, and, while at certain points it touches it, at other points it does not. It is unsafe to reason to it from the common law. Second, it overlooks the fact that the master of a ship represents, not only her owners, but also her passengers, cargo and crew; so that, whatever stipulations may be made between owners and charterers, the ordinary maritime necessities for which the master must provide as the common agent, overrule them. This fact is everywhere recognized with regard to sailors' wages; and it would also be conceded with reference to repairs to a ship laden with cargo or passengers, or both, in marine distress in a distant port of refuge, which, as representing all interests, the master is bound to obtain, even to the extent of a bottomry of the vessel. It will be conceded that no form of stipulation on the part of the owner of a vessel who permits her to take the seas, could prevent a lien, either in behalf of the crew, or in behalf of merchants furnishing necessary repairs, or funds therefor, under those circumstances. Inward pilotage, wharfage, dockage and stevedoring, all fall into the same line, because they concern, not merely the vessel, but the crew, passengers and cargo; all of which the master must protect, notwithstanding special stipulations with charterers, whenever the owner has permitted his ship to make voyages. If, in these respects, there is any violation of any agreement, express or implied, between owners and charterers, the owners must protect themselves, as was done in the case at bar, by taking an obligation with a surety, or by terminating the charter for a breach of the terms thereof.

Also, bills of lading for merchandise for cargo to be transported, or cargo received aboard without bills of lading, necessarily raise a lien under all circumstances. The same may be said as to fresh provisions on arrival, which are generally absolutely necessary for the health of the crew. Thus, sometimes, the maritime law raises a necessary presumption in favor of the right to pledge the credit of the vessel, while she is being navigated with the consent of the registered owner; while the conditions with regard to supplies of the classes furnished by Robinson, when obtained by the authority of the master, express or implied, under the circumstances of this case, are commonly so pressing that they overcome the merely ordinary stipulations on the part of the charterer that he will not burden the vessel with liens.

These propositions are not only based on fundamental rules of maritime law, which regard above everything else the necessity of keeping a ship active and useful, but they have always been recognized in the United States by those learned in that direction. The reasons therefor are numerous, and sometimes one is stated and sometimes another.

Judge Asher Ware, who has always been held as most learned in admiralty and maritime rules, in The Phebe, 1 Ware, 263, 267, Fed. Cas. No. 11,064, observing upon the proposition of the claimant of a vessel that a shipper had no lien on her because she had been let under the parol agreement well known on our northeastern coast, under which it is held that the vessel goes out of the employment of the owner into the control of the master, said:

"But the argument is founded on a misconception of the true principles of the law. This rule by which the vessel is bound in specie for the acts of the master is not derived from the civil law [meaning thereby the civil law as practiced in the common law courts], but has its origin in the maritime usages of the Middle Ages; and it is to these usages that we must look to ascertain its true character."

Again, on page 268, 1 Ware, Fed. Cas. No. 11,064 he said:

"But, by the maritime usages and customs of the Middle Ages, which, having been generally adopted by merchants, silently acquired the force of a general law, the master, who was ordinarily a part owner, was not considered as properly the agent or mandatary of the other part owners, but rather as the administrator of the property, that is, of the vessel which was entrusted to his care and management."

Again, he said, at page 269, 1 Ware, Fed. Cas. No. 11,064:

"Thus, all the contracts of the master with the mariners for their wages, with materialmen for repairs and supplies of rigging, or for provisions, or other necessaries for the vessel, involved a tacit hypothecation of the ship and freight. But he was not authorized in his character as master, and as representing his co-owners, to bind them beyond the value of their share in the ship and freight. * * * If the vessel was lost before the creditors were paid, they had no remedy except against the master."

In this same line, in The China, 7 Wall. 53, 68, 19 L. Ed. 67, where it was held that the vessel may be liable in case of collision, although in charge of a pilot which she was compelled to take, while it was subsequently established in Homer Ramsdell Company v. La Campagnie Generale, 182 U. S. 406, 21 Sup. Ct. 831, 45 L. Ed. 1171, that the owners are not liable at the common law, these observations of Judge Ware were repeated. Commenting on The China, the opinion in behalf of the court in Ralli v. Troup, 157 U. S. 386, 403, 404, 15 Sup. Ct. 657, 663, 664, 39 L. Ed. 742, says that that decision proceeded on the distinct practice of the maritime law, that a vessel, in whosesoever hands she is, is considered as the wrongdoer, liable for her torts, and subject to maritime liens for the damages arising therefrom. Judge Ware's propositions were again repeated in Homer Ramsdell Company v. La Campagnie Generale, 182 U. S., at page 413, 21 Sup. Ct. 834, 45 L. Ed. 1171. Further, in Thomas v. Osborn, 19 How. 22, 15 L. Ed. 534, where the question arose as to hypothecation for repairs and supplies by one who was both master of the vessel and charterer, having taken her on shares in accordance with the usages of our northeastern coast to which we have referred, the terms of the lease were described at page 26, 19 How., 15 L. Ed. 534, to the effect that the master had the entire possession and navigation of the vessel, and that he was to victual and man her at his own expense, although the owners were to keep her in repair. The libel in that case related, not only to repairs, but to provisions, without distinguishing one from the other; and the opinion of

Mr. Justice Curtis, in behalf of the majority of the court, makes no distinction in reference thereto. At page 30, 19 How., 15 L. Ed. 534, it refers to a case in which the Supreme Court held that the master may bind the vessel to the cargo, wholly irrespective of the ownership of the vessel; and it continues:

"And so, in this case, we think the general owners must be taken to have consented that, if a case of necessity should arise in the course of any voyages which the master was carrying on for the joint benefit of themselves and himself, he might obtain, on the credit of the vessel, such supplies and repairs as should be needful to enable him to continue the joint adventure. This presumption of consent by the general owner is entertained by the law from the actual circumstances of the case, and from considerations of the convenience and necessities of the commercial world."

There was a dissent in Thomas v. Osborn; but nothing therein contravenes what was thus said. It must be admitted that what we have cited from that opinion was mere dictum, as the case turned; but it stated the views of Mr. Justice Curtis, who is conceded to have had a thorough knowledge of the principles of admiralty, and of the maritime law. So, in 1842, in The Monsoon, 1 Spr. 37, Fed. Cas. No. 9,716, the entire subject-matter now before us, in the best view which can be taken for the owner of the Surprise, was ruled against him, Judge Sprague holding that the person who furnishes provisions to a vessel, not in the home port, may have a lien therefor, although he knew that the master has taken her on shares and is to victual and man her. We must bear in mind what we have already said, that the taking of vessels on shares according to the custom of the northeastern coast operates as a charter, and creates what is known as an ownership pro hac vice; and we repeat that there is no distinction between an oral charter, where the duty of provisioning the vessel arises by implication and the force of law, and a formal charter, where the same duty is expressly stated. At page 38, 1 Spr., Fed. Cas. No. 9,716, Judge Sprague said:

"In order to see whether a lien was created in this case, we must look to the general authority of the master, and the reasons on which it is founded. He has power to hypothecate the vessel in other than the home port for necessary supplies, or to create a lien upon her therefor; and this power is given in order that he may pursue the voyage. It is deemed for the benefit of the owners that such a right should exist, that the certainty of holding the ship therefor, without the necessity of inquiring into the state of the title, or the ability of the owners, should give the greatest facility for obtaining these necessaries."

Then followed this observation:

"I am not aware of any case in which the state of the title has in any degree affected this right, and I think it would impair the usefulness of the rule to introduce any such modification of it. * * * I should fear that owners themselves would be the sufferers from any diminution of the certainty of this security."

Of course, in all this, Judge Sprague had reference to supplies obtained under such circumstances that they were expressly or impliedly ordered by the master in the manner we have already explained; because that was the case before him, and, at that time, the subject-matter of maritime liens given by an owner who was not acting as master was not a familiar one to the admiralty lawyers, as we have shown in Cuddy v. Clement, 113 Fed. 454, 462, 51 C. C. A. 288, according to the ex-

tract we have already made from that case. The Grapeshot, 9 Wall. 129, 19 L. Ed. 651, was not decided until more than 30 years after The Monsoon.

So, in Flaherty v. Doane, 1 Low. 148, 150, Fed. Cas. No. 4,849, the rule of The Monsoon was restated without question. This was in 1867, and by Judge John Lowell, whose familiarity with the whole field of the maritime law cannot be questioned. The case related to seamen's wages, which are peculiar, so that the rule of The Monsoon was not in question, and what Judge Lowell said in reference thereto may be regarded as a dictum. Nevertheless, it was an unqualified expression of a recognized authority.

The result is a restatement of several well-known rules of the maritime law. First, the vessel, for ordinary maritime purposes, has an individuality which is separate from, and superior to, all questions of ownership or title. Second, it is for the interest of all concerned in the vessel, whether registered owners or owners pro hac vice, that the credit given according to the maritime law be governed by simple rules, regarding only the leading circumstances, without the necessity of investigating problematical details of ownership or titles. Third, notwithstanding the details of a charter party, presumption of consent by the registered owners that the ordinary necessities and conveniences of a voyage should be obtained on the credit of the vessel, subject only to the usual limitations, is entertained by the law, not only from the actual circumstances of particular cases, but, also, as said in Thomas v. Osborn, "from consideration of the convenience and necessities of the commercial world." Fourth, the master represents not only the vessel, but the crew, passengers, and cargo, and, therefore, is conclusively authorized to bind the vessel in behalf of the entire enterprise, within, at least, the reasonable limits to which this case relates. In conclusion, we repeat that The Kate and The Valencia have only a narrow application, and that the libelants are clearly outside the same.

We may add, although, perhaps, unnecessary so to do, that since Ex parte Easton, 95 U. S. 68, 24 L. Ed. 373, there has been no question that claims like that of The Proprietors of Union Wharf are of a maritime nature, and may be protected by maritime liens.

The decree of the District Court is reversed; and the case is remanded to that court, with directions to enter a decree for each of the libelants for the amount claimed by him or it, with interest, and the costs of that court, and also for the costs of appeal.

HOSMER et al. v. WYOMING RY. & IRON CO. et al.

(Circuit Court of Appeals, Eighth Circuit. April 28, 1904.)

No. 1,873.

1. APPEAL—GROUNDS FOR REVERSAL—MULTIFARIOUSNESS OF BILL.
   An appellate court of the United States will rarely reverse a decree in equity on the sole ground that the bill was multifarious, and it will not do so where the causes of action joined are not repugnant or inconsistent with each other, and where the only loss or inconvenience to a

defendant from such joinder arises from his having been subjected to the payment of costs with which he is not justly chargeable, which can be remedied by a modification of the decree.

2. VENDOR AND PURCHASER—PAYMENT OF PURCHASE MONEY—TIME AS OF THE ESSENCE OF THE CONTRACT.

A court of equity will not hold time to be of the essence of a contract for the absolute sale of mining property, so as to cause the forfeiture of the rights of the vendee thereunder because of his failure to make payment promptly, in the absence of an express stipulation to that effect, and where it appears from recitals in the contract in making statement of the consideration that the greater part of the original purchase price of the property had been paid by the vendee under prior contracts between the parties for which the later one was substituted.

3. SPECIFIC PERFORMANCE—CONTRACT FOR SALE OF REALTY—NECESSITY OF TENDER.

When a contract evidences an actual sale and purchase of real property, and time is not an essential element therein, and the parties have substantially progressed with performance, the rule requiring a tender of payment by the purchaser before institution of suit for specific performance is not of imperative application, and a bill for that purpose will not be dismissed for failure to make such tender, where it appears that complainant has a substantial interest in the property, and a dismissal would work loss and inconvenience to both parties; but where the costs of the suit might have been avoided, had the tender been made, they will be taxed to complainant, although the suit is contested.

Appeal from the Circuit Court of the United States for the District of Wyoming.

This was a suit brought by the Wyoming Railway & Iron Company against Edward S. Hosmer, Addison A. Hosmer, Amanda S. Hosmer, David S. Wegg, and the Colorado Fuel & Iron Company, to enforce specific performance of a contract for the sale of certain mining claims and real property appurtenant thereto in Laramie county, Wyo. The contract sought to be enforced was entered into by defendants Edward S. Hosmer and David S. Wegg on September 7, 1898, and was supplemented and qualified by certain agreements of extension. The Wyoming Company, the complainant, was the successor in interest of Wegg. Amanda S. Hosmer succeeded to the interest of Edward S. Hosmer, her son. Addison A. Hosmer, after filing a disclaimer, departed this life. The Colorado Company was the lessee of the Wyoming Company, and was engaged in mining and removing iron ore from the property in controversy. Wegg filed a cross-bill against the Hosmers, which was substantially in aid of the relief sought by the complainant. The Hosmers, excepting Addison A., claimed in their answers a forfeiture of the contract and of all rights of the purchaser thereunder. The property involved in the suit comprised what was generally known as the "Sunrise Group" of patented mining claims, including in such designation the appurtenant mill sites.

The transactions leading up to the contract last mentioned will be briefly noticed. Some time in 1891 William Sturgis, Jr., who was then the legal owner of part and the equitable owner of the remainder of the "Sunrise Group," contracted to sell the property to one Charles A. Guernsey, representing himself, Wegg, and one Kennan, for the sum of $120,000. Afterwards, in June of that year, Edward S. Hosmer came into the transaction, and agreed to furnish the entire amount necessary to acquire the property from Sturgis, the same to be held for the benefit of himself, Wegg, and the latter's associates, Guernsey and Kennan, each to have a one-fourth interest, subject, however, to the payment to Hosmer of the moneys expended by him in the purchase of the property, with certain additions by way of interest and a bonus in case of resale by them. The title was to be taken in the name of Hosmer as his security for the moneys advanced. The agreement between the four parties, dated June 9, 1891, provided that Wegg and his associates

¶ 3. See Specific Performance, vol. 44, Cent. Dig. § 286.

should have the right to sell the property, and that Hosmer should deed to their vendee upon the payment to him of the moneys advanced and interest, and the bonus in addition thereto. It was also stipulated that, if the property was not sold within a limited period, it should, at Hosmer's option, be conveyed to a corporation to be formed, Hosmer to receive one-fourth of the capital stock, and Wegg and his associates to receive three-fourths thereof, in consideration of the conveyance by them of certain other mining claims and property in the vicinity of the "Sunrise Group." When Hosmer came into the transaction new papers were drawn between him and Sturgis. Sturgis executed a deed conveying to him the "Sunrise Group," and placed it in escrow. Sturgis and Hosmer executed an escrow agreement, so called, which specified the times of maturity of the deferred installments of the $120,000 purchase price. The agreement contained explicit and stringent provisions making time of payment by Hosmer of the essence of the contract, and providing that upon default in the payment of any installment on the due day thereof all previous payments should be forfeited to Sturgis as liquidated damages, and that he might immediately resume possession of the property. About three months later, the property not having been resold by them, several contracts were drawn up and signed by Hosmer and Wegg and his associates, looking to the formation of the corporation and the conveyance to it of the "Sunrise Group" and the other properties. These contracts, however, were subsequently canceled and abandoned. It was contended on the part of Hosmer that the abandonment was caused by certain misrepresentations of Wegg and his associates concerning the title to the properties which on their part they were to convey to the corporation. It was contended by Wegg that the cause was the financial embarrassment of Hosmer, which rendered him unable to complete the payments to Sturgis. Wherein lies the truth among their contentions is immaterial. They are referred to merely as marking a stage in the progress of the transactions between the parties. Whatever the cause, Hosmer concluded to accept repayment of the moneys thus advanced by him and drop out of the enterprise. On March 24, 1892, Hosmer, Wegg, and Guernsey entered into a new contract, Kennan retiring, which recited the contract between Hosmer and Sturgis, that the consideration to be paid Sturgis was $120,000, that at that time Hosmer had paid thereon $42,000 of principal and $912.92 of interest, and that Wegg and his associates had paid thereon $3,000. It was agreed that Wegg and Guernsey were within five years from that time to pay to Hosmer $44,287.92 (the increased amount being due to certain other small disbursements), with interest at 5 per cent. per annum, and were also to assume and pay to Sturgis the remaining $75,000 and interest necessary to secure the Sturgis deeds, which were still held in escrow. Hosmer on his part agreed to use his best endeavors to secure for Wegg and Guernsey an extension from Sturgis of time for paying the remaining installments of purchase price, and he also agreed to execute to them a warranty deed for the property when they had paid to him the amount above mentioned, and had also paid the balance due Sturgis and the taxes upon the property. This is one of the important contracts bearing on the controversy between the parties, and it is one of those recited in the contract of September 7, 1898, the specific performance of which was sought to be enforced. It will be noticed that this new arrangement contemplated no change in the contract with Sturgis, that the right of purchase from him was left in the name of Hosmer, that payments of the balance due Sturgis would therefore be made in the name of Hosmer, and the deeds which were held in escrow would come to the latter upon final payment by Wegg and Guernsey. When this agreement with Hosmer was reached, Wegg and Guernsey contracted with the Wyoming Company, the complainant, a corporation organized and controlled by them, to convey to it the "Sunrise Group" in consideration of a certain amount of its capital stock. Guernsey subsequently surrendered to Wegg his rights under the contract of March 24, 1892, and Wegg completed the payment to Sturgis of the remaining installments of the purchase price, amounting, with interest, to $81,377.80. From time to time prior to September, 1898, he also made payments to Hosmer aggregating $9,857.61, but did not thereby reduce the principal of Hosmer's claim, nor pay all of the interest thereon.

On September 7, 1898, Hosmer and Wegg entered into the contract sought to be specifically enforced by complainant's bill and the cross-bill of Wegg. This contract recites that on June 15, 1891, Hosmer contracted with Sturgis for the purchase of the "Sunrise Group," and made certain payments upon the purchase price; that on March 24, 1892, Hosmer entered into a contract with Wegg and Guernsey whereby the latter agreed to pay to Sturgis the balance of the purchase price, and further agreed to pay to Hosmer on or before March 24, 1897, the sum of $44,287.92, with interest; that Hosmer agreed, in consideration thereof, to convey the property to Wegg and Guernsey; that Sturgis had been paid in full, and that deeds vesting title in Hosmer were in the possession of a certain bank; that Wegg had acquired the interest of Guernsey; that Wegg had not paid to Hosmer any part of the principal sum due him, nor had he paid all of the accrued interest; that there was due to Hosmer an additional $5,000 on account of the purchase for Wegg and his associates of another claim not included in the "Sunrise Group"; that Wegg was desirous of acquiring the "Sunrise Group." Following these preliminary recitals is this expression of the consideration for the contractual clauses of the instrument: "Now, therefore, in consideration of the premises and of one dollar in hand paid by each of the parties hereto to the other party hereto, respectively, the receipt whereof is hereby mutually acknowledged, and in further consideration of the covenants herein contained and for other valuable considerations, it is agreed as follows." By this contract Wegg bound himself to pay to Hosmer $60,000, with interest, in certain installments, the last thereof maturing March 24, 1900, and also to pay all of the taxes upon the property. Hosmer agreed to convey the property to Wegg by full and sufficient warranty deed. It was stipulated that the contracts of September 9, 1891, and March 24, 1892, were canceled, and the parties mutually released from all obligations arising by reason thereof; also that if, on March 24, 1900, Wegg was unable to pay the balance of the principal sum due to Hosmer, then notes were to be given secured by mortgage upon the "Sunrise Group" and other properties. Wegg agreed to have the Sturgis deeds recorded, thus vesting complete title of record in Hosmer. The $60,000 to be paid by Wegg to Hosmer was made up of the principal amount specified in the contract of March 24, 1892, the $5,000 advanced by Hosmer in the purchase of the other mining claim and interest, and other disbursements by Hosmer for traveling and living expenses in connection with the "Sunrise Group." There was no provision in this contract of September 7, 1898, making time of payment by Wegg of the essence of his rights thereunder. On May 23, 1899, Hosmer and Wegg entered into another contract, which contemplated the conveyance of the property to the latter, so that he could use it as security for a series of mortgage bonds aggregating $250,000, of which Hosmer was to take an amount sufficient at 80 cents on the dollar (in the language of the contract) "to satisfy the claim he now has against said Wegg." Hosmer agreed to attempt to float the balance of the bonds, and to accept as his commission, if successful, 20 per cent. of the capital stock of the Wyoming Company. Afterwards, for reasons satisfactory to both parties, this contract was abandoned, and Wegg paid to Hosmer $7,500 as compensation for his services. On March 22, 1900, Hosmer agreed in writing that the contract of September 7, 1898, which would mature two days thereafter, should be extended to September 24, 1900, with provision for the payment of some intermediate installments. A further extension to November 24, 1900, was granted by Hosmer upon condition that by so doing there should be no other change or modification of the rights and obligations of the parties. As this last-mentioned day approached Wegg endeavored to secure a further extension of time for payment and the division of the balance due Hosmer into monthly installments. Hosmer resided in New York; Wegg in Chicago. On October 17, 1900, Hosmer wrote Wegg that he could not decide definitely upon any plan of settlement differing from that of the contract in force until some time in November, when he would be glad to take the matter up. He also wrote: "You may rest assured that I will do everything I can to arrange the matter in some way to your satisfaction, if you find yourself unable to carry out the terms of your agreement." On October 26, 1900, Wegg wrote requesting favorable action upon his proposition

of modification, and Hosmer replied on the 1st of November that he was busily engaged in other matters, and when at liberty would, if Wegg would come to New York, talk the situation over with him and see what could be done. On the 15th of November Hosmer wrote that he had completed his other labors and would see Wegg any time that he came. On the 23d Wegg wired that on account of the illness of his wife he was unable to go East at that time, and making another proposition to pay the amount due to Hosmer in monthly payments. On the 24th of November, 1900, the final day of the last extended period, Hosmer wired Wegg that he could not accept the terms suggested and notified him that he (Hosmer) would stand on his legal rights. On the same day Wegg wired in reply that he was ready to pay Hosmer the amount due him, but that he should stand on his legal rights and insist upon delivery of perfect abstract of title with warranty deed, and that until Hosmer was ready to deliver the same he would hold him responsible for costs and damages. The demand for the delivery of abstract of title with warranty deed was unjustifiable, as Wegg well knew. He had several times agreed to have the original deed to Sturgis and the Sturgis deed to Hosmer recorded, and had defaulted in his promise and duty. On the 24th of November, 1900, Hosmer wrote to Wegg confirming his telegram of the same day, but indicated that his purpose was not to make a modification of their contract relations excepting upon personal conference. When Wegg received this letter, he wired Hosmer on the 27th that he misunderstood the latter's telegram, and on the same day he wrote him renewing his proposition of modification. To this Hosmer replied that, as the money had not been paid on the 24th of November, he had sold the property to a party in New York. The sale referred to was to his mother, who took with notice of whatever rights or equities were possessed by Wegg. The deed to Mrs. Hosmer was executed on the 28th of November, 1900. On the 10th day of the following month Wegg deeded the property to the Wyoming Company. On the 24th of November, 1900, Wegg had perfected arrangements enabling him to secure the money to pay the entire amount due to Hosmer, but, instead of utilizing his ability in that respect, he endeavored to secure from Hosmer another extension and modification of terms. Under the contract of September 7, 1898, and its extensions, Wegg paid Hosmer $15,600. All of the payments made to Sturgis and Hosmer upon the property amounted in the aggregate to $109,835.41. The amount due Hosmer, principal and interest, when the suit was instituted, was $53,205.40. At this time the complainant or Wegg had received in royalties upon ore taken from the "Sunrise Group" the sum of $23,365.59. The bill of complaint was filed December 12, 1900. No tender of the amount due Hosmer was made by either the complainant or Wegg prior to the institution of the suit. The bill, and an amended bill afterwards filed, contained a general offer to pay and deliver to defendants, or to such of them as might be entitled thereto, and upon such terms and at such times as might be found by the court to be just and right, any and all stocks, moneys, and other property found to be due to them. Wegg by his cross-bill made substantially the same offer in connection with a prayer for an accounting.

On November 5, 1898, the Wyoming Company executed a mining lease of the property in controversy to the Colorado Fuel & Iron Company; the latter contracting thereby to pay certain royalties upon the ore removed. It was alleged in the amended bill of complaint of the Wyoming Company that it had the right to cause the application of the royalties accruing under the lease to the payment of any sum that might be found to be due to Hosmer; that the Hosmers were seeking to prevent the payment of royalties, and that the lessee was threatening to discontinue its payments; that the complainant consented, and prayed that the Colorado Company be required to pay into court such royalties as might accrue under the lease, and that the court make such disposition thereof as was just and right. Mrs. Hosmer demurred to the amended bill upon the ground, among others, that it was multifarious, because of the joinder of a suit to enforce the contract of September 7, 1898, with an action against the Colorado Company upon the lease. The demurrer was overruled. Upon motion of complainant the Circuit Court ordered the Colorado Company to pay into court the royalties accruing under the lease.

The company did so. Subsequently it was decreed that the clerk pay the money so deposited to the complainant, and the costs of the suit, including the 2 per centum upon the amount of royalties paid to complainant out of the registry of the court, were taxed to the Hosmers. The final decree awarded specific performance upon payment into court by complainant of the amount found due to Hosmer, from which was to be deducted the costs. The Hosmers appealed.

Brainard Tolles and J. F. Vaile (Wolcott, Vaile & Waterman, on the brief), for appellants.

John W. Lacey, for appellee Wyoming Railway & Iron Company.

Timothy F. Burke, for appellee David S. Wegg.

Before SANBORN, VAN DEVANTER, and HOOK, Circuit Judges.

HOOK, Circuit Judge, after stating the case as above, delivered the opinion of the court.

Did the Circuit Court commit reversible error in overruling the demurrer to the amended bill of complaint, which was alleged to be multifarious? Was time of the essence of the contract sought to be enforced? Was the failure of complainant and its predecessor in interest to tender the amount due under the contract fatal to the maintenance of the suit? These are the questions presented on this appeal.

The doctrine of multifariousness in equity pleading rests largely upon considerations of inconvenience and expense. Its limitations are not sharply defined, and it would be both difficult and unwise to formulate a rule for unvarying application. It often becomes a nice question whether the convenience of a complainant, and his interest that a multiplicity of suits be avoided, which is also of public concern, outweigh the inconvenience of the defendants arising from the joinder of two or more causes of action in a single suit, and whether the relation between the causes of action is sufficiently apparent to present a common point of controversy. United States v. Bell Telephone Co., 128 U. S. 352, 9 Sup. Ct. 90, 32 L. Ed. 450; Brown v. Guarantee Co., 128 U. S. 403, 410, 9 Sup. Ct. 127, 32 L. Ed. 468; Barney v. Latham, 103 U. S. 205, 215, 26 L. Ed. 514; Oliver v. Piatt, 3 How. 333, 411, 11 L. Ed. 622; Gaines v. Chew, 2 How. 619, 641, 11 L. Ed. 402. But it has rarely, if ever, happened that a decree has been reversed in an appellate court of the United States upon the sole ground that the bill was multifarious. An appellate court should hesitate in awarding a reversal, if the evil resulting to an objecting party from a pleading of that character may be properly and effectively cured. In the absence of a union of causes of action or defenses which are repugnant and inconsistent with each other, the substantial evil is generally one of costs accruing in respect of a matter in which an appellant has no concern. In the appeal before us it is contended that the complainant used the suit to enforce the payment of rents into court by an unresisting defendant, that the demand was not of an equitable nature, that the contract reserving the rents was solely between complainant and its lessee, that the appellants were not parties to the instrument and asserted no claim thereunder, that the trial court ordered the moneys so turned into court by the lessee to be paid to complainant and taxed against the appellants all of the

costs including those connected with that feature of the case. Assuming, without determining, that the claim of multifariousness is well founded, it is clear that with the lifting of the burden of the costs all substantial cause for complaint would disappear, and that in the action of the Circuit Court there would be nothing of prejudice to the appellants.

The general rule applied in courts of equity is that time is not ordinarily of the essence of a contract for the sale of real property, and that it will not be so regarded unless it affirmatively appears that the parties so intended it. Such intent may be indicated by express stipulation to that effect, or it may be gathered by clear implication from the character of the contract itself, or from the nature of the property which is the subject of the contract, or the avowed purposes of the parties with reference thereto. Thus a strict and prompt performance of optional contracts by the party to whom the privilege of purchase is given is regarded as essential to the maintenance of his rights thereunder. The same rule has been applied to contracts for the sale of property of a speculative character, or which is subject to sudden or frequent fluctuations in value or condition. The principle underlying this rule is manifest. It is designed to prevent a defaulting party from utilizing his own default in a hazard or speculation to the disadvantage of another. But the mere fact that the property is of the character mentioned does not give rise to a necessary or inevitable inference that time of performance is a vital and essential feature of the contract. Other facts and other circumstances may so condition the relation of the parties as to clearly impel a contrary conclusion. Notwithstanding the character of the property, it may appear from their course of dealing that the contracting parties did not regard time as of the essence. It may also appear that the transaction has progressed to such a stage that the vendee has an equity in the property equal or superior to that of his vendor, and that the latter's title or possession should be regarded in the light of a security for the balance of the purchase price, or that the vendee has such an interest that it would be unconscionable to permit of its forfeiture. When by the omission of affirmative stipulation the question is at large, and is one for the determination of a court of equity, it is to be so determined, if possible, that no unnecessary hardship or loss shall be inflicted upon one party not demanded by the clear rights of the other. It is presumed, in the absence of countervailing reasons, that such interpretation was within their intent and purpose when they assumed the contract relation and before their controversy arose. To reach a just conclusion in a suit for specific performance, a court may avail itself of all of those aids which the rules of law permit in the ascertainment of the intention of the contracting parties, and all of the facts and circumstances which serve to disclose their conduct under the contract, their own interpretation of its terms, and their relations to the property and to each other. While it will not make a new contract for them, nor interpolate stipulations not of their selection, nevertheless it will distinguish between those provisions which pertain to the form and those which are of the substance of their agreement, to the end that the former be not permitted to lead to an inequitable and unjust result. The power so to do belongs to one of the great heads of

equity jurisprudence. No express provision making prompt payment by Wegg of the essence of his rights appears in the contract of September 7, 1898, or in any of the agreements of extension. The fixing in the extension agreements of new times for payment is of no more importance in this connection than the specification of the maturity of the installments in the original contract. Does it arise by implication that such vital importance should be attached to time of payment by Wegg? It is clear that the contract is not of an optional character. On the contrary, Hosmer agreed to convey the property to Wegg, and the latter obligated himself unconditionally to pay the remainder of the purchase price. This operated to pass to Wegg an equitable interest in the property, even if he possessed none before, and his interest increased with his continued payments. The legal title remained in Hosmer as security for the balance due him and as trustee for his vendee. Nor should the consideration be overlooked that Hosmer did not acquire ownership of the property solely through his own means, but that, on the contrary, nearly two-thirds of the consideration moving to Sturgis, the original owner, was paid directly by Wegg himself, and in that wise Hosmer secured his title. It is true that the property in controversy is a group of mining claims containing deposits of iron ore, but it is also true that whatever enhancement in value has occurred is attributable largely, if not wholly, to the efforts and industry of Wegg and the complainant. Certain prior transactions are expressly referred to in the contract of September 7, 1898, as constituting a part of the consideration thereof. We do not reopen that contract for the purpose of inserting new stipulations, but simply avail ourselves of its affirmative recitals of the considerations moving between the parties. Briefly stated, those recitals refer to the contract of sale by Sturgis to Hosmer, the partial payment of the purchase price by the latter, his contract of sale to Wegg and associates in consideration of reimbursement to him and payment of balance due Sturgis, the actual payment in full to Sturgis, and the inclusion as part of the consideration of a sum of money expended by Hosmer in another matter. By these recitals and by the evidence we learn that at the institution of the suit Wegg had paid to Sturgis and Hosmer upon the purchase of the property more than $86,000 over and above the royalties received from the mining operations. When this is placed against the fact that there remained due to Hosmer, principal and interest, but $53,205.40, it becomes apparent, in the light of all of the other circumstances of the case, that a forfeiture of the purchaser's rights would be grossly inequitable and unjust, and that it would be unconscionable to impose such a penalty upon him. While it is true that the prior contracts were canceled and the parties released from all obligations thereunder by the contract of September 7, 1898, what was meant thereby was merely that the last contract should stand as the evidence of their rights and obligations, and not that the former could not be referred to, as they were in fact expressly referred to, as indicating in part the consideration already paid and the equitable relation thereby created.

Neither the complainant nor Wegg made a tender of the balance of the purchase price due to Hosmer before the suit was instituted, nor is it at all clear that the offers set forth in the pleadings are sufficient

either in time or character. The amount due to Hosmer was fixed and certain, and did not depend for its ascertainment upon trial and decree by the court. No accounting was necessary. The indefinite and uncertain tenders in complainant's bill and Wegg's answer were well calculated to postpone the performance of an immediate and positive obligation. In this connection it should be said that upon a careful consideration of the record we are of the opinion, notwithstanding the averments of forfeiture in the answers of the Hosmers, that, had a full and fair tender been made to them before suit was instituted, it would have been accepted, and thereby all of the costs incident to this litigation would have been avoided. The course of complainant and of Wegg, its grantor, has caused them to be unfairly charged with the payment of a large bill of costs. Ordinarily, when a tender is not made before the institution of the suit, or is not made in the bill in cases in which it is proper to so tender performance, the bill will be dismissed at complainant's cost. But should that be done in this case? The transactions of the contracting parties were such that at the time the suit was instituted each of them possessed a substantial interest in the property in controversy. The purchaser had paid the major part of the purchase money. He had been, and his grantee was then, in the actual possession of the property, and had caused to be made extensive improvements in the immediate vicinity, to the end that the product thereof was readily marketable. The seller retained the legal title, and there remained unpaid to him, even with interest added, considerably less than one-half of the principal of the original purchase price. When a court of equity has acquired jurisdiction of a suit, it will generally proceed to a complete determination of the entire controversy, and will not remit the parties to additional suits or actions for relief, if such course may be properly avoided. And while, in working out an equitable result, a court has no power to impose conditions not authorized by the settled principles of equity jurisprudence, nevertheless it is well recognized that, under the doctrine that he who seeks equity must do equity, it may so condition and qualify its decree that a righteous adjustment of the claims of the contending parties may be accomplished. The Hosmers have not sought, by act or pleading, a rescission or termination of the contract, except by way of strict forfeiture of Wegg's equitable interests; and this, we have seen, is inadmissible. There should be no forfeiture of his or his grantee's interests, if they are still willing to promptly pay the balance which is due.

No result beneficial to any of the contending parties would be secured by a dismissal of complainant's bill because of failure to tender performance. Their rights would be by such course left in a condition wholly unsatisfactory. When the contract evidences an actual sale and purchase of real property, and time is not an essential element therein, and the parties have substantially progressed with performance, the rule requiring tender before institution of suit for specific performance is not of imperative application. Much depends upon the equities of the particular case, and whether the omission to proffer performance has resulted in a hardship or loss that cannot be readily remedied by the decree. It is not infrequent that the question is resolved into one concerning the mere assessment or apportionment of costs. In Hepburn

v. Auld, 5 Cranch, 262, 3 L. Ed. 96, it was held that a vendor could compel specific performance of a contract for the sale of land, if able to give a good title at the time of the decree, although it was perfected after suit was instituted. And in Hepburn v. Dunlop, 1 Wheat. 179, 4 L. Ed. 65, it was suggested that in a case peculiarly circumstanced a court might even continue the cause for the purpose of affording a party time for the completion of his title. In Stevenson v. Polk, 71 Iowa, 288, 32 N. W. 346, it was said:

"It is sufficient if the title is perfected or incumbrances removed prior to the trial. If the court can then by a decree protect the rights of all parties, this is all either can justly ask, unless there has been a rescission, or an offer to rescind, and the party so offering has done all he is required to do, and was entitled thereto at the time the offer was made." Wilson's Ex'rs v. Tappan, 6 Ohio, 174; Linn v. McLean, 80 Ala. 368; Chrisman v. Partee, 38 Ark. 60; Tewksbury v. Howard, 138 Ind. 111, 37 N. E. 358; Oakey v. Cook, 41 N. J. Eq. 364, 7 Atl. 503.

The principle of these authorities may well be applied to the case of a proffer or tender by a vendee, where considerations of equity and justice demand it. On the whole we are of the opinion that substantial justice will be accomplished by the reversal of the decrees of the Circuit Court and the entry in lieu thereof of a decree in conformity with the views herein expressed.

The decree below will be reversed, with costs, and the case will be remanded to the Circuit Court, with instructions to enter a decree to the effect that Edward S. Hosmer and Amanda S. Hosmer recover of the complainant below their costs in the Circuit Court, to be duly taxed, and that if, within 30 days after the filing in the Circuit Court of the mandate herein, the complainant, as the grantee of Wegg, shall pay into the Circuit Court, for the benefit of the said Edward S. Hosmer and Amanda S. Hosmer, the entire amount due and unpaid under the contract of sale, with interest to the date of payment, all of the costs of this suit in the Circuit Court and in the Circuit Court of Appeals, and the commission or percentage upon said amounts which the clerk of that court will be entitled to obtain for his services in receiving and disbursing the money, the complainant may have specific performance of the contract, and the Hosmers may receive the moneys thus deposited for their benefit; but, if it fails to make these payments at the time and in the manner above specified, it shall be deemed to have elected to abandon all rights under the said contract, and Amanda S. Hosmer shall be deemed and decreed to be the owner of the property free from the claims of the complainant and of the defendant Wegg. Amanda S. Hosmer should not be required to execute a deed containing covenants of warranty against demands, liens, or titles of persons who do not claim under or through her or her grantor, Edward S. Hosmer, nor against claims, liens, or titles arising out of unpaid taxes, general or special.

It is so ordered.

THE NEW BRUNSWICK.

MORRISON v. OBRION.

(Circuit Court of Appeals, First Circuit. May 4, 1904.)

No. 528.

1. MARITIME LIENS—SUPPLIES—PRESENCE OF OWNER.
   Where the place of business of a corporation which is the owner of a vessel is at a port in a state other than that of its creation and legal domicile, and its officers are there present, to the knowledge of one who furnishes supplies in that port, the master has no authority to impress a lien on the vessel for such supplies.

2. SAME—STATE STATUTE—FOREIGN VESSELS.
   The rule that a proceeding cannot be maintained to enforce a lien under a state statute for supplies furnished a seagoing vessel owned by a corporation of another state is not rendered inapplicable by the fact that she was enrolled at the port where the supplies were furnished, where it is not shown that the person furnishing the same was misled by such fact into believing her a domestic vessel.

Appeal from the District Court of the United States for the District of Massachusetts.

For opinion below, see 125 Fed. 567.

Eugene P. Carver and Stephen R. Jones, for appellant.

Arthur J. Selfridge (William L. OBrion, on the brief), for appellee.

Before COLT and PUTNAM, Circuit Judges, and BROWN, District Judge.

PUTNAM, Circuit Judge. This appeal arose out of an intervening petition filed by Morrison, the appellant, on the 1st day of June, 1903, in a proceeding then pending in admiralty against the steamer New Brunswick in the District Court for the District of Massachusetts. 125 Fed. 567. The petition was dismissed, and Morrison appealed to this court.

The essential parts of the petition are as follows:

"That the steamer New Brunswick, during the months of June, July and August, 1902, was owned by the Colonial Steamboat Company, a corporation organized and existing under the laws of the state of Maine.

"That your petitioner during the said months was engaged in the business of furnishing and supplying coal to vessels in said Boston; that during the said months the said steamer New Brunswick was lying in the port of Boston, and in need of coal and certain labor incident to its delivery, to enable her to continue in the business in which she was engaged and for which she was intended, and, at the instance and request of her master and agent, your petitioner supplied to said steamer certain coal, labor, and supplies of which she was in need, on the dates when and in the amounts as are set out in the itemized account which is hereunto annexed, marked 'A,' and that there is due to your petitioner for said coal, labor, and supplies the sum of $1,536.32; and that the said coal, labor, and supplies were furnished on the credit of the said steamer, and the amounts charged for the same are fair and reasonable, and your petitioner is entitled to a lien on the said steamer New Brunswick for the said amount.

¶ 1. Maritime liens for supplies and services, see note to The George Dumois, 15 C. C. A. 679.

¶ 2. Maritime liens under state statutes, see note to The Electron, 21 C. C. A. 21.

"That the said coal, labor, and supplies were furnished in the port of Boston, and your petitioner duly filed in the office of the clerk of the city of Boston statements subscribed and sworn to by him, giving a true account of the demands due to him, with all just credits, and otherwise in accordance with law."

Thereupon the petitioner prayed that the District Court would decree for the balance against the steamer. The opinion of the District Court on this petition was as follows:

"This was for the price of coal. The arrangements for its purchase were made by the claimant's manager before the season began, and without any intervention by the captain. Under these circumstances, it is of little consequence who ordered the coal to be delivered from time to time. Morrison relied upon an agreement to give a lien said to have been made between himself and some of the claimant's officers, but I find that no such lien was ever agreed to by any one authorized to represent the claimant in the matter. So far as appears, even the libelant did not understand that he had a general maritime lien for the coal furnished. He seems to have supposed that he could avail himself of the lien given by the statutes of Massachusetts. He may have supposed this either because he thought the steamer was a Massachusetts vessel, or because he did not anticipate the decision of the Supreme Court in The Roanoke, 189 U. S. 185 [23 Sup. Ct. 491, 47 L. Ed. 170]. As the contract for coal was made for the season by the owners, there was no lien. Cuddy v. Clement, 113 Fed. 454 [51 C. C. A. 288]. While Morrison filed the statutory claim for a lien, he cannot, under these pleadings, avail himself of it."

There may be some question whether there was a definite arrangement for the coal before the season commenced, as stated by the learned judge of the District Court. This, however, in view of other aspects of the case, it is not necessary for us to determine. It appeared that the corporation which owned the New Brunswick, although created by the laws of Maine, had its usual, and in fact only, place of business at Boston. It also appeared that the steamer was engaged in excursion trips between Boston and Salem, making her port of rest at Boston, where the coal was supplied.

The petitioner undertakes to bring this appeal within The Surprise (decided by us on March 29, 1904) 129 Fed. 873, and The Philadelphia, 75 Fed. 684, 686, 21 C. C. A. 501, also decided by us. This he fails to do. In each of these cases, hand-to-mouth supplies were furnished at intermediate ports on the orders of the master, or under such circumstances that they were presumed to be by his orders. Certainly there is nothing in this record to enable us to frame a judgment for any portion of the coal in issue as having been thus ordered. As testified by the general manager of the Colonial Steamboat Company, it was obtained in the following manner:

"I had instructed the wharfinger [that is, the wharfinger at Boston], several times, to go to the head of the wharf and phone for coal. All coal that was sent to the dock, there was a slip sent with it. The wharfinger would receipt the slip, pass it to the engineer for his O. K., and then pass it to the treasurer."

The wharfinger was in no sense a representative of the master of the vessel; and, independently of that, inasmuch as the established place of business of the Colonial Steamboat Company was at Boston, although that city was not its legal domicile, that corporation, as the owner of the New Brunswick, must be regarded as so far present that

there was no existing emergency which vested in the master authority to impress a lien on the vessel for supplies furnished her at that port. The undisputed rule in this respect is as stated in The Lulu, 10 Wall. 192, 200, 19 L. Ed. 906, and in 2 Parsons on Shipping & Admiralty (1869) 332. The continued presence of the owner, even at a place other than that of his domicile, if known to the supplyman, as it was in this case, defeats the power of the master to impress a lien on the ship.

The only evidence which the petitioner produced on this point was that "sometimes the captain would order; sometimes Mr. Peck would order, and Mr. Ware." Mr. Ware was the treasurer of the corporation, and, as we have said, Mr. Peck was the general manager. Nothing in the record enables us to form any estimate of what coal was in fact ordered by the master, if any was so ordered, either directly or by implication, so that, if in truth any was ordered by him, it would be, as we have already said, impossible for us to frame a judgment for any specific amount in that behalf. Without going further into details, the record thus lacks definite evidence that any particular part of the coal in question was ordered by the master, either expressly or by implication.

The petitioner undertakes to bring himself within The Patapsco, 13 Wall. 329, 20 L. Ed. 696; but, alike for the reasons we have stated, and for the other reasons given by us in Cuddy v. Clement, 113 Fed. 454, 460, 51 C. C. A. 288, the circumstances of The Patapsco were essentially unlike those of the case at bar. The petitioner also insists that if what we have already said be conceded, including that the coal was ordered by the corporation itself through its principal and responsible officers, yet there was an agreement, express or implied, that the petitioner should have a lien on the steamer therefor. Aside from the question which we considered somewhat in Cuddy v. Clement, at page 462, 113 Fed., 51 C. C. A. 296, whether a lien of a maritime character could be created in that way without evidence of a maritime necessity therefor, as to which there was no sufficient proof at bar, the record fails to show a meeting of the minds, such as in several decisions we have stated is required in order to sustain this proposition. We need refer to none of our decisions on this point except Whitcomb v. Metropolitan Coal Co., 122 Fed. 941, 59 C. C. A. 465. There the opinion of Judge Aldrich, rendered in behalf of the court, stated at page 942, 122 Fed., page 466, 59 C. C. A., that, in order to raise a lien in this way, "the minds should meet in such a sense as to create an understanding or a contract that such a lien should exist for the purposes of security to the party who furnished the supplies." As, therefore, the only question is one of fact—whether the evidence sustains the petitioner in the particulars required by Whitcomb v. Metropolitan Coal Co., it would not be of advantage to detail the proofs, because it is too clear that they are so indefinite and uncertain that they do not justify us in finding this issue in his favor.

It will be noticed that the petition which we have considered represents merely that the New Brunswick was owned by the Colonial Steamboat Company—a foreign corporation, so far as the questions here involved are concerned. It does not state where she was registered or enrolled, though it perhaps left the presumption that she was regis-

tered or enrolled at some port in the state of Maine. The petition contained some allegations looking to claiming a lien under the statutes of Massachusetts. The Roanoke, 189 U. S. 185, 23 Sup. Ct. 491, 47 L. Ed. 170, as applied to the petition and the facts already referred to, rendered ineffectual any attempt to enforce such a lien. The Roanoke was decided on the 2d day of March, 1903, but the volume containing it was undoubtedly published after this petition was filed. The opinion of the District Court adverse to Morrison was passed down on July 9, 1903. Shortly previous thereto an application had been made to the court for leave to amend, alleging that at all times while the coal was being delivered the New Brunswick was enrolled at the port of Boston. We assume that the purpose of this application was to enable the petitioner to rely on the alleged statutory lien. Whether this amendment should have been allowed was, under the circumstances, a matter of discretion which we cannot revise. Any decisions of the Supreme Court apparently to the contrary, on careful examination and comparison with other decisions, will be found not to contravene this proposition as applicable to the precise case before us. But as we will see, the amendment would have been ineffectual if it had been made.

Subsequently, after the opinion of the District Court to which we have referred had been passed down, Morrison filed a new petition, alleging that the New Brunswick was during the year 1902 enrolled at the port of Boston, and evidently he aimed by this petition to secure from the District Court the enforcement in admiralty of the alleged statutory lien to which we have referred. The second petition was dismissed by the District Court on the ground of res adjudicata, holding that the disposition of the first petition on the merits barred it. As a general proposition, the court is sustained by the rule as given in Stearns on Real Actions (1831) 80, 81, and elaborated and broadly applied in United States v. California & Oregon Land Co., 192 U. S. 355, 24 Sup. Ct. 266, 48 L. Ed. ——. The usual rule undoubtedly is that where a proponent has made his case in his own way, and has gone to trial on the merits and been defeated, he cannot afterwards maintain another suit, based upon the same transaction, varying the allegations with reference to the cause of action. For other reasons, however, this petition, as well as the proposed amendment, was ineffectual.

There were no allegations in the second petition to the effect that Morrison was misled by the fact that the New Brunswick was enrolled at Boston, and there is no claim of that nature in the record. So far as either is concerned, he was wholly inconsiderate of any question as to the place of enrollment. Therefore there is no basis for any claim that a foreign vessel may be regarded as domestic, or vice versa, when the materialman has been misled. St. Jago de Cuba, 9 Wheat. 409, 418, 6 L. Ed. 122; Parsons on Shipping & Admiralty (1869) 325. Consequently the ordinary rule applies, that a vessel is domestic at the port where her owners are domiciled or reside, and foreign at other ports, wherever she may be registered or enrolled. White's Bank v. Smith, 7 Wall. 646, 19 L. Ed. 211; The Havana, 64 Fed. 496, 12 C. C. A. 361. It is also the settled law of the federal courts that a corporation is domiciled and resides in the state of its creation. Therefore Maine

was the home port of the New Brunswick, and, in any view of the case, and alike on each petition, the Roanoke meets it, and no statutory lien can be successfully maintained.

The decrees of the District Court are affirmed, and the appellee recovers the costs of appeal.

MAHLER et al. v. ANIMARIUM CO.

UNITED STATES ex rel. ANIMARIUM CO. v. CIRCUIT COURT OF UNITED STATES, SOUTHERN DIST. OF IOWA, et al.

(Circuit Court of Appeals, Eighth Circuit. April 28, 1904.)

Nos. 1,527, 41.

1. DECREE—IMPEACHMENT—DENIAL OF AUTHORITY OF COUNSEL.
   Duly authorized counsel instituted a suit for the complainant, during the progress of which an order of severance was made, and leave was given to file a new bill against certain of the defendants, which was done. The cause on such bill proceeded to a decree in complainant's favor, which was reversed on appeal, being conducted throughout by the same counsel. *Held*, that complainant could not challenge the validity of the decree of the appellate court on the ground that the trial court was without power to make the order of severance, and consequently the subsequent proceedings thereunder constituted a new suit, in which the counsel thereafter appearing had no authority to represent it without a new and express employment.

2. SAME—POWER OF COURT TO SET ASIDE.
   A decree, although final, remains under the control of the court during the term at which it was rendered; and where the court suspended the entry of a decree which had been previously signed, but not entered on the journal, and proceeded thereafter to reform the pleadings and hear the cause anew, with the acquiescence of the parties, such decree is of no validity, although it was by mistake filed by the clerk.

Appeal from the Circuit Court of the United States for the Southern District of Iowa.

Edward J. Hill, for Animarium Co.

Leslie A. Gilmore, for James H. Mahler and others and respondents.

Before SANBORN, VAN DEVANTER, and HOOK, Circuit Judges.

HOOK, Circuit Judge. In the first of these causes a motion was presented on behalf of the Animarium Company and certain of its licensees to cancel a decree of this court for want of jurisdiction. The other cause is an application on behalf of the same company for a writ of mandamus commanding the respondents to proceed with the enforcement of what is claimed to be a decree in its favor rendered by the Circuit Court of the United States for the Southern District of Iowa. These matters are the outgrowth of the same litigation, and, as there exists in a large measure a dependence upon the same conditions, they will be considered together.

On September 20, 1899, the Animarium Company filed its bill in the Circuit Court of the United States for the Southern District of Iowa against one G. Walter Filloon, to obtain an injunction restraining

the infringement of certain letters patent. In January, 1901, James H. Mahler and others, doing business as the Oxygenor Company, were, upon their own application, made parties defendant. The issues were joined, and a large amount of testimony was taken. The cause having been heard, an opinion was filed by the trial judge on June 21, 1900, to the effect that the Animarium Company was entitled to a decree. Animarium Company v. Filloon (C. C.) 102 Fed. 896. A decree, however, was not entered at that time, for the reason that it was agreed that the pleadings should be recast, so that, the complainant having embraced in an amended and substituted bill of complaint the substance of the facts proven by the testimony, the questions involved might be concisely presented by demurrer, and determined by the ruling of the court thereon, and thus the expense of a voluminous record on appeal could be avoided. Counsel for the respective parties appeared on September 8, 1900, and it was then formally ordered that the Animarium Company have leave to file instanter an amended and substituted bill, and that defendants have leave to file a demurrer thereto; and, said pleadings being considered as having been filed, it was further ordered that the demurrer to the amended and substituted bill be overruled. The defendants electing to stand on the demurrer, a decree was rendered in favor of the Animarium Company. This is the decree which that company now seeks to have enforced. The amended and substituted bill not being completed at the time of the hearing, the papers, including the signed decree, were delivered to one of the solicitors for the complainant, with the direction that, when presented to the clerk of the circuit court, they should be filed and entered as of the 8th of September. These pleadings and the decree were not presented to the clerk until September 26, 1900. Two days prior thereto the defendant, Filloon, presented a petition for rehearing, and supported the same with an affidavit stating in substance that he had not been represented at the hearing of September 8th, and that the counsel who there represented the defendants were the counsel of his codefendants, Mahler et al., and had no authority from him. The trial judge at once fixed a date for the hearing of Filloon's petition, and made an order on September 24, 1900, that in the meanwhile the decree should not be entered. When the papers were received by the clerk, on the 26th of September, he filed all of them, including erroneously the draft of the suspended decree. The decree was not entered upon the journals of the court, and it has not been so entered to this day. The petition of Filloon for a rehearing was heard on the 17th of October, 1900, counsel for all of the parties being present; and the court, being impressed with the contention of Filloon that he had not been represented at the prior hearing, and that his rights would be prejudiced by joinder with his codefendants, Mahler et al., made an order of severance, and that the litigation should thereafter proceed as two independent suits in equity; that is to say, that the bill as originally filed, Filloon's answer, and complainant's replication, should stand as the pleadings in one suit, and that the Animarium Company should have leave to file another amended and substituted bill against Mahler et al., and that it should be docketed and proceeded with as a separate and independent suit. No objections appear to have been made at the time to this procedure. The suit against Filloon may be

dismissed from further consideration with the observation that it seems to be still pending, and that its course since the order of severance is marked by an unusual confusion and complexity of pleading. In compliance with the order of severance, the Animarium Company filed its second amended and substituted bill against Mahler et al. on October 31, 1900. The defendants demurred thereto, the demurrer was overruled, the defendants elected to stand upon their demurrer, and on November 13, 1900, a decree was rendered in favor of the Animarium Company. From this decree the defendants appealed to this court. The record filed here contained none of the proceedings prior to the filing of the second amended and substituted bill. The only reference to such proceedings is contained in the recital in the second amended and substituted bill that it was filed pursuant to the order and direction of the court. Upon hearing in this court, the decree below was reversed, and the cause was remanded, with directions to dismiss the bill of complaint. Mahler v. Animarium Company, 111 Fed. 530, 49 C. C. A. 431. The decree in this court was rendered October 21, 1901, and it is the decree which is sought to be canceled because of an alleged want of jurisdiction. On April 14, 1902, the application of the Animarium Company for a writ of certiorari was denied by the Supreme Court. 186 U. S. 481, 22 Sup. Ct. 941, 46 L. Ed. 1266.

Two grounds are relied upon for the cancellation of the decree of this court. They are: (1) That commencing with the filing of the second amended and substituted bill of complaint in the Circuit Court, the same being the first pleading shown in the record on appeal to this court, the suit was prosecuted without the knowledge or authority of the Animarium Company; (2) that it appears upon the face of the bill of complaint filed in the name of the Animarium Company, and shown in said record, that the Circuit Court was without jurisdiction, in that the suit was not instituted in a district in which the defendants were inhabitants, or had committed acts of infringement, and had a regular and established place of business. Of these in their order.

Passing the question which at once suggests itself—whether a solemn decree of a court can be attacked, after the term at which it was rendered, by mere motion, and affidavit that counsel had no authority to represent a party for whom they appeared, or whether the remedy under such circumstances is not by original bill—the first of the enumerated objections is disposed of by the record, and the admission of counsel who now appears for the Animarium Company. It was admitted by counsel that the original bill which was filed on behalf of the Animarium Company in 1899 was filed with its authority; that it was cognizant of all of the proceedings in the cause prior to the order of severance of October 17, 1900; that the counsel who prosecuted the suit and participated in such proceedings, and whose names appear of record, had full authority to do so, down to the date last mentioned. They are the same counsel who continued in charge of the cause against Mahler et al., and of the interests of the Animarium Company in the appeal to this court. But it is argued that the Circuit Court had no power to make the order of severance, and to set aside its previous decree of September 8, 1900, and, being without such power, the counsel who had theretofore appeared were without authority to continue their rep-

resentation of the interests of the Animarium Company, unless that company was advised of the situation, and had expressly empowered them to act in what counsel claims was substantially a new suit. The mere statement of this proposition is sufficient to demonstrate its unsoundness. Moreover, there appears in the petition for the writ of mandamus an express admission of the Animarium Company that its solicitors endeavored for a long time, and in good faith, to carry out the order of severance of October 17, 1900. The excuse offered is that its acquiescence and compliance was out of deference to the trial judge.

The second ground of the motion is that the amended and substituted bill of complaint is deficient in essential jurisdictional averments. The act of March 3, 1897, c. 395, provides as follows:

"That in suits brought for the infringement of letters patent the Circuit Courts of the United States shall have jurisdiction in law or in equity, in the district of which the defendant is an inhabitant, or in any district in which the defendant * * * shall have committed acts of infringement and have a regular and established place of business." 29 Stat. 695, 1 Comp. St. 1901, p. 589.

It is claimed that it appears from the second amended and substituted bill that the defendants Mahler et al. reside in Chicago, Ill., and that it was not sufficiently alleged that they committed acts of infringement and had a regular and established place of business in the Southern District of Iowa. But in that pleading it is expressly alleged that the defendants were infringing upon complainant's rights secured by its letters patent; that it had requested them to cease and desist, but that defendants failed to comply with the request, and were still using the infringing devices, and were threatening to continue the use thereof, and, using the language of the complainant itself—

"That they now have a place of business for the manufacture and sale and disposition of said devices so manufactured and sold by them in the city of Des Moines, Polk county, state of Iowa, and had said place of business at said city of Des Moines aforesaid prior to and at the commencement of this suit, and still have the same, and threaten to continue their said business there, and will continue to do so, as your orator believes, unless restrained by an injunction of this honorable court."

Even were nothing else to be said upon this point, it is manifest that these allegations constitute a compliance with the requirements of the act.

By the petition for the writ of mandamus it is sought to give life and efficacy to the decree of September 8, 1900. It is sufficient to say that this decree was never entered, and that, even if it ever became effective, the order of the Circuit Court of the 24th of September, the order of October 17th, and the course pursued by the court, with the acquiescence of the parties, in severing the two causes and proceeding with them as independent suits, operated to vacate it. A court has full control over its orders and decrees during the term at which they were rendered. Henderson v. Carbondale Co., 140 U. S. 25, 11 Sup. Ct. 691, 35 L. Ed. 332. And this power extends to decrees which are final as well as to those of an interlocutory character. It will be presumed, nothing appearing to the contrary, that the action of the Circuit Court in suspending and then in effect vacating the decree was during the same term

at which the decree was signed. The briefs of counsel contain many suggestions in support of the motion and the petition for the writ of mandamus, but, although they have received due consideration, we have deemed it unnecessary to give more than a general reference to them.

The Animarium Company, through counsel who were employed and fully authorized by it, instituted suit and proceeded with the prosecution thereof. It was wholly successful in the Circuit Court. It endeavored to hold fast to its success on the appeal to this court, and by its application to the Supreme Court for the writ of certiorari, but met with failure. It was finally adjudged that the complainant's devices were devoid of patentable quality. And now, two years after the cause was finally closed, a dragnet is drawn through the proceedings, and the company seeks a review by this court of matters most of which have not even a remote bearing upon the jurisdiction of the court below. Some of its objections are predicated upon its own omissions; others, upon a course of procedure in the Circuit Court in which it fully acquiesced at the time. None of them are substantial.

The motion to cancel the decree of this court will be overruled. The petition for a writ of mandamus will be denied.

LAND TITLE & TRUST CO. v. McCOACH, Internal Revenue Collector.

(Circuit Court of Appeals, Third Circuit. May 26, 1904.)

No. 30.

1. INTERNAL REVENUE—LEGACY TAXES—VESTED OR CONTINGENT REMAINDER.
A testator who died in March, 1901, by his will bequeathed his residuary estate in trust, the income to be paid to his wife during her life, with remainder to his children living at the time of her death, and the lawful issue of any deceased child or children; such issue taking the share only their parent would have taken if living. *Held*, that the remainder so created was not vested, not being limited to "persons in esse and ascertained," but was contingent, being limited to persons who could not be ascertained until the death of the wife, and that such bequests were not subject to the legacy tax imposed by section 29 of the war revenue act of June 13, 1898, c. 448, 30 Stat. 464 [U. S. Comp. St. 1901, p. 2307]; the wife being still living at the time of the taking effect of the amendment of June 27, 1902, c. 1160, § 3, 32 Stat. 406 [U. S. Comp. St. Supp. 1903, p. 282], exempting from the tax "any contingent beneficial interest not absolutely vested in possession or enjoyment" prior to July 1, 1902.

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

For opinion below, see 127 Fed. 381.

John G. Johnson, for plaintiff in error.

James B. Holland and J. Whitaker Thompson, for defendant in error.

Before ACHESON, DALLAS, and GRAY, Circuit Judges.

DALLAS, Circuit Judge. The plaintiff in error was plaintiff below, and the defendant in error was defendant below. In this opinion

they will be referred to simply as plaintiff and as defendant, respectively. As collector of internal revenue, the defendant on December 8, 1902, assessed, inter alia, a tax of $11,439.53 upon the beneficial interests of the remaindermen in the residuary estate of George M. Troutman, who died in the city of Philadelphia on March 5, 1901. The plaintiff admitted that there was due, upon sundry specific bequests under the will of the said George M. Troutman, internal revenue taxes upon said estate aggregating $1,421.51, and he paid this amount to defendant on January 5, 1903; but he refused to pay the additional sum of $11,439.53, assessed and demanded by the defendant, who thereupon assessed a penalty of 5 per centum for nonpayment thereof within 10 days, making the total amount of the disputed assessment $12,011.51. The plaintiff paid this last-mentioned sum under protest and distress, and, after duly appealing to the Commissioner of Internal Revenue for the refund and repayment thereof, which was refused, he brought this action in the Circuit Court, in which he claimed to recover the said sum of $12,011.51, with interest. To the statement of this claim the defendant demurred, assigning several causes of demurrer, which it is unnecessary to set forth, as the declaration in defendant's brief, that he demurred "upon the ground that the beneficial interests upon which the taxes were assessed were vested, and not contingent, and therefore liable for the tax," presents the main question in the case, and one upon which it properly may be decided. The statutory provisions under which this question arises are as follows:

"An act to provide ways and means to meet war expenditures, and for other purposes," approved June 13, 1898, c. 448, 30 Stat. 448, 464 [U. S. Comp. St. 1901, pp. 2286, 2307].

"Sec. 29. That any person or persons having in charge or trust, as administrators, executors, or trustees, any legacies or distributive shares arising from personal property, where the whole amount of such personal property as aforesaid shall exceed the sum of ten thousand dollars in actual value, passing, after the passage of this act, from any person possessed of such property, either by will or by the intestate laws of any state or territory, or any personal property or interest, therein, transferred by deed, grant, bargain, sale or gift, made or intended to take effect in possession or enjoyment after the death of the grantor or bargainor, to any person or persons, or to any body or bodies, politic or corporate, in trust or otherwise, shall be, and hereby are, made subject to a duty or tax, to be paid to the United States, as follows—that is to say: Where the whole amount of said personal property shall exceed in value ten thousand and shall not exceed in value the sum of twenty-five thousand dollars the tax shall be: First. Where the person or persons entitled to any beneficial interest in such property shall be the lineal issue or lineal ancestor, brother or sister to the person who dies possessed of such property, as aforesaid, at the rate of seventy-five cents for each and every hundred dollars of the clear value of such interest in such property."

"An act to provide for refunding taxes paid upon legacies and bequests for uses of a religious, charitable, or educational character, for the encouragement of art, and so forth, under the act of June thirteenth, eighteen hundred and ninety-eight, and for other purposes," approved June 27, 1902, c. 1160, 32 Stat. 406 [U. S. Comp. St. Supp. 1903, pp. 281, 282].

"Sec. 3. That in all cases where an executor, administrator, or trustee shall have paid, or shall hereafter pay, any tax upon any legacy or distributive share of personal property under the provisions of the act approved June thirteenth, eighteen hundred and ninety-eight, entitled 'An act to provide ways and means to meet war expenditures, and for other purposes,' and amend-

ments thereof, the Secretary of the Treasury be, and he is hereby, authorized and directed to refund, out of any money in the treasury not otherwise appropriated, upon proper application being made to the Commissioner of Internal Revenue, under such rules and regulations as may be prescribed, so much of said tax as may have been collected on contingent beneficial interests which shall not have become vested prior to July first, nineteen hundred and two. And no tax shall hereafter be assessed or imposed under said act approved June thirteenth, eighteen hundred and ninety-eight, upon or in respect of any contingent beneficial interest which shall not become absolutely vested in possession or enjoyment prior to said July first, nineteen hundred and two."

The will of George M. Troutman disposed of his residuary estate as follows:

"Thirteenth. All the rest, residue, reversion and remainder of my estate, real and personal, whatsoever and wheresoever and of which I may die seised, possessed or in any way entitled to, I give, devise and bequeath unto my executors, hereinafter named, their heirs, executors, administrators, successors and assigns forever, in trust nevertheless to collect and receive the rents, interest, income, dividends, and profits thereof and after first deducting all expenses attendant upon the execution of the trust to pay the same unto my said beloved wife, Maria E. Troutman, for and during the full end and term of her natural life in at least quarter yearly payments. And from and immediately after the decease of my said wife, then in trust to divide the said rest, residue and remainder of my estate into as many equal parts and shares as there shall be children of mine then living and lawful issue of deceased children, such issue taking such share only as their parent would have taken if living.

"And the shares happening to my children in such division to continue to hold in trust to collect and receive the interest, rents and income thereof and pay over the same unto my said children during the terms of their respective natural lives for their respective use, benefit and behoof and so that the same shall not be liable for their debts, contracts or engagements by assignments, anticipation or otherwise and also that the shares of my daughters shall not be subject to the control or interference of or liable for the debts, contracts or engagements of any husband they may have or take. And the shares so happening to my said children from and immediately after their respective deaths, to hold in trust for all their children then living and the lawful issue of such of them as may then be deceased, their heirs, executors, administrators and assigns forever, in equal parts and shares, so nevertheless, that such issue take and receive such part and share only as his, her or their deceased parent would have taken and received, if then living, for the purposes hereinafter set forth, that is to say, as to the shares of the issue born before my decease of any of my children, to hold the same in trust for such issue during their respective natural lives upon the same trust as hereinbefore set forth with respect to the shares of my children during their lives and after the decease of such issue respectively, then in trust to grant, convey, assign and pay the said shares respectively unto all their respective lawful issue in equal parts and shares, absolutely and in fee, such issue taking by representation and not per capita. And as to the shares of the issue born after my decease, of any of my children, to grant, convey, assign and pay the same unto such issue, their heirs, executors, administrators and assigns forever.

"And as to the shares happening in the division of my residuary estate after the decease of my wife, unto grandchildren or remoter descendants of mine, to hold in trust for the following purposes, that is to say, the shares happening to grandchildren or remoter descendants born before my decease to hold upon the same trusts above set forth with respect to the shares of the issue born before my decease, or any of my children taking in the division aforesaid and the shares happening to grandchildren or remoter descendants born after my decease to hold upon the same trusts above set forth with respect to the shares of the issue born after my decease of any of my children taking in the division aforesaid."

It is contended for the defendant that the remainder created by this clause is a vested remainder, and for the plaintiff that it is a contingent one. Let us, then, in the first place, consider the language of its creation. After a devise and bequest of the residuary estate in trust to pay the income to the testator's wife during her life, the provision is that upon her death (which has not yet occurred) the said residuary estate shall be divided "into as many equal parts or shares as there shall be children of mine then living and lawful issue of deceased children, such issue taking such share only as their parent would have taken if then living." Here, it will be observed, the remainder is not given to the testator's children generally, or as a class, but is limited to such of them as shall be living upon the termination of the precedent life estate, and, furthermore, that it is left uncertain whether, as to any share or shares, the person or persons entitled to take in remainder will be his children, or will be the lawful issue of them, or of any of them. This is made evident by what follows that part of the clause from which we have just quoted, where the contemplation of a remainder which might pass to children, or which might pass to other descendants, plainly appears in the provisions made as to the shares happening to his children and as to the shares happening in the division unto his grandchildren or remoter descendants. From the language employed in its creation, it seems, then, to be obvious that this remainder is not "limited to a person in esse and ascertained," and therefore is not vested (Fearne on Contingent Remainders, 217), but is "limited to a person not ascertained," and therefore is contingent. Cruise on Real Property (1st Am. Ed.) vol. 2, p. 263. It is precisely within the rule laid down in Smith on Executory Interests (section 281), that:

"Where real or personal estate is devised or bequeathed to such children, or to such child or individuals as shall attain a given age, or the children who shall sustain a certain character, or do a particular act, or be living at a certain time, without any distinct gift to the whole class, preceding such restrictive description, so that the uncertain event forms part of the description of the devisee or legatee, the interest so devised is necessarily contingent on account of the person. For, until the age is attained, the character is sustained, or the act is performed, the person is unascertained. There is no person answering the description of the person who is to take as devisee or legatee."

That the law is as stated by the standard text-writers to whom we have referred, the general current of judicial decisions abundantly shows; but it is contended that those of the Supreme Court of Pennsylvania disclose no settled construction of such language as is used in George M. Troutman's will, and that therefore the decisions of the federal courts should be followed. But in our opinion the law of Pennsylvania as to the matter in question has been settled by the decisions of its court of last resort, and in conformity with the generally established rule to which we have heretofore adverted. It may be that it would be difficult to harmonize all the dicta, or perhaps some of the judgments, reported in the earlier Pennsylvania cases, but no attempt to do so need be made. It suffices to say that the Supreme Court of that state has, by its more recent adjudications, distinctly, and, as may be assumed, finally, resolved any doubt that

might previously have been entertained as to its position upon the subject under consideration. In Craige's Appeal (1889) 126 Pa. 223, 17 Atl. 585, the testamentary clause in question was:

"(4) In the event of my son's decease, and of his wife, Ann, while his widow, or in the event of her second marriage, I will that my whole estate shall be immediately divided into two equal portions by my trustee herein named, or his successor, calling to his aid the advice of my daughter Caroline, and such other friends of the family as they may choose to consult; and that one-half of said estate thus divided shall be distributed in equal proportions, to the children of my said son Edmund and his wife Ann, living at the time of their death or said Ann's second marriage, giving hereby to my daughter Caroline the choice of one-half of said estate thus divided."

It was held "that the estate given to the children of Edmund and Ann Holmes was contingent, and became vested only upon the death of both, and in such children as were then in life"; and in that case, as also in Reilly's Estate (1901) 200 Pa. 304, 49 Atl. 939, it was said that the rule of legal construction, as well as the testamentary intent in such cases, is well stated in the passage which we have already quoted from Smith on Executory Interests. These cases would seem, as to the law of Pennsylvania, to be conclusive, but to the same effect are Martin's Appeal (1898) 185 Pa. 51, 39 Atl. 841, and Raleigh's Estate (1903) 206 Pa. 451, 55 Atl. 1119.[1] It is not impossible plausibly to suggest that the federal decisions disclose some apparent discrepancies, but, as was said in the case of In re Hoadley (D. C.) 101 Fed. 233, their explanation is to be found in the endeavor to adopt that construction of the will which will most nearly carry out the apparent intent of the testator, and make that intent controlling. But that the question before us, if presented as in this case, would be decided by the Supreme Court of the United States as we feel compelled to decide it, is, we think, made apparent by the opinion delivered by that court in McArthur v. Scott, 113 U. S. 340, 5 Sup. Ct. 652, 28 L. Ed. 1015, in which (page 379, 113 U. S., page 661, 5 Sup. Ct., 28 L. Ed. 1015) it is significantly pointed out that the gift of the remainder there under examination "is not to such grandchildren only as shall be living at the expiration of the particular estate, but it is to 'my grandchildren per capita, the lawful issue of my said sons and daughters'—words of description appropriate to designate all such grandchildren."

Having reached the conclusion that the remainder in this case is contingent, and that therefore the assessment was unlawful, it is unnecessary for us to express an opinion upon any other of the questions which have been argued. Our views upon the single point we have discussed require that the judgment of the Circuit Court shall be reversed, and the cause be remanded to that court with direction to enter judgment for the plaintiff upon the demurrer, and it is so ordered.

[1] Note by the Court. And also Mulliken v. Earnshaw, 58 Atl. 286, which has been decided by the Supreme Court of Pennsylvania since this opinion was written. It has not yet been officially reported.

PHILADELPHIA TRUST, SAFE DEPOSIT & INS. CO. et al. v. McCOACH, Internal Revenue Collector.

(Circuit Court of Appeals, Third Circuit. May 26, 1904.)

No. 29.

1. INTERNAL REVENUE—LEGACY TAXES—VESTED OR CONTINGENT REMAINDER.
The interest of a daughter in her father's estate, which, by the terms of his will, she was not to take unless she survived her mother, was contingent, and not vested, and did not become subject to legacy tax, under section 29 of the war revenue act of June 13, 1898, c. 448, 30 Stat. 464 [U. S. Comp. St. 1901, p. 2307], where her mother was living July 1, 1902, after which time contingent beneficial interests vested in possession or enjoyment were exempted from the tax by the amendment of June 27, 1902, c. 1160, § 3, 32 Stat. 406 [U. S. Comp. St. Supp. 1903, p. 282].

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

For opinion below, see 127 Fed. 386.

John G. Johnson, for plaintiffs in error.

James B. Holland and J. Whitaker Thompson, for defendant in error.

Before ACHESON, DALLAS, and GRAY, Circuit Judges.

DALLAS, Circuit Judge. In this case the interest of a daughter in her father's estate, which, by the terms of his will, she was not to take unless she should survive her mother, was adjudged to be liable to tax, notwithstanding the statutory exemption from such tax of "a contingent beneficial interest not absolutely vested in possession or enjoyment." That this adjudication was erroneous is shown in the opinion filed herewith, in the case of Land Title & Trust Company, Executor, etc., v. McCoach, Collector of Internal Revenue, 129 Fed. 901, and in the opinion and judgment of the Supreme Court of Pennsylvania in Holmes' Appeal, 116 Pa. 246, 9 Atl. 341.

The judgment of the Circuit Court in favor of the defendant upon his demurrer to the plaintiffs' statement of claim is reversed, and the cause will be remanded to that court, with direction to enter judgment thereon in favor of the plaintiffs.

HEMPSTEAD v. THOMAS, Collector of Customs.

(Circuit Court of Appeals, Third Circuit. May 9, 1904.)

No. 11.

1. CUSTOMS DUTIES—CLASSIFICATION—BORATE OF MANGANESE—BORATE MATERIAL—CHEMICAL COMPOUND—NOSCITUR A SOCIIS.

The enumeration in paragraph 11, Tariff Act July 24, 1897, c. 11, 30 Stat. 152 [U. S. Comp. St. 1901, p. 1627], of "other borate material," refers only to borate materials found in nature in a raw condition, such as the "borates of lime or soda" included in the same provision, and does not embrace borate of manganese, or bormangan, which is a manufactured article made from manganese and borates of lime or soda, and which is held to be dutiable as a chemical compound or salt under paragraph 3 of said act, 30 Stat. 151 [U. S. Comp. St. 1901, p. 1627].

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

For decision below, see Hempstead v. United States, 123 Fed. 346, G. A. 5155.

Wm. A. Keener (J. Stuart Tompkins, on the brief), for appellant.

James B. Holland and Wm. M. Stewart, Jr., for appellee.

Before ACHESON, DALLAS, and GRAY, Circuit Judges.

GRAY, Circuit Judge. This is an appeal by the importers from a decree of the Circuit Court of the United States for the Eastern District of Pennsylvania, affirming the action of the Board of General Appraisers. The undisputed facts appear to be as follows:

O. G. Hempstead & Son imported into the port of Philadelphia, at various dates between December 4, 1899, and March 29, 1900, 16 separate lots of merchandise, invoiced as bormangan, or borate of manganese, which was assessed with duty at three cents per pound, under paragraph 11, Act July 24, 1897, c. 11, 30 Stat. 152 [U. S. Comp. St. 1901, p. 1627] which provides as follows:

"11. Borax, five cents per pound; borates of lime or soda, or other borate material not otherwise provided for, containing more than thirty-six per centum of anhydrous boracic acid, four cents per pound; borates of lime or soda, or other borate material not otherwise provided for, containing not more than thirty-six per centum of anhydrous boracic acid, three cents per pound."

The importers protested against this classification and assessment, claiming that said merchandise was dutiable at 25 per cent. ad valorem as a chemical compound or salts, under paragraph 3 of said act of 1897, c. 11, 30 Stat. 151 [U. S. Comp. St. 1901, p. 1627], which said paragraph reads as follows:

"3. Alkalies, alkaloids, distilled oils, essential oils, expressed oils, rendered oils, and all combinations of the foregoing, and all chemical compounds and salts not specially provided for in this act, twenty five per centum ad valorem."

The Board of General Appraisers overruled the protests, and affirmed the decision of the collector. The Circuit Court affirmed the

action of the Board of General Appraisers. In so doing, we think the learned judge of the court below was in error. We take the following findings of fact from the opinion of the court:

"It is agreed by the parties to this appeal, that the following facts have been established by the testimony: The merchandise in question is borate of manganese, and is known by the trade as such. It is not found in nature, but is a manufactured product derived from borate of lime, or borate of soda, and manganese. It is a compound of boracic acid and manganese. The several importations in question contain from 4 to 20 per cent. of manganese, and from 10 to 30 per cent. of anhydrous boracic acid. The market price of manganese is 4 cents a pound, and the market price of anhydrous boracic acid is 16 cents a pound. Borate of manganese is extensively used in the manufacture of varnishes, where a light colored varnish is desired, and its only practical use is in such manufacture. The manganese acts as a dryer, the boracic acid having apparently no effect, except as a vehicle for the manganese."

The classification of the importation in this case turns upon the meaning of the words "other borate material," as used in paragraph 11, above quoted. There is apparently confusion in the use of the word "material," by both the Board of Appraisers and the court. It is sometimes used by them as the equivalent of "substance" or "article," without reference to its real meaning as the substance or matter of which anything is made or to be made.

Borate of manganese is shown by the testimony to be an article not found in nature, but manufactured from the raw materials, borate of lime, or borate of soda, which are found in nature. Borate of manganese, therefore, is purely a manufactured article—as stated above, a chemical compound of boracic acid and manganese.

Is this borate of manganese a "borate material," within the meaning of paragraph 11 of the tariff act of 1897? We think not. As the only borate material specifically mentioned in paragraph 11 of the tariff act of 1897 are the borates of lime and soda, the meaning of "other borate material," used in conjunction therewith, must, on the principle of noscitur a sociis, be determined with reference to these substances. Borate of lime and borate of soda are the principal raw materials from which borax and boracic acid are obtained. There are other borate materials, such as Tuscan crude boracic acid, tincal, boro-nitro-calcite, boracic acid crystals and tisa, from which borax and boracic acid are manufactured. They are all crude raw materials found in nature, and are of a character similar to borate of lime and borate of soda, but borate of lime and borate of soda seem to be the principal borate materials from which borax and boracic acid are obtained, as they are found in nature in enormous quantities. Borate of manganese, on the other hand, as we have seen, is not found in nature, but is a manufactured product, obtained from the raw materials, borate of lime, borate of soda, and manganese. Thus manufactured, it contains, of course, boracic acid in varying proportions from 10 to 30 per cent., the same being useful only as a vehicle for the manganese, and when eliminated, is waste product. It is true, that, chemically, borax and boracic acid can be obtained from the borate of manganese, but it is not true that, commercially, they can be so ob-

tained. It is in evidence that borax is sold for 8¼ cents per pound, and boracic acid for 16 cents per pound, while it would cost at least one dollar per pound to produce borax or boracic acid from borate of manganese. It is also testified that, apart from the cost, boracic acid so obtained would not be a commercial article, on account of the stain produced by the manganese.

We think, therefore, that it is clearly established by the evidence contained in this record, that borate of manganese is not, practically or commercially, a borate material. It is itself a product of the borate materials mentioned in paragraph 11 of the tariff act referred to.

It is admitted on both sides, that this paragraph is founded upon the protective policy of the government. This fact only lends force and emphasis to the argument, that a practical and commercial meaning must be given to the words "borate material." The fact that, chemically, it is possible to produce borax or boracic acid from borate of manganese, does not bring the latter within the meaning of the words "borate material," as used in the paragraph in question. Neither the letter nor the spirit of the act requires that it should.

Excluded from classification under paragraph 11 of the tariff act of July 24, 1897, borate of manganese, we think, should be classified under paragraph 3 of the said act, as a chemical compound or salts not specially provided for in the act.

The decree of the court below is reversed, and the case remanded to that court, with directions to enter a decree in conformity with this opinion.

UNITED STATES v. O'NEILL et al.

(Circuit Court of Appeals, Third Circuit. May 2, 1904.)

No. 19.

1. CUSTOMS DUTIES—LIABILITY OF CONSIGNEES—UNAUTHORIZED SHIPMENT—MERCHANDISE NOT "IMPORTED."

Certain merchants ordered for importation a quantity of merchandise of a kind not subject to duty. In response to the order a shipment was consigned to them of an article of a different character, which was subject to a high rate of duty, and which they refused to accept or to make themselves responsible for in any way. *Held* that there was no colorable authority for the shipment of the merchandise, and that the consignees should not be considered as having "imported" the merchandise within the meaning of section 1, Customs Administrative Act of June 10, 1890, c. 407, 26 Stat. 131, 1 Supp. Rev. St. 744 [U. S. Comp. St. 1901, p. 1886], providing that all merchandise "imported" into the United States shall for the purposes of the act "be deemed and held to be the property of the person to whom the merchandise may be consigned."

2. SAME—CONSIGNMENT WITHOUT CONSENT OF CONSIGNEE.

Where merchandise is shipped to parties in the United States, which is of a different character from that ordered, it is a consignment made without the consent of the consignees, within the meaning of article 1231, Customs Regulations 1899, prescribing that, when the proceeds from the sale of unclaimed merchandise are not sufficient to pay the duties and other charges thereon, "the consignees are liable for such duties, unless it be shown that the consignment was made without their consent."

3. SAME—UNAUTHORIZED SHIPMENT—OBLIGATION OF CONSIGNEE TO MAKE ENTRY.

Where merchandise is shipped to parties in the United States without their authority, they are under no obligation, in order to free themselves from liability for duty, to make entry of the merchandise or to take possession of it for any purpose.

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

For decision below, see 122 Fed. 547. Note U. S. v. Bishop, 125 Fed. 181, 60 C. C. A. 123.

Wm. M. Stewart and James B. Holland, for plaintiff in error.
John G. Johnson, for defendants in error.

Before ACHESON, DALLAS, and GRAY, Circuit Judges.

GRAY, Circuit Judge. This was an action of assumpsit, brought by the United States to recover a balance of customs duties, amounting to $722.72, alleged to be due by the firm of O'Neill Bros., of the city of Philadelphia. The case was tried before McPherson, J., without a jury, in accordance with the provisions of section 639, Rev. St. After hearing and argument, the learned judge directed judgment to be entered in favor of the defendant upon his findings of fact and law, as set out in his opinion, of which the following is a copy:

"This suit is brought to recover a balance of tariff duties for which the defendants are alleged to be liable. The case having been tried by the court without a jury, I find the following facts:

"The defendants are merchants in the city of Philadelphia, and as part of their business buy and sell cotton waste and woolen waste. Shortly before October 1, 1899, they received a sample of cotton waste from the Kingston Hosiery Company, doing business in the Province of Ontario, and ordered fifty bales to correspond with the sample. On October 1st the hosiery company delivered to the Grand Trunk Railway fifty bales of waste consigned to 'J. D. Lewis, Suspension Bridge, Messrs. O'Neill Brothers, Philadelphia.' This bill of lading was indorsed by J. D. Lewis: 'Deliver to J. McI. McNiven.' When the goods arrived at Suspension Bridge, McNiven entered them for consumption, declaring, among other things, that 'to the best of my knowledge and belief, O'Neill Brothers, Philadelphia, Pa. are the owners of these goods, wares, and merchandise mentioned in the annexed entry.' The bales were afterwards examined by a customs officer, who discovered that four bales were nearly all wool, and forty-six bales were cotton and wool mixed, although mostly cotton. Cotton waste is admitted free of duty, while woolen waste, or woolen and cotton mixed, is charged with a duty of ten cents a pound. The net weight of these bales being eight thousand five hundred pounds, a duty of $850 was accordingly imposed and payment was demanded from the defendants. To this they replied that their order had been given upon a sample that contained nothing but pure cotton, and that if the bales which were shipped contained wool the hosiery company had sent something that they had not ordered, and therefore that they did not hold themselves responsible for any duty that might be collectible upon the shipment. The goods were stored by the customs authorities for more than a year, and were then sold to enforce payment of the duty, producing the net sum of $127.28, thus leaving an unpaid balance of $722.72, for which amount the present suit is brought. So far as appears from the evidence, neither Lewis nor McNiven was an agent of the defendants, either general or special, and neither had any authority, express or implied, to enter the goods for consumption. The defendants declined to accept the bales, and paid no further attention to the shipment. They had not ordered the goods that were

sent, and very properly refused to receive them or to make themselves in any way responsible for their care or custody.

"Upon these facts, it seems to me that the defendants are not liable for the balance of the duty. It is true that the act of 1890, 1 Supp. Rev. St. 744 [U. S. Comp. St. 1901, p. 1886], declares that 'all merchandise imported into the United States shall, for the purpose of this act, be deemed and held to be the property of the person to whom the merchandise may be consigned.' It is also true that the bill of lading shows that the Grand Trunk Railway named O'Neill Brothers as the ultimate consignees of the merchandise. But under the other facts, I do not think that the act should be so construed as to embrace the present defendants. They did not import this merchandise into the United States in the proper sense of that word. They ordered an entirely different article from the hosiery company, and, if that article had been furnished, no doubt they would have been liable for the duty with which the goods might have been properly chargeable. But I am unable to see upon what ground they can be charged for duty upon an article which they neither bought, nor accepted, nor entered for consumption. The entry at the custom house was not made by the defendants' agents, and they cannot be held responsible for McNiven's unauthorized act. They disavowed it as soon as they knew of it, and consistently refused to pay any further attention to the goods. The government argues that they should have given the bond provided by law and have withdrawn the goods for exportation to the hosiery company, but I cannot agree that any such obligation was imposed upon the defendants. On the contrary, as it seems to me, to have taken possession of the goods for any purpose, might have been construed by the hosiery company to be an acceptance, and, at all events, would have exposed the defendants to the hazard of a lawsuit upon that ground.

"In my opinion, they were fully justified in the course they followed. The opinion of the Attorney General in 5 Treas. Dec. 244 (Dec. No. 23,606), does not in any respect affect the question now being considered. There the consignee received and entered the very tobaccos he had ordered, but because the wrappers and fillers were improperly packed together, he was obliged to pay a higher duty than would have been otherwise chargeable. He had 'imported' the goods and the law fixed him with liability. Here, however, the defendants did not order these goods to be sent into the United States, did not enter them, and have never exercised any act of ownership over them. In a word, the defendants did not 'import' the goods and never intended to import them.

"I conclude, therefore, that the defendants are not liable for the amount sued for, and that judgment should be entered in their favor."

The plaintiff thereupon brought the case to this court on a writ of error to the District Court. The questions raised by the assignments of error, as stated by the District Attorney, are: (1) Were O'Neill Bros., under the facts as found by the court, the consignees of the 50 bales of waste in question? (2) If O'Neill Bros. were the consignees, was "the consignment made to them without their consent," within the meaning of those words, as used in article 1231 of the customs regulations?

The facts are found by the court and are not in dispute. Whatever may be said in answer to the first question, as above stated, we are clearly of opinion that if O'Neill Bros. were the consignees, the consignment was made to them without their consent, within the meaning of those words, as used in article 1231 of the customs regulations. That article provides that, "when the proceeds of any sale of goods remaining unclaimed more than a year, are insufficient to pay the charges and duties, the consignees are liable for such duties, unless it be shown that the consignment was made without their consent." This rule of the Secretary of the Treasury, for the practical admin-

istration of the customs laws in this respect, promulgated under authority conferred by law, is in accord with justice and common sense. The facts, as found by the court below, clearly show that this consignment of wool waste and mixed cotton and wool, was made without the authority, express or implied, of the defendants in error. The goods were not sent by the consignors in response to an order for the same. What defendants in error ordered, was cotton waste, an article to be imported free of duty. The consignment here in question was of wool waste and mixed cotton and wool, dutiable at 10 cents per pound. Such a shipment is as clearly made without the consent of the consignee, as if no order for a different article had been sent. The facts found do not support the assertion, that the defendants in error "ordered fifty bales of waste and they were forwarded fifty bales of waste." The order of one article is not colorable authority for the shipment of an entirely different article, especially where the articles ordered are on the free list, and those shipped are dutiable. In such case, the party to whom the shipment is made, is not bound, in order to free himself from liability, to enter a bond for re-exportation of the goods thus sent without authority. Such entry of bonds and re-exportation would, as said by the court below, expose the party to liabilities, both to the government and to the shippers, which he was not obliged to assume. We are of opinion that the defendants in error in this case, on the facts found by the court below, are within the exception to article 1231 of the customs regulations above quoted, it being clearly shown that the consignment in question "was made without their consent."

The judgment of the court below is therefore affirmed.

LANYON ZINC CO. et al. v. BROWN et al.

(Circuit Court of Appeals, Eighth Circuit. March 28, 1904.)

No. 2,014.

1. PATENTS—INFRINGEMENT—ORE ROASTING FURNACE.

The Brown patent, No. 471,264, for an ore roasting furnace, claim 1, which covers a furnace in which the mechanism for operating the rabbles for stirring and advancing the ore is placed in a supplemental chamber for the purpose of protecting it from the action of the heat, dust, and fumes, is limited by the words "supplemental chamber," and is not infringed by the construction shown in the Cappeau patent, No. 691,112, in which the furnace is supported by posts, and the rabble operating mechanism is placed in the uninclosed space beneath.

Appeal from the Circuit Court of the United States for the District of Kansas.

John H. Atwood and John R. Bennett (C. E. Benton, on the brief), for appellants.

Douglas Dyrenforth, for appellees.

Before SANBORN and THAYER, Circuit Judges.

THAYER, Circuit Judge. This is an appeal from an order awarding an injunction which restrained the appellants from using ore roasting furnaces made in accordance with the specification of letters patent No. 691,112, issued to Joseph P. Cappeau on January 14, 1902. This order of injunction appears to have been made on a motion which was filed in a proceeding that had been begun against the Lanyon Zinc Company and others to punish them for an alleged violation of an order of injunction previously obtained, which enjoined them from infringing claim 1 of letters patent No. 471,264, issued to Horace F. Brown, one of the appellees. In view of the manner in which the injunction was obtained, certain questions of procedure are discussed in the briefs. On the oral argument, however, it was agreed by counsel that all questions of procedure should be waived, and that the point to be determined on appeal was whether an ore roasting furnace made in conformity with the specification of the Cappeau patent, such as the appellant is now using, infringes the first claim of the Brown patent, which is owned by the appellees.

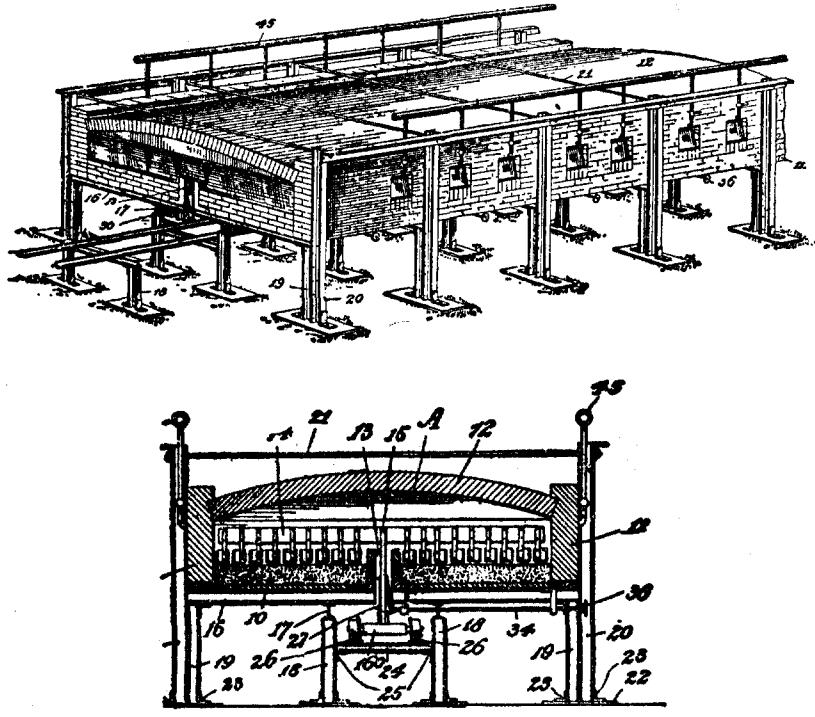
The Brown patent has been before this court for construction on several occasions. Thus in Metallic Extraction Co. v. Brown, 43 C. C. A. 568, 104 Fed. 345, the patent was upheld, and it was decided that an ore roasting furnace made in accordance with the specification of letters patent No. 532,013, issued to Alfred Ropp on January 1, 1895, infringed the first claim of the Brown patent; the same ruling was made in Lanyon Zinc Co. v. Brown et al., 53 C. C. A. 354, 115 Fed. 150; and the ruling was repeated in Lanyon Zinc Co. v. Brown, 56 C. C. A. 448, 119 Fed. 918. The first claim of the Brown patent, that has been upheld in the cases last cited, is as follows:

"In an ore roasting furnace having means for stirring and advancing the ore, a supplemental chamber at the side of the main roasting chamber, and cut off from said main chamber by a wall or partition, and carriers in said supplemental chambers connected with the stirrers, but removed from the direct action of the heat, fumes, and dust, substantially as herein described."

Figures 1 and 2, which appear on the adjoining page, disclose the method of constructing the Cappeau furnace. Referring to these figures—particularly figure 1—it will be seen that the body of the furnace is supported by pillars or iron posts set firmly in the ground; the space underneath the hearth being left open and uninclosed to permit the free circulation of air from all sides. The floor of the hearth has a longitudinal slot through which a perpendicular arm or rod extends, which rod or arm, at its lower end, is attached to a carrier that moves on a track underneath the hearth. To the upper end of this rod a crossbar is attached, from which the rabble arms depend that serve to stir the ore within the furnace as the carrier moves along the track. At the ends of the furnace are swinging gates, which are opened by the stirrer mechanism, and are closed by their own weight as soon as the stirrers have passed.

The appellants contend that the Brown patent describes and claims a "supplemental chamber cut off from the main chamber," that a supplemental chamber is one of the essential features of the invention covered by that patent, and that it is not found in the Cappeau furnace which they are using. We entertain no doubt that, as claimed by the appel-

lants, a supplemental chamber for the housing of the rabble operating mechanism constitutes an essential feature of the Brown furnace. It was that novel method of constructing a furnace which entitled him to a patent. The language of the Brown specification, and particularly the language of the first claim, leaves no room for doubt on that point. Brown described the disastrous effect of the heat and fumes within the



furnace upon the mechanism which had previously been employed to stir the ore within the oven and gradually move it to the end where it was to be discharged. He also described a means whereby the difficulty theretofore encountered could be overcome and had been overcome; the means described being the construction of a supplemental chamber cut off from the main roasting chamber wherein the rabble operating mechanism could be placed, thereby removing it from the direct action of heat; and the means thus described he specifically claimed in his first claim, thereby making the supplemental chamber the principal feature of his furnace. In the case of Metallic Extraction Co. v. Brown, supra, this court concluded, after a careful scrutiny of his specification, that Brown did not intend to make the location of the supplemental chamber a material element of his claim, although he had described it as located at the side of the main roasting chamber. We accordingly held in that case that the use of the Ropp furnace, which had a well-defined supplemental chamber underneath the hearth for housing the rabble operating

mechanism and protecting it from the heat, was an infringement of claim one of the Brown patent.

The question to be determined on the present appeal, therefore, is whether the open and uninclosed space underneath the Cappeau furnace can be held to be a supplemental chamber, within the fair intent and meaning of those words as employed in the Brown patent. We are of opinion that this question must be answered in the negative. The space in question satisfies none of the definitions usually given of a chamber. It is not a "room" or "an apartment" or "a cavity" or a "closed space" of any sort. It is entirely uninclosed. In ordinary speech, no one would think of describing the open space underneath the Cappeau furnace, where the track is laid on which runs the carriage that operates the rabble arms, as a supplemental chamber, although the words in question were aptly applied by Brown to describe the inclosed space in his furnace where the rabble operating mechanism is located.

It is an elementary rule that a patentee may claim the whole or a part of what he has invented. He is entitled to limit his claims to any extent that may seem desirable, but, having done so, his right to protection is also limited, since the claim actually made by the patentee is the measure of his right to relief. McClain v. Ortmayer, 141 U. S. 419, 12 Sup. Ct. 76, 35 L. Ed. 800; Keystone Bridge Co. v. Phœnix Iron Co., 95 U. S. 274, 278, 24 L. Ed. 344; White v. Dunbar, 119 U. S. 47, 51, 7 Sup. Ct. 72, 30 L. Ed. 303. It may be that Brown, being the first to place the rabble operating mechanism of a furnace outside of the oven, might have formulated his claims in such a manner as would have covered the method of construction described in the Cappeau patent, but he has not done so. He saw fit to place his rabble operating mechanism not in an open and uninclosed space adjacent to the oven, but in a supplemental chamber, and claimed the chamber as an element of his combination. Having done so, he is not entitled to relief against one who does not employ a chamber in which to locate his mechanism for operating the rabble arms. The first claim of the Brown patent is entitled to a fair and reasonable interpretation, but we cannot indulge in a liberality of construction which ignores the ordinary meaning of words and phrases, as we must do if we hold that an open and uninclosed space is a chamber.

The decree of the lower court awarding an injunction restraining the appellants from using the Cappeau furnace, and holding the use of that furnace to be in violation of the existing injunction, is reversed, and the cause is remanded with directions to dissolve the injunction which was granted.

MORTON TRUST CO. et al. v. AMERICAN CAR & FOUNDRY CO.

(Circuit Court of Appeals, Third Circuit. May 13, 1904.)

No. 18.

1. PATENTS—SUIT FOR INFRINGEMENT—PLEADING.

Where a bill charges infringement of a patent generally, in accordance with the approved practice, it may be construed to charge infringement of all the claims; and, unless under very exceptional circumstances, the complainant cannot be required to amend by specifying the claims with respect to which infringement is claimed and the parts of defendant's structure which are claimed to infringe.

Appeal from the Circuit Court of the United States for the District of New Jersey.

For opinion below, see 121 Fed. 132.

John R. Bennett, for appellants.

Paul Bakewell, for appellee.

Before ACHESON, DALLAS, and GRAY, Circuit Judges.

ACHESON, Circuit Judge. This is an appeal from a decree in equity dismissing the bill of complaint upon the ground that the plaintiffs had failed to comply with an order of the court requiring them within 30 days to "specify the particular parts of the defendants' car or car construction that are relied upon as infringements of the patent in suit, and the several claims which they are alleged to infringe." The suit was for the infringement of letters patent No. 584,709, for an "improvement in metallic cars," granted to Charles T. Schoen. In the introductory part of the specification are these statements:

"This invention relates, stated generally, to the construction of a railway car, and, stated specifically, to the construction of a pressed steel hopper-bottom car. The invention comprises a number of details of construction, such as the under frame and its sills, the draft-gear, the body-bolster, the bottom, the doors for the bottom, the supports for the bottom, the sides and ends, the stakes and corner-posts, and other parts and combinations of parts, as hereinafter more particularly set forth and claimed."

Then follows a detailed description of the invention. The claims are 28 in number.

The bill is in the usual form, and contains the usual allegations in an infringement suit, and the usual prayers for relief. Infringement by the defendant company is charged thus:

"And so it is, may it please your honors, that the said defendant, as your orators are informed and believe, and therefore aver, well knowing the premises, and without the license of your orators, against their will and in violation of their rights, and to their very great damage and irreparable injury, has manufactured, sold, and used metallic cars, and sold such cars to others to use, substantially as set forth in the said letters patent No. 584,709, and claimed in the claims thereof, and that it has threatened and intends to continue to so manufacture, sell, and use, and sell to others to use, metallic cars embodying

¶ 1. Pleading in patent infringement suits, see note to Caldwell v. Powell, 19 C. C. A. 595.

See Patents, vol. 38, Cent. Dig. § 511.

the invention and method of the claims of the said letters patent No. 584,709 within the United States, all of which is in violation and infringement of the said letters patent No. 584,709, and of the claims thereof, and your orators' rights in the premises."

The averment of infringement was clearly sufficient, according to the approved practice in patent causes. 3 Robinson on Patents, p. 430, § 1106; Thatcher Heating Co. v. Carbon Stove Co., 4 Ban. & A. 68. The defendant, however, presented to the court a petition concluding with the following motion:

"Defendant moves your honors to make an order in this cause requiring the complainants, within a time to be appointed by this court, to amend their bill of complaint in order to specify in and by the same the particular claim or claims of said Schoen patent, No. 584,709, of June 15, 1897, with respect to which complainants charge infringement by the defendant in this cause, and that, after complainants have so amended their bill of complaint, defendant have at least thirty days within which to file its answer or other pleading in this cause; and defendant prays for such other and further order in the premises as to this court may seem meet, and which may be in accordance with the principles of equity and good conscience."

Thereupon the court made the order above mentioned. It will be observed that in its order the court went beyond the defendant's specific prayer, for it not only required the plaintiffs to specify the several claims which they alleged the defendant infringed, but also "the particular parts of the defendants' car or car construction that are relied upon as infringements of the patent in suit."

In some rare instances where the cases seem to have been exceptional, the plaintiff in an infringement suit has been required to specify in limine the claims relied on, but there is no precedent in this circuit for such an order. Applications therefor were denied by the Circuit Court for the Eastern District of Pennsylvania in Johnson v. Columbia Phonograph Co. and Johnson v. National Graphophone Co., 106 Fed. 319. We are not convinced that in the present case there are any special reasons for a departure from the usual practice. Moreover, the charging clause of this bill recited above, we think, imports infringement of all the claims of the patent in suit. The invention of this patent covers a number of details of construction of the described railway car, and there might well be infringement of all the claims. As we have seen, however, the order made by the court below required the plaintiffs not only to specify the several claims alleged to be infringed, but also the particular parts of the defendant's car or car construction that are relied upon as infringements of the patent. In its scope the order goes beyond any precedent known to us. Compliance with the order would require definite knowledge of the defendant's car construction. It does not appear, and we think it ought not to be presumed, that the plaintiffs have had such an opportunity to inspect all the parts of the defendant's car as would enable them to specify the extent and character of the defendant's infringement with the particularity enjoined by the order. On the other hand, there is no hardship that we can see in calling upon the defendant to answer the charge of infringement contained in this bill. The defendant has before it, or is entitled to have before it, the patent sued on, and upon an inspection of the patent can see whether its construction is the same as or different from that of the

patent. We are far from satisfied that the trial of patent causes would be expedited, or the records therein abbreviated, by the adoption of the new practice contemplated by the order in question.

We cannot agree with the contention of the appellee that the court has no jurisdiction of this appeal, and therefore should dismiss it. The order complained of was not simply one of judicial discretion. But furthermore the appeal is not from the interlocutory order, but from the final decree of the court dismissing the bill for failure to comply with the order.

The decree of the Circuit Court dismissing the bill of complaint is reversed, and the cause is remanded to that court, with direction to reinstate the bill, and for further proceedings thereon in conformity with the views expressed in this opinion.

TOWER v. HOBBS.

(Circuit Court of Appeals, First Circuit. May 5, 1904.)

No. 515.

1. PATENTS—INFRINGEMENT—PENHOLDERS.
   The Tower patent, No. 378,223, for a penholder having a sleeve of cork at its lower end, *held* not infringed.

Appeal from the Circuit Court of the United States for the District of Massachusetts.

Anson M. Lyman (Walter S. Logan, on the brief), for appellant.

Marcellus Bailey (Aaron H. Latham, on the brief), for appellee.

Before PUTNAM, Circuit Judge, and BROWN and LOWELL, District Judges.

LOWELL, District Judge. The question here raised was decided by the Circuit Court of Appeals for the Second Circuit in Tower v. Eagle Pencil Co., 94 Fed. 361, 36 C. C. A. 294. Upon consideration we find no reason to differ from that court in its conclusion that a pen precisely like the defendant's, here in evidence, did not infringe the patent in suit. Concerning the validity of that patent we express no opinion.

The decree of the Circuit Court is affirmed, and the appellee recovers his costs of appeal.

AMERICAN CHOCOLATE MACHINERY CO. v. HELMSTETTER.

(Circuit Court, S. D. New York. March 14, 1904.)

1. PATENTS—INFRINGEMENT—MACHINE FOR COATING CONFECTIONERY.
The Holmes patent, No. 492,205, for a machine for coating confectionery, claim 1, covering a combination of a dipping mechanism with a jarring device for removing surplus coating from the drops, was not anticipated, and is entitled to a liberal construction as embodying the first successful automatic machine for coating cream cores with chocolate, and is infringed by the machine of the Weeks patent, No. 634,633.

2. SAME—CHOCOLATE DIPPING TRAY.
The Gousset patent, No. 526,968, for a chocolate dipper, claim 4, was not anticipated, and is valid; also *held* infringed.

3. SAME—CHOCOLATE COATING MACHINE.
The Walter patent, No. 533,974, for a chocolate dipping or coating machine, claim 1, *held* infringed.

In Equity.

Charles C. Gill, for complainant.
Hector T. Fenton, for defendant.

COXE, Circuit Judge. This action is founded on three letters patent for improvements in the confectionery art. They are as follows: No. 492,205, granted February 21, 1893, to Daniel M. Holmes; No. 526,968, granted October 2, 1894, to Cyprien Gousset and No. 533,974, granted February 12, 1895, to William Walter.

The complainant is a New York corporation engaged in the manufacture and sale of machinery for making chocolate confections and is the owner of the patents in controversy. The defendant is engaged in making chocolate creams in the city of New York and, in such business, uses apparatus alleged to infringe. Holmes seems to have been the first person to produce a successful automatic machine for coating cream cores with chocolate. The portion of the machine in controversy relates to mechanism whereby the cream cores are properly held in position, dipped in the chocolate solution, withdrawn therefrom and the surplus chocolate removed by means of a jarring action imparted to the holding frame or dipper. The first claim of the Holmes patent, the only one involved, is as follows:

"In a machine of the character herein specified, the combination with the drop dipping mechanism, of a jarring device for removing surplus coating material from the drops, substantially as shown and described."

This combination contains two elements, first, a drop dipping mechanism, and, second, a jarring device for removing the surplus chocolate; both elements, of course, must be found in a machine for coating confectionery as described and shown.

The jarring device is thus referred to in the specification:

"As the dipping mechanism reaches its highest point, the finger is no longer held out of engagement with the ratchet, but, through the medium of the rod and its connections is released permitting the ratchet to strike it, and the hammers are caused to rapidly tap the upper portion of the connections to the drop holder, thus causing the jarring off of the surplus coating, and this jarring continues until the drops are nearly deposited upon the paper."

It consists of a succession of sharp jars or shocks imparted to the holding tray by hammers moving vertically, so that the surplus chocolate is removed without injuring or marring the symmetry of the drop.

There is nothing in the prior art requiring a limitation of the claim in any particular material to this controversy. The Stone patent, No. 371,990, for "improvements in holders and gages for paper cones while waterproofing them," is so obviously different in mechanism and purpose that it is unnecessary to discuss it. No one from a study of the Stone patent would know how to construct an automatic power chocolate machine. The only other prior patent is No. 485,326, granted to Holmes himself, for a hand machine designed to accomplish a result similar to that of the patent in suit. It is, however, a crude and clumsy device which never was and never can be used commercially. It is enough to say that the "jarring device" of the present patent is absent and no equivalent is shown therefor. The rollers which are described in the specifications as "assisting the removal of the surplus chocolate" do not remove the surplus from the cream drops, but only such drippings as may accumulate upon the rollers by gravity or otherwise. There is nothing in the mechanism of the first patent at all comparable to the mechanism of the combination of the first claim of the second patent.

The defendant seeks to avoid infringement by placing unnecessary limitations upon the claim. To paraphrase the language of the Supreme Court it may be said that "Holmes, having been the first person who succeeded in producing an automatic machine for coating chocolate cream drops is entitled to a liberal construction of the claims of his patent. He was not a mere improver upon a prior machine which was capable of accomplishing the same general result; in that case his claims would properly receive a narrower interpretation." Sewing Machine Co. v. Lancaster, 129 U. S. 263, 9 Sup. Ct. 299, 32 L. Ed. 715.

The defendant's machine is made under letters patent No. 634,633 granted to W. H. Weeks October 10, 1899. It is argued that the defendant's jarring frame is not the "jarring device" of the claim. It certainly is not the exact apparatus shown and described by Holmes but it accomplishes the same result in substantially the same way and only differs in nonessential details. The defendant's tray, filled with the candy cores, is detachably hung on hooks of the dropping mechanism which descends into the chocolate solution and then rises until its upward course is arrested by appropriate devices. The tray is then taken, manually, from the hooks and moved laterally upon guides to the jarring frame which is part of the same machine and is placed over a continuation of the vessel containing the solution. This frame is mounted upon rods, the lower ends of which rest upon ratchet wheels which are rotated from the main shaft and as the ends drop off the teeth of the ratchets, a jarring motion is imparted to the tray and the superfluous chocolate is shaken off. In both the complainant's and defendant's structures, the jarring motion is produced by ratchet wheels; in the former by causing hammers to tap the tray and in the latter by causing the tray to tap the hammers—for this is, in effect, what occurs when the

toothed wheels revolve, causing the tray to rise and fall with great rapidity. The two structures are clearly equivalents. There can be no doubt that the defendant has, in his machine, a drop dipping mechanism and a jarring device, and so infringes the claim in issue. It is true that for an instant the intervention of an attendant is necessary in placing the defendant's tray upon the jarring frame, but this frame and the dipping mechanism are, nevertheless, in combination. The machine is a unit. All its parts co-operate to produce the desired result. Forbush v. Cook, 2 Fish. Pat. Cas. 668, Fed. Cas. No. 4,931; Birdsall v. McDonald, 1 Ban. & A. 165, Fed. Cas. No. 1,434; Hoffman v. Young (C. C.) 2 Fed. 74.

Gousset's invention is an exceedingly simple one and relates solely to improvements in that class of devices which are used for dipping cream drops into a chocolate solution so as to give them the desired exterior chocolate coating. The fourth claim, only, is involved and it sufficiently described the invention, as follows:

"A chocolate dipper comprising an open frame, a series of parallel wires crossing the frame, and secured at their ends thereto, and a series of cups formed of a series of serpentine or zig-zag wires crossing the frame and resting at their upward bends upon said cross wires, and the second series of serpentine or zig-zag wires at right angles to the first series and having their downward bends crossing the downward bends of the said first series substantially as described."

It required ingenuity and skill to construct a basket which would hold the creams while being coated and release them afterwards without being disfigured. The basket patented in Germany to Reiche shows an entirely different construction, which is obvious on comparison, and nothing else in the art approaches the patented device as closely as does the Reiche structure.

The defendant's tray is almost an exact reproduction of the Gousset device, the only difference being that the defendant has introduced additional heavy wires extending longitudinally and other immaterial changes incident to the increase of these wires. That the defendant has appropriated the essential features of the Gousset tray and those upon which its successful operation depends, there can be little doubt.

The patent to Walter is an exceedingly elaborate one and contains 18 claims, but the first claim only is involved and the structure therein described is not at all complicated or difficult to comprehend. The distinctive feature sought to be secured by this claim was the removal of a large number of coated creams—amounting to several hundred—in a series of rows, from the tray. With this object in view the patentee uses a tray, of the Gousset type, having an individual holding receptacle for each core and mounts the tray on pivots so that it may be turned over, after having a receiving plate of equal dimensions placed upon it, thus depositing the coated drops upon the plate. The first claim is as follows:

"In a machine of the character described, the receptacle to contain the coating substance, and the vertically movable tray reversibly mounted over said receptacle and adapted to hold the pieces to be coated, combined with means for raising and lowering said tray, substantially as and for the purposes set forth."

The defendant's tray is reversibly mounted precisely as in the Walter structure but it is moved laterally, on the jarring frame, to its pivoted supports before the reversing action takes place. In both machines the tray is reversed over the receptacle which contains the chocolate solution, and in both, the mechanisms which accomplish this result are integral parts of the machines.

It is thought, contrary to the impression formed at the argument, that the defendant's pivoted reversing apparatus does not cease to be part of this combination because of the change of position on the frame, for the reasons stated in considering the combination of the Holmes patent. The jarring frame is part of the combination and the reversing apparatus is part of the jarring frame.

These conclusions render it unnecessary to consider the effect of the licenses granted to the defendant under the Walter and Gousset patents.

The complainant is entitled to the usual decree for an injunction and an accounting.

In re LEEDS WOOLEN MILLS.

(District Court, W. D. Tennessee. April 22, 1904.)

1. BANKRUPTCY—JURISDICTION OF COURT—DETERMINING ADVERSE OWNERSHIP OF PROPERTY.

   The fact that property was in the actual possession of a bankrupt at the time of the filing of the petition, and was by him surrendered with his other property to a receiver or custodian ad interim appointed by the court, places such property in custodia legis, and gives the court of bankruptcy jurisdiction to determine its ownership as between the trustee subsequently appointed and an adverse claimant; and such jurisdiction is not affected by the fact that the receiver, acting without authority, surrendered possession of the property to the claimant.

2. SAME—PROPERTY WRONGFULLY TAKEN FROM CUSTODY OF COURT.

   One who has obtained possession of goods from a receiver appointed by a court of bankruptcy, who had no authority to surrender the same, by such intermeddling with property in the custody of the court submits himself to its jurisdiction for all purposes properly connected with proceedings to compel him to restore the property or its value, and where he has disposed of it, claiming to be the owner, the court may determine the question of ownership in the same proceeding as a matter affecting the propriety of entering a decree against him for its value.

3. SAME—ADVERSE CLAIMANT OF PROPERTY—BURDEN OF PROOF.

   On the question whether a shipment of goods to an insolvent company a short time prior to its bankruptcy was pursuant to a sale, or whether the transaction was such that the shipper remained the owner, he has the burden of proof as against the trustee in bankruptcy, and his claim to ownership will not be sustained unless he fully and fairly discloses all the facts bearing on the nature of the transaction, and such facts show clearly that a sale was not intended at the time.

4. SAME—BAILORS AS ADVERSE CLAIMANTS.

   Bailors permitting their goods, in the hands of an insolvent bailee becoming bankrupt, to pass into the custody of the receivers or trustees in bankruptcy, cannot occupy the attitude of adverse claimants in determining the jurisdiction of the court.

5. SAME—SALES—RETAINING TITLE—HOW DETERMINED.

   The fact that a merchant ships goods to a customer, but consigned to himself, is not conclusive of a title reserved for future scrutiny of the

customer's financial condition, if there be other and equivocal facts tending to show an actual sale and a resort to this equivocal method for the purpose of denying a sale in case of bankruptcy. There must be good faith, and no sinister design, in the transaction.

In Bankruptcy. On exceptions to master's report.

Pierson & Pierson, for exceptions.
D. W. De Haven, opposed.

HAMMOND, J. This petition of the trustee against Hines for the recovery of about $500 worth of goods received by him from the referee in bankruptcy, acting as receiver or custodian of the property, has been twice on reference before the standing master, and is before the court again upon a second report sustaining the title of the trustee to the goods. Objection is taken again to the jurisdiction of the court, that question having been reserved from the beginning.

Both counsel seem under the misapprehension that it is necessary for the court to decide the question of adverse ownership as one involved in the question of jurisdiction. It is true, we are compelled to look at the facts found in the record relating to the ownership in order to determine whether or not Hines was, at the time of the filing of this petition, subject to the jurisdiction of this court, to entertain it against him; but certainly the jurisdiction of the court does not depend upon the fact of an adverse claim of ownership, and we may have the jurisdiction whether the goods belonged to him as an adverse claimant or not. The very question is whether or not we can entertain the jurisdiction to decide that controversy. The facts pertinent to the element of jurisdiction are that at the time of the bankruptcy the goods in controversy were in the actual manual possession of the bankrupt corporation and passed from it into the manual possession of the referee as custodian, upon the surrender of these and all the other goods to him. In my judgment, the simple fact of this possession by the referee in bankruptcy is conclusive in favor of our jurisdiction. By that possession the goods were in custodia legis—whether rightfully or wrongfully is another question. But that question may be rightfully decided by us. Whether it might also be rightfully decided by any other jurisdiction it is not necessary to determine. The bare possession by the court, through its officer, of the property, was sufficient to give us jurisdiction to determine to whom the goods properly belonged. The case belongs to the category of those controlled by the decision of the Supreme Court of the United States in the case of White v. Schloerb, 178 U. S. 542, 20 Sup. Ct. 1007, 44 L. Ed. 1183, and not to that of those controlled by the decision of that court in Bardes v. Hawarden Bank, 178 U. S. 524, 20 Sup. Ct. 1000, 44 L. Ed. 1175.

If it be a fact, upon the proof in this record, that the bankrupt held the goods as a bailee of the rightful owner, and yet, through some misapprehension, he surrendered them as his own to the bankruptcy receiver or trustee, or if he mixed them with his own goods and so surrendered them along with his goods, nevertheless, if the bankruptcy receiver or trustee deny title of the rightful owner and claim the property as that of the bankrupt, it is a controversy which this court has the plain jurisdiction to determine; and that jurisdiction cannot be defeated

by the delivery or surrender of the possession to the supposed rightful owner by the receiver or referee in bankruptcy, whatever may be said upon that point as to such a surrender by the trustee in bankruptcy after his appointment. The referee, as custodian or receiver, or a receiver ad interim, has no title to the goods, and no right or authority to determine any question of title or ownership, and no right to make any surrender of the goods to any claimant, so as to bind the trustee when he is subsequently appointed, or those who are interested in the estate. When the trustee is elected under the statute, he represents the title and ownership of the goods, for the benefit of the estate, and it is not impossible that if he should surrender them to a claimant, even under a misapprehension as to the ownership or validity of the claim, the latter would be such an adverse claimant as would bring the case within the jurisdiction of the case of Bardes v. Hawarden Bank, supra. But this cannot be the effect of a surrender by the referee holding goods under our rule constituting him the custodian until a trustee is appointed in cases of voluntary bankruptcy, nor by an ad interim receiver otherwise appointed until the trustee is elected. Therefore, when the defendant Hines represented to the referee as the temporary receiver that he was the owner of the goods, and persuaded him to accept his representations and deliver to him the two boxes of woolen stuffs as his own property, he did not thereby become an adverse claimant in such a sense as that he is entitled to rely upon the rule of Bardes v. Hawarden Bank, supra. On the contrary, he wrongfully took the goods from the possession of the court, whether he was the rightful owner or not, and he can be, by this court, compelled to restore that possession for the purposes of its jurisdiction; and the case stands as if the court had never been deprived of its jurisdiction, and Hines were himself the petitioner, asking to have the goods decreed to him upon the facts of this case. Bailees in possession of an insolvent's goods at the time of bankruptcy are not altogether favored claimants, and they must expect such embarrassment as a controversy arising with the trustee about the ownership of the property, and must be willing to submit that controversy to the bankruptcy court, if they permit their property to pass into its possession along with the bankrupt's own goods. Our bankruptcy statute is not so drastic as the English act, which passed the title to the trustee in bankruptcy of "all goods being, at the commencement of the bankruptcy, in the possession, order or disposition of the bankrupt in his trade or business, by the consent and permission of the true owner, under such circumstances that he is the reputed owner thereof." Property so situated passed to the trustee and creditors of the bankrupt upon the general ground of equity against one who allows a person to obtain the credit that belongs to reputed ownership acquired by consent of the true owner, so that, if one chooses to leave his property in the hands of an insolvent who becomes bankrupt, he cannot complain if those who give the bankrupt credit upon the possession of the property shall be held to have a better right to it than himself. Act of 1890, § 43; Williams' Bky. 175. This has long been a principle of English bankruptcy legislation. It has been mitigated somewhat by adjudications that discriminate in favor of the unfortunate true owner, under particular circumstances that show a better equity than the creditors may have under the general

rule. I call attention to this principle for the purpose of showing that, notwithstanding our bankruptcy act does not go so far as the English act, it does not lie in the mouth of a bailor whose goods are, by his consent, in the possession of an insolvent bailee who becomes bankrupt, to set up any objections to the jurisdiction of the court of bankruptcy to determine the ownership, if he permits the goods to pass into the possession of the officials, receivers, or trustees of the bankruptcy administration. He, probably, of all claimants, can least expect to have the advantage of being an "adverse claimant" in the sense of Bardes v. Hawarden Bank, supra. Certainly, if he reacquires possession by representations made to the receiver, who has no authority to deliver such possession nor to determine any question of title, he will not be allowed to take advantage of that recovered possession, although he may, in fact, be the rightful owner.

The case of In re Bender (D. C.) 106 Fed. 873, is very much in point in favor of the ruling we make here, though it presents the question in a somewhat different aspect. There the marshal seized the property in possession of the bankrupt under a writ issued by the bankruptcy court, upon the petition of creditors, after a voluntary adjudication. A claimant set up that the bankrupt was in possession only as his agent, and that the property really belonged to him, and he asked the court, upon a summary motion, to deliver the property to him, which the court refused upon the ground that it had no jurisdiction by a summary proceeding to settle the question of title; that, if the claimant choose to come in and submit to the jurisdiction of the bankruptcy court, it had jurisdiction to settle that title, but, if not, he could not be compelled to do so. It was not decided that the trustee could, by a petition against the rightful claimant, have invoked the jurisdiction of the bankruptcy court to settle the title, but the possession of the court was protected until the question of title was settled by a refusal to surrender it to the alleged rightful owner. If, however, that rightful owner had, by some arrangement with the receiver or the marshal, secured a surrender of the property to him, could there have been any doubt about the power of the court to compel him to replace it in the possession of the marshal? White v. Schloerb, supra. And that is, in legal effect, the purpose of this petition. With that jurisdiction goes, in my judgment, the power to determine the whole controversy.

One who meddles with the possession of the court by ousting it in any unauthorized way thereby necessarily submits himself to the jurisdiction of that court for all the purposes of making right that which has been done wrongfully by him. If he cannot restore in kind the very goods he has taken away, he must pay their value, and it would seem idle that a court of equity having jurisdiction for that purpose should find itself unable to determine the rightful ownership and settle the whole controversy. It is a familiar principle that courts of equity claim that right. It is true that in White v. Schloerb, supra, the bankruptcy court had not undertaken to determine the title to the property, but had specifically required the proceeds of sale to be kept separate and apart to abide the further order of the court; and the Supreme Court was careful not to go beyond the question certified to it, and reserved any opinion as to the right of the bankruptcy court

to settle the question of title, and only decided that it had the jurisdiction to compel a return of the property. In that case the goods had not been sold or disposed of by the wrongdoer, and his sale of them was restrained, and he was compelled to deliver them to the trustee, who sold the goods, and the court directed him to set apart the price until by proper proceeding all question of title was settled. Each case may depend upon its own circumstances, and since here the wrongdoer is not in a condition to restore the goods, and has appropriated them to his own use, restoration cannot be made without a decree against him for their value, and of course the court should not give a decree against him for their value if the goods belonged to him. There seems no reason for taking two judicial bites at this one cherry, and I feel quite sure that the case falls within the rule that an equity court having jurisdiction for the purpose indicated will complete the adjudication by finally determining it. 1 Fonbl. Eq. § 3; Story's Eq. Jur. 64 (k); 1 Pom. Eq. § 237; 1 Fost. Fed. Pr. 2; Id. 28, 234; Tayloe v. Merchants' Ins. Co., 9 How. 390, 405, 13 L. Ed. 187; Ober v. Gallagher, 93 U. S. 199, 206, 23 L. Ed. 829; Ward v. Todd, 103 U. S. 327, 26 L. Ed. 339; Sunflower Oil Co. v. Wilson, 142 U. S. 313, 324 (3), 12 Sup. Ct. 235, 35 L. Ed. 1025; Eames v. Home Ins. Co., 94 U. S. 621, 630, 24 L. Ed. 298.

An instructive case is that of The Eliza Lines, 114 Fed. 307, 315, 52 C. C. A. 195, where it is said that, the court having acquired jurisdiction of the subject-matter of the controversy, one who had intervened to interrupt the proceedings submitted himself to the jurisdiction of the court for all purposes, as well those which were incidental and auxiliary to the proceedings as the others, and it had a right to settle all the controversies and consequences which followed naturally and reasonably from their interruption of the prosecution of the voyage of the ships and their interruption in respect to the adjustment of the various rights in the vessel and her cargo. See, also, Centervill v. Fidelity Tr. Co., 118 Fed. 332, 337, 55 C. C. A. 348; Barrett v. Twin City Co. (C. C.) 118 Fed. 861, 865; Fidelity Tr. Co. v. Fowler Water Co. (C. C.) 113 Fed. 566, 571; Union Cent. Life Ins. Co. v. Phillips, 102 Fed. 19, 24, 41 C. C. A. 263; Old Colony Tr. Co. v. Dubuque Light Co. (C. C.) 89 Fed. 794, 810; Springfield Mill. Co. v. Barnard & Leas Co., 81 Fed. 261, 265, 26 C. C. A. 389; Ill. Cent. Tr. Co. v. Arkansas City, 76 Fed. 271, 288, 22 C. C. A. 171, 34 L. R. A. 518; Western Assur. Co. v. Ward, 75 Fed. 338, 341, 21 C. C. A. 378; Fitton v. Phœnix Ins. Co. (C. C.) 25 Fed. 880, 881; Berry v. Ginaca (C. C.) 5 Fed. 475, 481. The limitation upon this doctrine in its relation to the federal courts found in the case of Byers v. McAuley, 149 U. S. 608, 13 Sup. Ct. 906, 37 L. Ed. 867—a limitation as to which two of the judges dissented in that case even—has no application to a case like this. There the jurisdiction failed as to some of the parties because it was a case of which the federal court could not obtain jurisdiction at all. Here it is plain that the only obstacle to our jurisdiction, if any, is that contained in the special provisions of the bankruptcy statute. Even those limitations have been eliminated by the amendment to the bankruptcy statute, approved February 5, 1903 (chapter 487, §§ 8, 16, 32 Stat. 798, 800 [U. S. Comp. St. Supp. 1903, pp. 413,

417]) amending sections 23b, 67e, and 70e (Act July 1, 1898, c. 541, 30 Stat. 552, 564, 566 [U. S. Comp. St. 1901, pp. 3431, 3449, 3452]), so that now there will be no sort of doubt of our jurisdiction of this controversy, were it not for section 19 of the amended act (32 Stat. 801), which prohibits its application to cases then pending, this suit being brought before the amendment was passed. But the existence of the jurisdiction under the amended act shows conclusively that this case does not fall within the exception of Byers v. McAuley, supra, the subject-matter of which controversy, so far as it was rejected by the Supreme Court, could not possibly come within the federal jurisdiction.

The case of Beach v. Macon Grocery Co., 116 Fed. 143, 53 C. C. A. 463, was one in which the receiver in an involuntary case of bankruptcy pending adjudication took control of property in the adverse possession of another, claiming it as her own, and sold it under the orders of the bankruptcy court. The Court of Appeals held that this part of the proceeding was wrongful, and the court was without jurisdiction, except to have enjoined the adverse claimant from making any disposition of the property until a trustee was appointed. It directed the money realized at the sale to be returned to her, to be held, however, in lieu of the property, without prejudice to the rights of the trustee to take such proceedings as would settle the ownership of the property. Evidently that was a case almost the converse of this.

In re Winship Co., 120 Fed. 93, 56 C. C. A. 45, was a somewhat peculiar controversy. Property went into the hands of the receiver, pending an adjudication upon an involuntary petition, being in the possession of the insolvent defendant at the time the receiver was appointed. Claimants who had leased the property to the bankrupt asked to have it returned under the terms of the lease. It was determined, upon the proof, that the transaction was really a sale and not a lease to the bankrupt, and thereupon the court ordered the receiver to settle, which was done, and the money paid into the registry of the court, but with a stipulation that the purchaser should return the property if the court should ultimately hold that it belonged to the alleged lessor. Before any final determination of this question the insolvent debtor made a composition with his creditors and paid the composition money into court, and creditors were paid according to its terms, leaving a balance, however, to represent the purchase money of the printing presses, the property in controversy. The Court of Appeals declined to decide some of the questions arising on this state of facts, and held that, the bankruptcy proceedings having been compromised, the property was to be returned to the alleged lessor by the purchaser, unless the lessor should choose to confirm the sale and take the money. The jurisdiction of the court to make this decree was put upon the distinct ground that property in custodia legis, whether the court be one of common law or equity or admiralty or bankruptcy, has the power to restore that possession to whomsoever it rightfully belongs. The receiver in the case was a mere caretaker, having no title, and was in no proper sense a trustee in bankruptcy with the powers conferred by the statute upon that fiduciary. The pertinency of the case is that it sustains in the most positive way the

jurisdiction of the bankruptcy court to deal with the right of property and settle it between the parties whenever it comes into the possession of the res itself, as it did in the case we have in hand.

The case of Mueller v. Nugent, 184 U. S. 1, 22 Sup. Ct. 269, 46 L. Ed. 405 (same case, 105 Fed. 581, 44 C. C. A. 620, and Wayne Knitting Mills v. Nugent [D. C.] 104 Fed. 530), which so strongly reinforces the case of White v. Schloerb, supra, and makes the distinction between that case and Bardes v. Hawarden Bank, supra, which we are now making, supports our jurisdiction in this case. Among other things it was held in that case that an order to pay over the money was not an order for the payment of the debt, but an order for the surrender of the assets of the bankrupt which had been placed in custodia legis by the adjudication, just as in this case, although we may give a judgment against Hines for the amount and the value of the goods, we are, in effect, only compelling him to restore to the trustee in bankruptcy that which properly belonged to him, and which Hines had wrongfully taken from the custody of the receiver and the court. It is in no sense the adjudication summarily of the title as against one claiming adversely, but compelling one who has taken wrongful possession from the court to restore that possession, without respect to his title or his right; and, as an incident to that authority, we have full jurisdiction to determine the whole controversy, necessarily including the title or rightful ownership. The proposition is broadly laid down in Re Antigo Screen Door Co., 123 Fed. 249, 59 C. C. A. 248, that authority to determine the right to a fund in the possession of the court belongs exclusively to that court, and is incident to the jurisdiction of every court. But it must be kept in mind that this authority accompanies the property that is in custodia legis whenever it is, without consent of the court, taken into the possession of another. One holding such possession can take no advantage of it. The property is still, notwithstanding his interference and interposed possession, in contemplation of law in the possession of the court, which is the condition we find in this case.

In Re Kellogg, 121 Fed. 333, 57 C. C. A. 547, Id. (D. C.) 113 Fed. 120, jurisdiction is placed upon the safe ground that, if the trustee is in the actual possession of the property, the right of the court of bankruptcy, even before the amendment of 1903, to settle the question of title, is an incident to that possession; but if the adverse claimant is in possession, and the trustee must bring the suit, Bardes v. Hawarden, supra, applies, and without the consent of the adverse claimant the bankruptcy court cannot acquire jurisdiction. But here again I must call attention to the fact that this judgment proceeds upon the theory that although Hines got the actual possession by an arrangement which the receiver had no right to make, the technical legal possession remained with the court through its receiver, and passed to the trustee. whereby this case stands as if that technical legal possession had never been disturbed by Hines and his arrangement with the receiver. In re Gutman (D. C.) 114 Fed. 1009, is quite directly in point. The day after a receiver had been appointed, property at that time in the possession of the bankrupt was taken from him by a mortgagee, who claimed the right to possession under the terms of his mortgage. The court

held that this mortgagee did not obtain legal possession of the chattels by that act, but the right of possession passed to the trustee from the bankrupt, and was all the time constructively in the possession of the court when the mortgagee's wrongful possession was obtained. The mortgagee therefore had no right of action in the state court against the trustee, and such action was enjoined. In re Whitener, 105 Fed. 180, 44 C. C. A. 434, is another case quite nearly in point. There the bankrupt was in possession of a livery stable, consisting of the real estate and other property related thereto. He did not put this property in his schedules, to which his creditors objected, showing that it belonged to him, and he was directed to deliver it to the trustee, which ultimately he did, although he earnestly protested that the property did not belong to him, but to another whose agent he was. The claimant filed his petition in the bankruptcy court to have the property restored to him, which was refused, whereupon he applied to the state court for necessary process against the trustee under the theory of Bardes v. Hawarden Bank, that he was an adverse claimant as against the property in the possession of the trustee, and the state court directed the sheriff to put him in possession, which was done. Thereupon the bankruptcy court, upon the petition of the trustee, enjoined the proceedings in the state court, and compelled the redelivery of the property to the trustee, and the jurisdiction of the bankruptcy court to do this was approved in the opinion of the Court of Appeals, although the proceeding there seems to have been dismissed. In re Corbett (D. C.) 104 Fed. 872, is another case where the goods, having been removed by claimant after adjudication in bankruptcy and while they were in custodia legis, were restored to the trustee—ultimately, I take it, by a judgment for their value against the attorney who removed them for his fee, though that does not appear in the report. In re Gibbs (D. C.) 103 Fed. 782, is a case where it was held that the actual "occupation at the time of adjudication" gives the bankruptcy court jurisdiction to determine a controversy about the property.

I think it may be affirmed upon all the cases that the question of the jurisdiction of the bankruptcy court depends upon the possession of the bankrupt at the time of the filing of the petition. Whether he was the real or qualified owner, or held it in some other capacity, the bare possession by him gives the bankruptcy court jurisdiction, particularly if that possession passes into the hands of the official administrators of the bankruptcy court, such as receivers, either temporary or ad interim, or trustees.

Having thus determined that we have the jurisdiction which has been so strenuously denied by the learned counsel for the defendant Hines from the very inception of this controversy, it only remains to determine to whom the property really belonged—whether to him or to the bankrupt corporation. That is purely a question of fact, and the court is entirely satisfied with the determination of it by the standing master in chancery, who reports that the property belonged to the bankrupt corporation, and not to Hines. All exceptions to his report are overruled. There is little difficulty in understanding the law of sales applicable to the facts of this case as reported by the master, or

as shown by the evidence sent up by him with his report, upon which his findings are based; but it has required a nice discrimination as to the application of the law of sales to the particular facts of this transaction, and the court is well satisfied with the treatment of the testimony by the master in working out his conclusions that there was a sale to the bankrupt corporation, and that the goods belonged to it. It is not necessary to repeat here the findings of the master in respect of this, but only to say that he bases his conclusion against the significance of the almost sole fact in favor of Hines, namely, that he shipped the goods consigned to himself in the care of the bankrupt corporation, and that the packages were so delivered, upon other facts appearing in the case which show either that this was a device by Hines to protect himself against what he intended to be a real sale, or that it was subsequently converted into an actual sale by the occurrences in the transaction. Hines does not present, in his testimony, that frankness of disclosure and full information which would strengthen his credibility, and there is some appearance of disingenuousness all through it. For one thing, he does not produce, nor satisfactorily account for the absence of, the letters which accompanied the invoices sent to the consignee. I think it may be agreed that the counsel for the trustee did not press him for information as to the contents of those letters in such a way as ought to have been done; still he was called upon to produce all his papers, and these he did not produce, and gave no reason for it. The failure of the bankruptcy trustee to produce them, or of the bankrupt to produce them, is accounted for by the fact that they were loosely thrown away or mislaid in the confusion attending the bankruptcy and transfer of possession. Those letters undoubtedly would show precisely what was in Hines' mind when he sent the two boxes of woolen stuffs in his own name to himself as the consignee, but in the care of the bankrupt concern. That which the management did upon the receipt of the goods shows that they understood it to be a sale, and indicates that they received that impression from the accompanying letters, or from them and the circumstances of their dealing with Hines. It must be conceded that their impression of the transaction, and even their conduct in relation to it, cannot, of itself, bind Hines as to his intention in sending the goods; but if he fails to produce the letters sent at the time, and subsequently asserts that his intention was not to make a sale, but to place the goods in the care of the company until he could afterwards deal with them, the assertion is not so strong as if he should produce the letters in confirmation of it. In the ordinary course of business the letters ought to show precisely how the fact was, and the want of them will be taken most strongly against Hines. Again, the fact that the manager of the business of the corporation, after the receipt of the goods and after dealing with them as if they had been sold to the concern, changed his mind, and, on the advice of a lawyer, concluded that the fact that they had been sent consigned to Hines himself was conclusive against the company's right to them, is not binding on the trustee in bankruptcy. This testimony of the manager is subject to some scrutiny, if not suspicion, when we consider the fact that immediately after the bankruptcy, and upon his statement, the goods were surrendered by the referee as receiver to Hines, and this same manager immediately

went into possession of the goods as a partner of Hines in a new firm doing the same business after the bankruptcy.

Another circumstance upon which the master somewhat confidently relies, and the court thinks fairly and justly, is the fact that, according to the custom of the trade in such goods, four yards of each bolt of woolens for tailoring purposes is cut off and sent outside of the packages containing the goods themselves to the purchaser, for the purpose of display and as a sample, for use in selling to customers. In this transaction this custom was followed, and the four-yard samples were sent to the consignee without any restrictions or instructions as to their use, and were immediately displayed and used as samples of goods belonging to the stock of the company; while, if the transaction had been such as Hines now contends it was, naturally and in the ordinary course of business he would not have cut off such samples, but would have packed all the bolts of cloth uncut in the shipping packages. There could have been no purpose in sending samples if there was no sale, but only a contemplation of a sale at some future time. It is on such circumstances as these that the master finds the fact against Hines, and I think correctly. There are many other circumstances in the proof that point in this direction, but it is hardly necessary to call attention to them here. It may be said in favor of Hines that he undoubtedly had suspicion of the ability of the company to pay for these goods, and it certainly would have been within his right to hold the title by consigning them to himself and awaiting developments; but even in that view it would have been more prudent and according to ordinary dealings to have consigned them in the care of someone else than the proposed purchasers, though there is no difficulty in consigning them to such proposed purchaser if it be done for the purpose of retaining the title and ownership until a future time, and it might be convenient to adopt that course. Hines testified that he did it for this convenience, and, because of his suspicion that they would not be able to pay for the goods, he desired to retain control of them until he could come to Memphis to see if it was safe to sell them to these parties. But, after all, he left his goods unreasonably in their hands, under circumstances leading them to believe that there had been a sale to them, and which were equivocal in their indications, notwithstanding the main fact that he did consign the goods to himself in their care. He had had previous dealings with them for the sale of goods, and they owed him a considerable sum when the bankruptcy occurred; but, at last, his claim of title depends almost entirely upon his assertion of an intention not to sell on this occasion, and the one fact that he did consign them in the unusual manner already stated. The master found that this fact and his testimony as to his intention were overborne by the accompanying circumstances that militate against him, and the court is not disposed to disturb that finding.

There is another controlling consideration in reaching this judgment. We know from judicial experience in the administration of the bankruptcy statute, and from the numerous cases arising in the bankruptcy courts everywhere, that there is a tendency on the part of sellers of merchandise to protect themselves against the possible bankruptcy of their customers by equivocal devices which will enable them to claim

a sale if the customer goes through the pending difficulties safely, but to claim ownership if he fails and becomes bankrupt. Resort is had oftentimes to undeniable and effective conditional sales and retention of the title, with similar methods of dealing to that we have here and with reservations appropriate to that kind of security, but sometimes it is not convenient or desirable to take the effective way of retaining title or making conditional sales, and yet the desire is to give to the transaction that false appearance, so as to meet possible emergencies. Therefore, in my judgment it is the duty of the bankruptcy courts to scrutinize such transactions with the utmost care, and protect the assets of bankrupts against invasions that may come by dubious dealings in business; and I think the rule of law is established that the seller must show the utmost good faith in the transaction, and the burden is upon him to establish the fact by a preponderance of the testimony that he remains an owner, and did not become a seller and creditor. The courts cannot allow him to shift his position from creditor to owner upon any except the clearest proof of such self-protection, made in good faith at the inception of the dealing, and not conceived afterwards for the purpose of escaping the results of a bad bargain.

Exceptions overruled.

RODGERS v. PITT et al.

(Circuit Court, D. Nevada. April 4, 1904.)

No. 658.

1. WATER RIGHTS—SUIT TO ENJOIN DIVERSION OF WATER—PARTIES.
A number of owners in common of a dam flume and irrigating ditch, who by agreement divide the waters flowing in the ditch between them, are tenants in common of the water rights, and one may alone maintain a suit to enjoin the diversion by a subsequent appropriator of any portion of the water to which he or either of his co-tenants is entitled.

2. RES JUDICATA—INTERLOCUTORY DECREE—QUESTIONS REVIEWABLE ON FINAL HEARING.
All questions decided on a motion for a preliminary injunction are open for review on the final hearing, but the prior decision should be adhered to unless additional facts appear which require its modification or reversal, or it clearly appears that an error was committed.

3. WATER RIGHTS—APPROPRIATION OF WATER—EXTENT OF RIGHT ACQUIRED.
To establish an appropriation of water from a stream, the proof must show an intent to apply it to a beneficial use existing at the time, an actual diversion from the stream, and the application of it to such beneficial use; but the right is not limited to the amount of water used at the time the appropriation is made, but extends to such other and further amount within the capacity of the appropriator's ditch as may be required for the future improvement and extended cultivation of his lands for which the appropriation was made, his intention, and the object and purpose for which it was made, and his acts in carrying out such purpose, being taken into consideration.

4. SAME—DILIGENCE IN APPLYING TO BENEFICIAL USE.
To entitle an appropriator of water to claim his rights therein by relation to the time when the appropriation was made, he must have pros-

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¶ 2. See Injunction, vol. 27, Cent. Dig. § 341.

ecuted the work necessary to apply it to the beneficial use intended with reasonable diligence; what constitutes such diligence being a matter depending on the facts in each particular case.

5. SAME—PREPARING LAND FOR IRRIGATION.
The fact that, at the time a complainant made an appropriation of water from a stream for irrigating purposes, the land intended to be irrigated was swamp and unfit for cultivation, does not affect his right to the water appropriated, as against a defendant whose appropriation was not made until complainant had drained his land, put it in cultivation, and applied the water to its irrigation.

6. SAME.
An appropriator of water from a stream for irrigating purposes is not confined to the amount of water he used, or to the amount of land he irrigated during certain dry seasons when there was not sufficient water to irrigate all his land or as much as he had previously irrigated.

7. SAME—BENEFICIAL USE—IRRIGATION OF WILD HAY LAND.
The use of water to irrigate wild grass land for the purpose of producing hay or pasturage is a beneficial one, and one who, year after year, conducts water from a stream onto his land for such purpose in such quantity as to be effective, thereby acquires the right to the use of sufficient water to irrigate such land.

8. SAME—MANNER OF USE—CUSTOM.
In determining the amount of water which a user applies to a beneficial use, and to which he is entitled as against a subsequent appropriator, the system of irrigation in common use in the locality, if reasonable and proper under existing conditions, is to be taken as the standard, although a more economical method might be adopted.

In Equity. Suit to enjoin the diversion of water from a stream. On final hearing.

Since the submission of this cause the original complainant, Arthur Rodgers, died, and the suit has been revived in favor of the executrix of his will, but the references will be made to the original parties to the suit.

There is no case made out against the defendant the Lovelock Mill Company, and it should be dismissed from the case.

The lands of the defendants are situated in the upper part of Lovelock Valley; the lands of complainant, Rodgers, and of Thies and Carpenter, are situated in the lower part of the valley.

There is a long history connected with the rights of the predecessors in interest of the complainant to the land and water obtained by them prior to the time when defendants acquired their rights to the waters of the Humboldt river. Hundreds of pages of typewritten testimony give the facts in relation thereto. It would serve no useful purpose to enter into any minute detail of the facts as shown by the undisputed testimony. Suffice it to say, that in 1875 P. N. Marker commenced purchasing land in Lovelock Valley. At this time there were several irrigating ditches in use on other lands owned by other parties. These lands and the water rights appurtenant thereto were acquired by the Markers, and all the lands described in the complainant's bill in this case were owned by them before the fall of 1888. In addition to the various ditches above mentioned, two new appropriations of water were made in 1875, viz., The Farmers' ditch and the Markers' ditch, claiming 15,000 inches of the water flowing in the Humboldt river, and the work on these ditches was prosecuted with reasonable diligence. When the Markers first acquired their rights to the land, most of the land was covered here and there with sloughs, with the natural water flowing in the Humboldt river. At the time the Markers went upon the land no grain or alfalfa was raised in Lovelock Valley. The irrigation was principally used upon wild land for pasturage and for hay, that the natural grasses could be made to produce. There was no scarcity of water for irrigation on the Markers' lands prior to the time of defendants' appropriation of the surplus waters. The flume in the Marker ditch, upon which much testimony was

given on both sides, would at that time carry all the water that the Marker ditch could bring to it, and the ditches below the flume were of sufficient size and capacity to carry all the water which the Marker ditch above the flume diverted from the river.

There is more or less conflict in the testimony of the witnesses, and a decided controversy in the briefs of the respective counsel, as to the capacity of the Marker ditch and flume. L. H. Taylor, a civil engineer, introduced by the defendants, testified that the carrying capacity of the ditch in 1898 was a little less than 7,000 miner's inches, and that the capacity of the flume was established by him at that time to be 11,500 inches, and that the flume actually showed a high-water mark of 7,175 inches. In 1901 he estimated the capacity of the ditch, before the banks were raised, to be 5,310 inches. Thurtell, the expert on behalf of complainant, testified that 9,000 inches would be a conservative estimate of the capacity of the ditch, and that the capacity of the flume when filled to a depth of three feet, with a free discharge, is about 12,000 inches. In making their measurements Taylor and Thurtell used the same coefficient of friction, and each took into consideration, in his estimates of the capacity of the ditch, "the willows growing along the ditch." The measurements of these experts were not based on the conditions existing at the time of trial. Thurtell, upon his cross-examination, said: "The carrying capacity of that ditch is based, not upon the carrying capacity of the ditch at present, but as it was within its old banks before the levee was thrown up. * * * My estimate was based on what the ditch would carry before it was leveed up."

There was as much land irrigated on the complainant's lands prior to 1888 as has been irrigated since, but not as much land cultivated for crops of grain and alfalfa; more land being used and cultivated in the earlier years for pasture and grass, and less for crops, than in the later years. At the time this suit was brought, in 1898, the amount of land cultivated in grain and alfalfa on complainant's land was 2,127 acres, on the Carpenter land 976 acres, and on the Thies land 544 acres, making a total of 3,647 acres.

In 1896 over 1,200 acres were cultivated in grain and alfalfa upon complainant's land, and 800 acres additional were plowed, but not sown on account of lack of water. In 1897 about 1,600 acres were in grain and alfalfa, in addition to 250 acres of plowed ground. In 1898, the year in which the present suit was commenced, there were 2,100 acres in cultivation, and there were also 1,250 acres of plowed land, part of which was sown, but on which no crops were produced, again because of the want of water.

Thies, Carpenter, and Rodgers own separate tracts of land in Lovelock Valley. Long prior to 1883 the owners of these separate tracts of land had acquired separate rights in various ditches and sloughs, for the purpose of conveying water to irrigate such portions of their lands as could be cultivated, etc. In 1883 they united together for the purpose of obtaining the water necessary to irrigate their respective lands from a common source. To this end they constructed the Marker dam, flume, and ditch, and by means thereof diverted the waters of the Humboldt river to and upon their lands for irrigating purposes. The interests of the owners of these respective tracts of land in the ditch and water flowing therein were, by agreement of the parties, divided as follows: Thies is entitled to $^{3}/_{24}$, Carpenter to $^{7}/_{24}$, and Rodgers to $^{14}/_{24}$. Rodgers brought this suit to enjoin defendants, who are subsequent appropriators of the water from the river, from diverting any of the water which Rodgers, Thies, and Carpenter are entitled to have flow through the Marker ditch for the purpose of irrigating their respective lands.

Complainant is the owner of the lands described in his bill, and of all the water rights of the Markers connected with said lands. About 10,000 acres of said land is so situated that it is capable of being irrigated by the water flowing through the Marker ditch. According to the testimony offered by defendants, more than 4,000 acres of the complainant's lands which were covered by sloughs, tules, and swamps in 1875 had ceased to be such in 1888, when the defendants commenced work to divert the waters of the river. There was a small portion of the land that was overflowed during a period of unusual high water in the year 1890. There is a great diversity of opinion in the testimony as to the actual number of acres that were irrigated

prior to 1888. P. N. Marker placed it at 4,000 acres, others much less, and some of the defendants' witnesses placed it at about 1,000 acres. Carpenter irrigated about 1,200 acres, and Thies about 700 acres.

In the fall of 1888 the defendants Pitt and Hauskins commenced work under their appropriation of water, to be conveyed under the Old Channel ditch, for the purpose of irrigating their lands, and completed the same in 1889. They then had between two and three thousand acres of land. In 1898 there was a freshet which washed away their dam. It was rebuilt, and in 1891 and 1892 about 1,200 acres lying under the ditch were put in crops. Thereafter the acreage of land irrigated was gradually increased. The largest increase was made in 1893 and 1895, and the defendants have now under irrigation about 4,000 acres of land.

In 1892 the Markers and Thies commenced an action in the state court against Pitt, Hauskins, and Downs to restrain the defendants therein from diverting 404 cubic feet per second of the waters of the river.

The various contentions of counsel for defendants, as stated in the brief, are as follows:

"Under the testimony, and the law of appropriation, we shall, under various headings, contend:

"(1) That Rodgers, Carpenter, and Thies are not, and never were, tenants in common of the water flowing through the Marker ditch, and that, even if they were, a co-tenant can only sue to protect his own interest in the water.

"(2) The holding of the court that they were tenants in common was not intended to preclude further investigation and final determination. The principle of res judicata does not apply. The whole of the subject matter is sub judice.

"(3) For the same reason it is immaterial that the court adopted the system of irrigation in use in Lovelock Valley for the purposes of the hearing upon the temporary restraining order. The right to water is usufructuary and not proprietary, and is subject to the control and regulation of the court.

"(4) That the maximum capacity of the Marker ditch, determined at the point of its least carrying capacity, was never greater than 5,310 inches, until enlarged somewhat in 1901. The discharge capacity of the flume is reduced to about 5,000 inches by obstructions below.

"(5) That what is now the Marker ditch was the main channel of the river in 1875. It was a succession of sloughs, connected in order to drain the lands. The sloughs and ditches were all for drainage purposes, excepting a small 'Farmers'' ditch. The great necessity then was to drain and keep the water away from the land. When Pitt and Hauskins appropriated, the Marker ranch had only a thousand acres under cultivation. The remainder was: 6,000 acres of swamp, tule, and cane; 3,000 acres of sagebrush, greasewood, etc.; and about 2,000 acres of barren land above the ditch.

"(6) To establish an appropriation of water, the proof must show: (1) An intent to apply it to a beneficial purpose; (2) a diversion from the stream to apply it to the beneficial purpose; (3) an actual application of it to the beneficial use.

"(7) The intent and diversion must be followed by the actual application within a reasonable time, or there is no appropriation—the prosecution of the enterprise must be regarded as abandoned.

"(8) If there is any delay in applying the water to a useful purpose, it must be attributable to matters incident to the enterprise itself, or the doctrine of relation cannot be invoked. Illness and poverty are not legal excuses.

"(9) T. J. Hauskins' appropriation antedated that of Marker, and, if lack of diligence in prosecuting the enterprise to completion may be excused by poverty, his appropriation is prior to that of Marker.

"(10) Marker only put under irrigation 1,000 acres in 14 years—from 1875 to 1889—and his right to increase the use of water, assuming that he was the first appropriator, ended when Pitt and Hauskins appropriated in 1888.

"(11) Assuming that Marker was prior in time, all of the residue of the

stream in 1888 was subject to appropriation, and Pitt and Hauskins acquired a vested right to such residue by their appropriation.

"(12) A claimant's right is not measured by the capacity of his ditch, nor by the quantity of water he diverts, but by the amount he needs, when economically used, for beneficial purposes. Beneficial use is the payment demanded by the law, and when payment ceases the right is suspended. The experiments made, the experience of the ranchers, and the tables prepared from the testimony of the witnesses absolutely and mathematically demonstrate that less than one-fourth of an inch to the acre during the irrigating season is ample to insure the best irrigation and crops on complainant's land and throughout the valley.

"(13) The complainant's right to irrigate begins April 1st and ends October 1st, and the defendants, by their intent, diversion, and use of the water, are entitled to a prior right to the water prior to April 1st.

"(14) While the court, having the authority to limit the use of water to the amount necessary to accomplish the purpose of the appropriation, has the correlative power to decree a sufficient head, by rotation or otherwise, it need not be exercised in this case, because the defendants have admitted that the equivalent of a constant flow of 250 inches for six months measures the complainant's rights, and consented that 84,487,500 cubic [feet] may be called for whenever required—enough to cover 1,000 acres two feet deep in any number of irrigations desired.

"(15) The case against the Lovelock Mill Company failed utterly, and it must be dismissed from the case."

Charles W. Slack and A. E. Cheney, for complainant.

Bigelow & Dorsey, R. M. F. Soto, and Torreyson & Summerfield, for defendants.

HAWLEY, District Judge (after stating the facts as above). This is a suit in equity to enjoin the diversion of water by defendants from the Humboldt river. It has frequently been before the courts, and four different opinions have been rendered therein. Rodgers v. Pitt (C. C.) 89 Fed. 420; (C. C.) 89 Fed. 424; (C. C.) 96 Fed. 668; (C. C. A.) 104 Fed. 387. It is now before the court upon the evidence taken under issue joined at the trial. The general facts in relation thereto are set forth in the foregoing statement, some of which were stated in the opinion of this court (89 Fed. 420), ordering the issuance of a temporary injunction, to which reference is here made.

A careful, extended, and painstaking examination and consideration of the briefs of the respective counsel, and the material portions of all the testimony, has convinced me that the points made and relied upon at the trial are substantially the same as at the preliminary hearing. The testimony at the trial was more thorough in its details as to the facts, and the arguments more extended, with a citation of authorities showing commendable industry, care, and zeal on the part of the respective counsel; but the general history of the case remains the same, with one or two minor exceptions, which will hereafter be noticed. Did the court err in any of the conclusions reached at the preliminary hearing? Do the merits of the case, as presented at the trial, demand any different conclusion than was then reached? These are the real questions to be now determined.

1. Can complainant maintain this suit and obtain an injunction against the defendants, except as to the amount of water appropriated, needed, and required for a beneficial use for the irrigation of his own lands? It is apparent from the facts of this case that Thies, Car-

penter, and Rodgers, by virtue of their interest in the Marker dam and ditch, might at any time agree among themselves that, instead of using their proportionate share of the waters flowing therein all the time on their land, each should take all the water a part of the time. As was said in 89 Fed. 420:

"They could agree that Thies should have all the water for 3 days out of 24, that Carpenter should have it all for 7 days out of 24, and that Rodgers should take it all for 14 days out of 24. In the event of any litigation between themselves as to their respective rights, a court of equity would have the unquestioned power to make such a decree, if it fairly represented their respective rights as to the use and necessity of the water to irrigate their respective lands. This being true, it follows that each has such a unity of possession of the ditch and water flowing therein as to entitle either of them to bring suit, and enjoin any diversion of the water, by a trespasser, to which they are all entitled."

This court will not consider any of the questions decided on the hearing for a preliminary injunction as res judicata. They are open for review, but they should be adhered to, unless it clearly appears that an error was committed, or that additional facts were brought out at the trial which demand a modification or reversal of the views expressed at the preliminary hearing. Upon this point no new facts were elicited at the trial. The conclusions reached in the former opinion are in accordance with the views expressed by this court in Union Mill & Mining Co. v. Dangberg (C. C.) 81 Fed. 73, 87, and followed in Miller & Lux v. Rickey (C. C.) 127 Fed. 573, 586. In addition to the authorities cited in the opinions referred to, upon this point, see: The Debris Case (C. C.) 16 Fed. 25, 34; Carpentier v. Webster, 27 Cal. 524; Himes v. Johnson, 61 Cal. 259; Meagher v. Hardenbrook, 11 Mont. 385, 390, 28 Pac. 451; Spanish Fork v. Hopper, 7 Utah, 235, 238, 26 Pac. 293; Hall v. Blackman (Idaho) 68 Pac. 19, 22; Bates v. District of Columbia, 7 Mackey, 75, 79; Black's Pomeroy on Water Rights, § 63; Long on Irrigation, § 85.

In Black's Pomeroy, supra, the author said:

"Wherever ditches or other structures for diverting and appropriating water belong to two or more proprietors, such owners are, in the absence of special agreements to the contrary, tenants in common of the ditch, and of the water rights connected therewith, and their proprietary rights are governed by the rules of law regulating tenancy in common. * * * Of tenants in common, each has a right to enter upon and occupy the whole of the common property, and every part thereof, and may recover the whole thereof from a trespasser; and an arrangement as to periods for the use of the water, among the co-tenants, affects them only, and is for their convenience, and is no defense to an action of trespass against a third party by one of the co-tenants."

In Meagher v. Hardenbrook, supra, the court said:

"That one tenant in common may preserve the entire estate or right held in common is a proposition so well settled it is unnecessary to cite authorities in support thereof. In this the tenant in common is only preserving his own, as his right partakes of the whole."

2. Touching the matter of jurisdiction discussed by the Circuit Court of Appeals in 104 Fed. 387, 390, some reference ought, perhaps, to be made to the averments in defendants' answer, alleging that the complainant had actual notice at the time he took the conveyance from

the Markers of the pendency of the action in the state court. The defendants introduced but one witness to sustain this special defense, and his testimony failed to meet the expectations of defendants in that respect. Notwithstanding this fact, counsel seem to think that the court ought to take judicial notice that complainant must have known the facts to be as alleged in the answer. It is enough to say upon this point that there is no testimony in the record tending to show that at or prior to the time of the commencement of this suit complainant had actual notice of the pendency of the action in the state court. If there had been any constructive or actual notice proven, then the court might have been called upon to answer the question, suggested by complainant's counsel, whether or not the jurisdiction, being matter of abatement, should have been raised by plea, and is waived by answering to the merits. It has been so held in many cases. Marshall v. Otto (C. C.) 59 Fed. 249, and authorities there cited. In addition thereto, see Dodge v. Perkins, 4 Mason, 435, Fed. Cas. No. 3,954; Wood v. Mann, 1 Sumn. 578, Fed. Cas. No. 17,952; 1 Bates on Fed. Proc. § 239; 1 Beach, Mod. Eq. Pr. § 304.

3. It is claimed by defendants that complainant's right to use the water commences April 1st, and ends on October 1st, each year, and that in any event the defendants should not be enjoined from using the water prior to April 1st. There is no doubt that, where a party in the appropriation of water limits himself in using it to certain specified dates, subsequent appropriators may acquire a vested right to the water to be used at times not embraced in the claim of the first appropriator. In Barnes v. Sabron, 10 Nev. 217, 245, the court said:

"We think the rule is well settled, upon reason and authority, that, if the first appropriator only appropriates a part of the waters of a stream for a certain period of time, any other person or persons may not only appropriate a part or the whole of the residue, and acquire a right thereto as perfect as the first appropriator, but may also acquire a right to the quantity of water used by the first appropriator at such times as not needed or used by him. In other words, if plaintiff only appropriated the water during certain days in the week, or during a certain number of days in a month, then the defendants would be entitled to its use in the other days of the week, or the other days in the month."

But the contention of counsel must be disposed of by the particular facts existing in this case. The record shows that the complainant claimed and used the waters appropriated by his predecessors in interest for the irrigation of the land owned by him. His claim and use of the water was not with reference to any particular period in the spring or fall, or during any particular months in the year. It is broadly claimed that complainant never irrigated any of his land any year before April 1st. This is not borne out even upon the testimony of H. C. Marker, offered by defendants:

"Q. What time did the irrigating season begin up to 1888 and 1889? When did you first begin to irrigate? A. What time of year? Q. Before 1889. A. About the 1st of March. Q. You began irrigating as early as the 1st of March? A. Yes. Q. Do you know of any irrigating that began as early as that time? A. Yes, I have irrigated in January. Q. What did you irrigate? A. Alfalfa. * * * Q. I asked you yesterday something about the time of the beginning of the irrigating season; you answered that; and now

I would like to recur to that subject and ask you when it was that you first began to irrigate while you were on the Marker ranch from 1875 until 1889—what month in the year? A. Generally commenced the 1st of April on grass ground. Q. Have you ever irrigated earlier than that? * * * A. Last year I turned water in on fruit trees, and to kill gophers, and some on alfalfa too, for three or four days. In January. * * * Q. Have you irrigated in March sometimes? A. It may be, but I do not think of it. Q. * * * I want to know whether that answer of yours fits all the time there, that your earliest irrigating season began in April, while you were on the Marker ranch? A. I think so; I can't say that for certain."

The truth is, as shown by the testimony, that there was no fixed time to begin irrigating in Lovelock Valley. It depended upon the seasons, climatic conditions, water supply, etc., as well as upon the character of the soil. In a season like the present, where there has been an almost continuous fall of rain or snow during the entire month of March, it is safe to say that no irrigation will be required before the 1st of April, and, in many localities, probably not before the 1st of May. In dry seasons it would be required much earlier.

Nelson, a farmer residing in the valley, said:

"Q. Is the season in the year for irrigating always the same? The same one year as in another? I am speaking, of course, of the land that you have described, Rodgers', Thies', and Carpenter's, and your own and your neighbors' land lying under the Union Canal? A. The season varies considerably. Q. There is no fixed time then at which you begin irrigation? A. No. Q. If the season is an open one and water is short, what time would you begin? A. I would begin about the first part of March for alfalfa. * * * It might damage grain to begin too early. Q. But if, on the other hand, if the season is a late one, could you make profitable use of water at an earlier period? A. If the season is late, with the prospect of abundance of water, we have better results irrigating in April. Q. On the other hand, if the season was late, and the prospect not good for an abundance of water, would you take the water when you could get it? A. Yes."

P. N. Marker, the former owner of the Rodgers land, testified:

"Q. Is there any fixed time when the first crop is cut? A. No, sir; that also depends on the season; it varies sometimes two weeks. Q. So, as a matter of fact, there is no fixed period of irrigation of that property out there? A. Well, yes; there is a certain time between February and September."

Joseph Hill, superintendent of the Rodgers ranch, on cross-examination testified:

"Q. Do you mean during the irrigating season, running through the entire irrigating season? A. Yes. Q. What is the irrigating season? A. When you need it. Q. How many months? A. From February until September."

Peter Anker testified that the irrigating season in Lovelock Valley "would be all the way from the first of March, or last of February, to the first of September."

W. C. Pitt, one of the defendants, testified, that alfalfa required irrigation "in April or March as the case may be. * * * I have irrigated at all times through the winter when I could get water; that is, in places where I could put the water, where it would not injure the land. The regular time that I am using water to irrigate with is about the 1st of March at the present time."

4. It is claimed by counsel that, "to establish an appropriation of water, the proof must show intent to apply it to a beneficial purpose

existing at the time, an actual diversion from the stream, and the application of it to a useful purpose." This is correct. In Union Mill & Mining Co. v. Dangberg, supra, this court, in discussing principles applicable to this case, said:

"Under the principles of prior appropriation, the law is well settled that the right to water flowing in the public streams may be acquired by an actual appropriation of the water for a beneficial use; that, if it is used for irrigation, the appropriator is only entitled to the amount of water that is necessary to irrigate his land, by making a reasonable use of the water; that the object had in view at the time of the appropriation and diversion of the water is to be considered in connection with the extent and right of appropriation; that if the capacity of the flume, ditch, canal, or other aqueduct by means of which the water is conducted, is of greater capacity than is necessary to irrigate the lands of the appropriator, he will be restricted to the quantity of water needed for the purposes of irrigation, for watering his stock, and for domestic use; that the same rule applies to an appropriation made for any other beneficial use or purpose; that no person can, by virtue of his appropriation, acquire a right to any more water than is necessary for the purpose of his appropriation; that, if the water is used for the purpose of irrigating lands owned by the appropriator, the right is not confined to the amount of water used at the time the appropriation is made; that the appropriator is entitled, not only to his needs and necessities at that time, but to such other and further amount of water, within the capacity of his ditch, as would be required for the future improvement and extended cultivation of his lands, if the right is otherwise kept up; that the intention of the appropriator, his object and purpose in making the appropriation, his acts and conduct in regard thereto, the quantity and character of land owned by him, his necessities, ability, and surroundings, must be considered by the courts, in connection with the extent of his actual appropriation and use, in determining and defining his rights; that the mere act of commencing the construction of a ditch, with the avowed intention of appropriating a given quantity of water from a stream, gives no right to the water unless this purpose and intention are carried out by the reasonable, diligent, and effectual prosecution of the work to the final completion of the ditch, and diversion of the water to some beneficial use; that the rights acquired by the appropriator must be exercised with reference to the general condition of the country and the necessities of the community, and measured in its extent by the actual needs of the particular purpose for which the appropriation is made, and not for the purpose of obtaining a monopoly of the water, so as to prevent its use for a beneficial purpose by other persons; that the diversion of the water ripens into a valid appropriation only where it is utilized by the appropriator for a beneficial use. * * * Water in this state is too scarce, needful, and precious for irrigation and other purposes to admit of waste. No person, whether an appropriator or riparian proprietor, should be allowed to 'be extravagantly prodigal in dealing with this peculiar bounty of nature.'"

5. The questions stated by counsel in points 5 to 11 will be grouped together under one general head.

(a) The claim that "Hauskins' appropriation antedated that of Marker" is not supported by the testimony. The answer of defendants does not contain any allegation claiming any rights whatever under the appropriation made by Hauskins in 1873; it admits priority in complainant to the extent of 450 inches. It is without foundation in the pleadings or the proofs, and is not seriously urged. In fact, it appears to have been made subject to conditions which have no special application to the particular facts of this case. The facts as shown by the evidence at the trial, as well as upon the hearing, are that "the defendants' right to appropriate any water from the Humboldt river was not acquired until the fall of 1888. Complainant's

rights, as well as those of Thies and Carpenter, his co-tenants in the Marker ditch, were acquired many years prior to that time." 89 Fed. 423. Marker's claim and rights to the water commenced in 1875.

(b) Did complainant's predecessors in interest prosecute the work with such reasonable diligence as to entitle him to claim his rights by relation to the time of their first inception? The principles of law applicable to this question are covered by the quotation from Union M. & M. Co. v. Dangberg, supra. Whether this case comes within the rules there stated is a question of fact. The court must always be controlled by the facts, circumstances, and conditions as shown by the evidence. An illustration is found in the decisions of the Supreme Court of this state. Thus, in the Ophir Silver M. Co. v. Carpenter, 4 Nev. 534, 97 Am. Dec. 550, it was held that the diligence required by the law was not established by the facts. And in Barnes v. Sabron, 10 Nev. 217, 242, it was held that proper diligence was shown. But the principles of law announced in each were the same, and are substantially identical with the doctrine announced by this court in the case of Union M. & M. Co. v. Dangberg, heretofore quoted. "What constitutes a reasonable time within which the water must be applied to beneficial use is obviously a question of fact, depending upon the circumstances of each particular case." Long on Irrigation, § 47, and authorities there cited.

(c) In the course of defendants' brief it is said:

"An examination of the record will disclose the fact that, as to all save an exceedingly small part of the Marker diversion, each of the three elements essential to constitute a valid appropriation was utterly lacking when the water was first taken. There was no present intention to apply it to a useful purpose. There was no necessity for the water. There was no application of it to a beneficial use. As to the first element, the larger and more valuable portion of the Marker ranch—that part which is now under cultivation was under water—was swamp. There certainly could have been no intention to use water on swamp lands. As to the second element, there was—there could have been—no necessity to irrigate the swamps. As to the third element, no such application, if claimed or intended, could have been beneficially made."

The fact is that, at the time Marker secured the lands and appropriated the waters of the Humboldt river, the natural waters thereof were flowing in the Humboldt river, and spread over portions of the lands in various sloughs. It was necessary to drain these sloughs in order to put the land under cultivation. It was like cutting timber in the forests, or digging out or plowing up the sagebrush or greasewood that grows in the desert. The conditions on the land had to be changed in order to apply the water claimed and appropriated to a useful and beneficial purpose. It was a part of the enterprise which Marker had in view in making his appropriation. There is no principle of law that required him, under such circumstances, to delay making his appropriation until after he succeeded in draining the land and putting it in a condition where it could be cultivated. The defendants are not in a position to make any such defense. They did not make any appropriation of the waters of the river until years after Marker had appropriated the same, and had cleared nearly all of his land for cultivation, and was irrigating the same, using the water he had appropriated for a useful and beneficial purpose. All

that they can claim is as to the excess of the water after the time they made their appropriation in the year 1888. They were not entitled to any vested right to any of the waters of Humboldt river until that time. To hold otherwise would be to take away from complainant, whose predecessors in interest had made a prior appropriation and diverted the water to a beneficial use, the quantity of water to which he was entitled, and give to the defendants a quantity of water to which they never were entitled, and had never theretofore enjoyed, or had the right to enjoy.

(d) There was no lack of diligence upon the part of complainant, or his predecessors in interest, after the years 1888 and 1889. It is true that during certain years thereafter the complainant did not use as much water as had been used before 1888, and some reliance seems to be placed upon this fact in order to reduce the amount of water to which complainant is entitled. During the dry years there was not sufficient water to furnish the necessary supply. Complainant could not obtain sufficient water to irrigate the land. The complainant certainly ought not to be confined to the amount of water he used, and to the number of acres irrigated during the dry seasons. A reference to the statement of facts will show the number of acres cultivated on complainant's land in grain and alfalfa, and the number of acres plowed for which water could not be obtained during the years 1896, 1897, and 1898. Looking further into the facts, it will be discovered that, after the defendants had diverted the water of the river onto their lands, their acreage steadily increased year by year until they had about 4,000 acres under cultivation. In the estimates made by defendants of the number of acres under cultivation on complainant's land, they apparently overlook the plowed ground, and ignore the number of acres of pasture land or wild grass that were irrigated. It is in effect claimed that the use of water for pasture and for wild hay was not for a beneficial purpose. The courts have held otherwise. In Pyke v. Burnside (Idaho) 69 Pac. 477, it was expressly held that where one constructs a ditch and conducts water upon his land year after year, and permits the same to spread out over wild hay land for the purpose of making hay or using such land for pasture, he thereby secures the right to the use of sufficient water to irrigate such land, provided the amount of water so used is sufficient for that purpose; such use being a beneficial one. In Smyth v. Neal, 31 Or. 105, 109, 49 Pac. 850, 851, the court said:

"It seems to have been a conceded proposition that the use of water for the irrigation of these wild meadow lands was for a useful purpose, and that such irrigation was necessary for the production of grass in sufficient quantities to be gathered and cured as feed for stock."

The theory advanced by defendants, that the rights of complainant should be limited to the amount of lands actually cultivated for crops and grain, cannot be sustained. In Kleinschmidt v. Greiser, 14 Mont. 484, 497, 37 Pac. 5, 6, 43 Am. St. Rep. 652, the court, in answering a similar contention, said:

"Such theory, if followed, is, we think, without doubt, erroneous. Thereby a prior appropriator of water would be cut down to the quantity necessary to irrigate the land he actually had under cultivation when the subsequent

appropriation was made, although the first appropriator's land was all available for production of crops by aid of irrigation, but, at the time of making the appropriation of water necessary for its irrigation, he had not subdued all of it to the plow. The priority under such rule would depend largely upon the time appropriators brought their lands under cultivation, and not upon the priority of appropriation and diversion of the water necessary to irrigate the land owned by the appropriator, as the law provides."

6. What amount of water is complainant entitled to in this case? What amount of water is necessary to properly irrigate an acre of land? These questions were involved and disposed of on the preliminary hearing (89 Fed. 423), and must now be disposed of by the weight of the testimony given upon the trial of the case. No additional facts were elicited at the trial which demand any change in the views that were then expressed. The amount of water necessary to irrigate the lands depends, in a greater or less degree, upon the general character of the soil in the locality where the lands are situated. The system in vogue among the farmers in Lovelock Valley is that of using irrigating ditches, generally of uniform size and dimensions, varied only by changed conditions, and turning the water through these ditches over the land, controlling and changing the water, as occasion requires, at different times during the day, and letting it run and take care of itself during the night, but arranged where it is believed it will do the most good and least harm. Upon the preliminary hearing it was said: "It is the duty of the court, in the absence of any law upon the subject, to determine the amount of water by a reference to the system used." This necessarily implied that the system was a proper one under all the existing conditions. In Long on Irrigation, § 49, the author said:

"The methods of applying water to the soil vary with the character of the soil and crop, the quantity of water available, the slope of the ground, and like considerations. The water may be distributed, as is usually done in the case of hay crops, such as alfalfa, growing on nearly level ground, by cutting the side of the distributing ditch constructed along the highest parts of the field, either by making temporary openings with a shovel or hoe, or by permanent gates, and letting the water flow in all directions over the surface. This is evidently the simplest mode of distribution from a ditch. Other methods, varying in complexity up to elaborate systems of distribution by means of pipes, are employed."

The defendants' expert Taylor testified that in his opinion the system of irrigation used by the farmers in Lovelock Valley is defective, but nevertheless "it is arranged according to the best intelligence of the farmers themselves, and oftentimes very good, still apt to be defective more or less."

Absolute perfection in the system of irrigation in this state, has, perhaps, not yet been reached, and it is doubtful if any system could be devised that would not, in the opinion of some scientists and experts, "be defective more or less." The contention that the prior appropriators of the water ought to be compelled to change their system for the exclusive benefit of the subsequent appropriators, who use the same system, does not appeal, in the light of all the facts in this case, very forcibly to a court of equity, as being sound. It would seem more just to allow the complainant to change his system, if he can and desires so to do, and to adopt any system that would allow

him to so use the amount of water to which he is entitled as would enable him to cultivate more of his land. The court cannot, in the absence of any law upon the subject, compel the farmers to use any particular system, but it might, in a case where an extravagant and wasteful system is used, which demands more water than they are entitled to by virtue of their appropriations, declare that under such circumstances they were not entitled to the quantity of water they were using, and give the excess to subsequent appropriators. But this is not such a case. The testimony shows that the system referred to is used by all the farmers in Lovelock Valley—by the defendants as well as by the complainant.

In the former opinion, speaking of the testimony, the court said:

"The witnesses on behalf of complainant place the quantity at one inch to the acre; the defendants generally at about one-half an inch to the acre; some placing it, however, as low as one-quarter of an inch to the acre. The great weight of the testimony, however, is to the effect that one inch to the acre is required to properly irrigate the cultivated lands. The defendants offered testimony to the effect that they would be satisfied with one-half an inch to the acre, and that that quantity was all that was required. The fact, however, is that, during the early part of this season, all the farmers taking water from the Pitt ditch used 3,400 inches of water to irrigate about 3,000 acres of land, and there were more or less dissensions between them as to their not having their proportion or sufficient quantity of water to properly irrigate their lands. A surveyor was employed, and measurements made, showing, with but one or two exceptions, that each party was only using his proportionate share of the water," to wit, one inch to the acre.

The only additional testimony at the trial was given by experts, whose testimony is claimed by defendants to be entitled to greater credit than the testimony of the farmers. It is an easy task for counsel to claim that the witnesses introduced on behalf of their clients establish facts which entitle them to recover, but the court ought not to ignore the testimony of the other side. It is compelled to consider all the testimony offered by the respective parties, to weigh and analyze it by the settled rules of law, in order to determine where the preponderance lies. In its investigation the court cannot say that the testimony of experts as to the amount of water used or required must be accepted as against the farmers of the vicinage who had been living in the valley and using the water for several years. It may be difficult for the courts to determine with mathematical certainty the precise amount of water running in a stream, or the carrying capacity of ditches and flumes, when the testimony, as in the present case, is conflicting; but the experts, who ought to know, differ as widely in their measurements as do the ordinary farmers in their method of calculation. A reference to what was said by this court in Union Mill & Mining Co. v. Dangberg, 81 Fed. 99, 100, without comment, shows that even experts are liable to make mistakes in their methods of measuring water, and in their judgment as to the amount of water necessary to irrigate an acre of land.

There are divers other points argued by defendants' counsel, not specifically noticed herein. Their discussion would serve no useful purpose. Suffice it to say that in my opinion, after a careful examination thereof, they are not of such a character as to change the results. Many of the points urged by defendants' counsel seem to

have been made, as was said by the court in Francis v. United States, 188 U. S. 376, 23 Sup. Ct. 334, 47 L. Ed. 508, "in the hope that some shot might hit the mark."

Upon the whole case, my conclusion is that the complainant herein is entitled to a decree that the temporary injunction heretofore issued be made perpetual, restraining defendants and all parties claiming under them, their agents, servants, employés, etc., from diverting, or in any manner using, the waters of the Humboldt river so as to prevent 3,500 inches thereof, measured under a four-inch pressure (or, in other words, 70 cubic feet of water per second of time), from flowing in the bed of the river to the head of complainant's ditch during the irrigating season, and for costs.

THE HERCULES.

LARSEN et al. v. S. P. SHOTTER CO.

(District Court, S. D. Georgia, E. D. March 11, 1904.)

(Circuit Court, S. D. Georgia, E. D. March 11, 1904.)

1. SHIPPING—CONSTRUCTION OF CHARTER—BREACH BY REFUSAL TO ACCEPT VESSEL.

While loading at Savannah, a ship was chartered for a subsequent voyage from that port, the charter providing that she should be tight, staunch, strong, and in every way fitted for the voyage; that she should proceed in ballast to Savannah after having discharged her present cargo in Europe. There was no stipulation in respect to the time of her return, and the charter contained a provision that the dangers of the sea, fire, and navigation of every nature and kind be always mutually excepted. In passing out from Savannah in tow she struck on a bar, and was injured to such an extent that, after having discharged her cargo at Hamburg, it was found necessary to make repairs, and, there being a strike among the ship carpenters in Hamburg, she was taken to a port in Norway, the trip requiring two days, where the repairs were made as required by the official board of survey, and, as shown by the evidence, in as short a time as possible. The broker who negotiated the charter at once advised the charterers of the situation, and submitted an offer by the owners to substitute another vessel or to cancel the charter, which was refused, the charterers claiming a reduction of the freight on account of the delay. A subsequent offer of the same kind was also refused, and after completing her repairs the ship sailed for Savannah, where she was entered at the customhouse by the charterers, but after she had remained in port nearly a month they gave notice that they waived their claim for a reduction in the freight and had canceled the charter. *Held*, that the mutual exception in the charter of dangers of the sea took effect at once on its execution, from which time the owners became bound thereby to put the ship in a seaworthy condition and to proceed with reasonable dispatch until she was delivered for loading, subject to such exception, and that therefore the unavoidable delay caused by such perils afforded no ground for the refusal of the charterers to accept and load the vessel; nor was the taking of the ship to the port where she was repaired such a deviation from the contemplated prior voyage as released the charterers under the circumstances shown, or entitled them to damages for the delay, especially after their repeated refusal of the owners' offer to cancel.

In Admiralty. Cross-actions in the District and Circuit Courts, respectively, consolidated by consent and heard before Judge SPEER, as judge of both courts, without a jury.

Samuel B. Adams and Davis Freeman, for J. A. Larsen and others.
George W. Owens and Walter G. Charlton, for S. P. Shotter Co.

SPEER, District Judge. This proceeding originated in an action in the city court of Savannah by J. A. Larsen et al., plaintiffs here, and owners of the ship Hercules. It was an action for damages for breach of a charter party of that vessel by the defendant, the S. P. Shotter Company. The defendant, while carrying on its business in the city of Savannah, in this district, is a corporation of the state of West Virginia, and caused the removal of the case to this court. After the case was removed, the Shotter Company filed a libel claiming damages against the plaintiffs for alleged breach of the charter party on their part.

While there is much apparent conflict in the testimony, a careful analysis of the evidence, in connection with the admissions in the defendant's answer, discloses that there is little real conflict as to the material facts. The charter party was made on the 5th day of March, 1901. It was for a voyage from Savannah to certain ports, for orders to discharge at certain other safe ports, to be designated at charterer's option. It was expressly stipulated that the vessel shall be tight, staunch, strong, and in every way fitted for such a voyage. The Shotter Company engaged to provide and furnish for the said vessel a full and complete cargo of spirits of turpentine and rosin. The charterer agreed to pay four shillings British sterling per barrel of 40 gallons gross American gauge of barrels of spirits of turpentine, and two shillings and nine pence British sterling per barrel of 310 pounds gross American weight for rosin, all with 5 per cent. primage, payable in cash on proper discharge of cargo, free of discount or interest, three pence British sterling per barrel to be deducted from above rates if vessel is ordered, on signing bills of lading, to any direct port as above. It was further agreed that there should be 25 lay days for loading and discharging cargo, and that, for each and every day's detention by default of the Shotter Company or agent, 18 pounds British sterling per day, day by day, shall be paid by the charterer. It provided that the dangers of the sea, fire, and navigation of every nature and kind be always mutually excepted. It is not without importance to observe that H. Clarkson & Co., of London, acted as agents for the plaintiffs and for the Shotter Company. The final stipulation of the charter party is: "It is understood that the vessel proceeds to Savannah in ballast, after having discharged her present cargo in Europe." It is to be observed that there was no time stipulated in the charter party in which the ship should return, no such expression as "all convenient speed," but it is not questioned that her owners were under obligation to return her within a reasonable time.

Sailing from Savannah with full cargo after this charter party was executed and in operation, and attempting, while in charge of a pilot and in tow by a tug, to cross the bar at low neap tide, the Hercules

struck four times. That the ship by this misadventure was seriously injured is not, in the opinion of the court, fairly debatable. It was an old vessel, having been launched in 1868. The pilot, it is true, expressed the opinion that she could not have proceeded on the voyage had she sustained the injuries described by the witnesses for the plaintiff. This opinion is not deemed important, in view of the fact that she did proceed, and in view, also, of the positive testimony of several witnesses who did the actual work of repairing her in a Norwegian shipyard at Porsgrund. The testimony of Halvor Nielson, of the firm of Nielson & Backa, at whose shipyard the Hercules was repaired, is as follows:

"My firm repaired the ship 'Hercules,' of Skion, in Porsgrund, during the summer of 1901, owing to damage done to ship, said to have been done when the vessel crossed the bar on leaving Savannah en route for Hamburg. The repairs carried out by my firm were ordered to be done by the official surveyors—'Det norske Veritas' (the Norwegian Veritas). No repairs were made except those required by the above-named authorities. The repairs consisted in the following: A new piece of false keel under the forefoot, partially new inner and outer forestem. This had given way or started, especially between the ports, and was split in the middle where bolted. The materials were otherwise sound. The bow fastenings had to be loosened, partially removed, in order to get the inner stem in place, and consequently had to be rebolted and refastened. This work was difficult to effect, and took a very long time to do, although much overtime was spent on it, as only three to five men could be used at this work at a time. The sternpost was started and had to be completely rebolted, as well as in part further fastenings. The lower rudder metals were broken and had to be renewed. The false keel aft was split, and had to be replaced by two larger pieces. Besides which, the ship was retrenailed from beneath the chainbolts down to about six or seven feet from the keel. The ship was calked from keel to gunwale, and remetaled. The mizzenmast was repaired with three new pieces of pitchpine deals and iron hoops, and this work was carried out whilst the other repairs were proceeding, and without any detention to these."

There is other testimony as to the character of these injuries, but much of it is hearsay, and the conclusion of the court is based upon the testimony of the shipwrights and artisans above referred to. The injuries were, as stated, quite serious, but the vessel proceeded on her way to Hamburg, and there unloaded. It appears further from the testimony that her captain refused to take her out on another voyage until she was repaired. It is equally clear from the evidence that a strike was in progress among the ship carpenters at Hamburg, and that, while it may have been possible to have repaired her there, it was judicious, and in the interest of the charterer and the owners as well, to have the repairs made at Porsgrund, in Norway. This was only a two days' voyage from Hamburg.

When the Hercules reached Porsgrund she was surveyed by the official board, who enjoy and no doubt deserve the honorable title of the Norwegian Veritas. This body, created by Norwegian law with necessary authority, ordered certain additional repairs, and according to the testimony of Hans A. Oelsen, who was a shipbuilder for 35 years, and was present at the shipyard, the repairs were expeditiously made, a number of laborers, varying from 25 to 30, being continuously employed, and as many calkers and carpenters as could be reasonably brought to work on the repairs. These repairs were completed on Sep-

tember 22, 1901. They were so salutary in their effect upon the ship that she retained her class in the Norwegian Veritas. Oelsen testifies:

"As a ship builder and foreman of many years standing, and having had considerable experience in such matters, I may safely say that I am of the opinion that the said repairs were carried out with the utmost possible dispatch, and could, to the best of my belief and knowledge, not have been effected better or quicker elsewhere."

Mr. Halvor Nielson, who is a shipbuilder and a shipyard proprietor, testified to the same effect.

It will be recalled that H. Clarkson & Co., 112 Fenchurch street, London, were the brokers who negotiated this charter party for the contracting parties on May 25, 1901. These mutual agents by letter notified the Shotter Company of the plight of the Hercules.

"The owners of this vessel inform us," write these gentlemen, "that she has been aground and leaky and recommended to recopper (we understand she will also reclass). Owing to the carpenters' strike at Hamburg, owners have been obliged to take her to Norway in tow, whereby we understand no delay will occur. Owners might give you a substitute for earlier loading, or cancel charter if you should prefer, and we now await your cable on receipt if you have any proposal to make; if we don't hear from you by cable we shall understand you will load her as per charter."

This letter reached the defendant on June 7, 1901. This, according to the testimony of Mr. Einar Storm Trosdal, chief clerk of the foreign department of the Shotter Company, was some months before the presence of the Hercules at Savannah was indispensable. Indeed, he stated that he supposed that a cargo could have been provided for her as late as October. Notwithstanding this fact, the Shotter Company immediately (that is to say, on June 7) reply by cable:

"Charterer will not cancel charter Referring to your letter of May 25th Hercules we claim reduction 1½d."

The Shotter Company supplemented this telegram with the letter to Clarkson & Co. of June 8th, from which we extract the following:

"We do not approve of owners doing as they please in such matters. In our many years experience we have found Norwegian ship owners very strict indeed, in cases where we might deviate a little from the terms laid down in the charter party. As a matter of fact when we want any privilege or option we have to pay very heavy indeed, and there is no reason why we should be any more lenient to them than they are to us. As a matter of fact when the owners of the Hercules undertook to send their vessel to Norway for repairs they did so at their own peril, because we contend that it was a violation of the contract with us. We cabled you that we would consent provided owners make an allowance of 1½d. and await your reply."

This attitude of the Shotter Company does not appear to be wholly justifiable. It is, in effect, to make the Hercules a vicarious sufferer for the alleged sharp practices of other Norwegian owners. This does not seem maintainable upon any principle of admiralty law, save, perhaps, such as relate to letters of marque and reprisal, which it is superfluous to observe are only issued pursuant to act of Congress, and in time of war, or near thereto.

Clarkson & Co. having received this cable, write on June 8th:

"We have informed owners that you claim a reduction of 1½d. off the rate, because ship was sent from Hamburg to Norway for repair."

On June 12th, Clarkson & Co., who, as stated, acted as the joint broker of the owners of the Hercules and of the Shotter Company, write:

"We are sorry and must say rather surprised at the view you are taking in this matter and cannot see why you should claim any reduction, as it certainly has been in your interest to take the vessel over to Norway for repairs instead of having the same effected at Hamburg, where we understand strikes are still going on and there can be no doubt that the vessel will now be at yours much sooner than would have been the case if she had repaired at Hamburg. She will be remetalled and reclassed A2. She is being put in first class order, which naturally will make a great difference to you in effecting the insurance. Personally we think you ought to waive the whole question of reduction or if you should prefer it to cancel the charter."

To this letter it appears that the Shotter Company reply on June 13th:

"We will only refer you to our letter of the 8th instant where we wrote fully about this vessel. We therefore cabled you we would not cancel charter but insisted on getting allowance of 1½d."

On August 3, 1901, the Clarkson Company write to the Shotter Company:

"As cabled you the Hercules is expected ready about the end of this month. Awaiting further news we remain."

On August 27th the Shotter Company write to Clarkson & Co.:

"We take it for granted that by this time you will hardly agree with the owners of the vessel that time could be saved by having them go to Norway for repairs. Whilst we have not expressed ourselves plainly on this subject before, we will say that we consider it perfectly absurd on the part of the owners of that vessel to assume that they had the right to take the vessel to Norway for repairs without our permission. We consider that the owners violated their contract with us, and we shall see that the vessel carries part of the burden and loss which we have suffered."

Even at this late day it appears that there is no intimation on the part of the Shotter Company that they have any purpose to cancel the charter party. Their purpose, as disclosed, is to obtain a reduction of freights, or otherwise make the owners of the Hercules share their loss, whatever it may prove to be, or account to them in damages. On November 9, 1901, Clarkson & Co. write to Shotter Company:

"In the case of the Hercules you will remember that as soon as we informed you of this vessel having gone to Norway, owners made you a proposal to cancel C. P. to which you would not agree, but said that you would load the ship at a reduction of 1½d. so we cannot see how you claim more than this reduction from the owners. We can assure you that the owners of both ships have used every diligence to get vessels repaired."

Her repairs having been finally completed, and the Shotter Company, so far as the correspondence discloses, remaining inexorable in their determination not to cancel the charter party, but to insist upon a reduction of freight, the owners of the Hercules sent her on the long voyage through the North Sea and across the Atlantic to Savannah. She reached Savannah on the 28th day of November, was entered at the customhouse by Dahl, the agent of Shotter, who advanced the captain $100. Even now there appears to be no immediate determination of the Shotter Company to cancel the charter party. The Hercules is

in the harbor from the date last mentioned until December 24th, when Shotter Company write Clarkson & Co. as follows:

"We have decided to waive the claim for damages against the vessel, but we have notified the captain that we have cancelled charter party. We regret this very much indeed, but considering the high-handed position the owners took, they could hardly expect better treatment."

Now, whatever may be the technical rule which it is insisted authorized the Shotter Company to withhold cancellation until the ship arrived at the port of loading, the application of such a rule here seems unconscionable. In the meantime the Hercules is claiming demurrage from the 2d day of December, and finally succeeds in getting another charter from the Patterson Downing Company on the 31st day of December, 1901, and sails January 26, 1902. The Shotter Company contend, on account of the failure of the Hercules to come within a reasonable time, that they were compelled to charter another vessel or vessels to take the cargo provided for her, at a considerable loss to them. This loss was stated in their plea in the removed case to be $381.04. In their libel filed in this court, and sworn to by Mr. Shotter, it is stated to be $1,000, or other large sum. They insist that their conduct in repudiating the charter party is justifiable, first, because there was a deviation in the voyage of the Hercules after that instrument was executed, and, secondly, becauses they were under no obligation to cancel the charter party until the Hercules returned to the port of destination; that is, to Savannah. The court is unable to perceive any reasons under the circumstances which would justify the Shotter Company in repudiating this charter party on either ground. The obligations of that instrument were always mutually excepted from the dangers of navigation. The injury resulted from one of those dangers. Repairs were unquestionably necessary. It is clear that they could not be so well made at Hamburg as two days away at Porsgrund. That they could have been made at Savannah, where the injuries were sustained, is not contended. There were no adequate facilities here. It was stipulated in the charter party that the vessel should be staunch, sound, and seaworthy. The owners, after the misadventure at Tybee, took the proper course to make it so.

It is, however, insisted that this qualification relates to the voyage to be made for the charterer, and not to the condition of the ship while going to the owners' port of discharge, nor to any detention made necessary by that condition. The case of Porteous v. Williams et al., 115 N. Y. 116, 21 N. E. 711, is cited in support of this contention. It is true that certain language of the opinion in that case, Justice Danforth delivering the opinion for the court, seems to support this proposition of the defendant's counsel, but in that case, to use the language of the court:

"The express agreement of the owner required the ship, after discharging the cargo then on board with 'all convenient speed,' to sail and proceed to the port of the charterer. No deviation was provided for, nor detention for any cause, save the necessary delay of unloading."

The qualification in the charter party before the court seems much broader: "The dangers of the sea, fire and navigation of every nature and kind always mutually excepted." Besides, in the case of the Por-

teous v. Williams, the language used by the court may, we think, be regarded as obiter. This is defined to be an opinion expressed by a court. but which, not being necessarily involved in the case, lacks the force of an adjudication. 1 Bouvier, p. 567. As the question to be determined there was whether a nonsuit of the owners was justifiable, the court holding, favorably to the owners, that the nonsuit was improperly granted, and that the case ought to have been submitted to a jury, the observations above referred to, which favor the charterer, were therefore not necessary to the determination of the issue under consideration. Indeed, it seems to have been discussed as an abstract proposition along with, to quote the language of the learned justice, "some other propositions none of which in the present aspect of the case would permit the case to be taken from the jury, and it should be sent to them."

On the other hand, there are two carefully considered cases of the admiralty courts of the United States which adjudicate the contrary doctrine. They are the decisions of the District Court in The Star of Hope, reported in 1 Hask. 36, Fed. Cas. No. 13,312, decision by Judge Fox, of the District of Maine, and on an appeal taken from that decision, which was affirmed on circuit by Associate Justice Clifford, of the Supreme Court. 8 Fed. Cas. 1115, No. 4,710. That case is singularly like the case at bar, and the opinions of both of the learned judges are supported by a plentiful reference to authorities of the most convincing character. In that case the disabilities arose through a misadventure in the navigation of the vessel when it was dispatched from Boston to Farmingdale, in Maine, where it was expressly stipulated that the charter party should commence, and on page 42, Judge Fox, after citing a number of cases supporting the obligation of the charterer when the vessel is delayed for repairs, remarks:

"This principle is so well established, that I do not understand it as questioned by the learned counsel for respondent; but it is contended that, admitting such to be the law when the vessel meets with disasters in the prosecution of the voyage, it is not applicable to the present case, as the voyages stipulated for in charter had not yet commenced. It is very certain that the vessel was bound to proceed from Boston to Farmingdale under implied conditions, as the charter party is silent on this subject; and it is difficult for me to find satisfactory reasons why any other conditions should arise or be implied, in relation to this portion of her undertaking, than the law would imply in case the charter had merely said, 'vessel to proceed from Boston to Farmingdale,' or the charter had commenced at Boston, and had provided for the vessel going in ballast from Boston to Farmingdale and load; and in these cases, if the vessel had been delayed by storms and needed repair, and so was compelled to refit, and delay was occasioned thereby, neither party would have been exonerated from the performance of the contract, if the vessel was seasonably repaired and arrived at the port of loading."

On page 45 the court continues:

"I am therefore of opinion that the shipowners in this case are under the same liabilities as to delays and risks from dangers of the sea as they would have been under a charter commencing at Boston, and binding them to send their vessel to Farmingdale for a cargo. In that case they would not assume the risks and delays from perils of the sea, and they did not under the present agreement."

The case at bar is much stronger than that discussed by Judge Fox, for in the charter party before the court a stipulation was inserted in writing, as follows: "It is understood that the vessel proceeds to Sa-

vannah in ballast after having discharged her present cargo in Europe." This stipulation was made while the vessel was in Savannah. It necessarily followed that her voyage to Europe was in contemplation of the parties, and therefore the agreement that detention resulting from the dangers of navigation should be mutually excepted would not avoid the contract under the stringent clause on that subject above quoted.

The opinion of Justice Clifford in the same case, reported under the title Fearing v. Cheeseman et al., 8 Fed. Cas. 1115, No. 4,710, is also highly valuable. Discussing the contention that the charter party was not to attach until the vessel arrived at the place where it was expressly stipulated the charter party should begin, the learned circuit justice remarks:

"The contract became operative when the charter party was executed and delivered. The obligation of the shipowners to put the vessel in a seaworthy condition, and cause her to sail for the place of loading within a reasonable time, commenced when the charter party became operative, and continued in force till the covenants were fulfilled. Performance of that implied covenant was as much required by the charter party as that notice of readiness of the vessel to receive cargo be given on her arrival at the place of loading. Such notice could not properly be given before the vessel actually arrived, and the implied requirement was that she should proceed there with reasonable dispatch, the dangers of the seas and navigation excepted. Unavoidable delay arising from these causes would not discharge the charterers from their covenant to load the vessel, unless the delay was so great as to frustrate the voyage or deprive the freighter of the benefit of his contract. Where the delay ensues from unforeseen causes, but the voyage is not frustrated, the charterer is entitled to his claim for damages, as compensation for any injury he may sustain."

The owners in this case seem to have acted with entire frankness, and with marked consideration for the rights of the Shotter Company. They appreciated the fact that there might be some delay to that company, and, as soon as their ship was brought to the shipyard at Porsgrund, they communicated with the Shotter Company, offering to substitute another vessel, or to cancel the charter party. This proposition, as we have seen, the latter peremptorily refused to accept. No interest or consideration prompting the shipowners to cancel the charter party appears anywhere in the evidence. It was their interest to carry it out. It was, however, from the condition of their vessel, absolutely impossible for them to do so as soon as the Shotter Company wished; but instead of accepting their proposition to cancel the contract and allow them to secure a vessel elsewhere, it appears that the defendant company, aware the Hercules could not return to Savannah as soon as had been perhaps contemplated, while holding them to the contract, seizes upon the misfortune of the owner as a basis to exact a reduction in their freight charges. The mutual agent of the contracting parties, by reasonable and well-grounded appeals by letter to the consideration of the Shotter Company, seeks to change their ultimatum. This, however, is unsuccessful. At no time does the Shotter Company definitely cancel the charter party until long after the Hercules has reached the port of Savannah and is awaiting her cargo. Then the defendant waives its claim for damages and repudiates the contract. This can be considered as nothing less than an insistence upon the part of the Shotter Company that the Hercules shall yet make her voyage under the contract.

The opinion of the court is that, in waiving their claim for damages, the Shotter Company waive all right to take affirmative action against the Hercules for a delay which, as we have seen, was not unreasonable, and was occasioned by dangers of navigation. And it was no longer optional with the Shotter Company to adopt the arbitrary and oppressive action indicated by this letter.

In view of the uncontradicted evidence that the repairs were made as expeditiously as possible, and that the additional repairs ordered by the Norwegian Veritas were made at the same time with those rendered necessary by the grounding on Tybee bar, the whole contention of unreasonable delay by the Shotter Company must depend upon four days' voyage of the Hercules from Hamburg to Porsgrund and return. That the venture of the Shotter Company was not wholly frustrated is evidence by the fact that, after refusing the offer of the Hercules owners to substitute another ship, for a small additional charge they secured another vessel.

The court is then of the opinion that the claim for damages set forth by the libel of the Shotter Company must be disallowed. We are further of the opinion that the plaintiff is entitled to recover damages for breach of the charter party, and for all demurrage sustained during the period when the Hercules lay in the harbor of Savannah while attempting to obtain cargo. It would, however, seem equitable, if the Shotter Company, as contended, was obliged, at a greater rate of freight than that stipulated in the charter party under consideration, to charter another vessel to take cargo provided for the Hercules, that the damages recoverable by the owners of the Hercules should be reduced by an amount equaling the sum of the increased freight charges. An inquiry will be ordered before the master to ascertain: First, was the Shotter Company compelled to obtain another vessel or vessels to carry the amount of cargo which would have been transported by the Hercules but for the delay? Second, what increased freight rate, if any, was paid by Shotter Company for the transportation of such cargo? And, third, the amount of damages sustained by the Hercules because of the liability of the Shotter Company for the breach of its charter party, and for the demurrage resulting therefrom. A decree will be rendered for the plaintiffs for the amount thus found, less the sum of the increased charges, if any, above those fixed in the charter party, which were paid by the Shotter Company for the transportation of the cargo intended for the Hercules. All costs will be allowed against the Shotter Company.

O'SHAUGNESSY v. HUMES et al.

(Circuit Court, W. D. Tennessee. March 21, 1904.)

1. PARTIES—SUIT IN EQUITY BY ASSIGNEE—NECESSITY OF JOINING ASSIGNOR.
One who has assigned all his legal and equitable interest in the subject-matter of a controversy and all rights of action, legal and equitable, with respect to such interest, is not an indispensable party to a suit in equity by the assignee to enforce the rights assigned.

¶ 1. See Assignments, vol. 4, Cent. Dig. § 215.

2. EQUITY PLEADING—SPEAKING DEMURRER.
A speaking demurrer, or one setting up facts extrinsic to the bill, will be overruled for its defect of form without considering the merits of the defense, which can only be made by plea or answer.

3. DEMURRER—QUESTIONS PRESENTED—CONSTRUCTION OF CONTRACT.
A court will not, on demurrer, construe an instrument set up in the pleading demurred to, and determine the rights of the parties thereunder, when it is obscure and ambiguous in its language, and so uncertain in meaning that it cannot be fairly interpreted without a knowledge of the surrounding facts and circumstances.

In Equity. On demurrers to bill.

Metcalf & Metcalf, Thos. B. Turley, and Frank P. Poston, for demurrer.

Greer & Greer, opposed.

HAMMOND, J. Chronologically, the averments of this bill may be stated as follows:

(1) Prior to March, 1887, the defendant Milton Humes was the attorney and managing agent of Mrs. Ada Lane, and in that relation became indebted to her for sums of money not necessary now to notice, because they are not involved in the controversy over this demurrer.

(2) March 17, 1887, he sold to his own wife, one of the other defendants, Mrs. Ellelee C. Humes, real and personal property belonging to Mrs. Lane. The real estate in Madison county, Ala., was conveyed to Mrs. Humes for a recited consideration of $25,000, and "pictures, drawings, paintings, statuary, and other personalty," amounting to $5,000. It is not understood that the money for the personal property is involved in this controversy over the demurrer. The averments of the bill concerning this transaction are meager, indeed. The deed is neither set out in its particulars, nor exhibited with the bill, and, if it has any such relation as that which is suggested in the argument to the subsequent transactions between the parties, so as to create the relation of principal debtor between Mrs. Humes and Mrs. Lane, it is only a matter of inference, and is scarcely made to appear by the specific averments of this bill. Presumably Mrs. Humes in some form, we do not know how, agreed to pay the recited consideration of $25,000, but this is only an inference to be drawn from the bare averment of the bill that the deed of conveyance recited a consideration of $25,000.

(3) The bill avers that on the 3d of August, 1887, the defendant Milton Humes informed Mrs. Lane that the balance due her from all sources in the management of her property was $30,000, and that he had invested that amount in good securities yielding 8 per cent. interest. How this information was given is not stated, but the bill states that "this instrument [whether it means the deed to Mrs. Humes or the instrument containing the information we cannot say] should have brought the said Mrs. Lane an annual income of twenty-four hundred dollars." Then the bill states that the complainant, who is Mrs. Lane's assignee, is now informed and believes that Humes never made any investment of the money, but converted the moneys realized by him to his own use, and only made remittances and disbursements on Mrs. Lane's account out of his own personal funds.

(4) The bill avers that on the 4th of September, 1887, Mrs. Humes and her husband conveyed the real estate in Alabama to one James F. O'Shaugnessy for $25,000, that this consideration was never paid, and on the 26th day of January, 1892, O'Shaugnessy and his wife "reconveyed" the property to Milton Humes. Again, this deed is not set forth in its particulars, nor is it exhibited with the bill, nor are there any averments about it in its relation to subsequent transactions. Evidently it was not a "reconveyance," for that would have required a deed to Mrs. Humes herself, while this was to her husband. No averments are made in the bill as to the payment of the consideration or any undertakings of Humes in relation thereto, either with O'Shaugnessy or with his wife, Mrs. Humes, and we know nothing from the bill as to any adjustment of that matter as between these parties. What disposition was made of the indebtedness to Mrs. Lane from Mrs. Humes which is to be inferred from the fact that the property was conveyed to the latter by Mrs. Lane's agent and attorney is not shown by the bill, and therefore it throws scarcely any light except by inference upon the subsequent transactions involved in the controversy over this demurrer. It is not to be assumed as one of these inferences, however, we should think, that Mrs. Humes, without the consent of Mrs. Lane, by this transaction denuded herself of any indebtedness which she owed to the latter because of her original purchase of Mrs. Lane's property.

(5) The bill next avers that on February 13, 1892, the defendant Milton Humes conveyed another of the lots in Alabama to one Mrs. Wells for a consideration of $6,500, and that the title to the other three lots still remains in the said Milton Humes.

(6) The bill avers that Mrs. Lane was constantly making unsuccessful efforts to secure an accounting with Milton Humes, and at last, on the 1st day of October, 1889, he and his wife, "well knowing that the money recited in the deed of conveyance to Mrs. Humes as the consideration of twenty-five thousand dollars had never been paid, delivered to her an instrument of writing, as follows:

"This instrument of writing, witnesseth: That we, the undersigned Milton Humes and his wife, Ellelee C. Humes, hereby acknowledge that we hold for Mrs. Ada Lane Twenty-five Thousand ($25,000.00) which is loaned out at 8 per cent per annum. We are to collect the interest and pay it to her as near as we can in monthly installments as called for by her.

"[Signed] Milton Humes.
"Ellelee C. Humes."

(7) On the 7th of March, 1896, Milton Humes, being the owner of real estate in Shelby county, described in the bill as situated on the Poplar Boulevard, and known as the "Humes Place," executed a mortgage to his wife, the defendant Ellelee C. Humes, conveying this real estate to her. The bill avers that the mortgage "recites that it is given as security to Mrs. Ellelee C. Humes on account of her signing the above-described acknowledgment of twenty-five thousand dollars indebtedness to the said Mrs. Ada Lane, and for the consideration of ten dollars in hand paid." Again, the bill gives no further particulars as to this mortgage, nor does it exhibit the same, or a copy thereof, with the bill, nor in terms make it a part of the bill, but it is referred to as being of record in the register's office of Shelby county, giving the book and

page where it is to be found. It will be noticed that the bill does not say that the mortgage was given as a security to Mrs. Humes in any particular capacity or relation to these transactions, but it simply avers that the mortgage recites that it was given as above stated in the quotation from the bill. By consent of counsel arguing this demurrer, we are permitted to turn to the brief of counsel for the complainant, where the recitals of the mortgage are more fully set forth, as follows:

"Know all men by these presents, That I, the undersigned Milton Humes, am indebted to Ada C. Lane, as evidenced by my obligation to her, which is also signed by my wife, Ellelee C. Humes,—and Whereas, I am desirous of securing my said wife from any liability by reason of her signing said note—

"Now therefore, in consideration of the premises and the sum of Ten Dollars to me in hand paid, the receipt of which is hereby acknowledged, I, the undersigned Milton Humes, do hereby bargain, sell, alien, and convey unto my said wife, Ellelee C. Humes, the following described property, to-wit:

"[Description.]

"To have and to hold the above described property, unto the said Ellelee C. Humes, her heirs and assigns forever, but nevertheless, upon the following conditions: That whenever the said Milton Humes shall pay and discharge said debt to said Ada C. Lane, then this conveyance shall become null and void, and of no effect, and the said Ellelee C. Humes shall make this conveyance satisfied on record thereof, or, re-convey the property above described to said Humes, as he may elect."

It is to be noticed that even the recitals in the mortgage are somewhat indefinite, and the whole instrument seems to be quite obscure in its language as disclosing its purpose. It recites that Milton Humes is indebted to Mrs. Lane, "as evidenced by my obligation to her, which is also signed by my wife," and in the very next clause it expressed a desire to secure his wife from any liability by reason of her signing "said note." This imperfectly fits the instrument of October 1, 1889, which is neither a note nor in the ordinary form of an obligation of indebtedness, as will be observed by turning to the copy of it contained in this statement. That document states only that "we hold for Mrs. Lane Twenty-five Thousand Dollars, which is loaned at eight per cent per annum," and in terms it seems to promise only to collect the interest, and pay it over in monthly installments. It appears, however, to be assumed by both the complainant and the defendant that this is the document referred to by the recitals of the mortgage, though that is altogether a matter of inference, rather than from any definite statements that are contained in the mortgage itself; very much like the many other inferences that are left open by this bill in its statements about these instruments so meagerly set out in it. It seems to the court that too much is left to inference by the pleading, which is not nearly so specific in its indications of the groundwork of this lawsuit as are the arguments and briefs of counsel, in which either side treats of the object and purpose of the bill, and states the inferences to be drawn from its averments, quite differently from the other. Neither agrees with the other as to the nature and character of the pleading. The complainant insists that Mrs. Humes is a principal debtor by reason of these transactions, while the defendant insists that she is only a surety, and the fact is, probably, that she may be either one or the other, so far as we have any knowledge of her relation in respect of these transactions from the averments of the bill itself, or even from the instruments which the bill

so sparsely sets out. But it is to be observed that the mortgage itself is to become null and void only when "the said Milton Humes shall pay and discharge said debt to said Ada C. Lane."

(8) The bill next avers that on the 24th of March, 1903, the defendants Humes and wife sold the Memphis property to the other defendants Cooper and wife. No consideration is stated for the deed, nor any of its particulars, except the bare fact that the deed was made and executed; but the bill avers that the preliminary negotiations and the execution of the deed itself were intended as a fraud upon the rights of Mrs. Lane and her assignee, the complainant in this case. The grounds of this alleged fraud are not very distinctly set forth, and it is based upon the averment that the complainant is informed and believes that the defendant Milton Humes could not legally convey the property which was held as security for the indebtedness of Humes and wife to Mrs. Lane, until Mrs. Lane would sign a release of whatever claim or lien she had. Therefore, in February, 1903, the said defendant Humes endeavored to secure her release, which she refused to sign until the defendant had rendered her an account, which was finally done, showing that the said defendants Milton Humes and his wife were indebted to Mrs. Lane in the sum of $31,698.88, whereupon Mrs. Lane refused to release her claim or lien upon the property, notwithstanding which Humes and his wife conveyed the property to Cooper and wife. It is alleged that this conveyance was made with the intention of not paying the debt to Mrs. Lane or her assignee, and that the conveyance "was made and contrived of fraud, covin, collusion, and guile, with the intent and purpose to delay, hinder, and defraud the said creditor of the said Milton Humes and his wife of their just and lawful debts."

(9) The bill finally alleges that Cooper and wife had actual knowledge of this indebtedness, and of the mortgage to secure it, as well as the constructive notice given by the registration of the mortgage on the records of the county, and that they took the deed with the intent to hinder, delay, and defraud Mrs. Lane and her assignee of their just debt.

The prayer of the bill is: (1) For parties and process; (2) for an accounting between the complainant and the defendants Humes and wife, so as to ascertain the amount of the indebtedness; (3) for a decree against Humes and wife for the payment of this indebtedness, principal and interest; (4) that the deed to Cooper and wife be declared to be fraudulent and void; (5) that the complainant be declared to have a valid and subsisting lien for the $25,000 and interest thereon from the 1st of October, 1889, to date, upon the property described in the mortgage, until the indebtedness is paid in full by the defendant Milton Humes and wife; (6) "that, to secure and impound said property as described within, a writ of attachment be issued by fiat of the court, and be levied on said tract of land"; (7) complainant prays for such other, further, and general relief as he may be entitled to on the facts at the hearing.

To this bill both Humes and wife and Cooper and wife demur separately, but they may be treated together. The grounds of demurrer are: (1) That Mrs. Lane is a necessary party. (2) That Mrs. Humes, being a married woman, could not be bound upon any obligation to Mrs

Lane. (3) That by the laws of Alabama (Acts 1886-87, p. 82, § 9) it is provided that the husband and wife may contract with each other, but all contracts into which they enter are subject to the rules of law as to contracts made by and between persons standing in confidential relations, and the wife shall not, directly or indirectly, become the surety for the husband; which law was in force at the time of the execution of the obligation mentioned in this bill. (4) That the mortgage was not made to secure Mrs. Lane, but only Mrs. Humes as surety. (5) No allegation of Humes' insolvency.

The demurrers are very numerous, and present the questions sought to be raised in many forms, but they all hinge around these which have been above mentioned, and we need not consider any others at the present time. Indeed, except the first ground of demurrer—that Mrs. Lane is a necessary party—all the other grounds turn upon the coverture and alleged suretyship of Mrs. Humes. As to the first ground of demurrer, it should be definitely overruled. The assignment by Mrs. Lane to the complainant, set out in the bill, is so complete in itself that it conveys all legal and equitable interest that she had in the subject-matter of this controversy, and all rights of action, legal and equitable, which she might have to enforce that interest; and hence, under the strictest rules upon the subject of making the assignor a party to a bill in equity filed by an assignee to enforce the rights that have been assigned to him, it does not appear upon the face of the bill that Mrs. Lane is a necessary party. Possibly it may be made to appear by an answer or plea stating some of the extrinsic facts, such as have been suggested in the argument, that she is a necessary party, but it does not so appear upon the face of this bill. As it is laid down, the true principle on this subject would seem to be that in all cases where the assignment is absolute and unconditional, leaving no equitable interest whatever in the assignor, and the intent and validity of the assignment is not doubted or denied, and there is no remaining liability in the assignor to be affected by the decree, it is not necessary to make the latter a party. At most he is merely a nominal or formal party in such a case. It is a very different question whether properly he may not be made a party as a legal owner, although no decree is sought against him, for in many cases a person may be made a party, though it is not indispensable. 1 Daniel, Ch. Pr. (5th Ed.) 198, note. Also in the federal courts it is a rule that where it appears, as it does from the bill, that the absent party is out of the jurisdiction, the complainant is excused from making him a party, unless he be an indispensable party; though this rule has probably not so much force now in cases where the presence of the absent party would not oust the jurisdiction, since under the act of 1872 provision is made for bringing in absent parties by substituted service or by publication, where there is such an interest in the property within the district as to authorize that course under the act, which may be doubted on the facts stated in this bill. If the presence of the absent party would oust the jurisdiction, of course the complainant would still be excused from bringing him in, unless his presence in the suit were indispensable. Under the assignment exhibited with the bill Mrs. Lane does not appear to have remaining any interest in the real estate subject to the mortgage in controversy. At most she is only a proper par-

ty, and possibly, under the circumstances of this case, could not be brought in by the substituted service of the act of 1872, if she were formally named as a party to the bill. Rev. St. § 738. It seems, under the authority above cited from Daniel's Chancery Practice, that the custom is to make an assignor a party complainant where he can be so brought in, though, of course, he may be made a party defendant if deemed advisable or made necessary by the circumstances. If Mrs. Lane does not choose to become a party complainant, and did not voluntarily appear, it is probable, under the practice of the court, that she could not be compelled to become a party to this suit. That ground of demurrer is therefore overruled.

The court is of opinion that it is neither necessary nor proper to decide the other grounds of demurrer which have been filed and argued at the bar. They proceed upon the almost gratuitous assumption that upon the face of the bill Mrs. Humes occupies the attitude of a surety to her husband. It may be that she is so, but it does not so appear upon the face of this bill. It is very conveniently assumed by the defendants that she is sued as a surety, and that this is a bill to subrogate the complainant to her rights as a surety to a mortgage provided by the debtor for her benefit; but none of this appears upon the face of the bill unless it may be by an inference which the defendants choose to draw for the purpose of presenting the demurrer. The bill is very difficult to define. It seems to be in one aspect a bill to set aside a fraudulent conveyance made to Cooper and his wife, for the purpose of defeating Mrs. Lane's security; but, if the complainant has a mortgage to secure the debt to Mrs. Lane, and his lien inheres in that instrument by its terms, then it is quite immaterial whether Cooper and wife are fraudulent vendees or such in the utmost good faith. Except in a very general and inferential way the bill does not appear to be a bill to foreclose such a mortgage. It does not pray for any foreclosure and sale of the mortgaged property, but it does pray for an attachment of the property, "to secure and impound" the property by such attachment, possibly upon the theory that the bill is to set aside a fraudulent conveyance from Humes and wife to Cooper and wife. But, after all, there is a general prayer for relief, and upon the averments of the bill it is rather to be inferred that Mrs. Humes is sought to be held as a principal debtor by these transactions than as any surety for her husband, and that it is in that relation she is treated by the complainant in the pleading. At all events, the bill may as readily be construed as a bill for that purpose and as a bill to foreclose the mortgage made by her husband to secure her debt and his debt, as to construe it as a bill for the subrogation of the complainant to any rights of Mrs. Humes as a surety. The paper signed by Humes and his wife is not, on the face of it, a declaration of suretyship; neither does the mortgage, by its recital, contain any declaration of suretyship; and, when closely analyzed, neither of these instruments can be said upon their face to present Mrs. Humes in the attitude of a surety, and, looking at the transactions from the beginning to the end out of which the obligation and the mortgage grew, she originally occupied the attitude of the primary and principal debtor to Mrs. Lane. The notion of her being a surety for her husband in the signing of this paper arises out of the peculiar phraseology of the

mortgage, in which it is recited that he secures her against any liability for signing the paper; but, non constat, that she signed it as a surety, and not as a principal debtor. The most that can be said is that the instruments are ambiguous, and only to be interpreted by the light of the real facts growing out of all these transactions, and that it does not appear upon the face of the bill definitely and distinctly that she is a surety. Therefore this demurrer in respect of these matters is what is known as a speaking demurrer. They state by way of defense facts that are extrinsic to the bill. As an illustration, it is stated in the demurrers that in Alabama a wife is forbidden to become a surety for her husband. That does not appear by any averment of the bill, and can only be made to appear here by our taking judicial notice of the laws of Alabama; but as it does not appear on the face of the bill or in the terms of the instrument that she is a surety, by the same law taking judicial notice of it, if she be a principal debtor, she had a right to make the contract. The dominant fact relied upon that she is a surety is one that at most is only an inference drawn by the defendants themselves from the averments of this bill. Such an inference is not properly a basis for an adjudication of the rights of the parties to this suit, and if it be true as a fact it must be set up by plea or answer as a defense to this bill. Imperfect as the bill is, it is, under our liberal method of practice, sufficiently framed, even under the general prayer, to decree a foreclosure of this mortgage if Mrs. Humes be a principal debtor, whose obligation as such has been secured by her husband. The language of her obligation is one of coequal, if not joint, obligation with her husband, and there is not the least indication from that paper that she signed it as a surety. He and she use in that paper the language of joint or coequal obligation, and not the language of suretyship. A speaking demurrer, or one making defense by setting up facts extrinsic to the bill, will always be overruled because of that infirmity in the demurrer. Stewart v. Masterson, 131 U. S. 151, 159, 9 Sup. Ct. 682, 33 L. Ed. 114; Richardson v. Loree, 94 Fed. 375, 379, 36 C. C. A. 301; 1 Bates, Fed. Eq. 210; 6 Enc. Pl. & Pr. 298; 25 Enc. L. (2d Ed.) 1161; 2 Danl. Ch. Pr. (1st Ed.) 72; 1 Danl. Ch. Pr. (5th Ed.) 587; 2 Bouv. Dic. 536. Wherefore the court, without expressing any opinion upon the questions of law that have been argued upon these demurrers, is constrained to overrule them because they do not present the questions that have been argued, and for no other reason. It will be time enough to consider these questions when they are properly raised upon the record. They cannot be considered now.

Defendants' counsel desire a more specific ruling on that ground of the demurrer which relates to the construction of the instrument secured by the mortgage, particularly that which insists that it is only a security for the interest, and not the principal of $25,000. Obviously, the instrument cannot be fairly interpreted upon the face of it, and within its own terms. It clearly belongs to that class of documents which must be construed in the light of the facts surrounding its execution, and is quite unintelligible without it. This outside light, it may be inferred, can only be shed upon it when all the facts are known at the hearing. Even the mortgage is not exhibited with the bill, and the averments about it are destitute of all particulars. They seem to assume that it

secures the $25,000 as well as the interest, and it is not impossible to conceive that the mortgage, when brought into evidence, may, by its particular language, interpret or throw light upon the instrument secured by it. We are asked by the demurrer to rule against this averment of the bill, which ordinarily is confessed by a demurrer, and declare on the language of the instrument secured that the mortgage is not as broad as the bill avers it is. If it were a plain proposition that the instrument of indebtedness itself is confined to a promise to pay the interest only, non constat that the parties might not by the mortgage itself have acknowledged an obligation for the principal debt, and secured it, as well as the interest; for it appears by the mortgage that Humes, who was the owner of the property, promised to pay and discharge his debt to Mrs. Lane, and the mortgage was to be null and void only upon his discharge of that debt; so that Mrs. Humes' relation to it may be wholly immaterial in a court of equity. She might be held to be only a trustee of the title for Mrs. Lane. We cannot tell from the bill, which is as indefinite as the instrument in controversy, as it merely avers that the mortgage "is given as security to Mrs. Humes on account of her signing the above-described acknowledgment of $25,000 indebtedness." What the language of the mortgage is we do not know, nor what the facts are about this alleged debt, except in the scant way, shown in the foregoing part of this opinion, being left as we are by the pleading mostly to inferences from barely stated averments of fact. But the inferences we are asked to draw by the defendants on this demurrer are not more satisfactory than the inferences we are asked to draw by the plaintiff on the argument from the scant averments of the bill; and the assumptions of fact by the one party are a very good set-off against the assumptions of the other on the present state of the pleadings.

The instrument of alleged indebtedness is unique in its language, if not artful, is out of the ordinary style of obligation, obscure as well as ambiguous, and altogether too uncertain in its meaning to enable any court to interpret it without knowing more about the facts. The bill does not throw much light upon it, but such as it does is not in favor of the interpretation given to the contracts by the demurrants. They may be right about their construction, but it does not satisfactorily appear to be so upon the face of the instrument nor upon the face of the bill. Therefore the question should be reserved for the hearing, as indicated in the foregoing part of this opinion.

Demurrer overruled.

SAUVAGEAU v. RIVER SPINNING CO.

(Circuit Court, D. Rhode Island. April 25, 1904.)

No. 2,686.

1. MASTER AND SERVANT—INJURIES TO SERVANT—RULES—EVIDENCE—WEIGHT.
Where, in an action for injuries to a servant while cleaning a carding machine, the evidence as to whether plaintiff was instructed to clean the machine while in motion was conflicting, and plaintiff's counsel argued to the jury that it was unreasonable to believe that plaintiff, after being expressly forbidden to clean the machine while in motion, as de-

fendant testified, would have proceeded within a few minutes to disobey such instruction, a verdict in favor of plaintiff on such issue should not be set aside.

2. SAME—ASSUMPTION OF RISK.

Plaintiff, while engaged in cleaning a wool carding machine while in motion, was injured by having his hand caught between the cylinder and one of the top rolls of the machine. The shaft which plaintiff was cleaning projected beyond the frame of the machine, and at the end thereof was a gear over which a chain ran. Wool having collected on the shaft inside the gear and outside the cylinder, plaintiff attempted to take the wool off the shaft as he was told to do. The wool got caught in the cylinder and dragged his hand in sidewise. *Held* that, while the risk of getting his hand caught in the gear and chain was obvious, plaintiff not having placed his hand where the rolls or cylinder would catch it, the risk that it would be drawn in by the wool caught in the cylinder was not so obvious that plaintiff assumed the same as a matter of law.

3. SAME—CONTRIBUTORY NEGLIGENCE.

Where plaintiff, who was 18 years of age, and had worked in the carding room of a factory only 3 days prior to his injury, was instructed by his superior to lift up his sleeve and clean a wool carding machine while in motion, and to look out for the chain at the end of the shaft, which danger he avoided, but he pulled off the wool from the shaft in such a manner that it became caught in the cylinder and drew his hand in, he was not thereby guilty of contributory negligence as a matter of law.

Archambault & Gaulin, for plaintiff.
Comstock & Gardner, for defendant.

BROWN, District Judge. The plaintiff's right hand was seriously injured by being caught between the cylinder and one of the top rolls of a carding machine. He was engaged in cleaning the machine while it was in motion. The plaintiff, at the time of the injury, was about 18 years old, and had worked but 3 days in the carding room, although he had worked for several years about the mill. He testified that he was instructed to clean the machine while in motion. Upon this question there was an issue of fact, to be determined by the jury upon conflicting evidence. The defendant's brief admits that there was a conflict in the direct testimony on this point between the plaintiff and Marchand, the second hand; but contends that, in view of the evidence of a strict rule of the mill forbidding the cleaning of machinery while in motion, and of the evidence of Marcroft, the overseer, that he also had instructed the plaintiff not to clean any machinery while in motion, and had told him specifically to keep his hands away from the rolls, the jury should have found that the plaintiff was not ordered to clean the machine while in motion. The plaintiff's counsel, however, argued to the jury, and with apparent effect, that it was not reasonable to believe that the plaintiff, after being expressly forbidden to do so, would have proceeded, within a few minutes, to clean the machine while in motion. Thus not only the direct evidence, but the probabilities of the case, were presented for the consideration of the jury; and I find myself unable to say that the jury overstepped its province, or did not act within the bounds of

¶ 2. Assumption of risk incident to employment, see note to Chesapeake & O. R. Co. v. Hennessey, 38 C. C. A. 314.

reason as to this point. If such direction were given, it exposed the plaintiff not only to the dangers from the chain and gears at the end of the shaft, concerning which he had been cautioned, but also to the danger of having his hand caught between the cylinder and rolls in the manner described by him.

The defendant makes no contention that the risk from which the plaintiff suffered was one of the ordinary risks of the business, but contends that the risk was obvious. It seems hardly credible that the plaintiff was not aware of the existence of the cylinder and rolls, and of their dangerous character should he get his hand between them. It is not clear, however, that the specific risk of having his hand drawn between the cylinder and the rolls by the wool which he was removing from the shaft in the process of cleaning was a risk obvious to one of limited familiarity with the work. The shaft which he was cleaning projected beyond the frame of the machine about seven inches. At the outside end was a gear about five inches in diameter, over which a chain was running. The risk from this was both obvious and actually known to the plaintiff. Wool had collected on the shaft inside the gear and outside the cylinder. The plaintiff testified: "I was taking the wool off the shaft, and the wool got caught in the cylinder and dragged my hand in * * * sideways." While it is true that in cleaning the machine while in motion the plaintiff assumed the obvious risk of getting his hand caught in the gear and chain on the outside end of the shaft, and while it is highly probable that he also knew that the rolls and cylinder at the inner side were dangerous, and could not recover if he voluntarily or carelessly placed his hand so near the cylinder and roll that it was caught thereby, yet, according to the plaintiff's testimony, in cleaning the machine he did not place his hand where the rolls and cylinder caught it, but in removing the wool, as he had been told to do, the wool caught in the cylinder, and dragged his hand between the cylinder and rolls. Was this an obvious risk? I am not satisfied that it was.

The question of contributory negligence remains. Was the plaintiff guilty of contributory negligence in attempting to clean this machine while in motion, or in getting his hand caught? In view of what we have already said, it must be assumed, on the petition for a new trial, that the plaintiff was instructed by the second hand to lift up his sleeve and clean the machine in motion, and to look out for the chain at the end of the shaft; that he avoided that danger, but pulled off the wool in such manner that it became caught in the cylinder and drew his hand in. Upon this state of facts it cannot be said, as a matter of law, that the jury should have found the plaintiff guilty of contributory negligence.

The allegation that the working place was not properly lighted was not sustained by the proof.

While there is room for serious doubts as to the merits of the case, yet the jury has acted within its province in finding the facts, and there is no sufficient reason for setting aside the verdict.

Petition for a new trial denied.

THE DEUTSCHLAND.

(District Court, S. D. New York. April 23, 1904.)

1. COLLISION—STEAMER AND SAILING VESSEL—STEAMSHIP TURNING IN NEW YORK BAY.

The Deutschland, a large steamship 687 feet long, after having been passed by the health officer at the quarantine station, Staten Island, where she had been at anchor, headed downstream on account of the flood tide, undertook to swing around with her head to the eastward, and in doing so backed, and her propeller hood came into collision with the Snow, a small schooner which had also just been released from quarantine, and had started northward at a distance of some 130 feet astern of the steamship before the latter backed. She made an effort to get out of the way, but could not do so in time. The Deutschland had no lookout astern, and, according to the weight of the evidence, gave no backing signal. *Held*, that for such reasons she was solely in fault for the collision.

In Admiralty. Suit for collision.

Wing, Putnam & Burlingham, for libellants.
Wheeler, Cortis & Haight, for claimant.

ADAMS, District Judge. This action arose out of a collision which occurred between the libellants' schooner Lavinia M. Snow, laden with lumber, and the steamship Deutschland, off a point somewhat above the Quarantine Station, Staten Island, about 8 o'clock on the morning of the 8th day of September, 1903. The Snow, about 133 feet long, having been passed by the Quarantine Health Officer, was standing to the northward under reduced sail, close hauled on the starboard tack, well to the westward of the channel. Being aided by a flood tide of about 2 knots strength, she was making about 4 knots over the ground. The steamship, which had also been passed by the Health Officer, was manœuvring to get a heading up the bay so as to reach her wharf in the North River. She was 687 feet long. The flood tide necessitated a heading down the bay on the part of the steamship while at anchor. When she became entitled to proceed, she hauled around to the northward, through the east. As she was turning and headed somewhat across the channel, the collision occurred, the steamship's submerged rudder hood coming in contact with the schooner's starboard side, causing such damage to the latter that she nearly sank.

The schooner charges that the collision and damages were wholly due to the steamship, in that she backed without any signals or warning; did not have a lookout properly stationed; miscalculated the force of the current and did not have a tug to aid her; did not seasonably check her sternway, and did not keep clear of the schooner.

The steamship's answer, after alleging the difficulty of turning a ship the size of this steamship, alleges:

"Seventh. And further answering the libel herein, and as a separate and distinct defence thereto, claimant alleges that on the said 8th day of September, 1903, the Steamship 'Deutschland' arrived at Quarantine, having completed a voyage from Hamburg, Germany, to the Port of New York. Said 'Deutschland' was in all respects tight, staunch, well manned and equipped, and in charge of a competent Master and officers. A competent pilot was on the bridge, having brought the vessel in from sea, and was directing her

movements through the channel to her wharf in the North River. Competent lookouts were properly stationed, and attending to their duties. While anchored at Quarantine, the 'Deutschland's' bow was pointing down stream, owing to the strong flood tide, and upon raising her anchor it became necessary to turn in a comparatively narrow and crowded channel, for the purpose of proceeding up stream to her wharf. The 'Deutschland' is a steamship of ——— thousand tons, being one of the largest and most powerful steamships afloat. To turn such a vessel in the channel off Quarantine is a matter of some difficulty, and is naturally conducted with great care. Upon this occasion the 'Deutschland' was turned in the usual method, by driving one engine ahead and reversing at reduced speed with the other engine. By this method the vessel swings around as on a pivot, her stern moving but little ahead during the operation, until nearly straightened on her course. During this manœuvre, and while the 'Deutschland' was pointing nearly across the channel, with her head to the eastward, the 'Snow,' being unskillfully and negligently handled, and approaching head on to the 'Deutschland's' starboard quarter, endeavored too late to pass under the 'Deutschland's' stern, and in so doing came in contact with the 'Deutschland' about or slightly below the surface of the water. There was plenty of room for the 'Snow' to have passed well astern of the 'Deutschland,' and the direction of the wind was entirely in favor of the schooner, in executing such a manœuvre. At the time that the 'Snow' approached sufficiently near to the 'Deutschland' to make a collision appear possible, the 'Deutschland' had no sternway, had little, if any, headway, and so far as her ability to avoid a collision was in question, was practically in the position of a vessel at anchor. Her engines were at once put at full speed ahead, in order to prevent a collision, if possible, and in any event, to co-operate with the 'Snow' in her tardy efforts to avoid a collision."

The answer then alleges that the schooner was solely in fault in that she (1) attempted to pass too close to the steamship's stern, when there was plenty of room to give her a wide berth; (2) in overestimating the speed of the steamship, or underestimating the strength of the tide, or both, and in delaying her attempt to pay off until too late to be successful; (3) that the master or other person in charge of the Snow was either grossly incompetent or grossly incapable and inattentive, as the collision which insued was not contributed to in any degree by a difficult or unusual situation, or the proximity of other vessels, but was the result of an act of stupid and reckless management on the part of the persons having in charge the movements of the schooner.

The evidence shows that at the time of collision, the Deutschland was headed across the bay and was going astern through the water towards the Staten Island shore. It would not be profitable to discuss the testimony in detail. Considerable of it comes from disinterested sources and to my mind shows conclusively that the collision, which occurred about on the line of the anchorage ground, was caused by a backward movement on the steamship's part. There is a conflict with respect to whether or not the steamship sounded any backing signal. The weight of the testimony shows that she did not. She had no lookout astern.

The schooner, after obtaining *pratique,* was headed up the bay, about north or north east, intending to pass about her own length astern of the steamship, then apparently simply endeavoring to get a heading towards New York by a turning movement of her screws. When the schooner observed the backward movement of the steamship, about 400 feet away, and that she was closing in on the course of the schooner, the master of the latter ordered the helm to be put to star-

board, dropped the mizzen topsail and let the spanker sheet run off to facilitate the rudder action. This brought the schooner around to a heading of about north north west but it did not serve to avoid the collision, which occurred by the hood coming in hard collision with the schooner's side about opposite the main rigging.

There is little contention with respect to the retrograde movement of the steamship. The testimony of her pilot shows, and it is practically admitted, that during the turning manœuvre, there was some sternway. The claimant's principal contention seems to be that the steamship had, because of her size, the right of way and it was the schooner's duty to avoid her. No authorities, however, have been submitted in support of such contention, and however strongly the argument that comparatively small sailing vessels should give way to these large steamships might commend itself to the court, it would be in violation of ordinary rules to apply it to this case. Evidently the steamship should not have backed without seeing whether there was anything in the way of such manœuvre and certainly should not have done so without signals. The faults are plain on her part and sufficiently account for the collision.

Decree for the libellants with an order of reference.

BRYCE v. SOUTHERN RY. CO. et al.

(Circuit Court, D. South Carolina. January 30, 1904.)

1. FEDERAL COURTS—REMOVAL OF CAUSES—UNDETERMINED MOTIONS.
   Where, at the time a petition for the removal of a cause was filed, a motion to make the complaint more definite and certain was pending and undetermined in the state court, such motion was transferred to the federal court with the record, to be there determined.

2. SAME—TIME FOR ANSWERING—EXTENSION.
   The removal of a cause to the federal court did not extend the time for answering the complaint.

3. SAME—DETERMINATION.
   The time for answering a complaint in a case removed to the federal courts from a state court is fixed by ascertaining the number of days which had elapsed between the service of the complaint in the state court and the date of the removal, suspending the time between such removal and the date the record reaches the federal court, which then begins to run from the day of the entry in such court, and, as provided by the circuit court rules (Fourth Circuit), the defendant will be in time if he serves his answer on a rule day within 20 days thereafter.

4. SAME—MOTION TO REMAND—EXTENSION OF TIME.
   Where, after the removal of a cause to the federal court, a motion to remand is made, such motion extends the time to answer until the rule day next succeeding the determination thereof.

5. SAME—FAILURE TO ANSWER—DEFAULT—JUDGMENT—VACATION—TERMS.
   Where, after the removal of a cause to the federal court, a motion to remand was made, which was determined before the hearing of a motion to make the complaint more definite and certain, which had been filed in the state court and removed with the record, and by reason of the pendency of such motion undetermined defendant filed no answer within the

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¶ 2. See Removal of Causes, vol. 42, Cent. Dig. § 249.

time required, and judgment was taken by default, such judgment will be set aside on terms, under Code S. C. § 195, providing that the court in its discretion, and on such terms as may be deemed just, may allow an answer to be made after the time limited by the Code has expired.

6. SAME—CARRIERS—INJURIES TO PASSENGERS—COMPLAINT—DEFINITENESS.
Where, in an action by a passenger against a carrier for injuries, his complaint alleged that the train on which he was riding was derailed, and that he was injured in consequence thereof, it alleged a sufficient cause of action, and was not subject to a motion to make it more definite and certain; the burden being on the carrier to show that the derailment did not occur from its negligence or the negligence of its servants.

See 125 Fed. 958.

J. P. K. Bryan, for plaintiff.
Joseph W. Barnwell, for defendants.

SIMONTON, Circuit Judge. This case now comes up on motion to make the complaint more definite and certain. The action began in the state court at Orangeburg. The plaintiff, William Bryce, brought suit against the Southern Railway Company and the conductor and engineer of one of its trains for personal injuries suffered by plaintiff, a passenger, by reason of the derailment of the train on which he was. A petition for removal, with bond, was filed in the state court, and the record was filed here.

A motion was made to remand the cause. The motion was heard and elaborately argued, and was refused, this court holding that the complaint stated a separable controversy with the Southern Railway (122 Fed. 709). Counsel for the plaintiff asked for a rehearing, this request was granted. The cause was again heard, and the order refusing the remand was affirmed (125 Fed. 958). It appeared that on the twentieth day after the service of the complaint the defendant had entered in the state court a motion that the complaint be made more definite and certain. On the same day, but after entering this motion, the petition for removal was filed. As the cause came into this court in the same plight as it left the state court (Duncan v. Gegan, 101 U. S. 810, 25 L. Ed. 875), this notice of the motion to make more definite and certain came with it. The removal did not extend the time for answering the complaint. This time for answering is fixed by ascertaining the number of days which had elapsed between the service of the complaint in the state court and the date of the removal. Suspending the time until the record reaches this court, which then begins to run from the date of the entry here, under our rule the answer is due the rule day, within 20 days thereafter. Pelzer Mfg. Co. v. St. Paul (C. C.) 40 Fed. 185. This record came in March 17, 1903, and under ordinary circumstances the answer was due on the rule day in April thereafter. But the motion to remand was not finally determined until November, 1903. The answer, therefore, unless there be some reason to the contrary, was due at the rule day in December. No answer having been filed on that day, nor at the January rules, plaintiff entered a judgment by default.

Under our rule, the judgment by default will entitle him to obtain a verdict from the jury at the term next succeeding the judgment by default. The defendant now seeks to avoid the judgment by default

by pressing his motion to make the complaint more definite and certain, contending that having duly entered this motion he was not bound to answer until it was disposed of, subject, however, to the opinion of the court hearing the motion whether the grounds on which he proceeds are frivolous or intended for delay only; in which case he will be put on terms, or perhaps fail in setting aside or avoiding a judgment by default. The questions thus before us are:

First, when a motion to make a complaint more definite and certain is made, must it be heard before the time for answering the complaint has expired? This character of motion is allowed in section 181 of the Code of Civil Procedure of South Carolina. No time is fixed in the section for making the motion. In Bowden v. Winsmith, 11 S. C. 409, it is said it must be made before answer filed; and in Zimmerman v. McMakin, 22 S. C. 375, 53 Am. Rep. 720, it is said that it must be made before trial. Rule 20 of the circuit court of South Carolina says that "it must be noticed before demurring or answering the pleadings and within twenty days after service thereof." There does not seem to be any case reported, certainly none has been cited, holding that such motion must be heard as well as noticed within 20 days after service of pleading. As full 20 days are given within which to serve such notice, the same period prescribed for filing the defense, it seems reasonable to conclude that the motion, though noticed within 20 days, need not be heard within that period. See Allen v. Cooley, 60 S. C. 370, 38 S. E. 622.

The question remains, however: Granted that such a motion may be heard after the expiration of the 20 days, does the pendency of the motion suspend the requirement of the Code that the demurrer or answer must be filed within 20 days after service of the complaint? The summons in every case notifies the defendant that 20 days after service of the complaint the plaintiff will apply to the court for the relief demanded. Code, § 150. Section 164 requires that the defendant must file his defense, whether by demurrer or answer, within 20 days after service of the complaint. Section 267 of the Code provides that if a plaintiff file proof of lawful service of summons and complaint on defendant, and that no appearance has been filed, or answer or demurrer served, the clerk must put the case on the default calendar, to be called on the first day of the next term. Such is our rule also. These rules seem to be imperative. Yet it is earnestly contended that, when a defendant bona fide asks that a complaint may be made more definite and certain, he cannot intelligently and fully make his defense until he knows the precise charge against him, and that it would be illogical to require him to make a defense necessarily imperfect. The point has not been decided in South Carolina. In Whaley v. Lawton, 53 S. C. 580, 31 S. E. 660, a motion was made to make a complaint more definite and certain, and then an answer was filed. The court below held that this waived the motion. The Supreme Court, commenting on this ruling, disapproved of it, but affirmed the decree below on another ground. After hearing this motion, inquiry has been made by the court of three practicing attorneys at this bar upon their practice in these cases. One of them replies that in every case, out of abundant caution, he files his defense notwithstanding the motion, or pro-

cures an order extending the time to file it. The others say that in their practice they always claimed that the time within which to file their defense was suspended ipso facto by the motion to make more definite and certain, and that they have never heard the matter disputed. The learned counsel for the defendant in this case has produced very many instances in his practice in railroad cases in which he has made this motion, and in every case has acted as if the time for answering had been ipso facto suspended.

In the absence of any decision in the state court, and with the contrariety of practice among members of the bar, the experience of the plaintiff's attorney being exactly contradictory to that of the defendant's attorney, this court will not definitely decide this point. The safer course unquestionably is to file the defense within the prescribed time, or obtain an order extending it.

Considering the doubt upon this question, the beneficial provisions of section 195 of the Code can be applied, and the judgment by default can be set aside on terms.

With regard to the motion to make the complaint more definite and certain, that is refused. The cause was removed into this court upon the ground that the complaint in full contained proper charges against the Southern Railway, but did not state a cause of action against the conductor and engineer. The plaintiff was a passenger on the Southern Railway, a common carrier, the train was derailed, and he was injured. All this he states distinctly. This makes a complete case. The law puts on the Southern Railway the burden of showing that the derailment did not occur from its own negligence or the negligence of any of its servants. Plaintiff is not bound to tell how or why the accident occurred. He need only state that it occurred to him, a passenger on the Southern Railway, on the passage.

It is ordered that the judgment by default be set aside, provided the defendant file his answer and serve a copy thereof upon the plaintiff on or before 15th of February, 1904, and that the case be prepared for trial at the ensuing April term of this court.

MERRITT & CHAPMAN DERRICK & WRECKING CO. v. GREENE et al.

(Circuit Court, D. Connecticut. April 5, 1904.)

No. 527.

1. CONTRACT—SERVICES RENDERED ON REQUEST—RECOVERY ON QUANTUM MERUIT.

   A complaint alleging that plaintiff, at defendant's request, furnished a steamer, men, and the necessary equipment, and pulled a schooner off the ways, where she had stuck, and which seeks to recover therefor on a quantum meruit, does not state a case authorizing a recovery thereunder for "materials used up on the job"; there being no allegation that it was necessary to use them up, in a proper performance of the work, or that their being so used up was contemplated by the parties when the contract was made.

On Motion to Expunge an Item in Plaintiff's Bill of Particulars, and Motion for More Specific Statement of Such Item.

James D. Dewell, Jr., for plaintiff.
Canfield & Judson, for defendants.

PLATT, District Judge. It is asumed that the item in the bill of particulars claiming for "materials used up on job, $887.80," relates to the demand set forth in the second count of the original complaint. A demurrer to that second count was filed May 6, 1903. A motion for more specific statement of matters set forth in certain paragraphs, of what was then the first count, was filed May 7, 1903. On June 8, 1903, at New Haven, the demurrer and motion were taken up together, and argued orally. After listening to the arguments, I was impressed with the force of the demurrer, and so stated frankly in open court. In an unfortunate moment, trusting that a path was plainly open, which, if followed, would lead to a harmonizing of the contentions and dissensions of counsel, I suggested that the plaintiff ought to strike out the second count, and also file a statement which, by its specific character, might inform the defendants of the claims which they were called upon to meet under the latter portion of the then first count. On July 10, 1903, an amended complaint was filed, which strikes out the original second count, and substitutes a new second count, which takes the place of the paragraphs of the original first count, where a quantum meruit was relied upon. As to the other feature of my suggestion, the plaintiff filed on the same day a paper which is entitled "Bill of Particulars," and contains an account with the schooner and with defendants. Among the items therein appears the one referred to at the outset, which the defendants, by their motions of September 26, 1903, ask to expunge and make more specific. It is obvious that both motions cannot be granted in the same breath. The matter has become somewhat confused by the peculiar state of the pleadings, growing out of an attempt on my part to promote, temporarily, at least, peace and good will among counselors and their clients. Having managed to make confusion worse confounded, it is full time to give the case a practical, common-sense treatment. The original arguments, coupled with the briefs forwarded at my request, and now before me, make it possible, it is hoped, to settle now what it would have been better that I should have settled when the demurrer was under consideration.

The gist of the second count, as it now stands, is this: On July 27, 1902, while the schooner Perry Setzer, upon which a fruitless pull had been made for $500, as set forth in the present first count, was still stuck on the ways, the defendants requested the plaintiff to fit up and get ready for use necessary appliances, materials, and men, and make further efforts to move the schooner. On July 28, 1902, plaintiff complied with the request, and succeeded in pulling the schooner into the water. The extra work of steamer and men, and the expense of preparing and furnishing the appliances and materials necessary for the work, were reasonably worth $2,132.80, over and above the $500 due on contract, as set forth in the first count. Plaintiff has requested payment thereof, which was refused. Such statement of a cause of action manifestly cannot entitle the plaintiff

to recover for "materials used up on the job." It is confined specifically to the extra work of boat and men, and the expense of preparing and furnishing necessary appliances and materials. There is no suggestion of an implied promise to pay for materials destroyed or rendered worthless. The theoretical situation suggested by counsel for plaintiff is not analogous. He supposes a case in which a farmer employs a man to remove stumps from his land, with no specific bargain as to price. The man blows up a stump, and charges $10 therefor. When called upon to be specific, he says, labor, so much; use of drill, so much; so many pounds of powder used up, so much. If it is conceded, as it must be, that when the bargain was made it was understood by both parties that the proper and reasonable way to remove a certain stump would be to blow it up, there would be some force in the reasoning. I have assumed that the contention here relates to the breaking of a cable by reason of the unusual strain to which it was subjected. Can it be claimed that it was contemplated by the parties when the bargain was made that to use a cable in such a manner as to produce such a result would be a reasonable and proper way to attempt to pull the schooner off the stocks? If not, there can be no implied promise to pay its value if it was "used up on the job." Look for a moment at another situation. Suppose that the same farmer employs a man to furnish horses and plow, and turn up the furrows in his field, with no specific bargain as to price. The man does the work, and, while doing it, breaks his plowshare on a well-embedded stone. He charges the farmer $20 on quantum meruit. When asked to be specific, he says, his own labor, so much; labor and use of horses, so much; plowshare broken, so much. It would seem that the last item in this theoretical case ought to be expunged on motion, and that would be so, no matter whether entered as "plowshare broken," or as "material used up on job."

The plaintiff contends that on the trial he ought to be permitted to present the facts attending the employment to the jury, so that it can estimate intelligently what the services were reasonably worth. If, on the trial, he shall offer evidence to prove that the appliances were proper, and that the necessary strain in pulling was so great as to cause the parting of a sound cable—such a cable as a reasonably prudent man would put to such a strain in such a case—the bridge which he pictures will be reached, and it will then be time to settle whether we shall cross it. Before that moment, it will be well to remember that two pulls had been taken without success under the $500 contract, and to consider whether such knowledge would not furnish the jury all the light it would require in reaching a conclusion as to the state of the minds of the parties when bargaining for the work, and the kind of work they bargained for.

Let the item, "Materials used up on job, $887.80," be stricken out.

THE THOMAS M. PARSONS.

(District Court, S. D. New York. April 9, 1904.)

1. COLLISION—EXCESSIVE CLAIM—COSTS.

A libelant, who recovers damages for a collision for which his own vessel was not in fault, is entitled to costs, although the recovery is much less than the amount claimed, where there is no evidence that such claim was made fraudulently.

In Admiralty. Suit for collision. On exception to taxation of costs.

James J. Macklin, for exceptions.
Avery F. Cushman, opposed.

ADAMS, District Judge. In this action the libellant sought to recover $150 costs of repairs and $300 for permanent injury to his small yacht Margery, caused by collision in August, 1901, with the lighter Thomas M. Parsons. Claim was also made for $100 demurrage. The yacht was moored off Tompkinsville, Staten Island, at the time of the collision. The lighter was a moving vessel and held in fault. The matter was then referred to a commissioner to ascertain and report upon the amount of damages. He has reported $50, and after the consideration of exceptions, I confirmed the report in a memorandum, of which the following is a copy:

"The commissioner has allowed the libellant $50. Both parties have filed exceptions to his report.

"The libellant's exceptions are to the effect, that enough has not been allowed, claim being made for several hundred dollars. I find nothing in the testimony that sustains the exceptions. There was probably some damage done by the collision but the evidence is very weak and uncertain as to its extent. It does not appear with reasonable certainty what expenditures for the repairs, incident to the collision, have been made.

"The claimant's exception is that nothing more than $12 should have been awarded, as there was no proof to show anything beyond that sum. There is some force in the contention, but I have no doubt that the commissioner's award of $50 is just in effect, although apparently conjectural, and as the claimant has not pointed out with precision the grounds of the exceptions, nor given references to the evidence, I will not consider it. The Commander-in-Chief, 1 Wall. 43 [17 L. Ed. 609].

"All exceptions overruled."

When the matter came before the clerk for taxation of costs, the claimant objected to the taxation of any costs. This objection was overruled and exception taken. It is now before me again on the exception, the claimant urging that no costs should be allowed to the libellant because the claimant has substantially succeeded, citing Pettie v. Boston Tow-Boat Co., 49 Fed. 464, 1 C. C. A. 314, in support of his contention.

The disallowance on appeal of the costs before the commissioner in the Pettie Case, was explicitly based upon the particular facts developed. Wallace, J., for the Circuit Court of Appeals, said (pages 467, 468, 49 Fed., and page 318, 1 C. C. A.):

"The appellant insists that the libellant should not have been awarded the costs of the reference before the commissioner, and urges that he was guilty of oppressive and fraudulent conduct upon the reference. We are satisfied by a careful examination of the record that the libellant corruptly attempted,

by his own testimony, and by the testimony of witnesses in his behalf, whose statement he did not himself believe to be correct, to exaggerate the value of the barge, and obtain an inordinate compensation for her loss. He was an expert, thoroughly qualified to judge of the value of such a vessel. He knew what she had actually cost, and the appraisal placed upon her for insurance just before she was lost. His own testimony was false in respect to matters as to which he could not well be mistaken. Among other statements, it was untrue that he had ever received the offer for the barge to which he had testified. His recklessness in disregarding even the appearance of candor is shown by his attempt to prove the value of the barge at $6,500 or $7,000, although he had alleged it in the libel to be but $5,500. It must be assumed for present purposes that she was worth only $1,750. It would serve no useful purpose to enter upon any recapitulation or analysis of his testimony, and that of his witnesses, before the commissioner. It suffices to say that we are unable to consider his misstatements, and those of several of the witnesses produced by him, as venial errors which can be reconciled with integrity of purpose by attributing them to honest, but mistaken, estimates in matters of opinion."

In the case under consideration, it does not appear that any fraud was attempted. A larger claim was put forward than the evidence subsequently justified but that does not establish corruption. The case was a genuine one of some damage. The evidence failed to sustain the amounts claimed but the fact of there being a small recovery, in the face of a comparatively large claim, is more consistent in this case, with defect of proof than the kind of fraud attempted in the Pettie Case. Here, the costs consist largely of disbursements and the effect of sustaining the exception would be not only to deprive the libellant of any recovery of damages but leave him out of pocket by reason of his action, which has been upheld. Such would be an anomalous result, where real damages have been suffered through the wrong of another, but the injured party is unable to prove the full extent of them.

Exception overruled and the taxation will be proceeded with.

SHORTLAND BROS. CO. v. CITY OF NEW YORK.

(District Court, S. D. New York. October 20, 1903.)

1. COLLISION—STEAM VESSELS ON CROSSING COURSES—CHANGE OF COURSE.
As the tug Watt was coming up East river on a flood tide a short distance from the end of the piers on her starboard hand, the Boody came out of her slip, but, instead of keeping her course and speed and crossing ahead of the Watt in accordance with the ordinary rule, she signaled her intention of passing on the Watt's starboard side, but came out at such fast speed that, before she could execute the maneuver, she was in the course of the tug, and a collision resulted. *Held* that, if she undertook to change the ordinary course which she was expected to take, it was her duty to navigate cautiously, and that she was solely in fault for the collision.

In Admiralty. Suit for collision.

Mr. Forrester, for libelant.

Mr. Kindleberger, for respondent.

HOLT, District Judge (orally). I think that these vessels, when they first saw each other, were on crossing courses, and it was the business of

the Watt to keep out of the way, and of the Boody to hold her course and speed, unless she gave a different direction. If she undertook to change the ordinary rule of passing to the right, she ought to use correct judgment to do it. She did decide to change, and, instead of holding her course, and passing to the right, she gave the signal of two whistles to pass to the left. She came out very fast, and the Watt was coming up on a strong flood tide, and couldn't maneuver as safely as the Boody coming out against the tide. It was the duty of the Boody not to come out fast, as there was a vessel coming up with the tide close off the mouth of the slip. She should have come out cautiously. If they were far enough apart so that she could come out at full speed, she was either bound to follow the usual rule, or, if she decided to sound two whistles and go on the other side, she was bound to have room enough to do it. The strong flood tide brought the Watt upon her, and at the last minute she backed, as they usually do when collision is inevitable. It isn't of much consequence what they do when they are right on one another. The question is whether the maneuvers are properly taken when they first see each other; and it seems to me from that point of view that the Watt was not guilty of any fault, and that the Boody was guilty of fault—that is, she elected to pass on the starboard side of the tug; and, if she changed the regular course that the other vessel expected her to take, and instead of holding her course and speed and allowing the other vessel to pass behind her, she determined to take the other course, and go the other way, she did that at her own risk.

My opinion is there should be a decree for the libelant, with the usual order of reference to ascertain the damages.

TOLLMAN v. QUINCY.

(Circuit Court, S. D. New York. March 14, 1904.)

1. ACCOMMODATION NOTE—DIVERSION—HOLDER FOR VALUE.

Where defendant's note was transferred to plaintiff before maturity in settlement of a pending suit, plaintiff's counsel being told that it had been given by the maker to the payee in settlement of an account between them, plaintiff was a bona fide holder for value, and it was therefore no defense that the note was accommodation paper, or that it had been diverted.

Howard R. Bayne, for plaintiff.

Wellman & Gooch (Sumner B. Stiles, of counsel), for defendant.

HOLT, District Judge. The defendant alleges in his answer that the note in suit was given to Bates "to enable him to effect a settlement of the said suit of the plaintiff against the said Bates." He testified on the trial, in substance, that he gave Bates the note to be used, if necessary, during his absence in Europe, to renew certain joint obligations on which both their names appeared, and that he knew nothing about the proposed use of the note to settle a debt of Bates until after its delivery. The general rule is that admissions in a pleading cannot be contradicted by testimony. Assuming, however, that this note was

either an accommodation note or a diverted note, I think the plaintiff is a bona fide holder, before maturity, for value. It was transferred in settlement of a pending suit, and was therefore transferred for value within the meaning of that term in commercial law. Northern, etc., Co. v. Kelly, 113 U. S. 199, 5 Sup. Ct. 422, 28 L. Ed. 948; Swift v. Tyson, 16 Pet. 1, 10 L. Ed. 865; Oates v. National Bank, 100 U. S. 239, 25 L. Ed. 580; Railroad Co. v. National Bank, 102 U. S. 39, 26 L. Ed. 61; American File Co. v. Garrett, 110 U. S. 288, 4 Sup. Ct. 90, 28 L. Ed. 149; Rector v. Teed, 120 N. Y. 583, 24 N. E. 1014; T. N. Bank v. Parker, 130 N. Y. 415, 29 N. E. 1094. The proof is that the plaintiff had no knowledge that the note was an accommodation note or that it had been diverted. His counsel was told that it had been given by Quincy to Bates in settlement of an account between them.

I think that the agreement of settlement between Tollman and Bates constitutes no defense. The effect of the agreement was, in my opinion, that, if the note were not paid at maturity, the plaintiff had an election, either to go on with the original suit, or to enforce payment of the note. It is not the correct construction of the agreement, as I regard it, that Bates or Quincy, or both, could elect not to pay the note, and that thereupon the plaintiff was left with no other remedy except to go on with the original suit. There was no reason why Tollman should have taken Quincy's note at all, if it could not be enforced.

My conclusion is that the plaintiff is entitled to judgment for the amount demanded in the complaint, with costs.

THE BUCKINGHAM.

STEAMSHIP BUCKINGHAM CO., Limited, v. PACIFIC TRANSPORT CO. et al.

(District Court, E. D. Pennsylvania. April 22, 1904.)

Nos. 12, 15.

1. SHIPPING—CHARTER—COMMENCEMENT OF VOYAGE.
   A steamer under a time charter was delivered to the charterer at Seattle, her first voyage to be to an Alaskan port. She took on some coal at Seattle, and then proceeded to other ports, where she took on cargo and a further supply of coal; proceeding thence to Alaska, and returning to Seattle, where she was again taken in charge by the charterer. *Held*, that the voyage began at Seattle, and not at the last port of loading.

2. SAME—DAMAGES CLAIMED BY CHARTERER.
   A time charterer who compromised and settled a claim for demurrage against a consignee cannot assert a claim for the balance which was in dispute, against the vessel, on the ground that he could have recovered in full but for the master's misconduct.

3. SAME—DEDUCTIONS FROM CHARTER HIRE.
   Evidence considered, and *held* not to establish the claims of a charterer to various deductions from the charter hire of a steamer.

In Admiralty.

Henry R. Edmunds, for Pacific Transport Co.
Convers & Kirlin and J. Parker Kirlin, for the steamship.

J. B. McPHERSON, District Judge. 1. The Buckingham is a British steamship, and was chartered to the Pacific Transport Company and James Griffiths for eight shillings and sixpence per ton, gross register, under a time charter, for the period of six months. Delivery of the vessel, which was on a voyage from Hong Kong to Tacoma when the contract was made, was accepted by the charterers at Seattle on May 27, 1901. The charter party contained the provision that the ship might be employed "in such lawful trades as the charterers or their agents shall direct, but not north of Vancouver, and no part of North America except Pacific side." This restriction was modified by cable a few days before the ship was delivered, so as to permit the charterers to make one voyage to St. Michael's, Alaska, for which privilege they were to pay the additional hire of two shillings and sixpence per ton. This voyage was the first enterprise upon which the ship was to enter, and the first subject of dispute now is: When did the voyage begin and end? The relevant facts are as follows: Immediately upon delivery of the vessel the charterers loaded some bunker coal, and on May 29th the ship left Seattle for Nanaimo, another port on Puget Sound, where she took on board a further supply of bunker coal and about 75 tons of cargo for St. Michael's. On May 30th she crossed the sound to Vancouver, where she loaded a general cargo of 2,400 tons; leaving that port on June 6th, and recrossing the sound to Ladysmith, where she completed her cargo by loading 2,000 tons of coal. She left Ladysmith on June 10th, and proceeded directly to St. Michael's, merely touching at Victoria to put the pilot ashore. She returned to Puget Sound on July 30th, making a brief stop only at Port Townsend, and arrived at Seattle four or five hours later on the same day, where she was again taken in charge by the charterers, and accounts for the voyage were settled with the master. On these facts, I agree with the position taken by the proctors for the Buckingham, that the voyage began and ended at Seattle. The charterers' contention that the voyage did not begin until June 10th, when the ship left her last port of loading with a complete cargo, finds no support in the authorities. No decision was cited in which the point has been so ruled, but there are several cases in which it has been distinctly decided that a voyage begins when a ship sets about doing what is to earn freight for the owner. Bruce v. Nicolopulo, 11 Exch. 129, questioning the authority of Crow v. Falk, 8 Q. B. (55 E. C. L.) 467; Barker v. McAndrew, 18 Com. Bench (N. S.) 114 E. C. L. 758; Valente v. Gibbs, 6 Com. Bench (N. S.) 95 E. C. L. 270; The Carron Park, 15 Prob. Div. 203; Nottebohn v. Richter, 18 Q. B. D. 63; Fearing v. Cheeseman, 3 Cliff. 91, Fed. Cas. No. 4,710. The English cases are summarized in Carver's Carriage by Sea (3d Ed.) § 148, in the following language:

"A doubt sometimes arises as to when during the agreed voyage the ordinary exceptions of perils apply. Do they relate only to that part of it in which the ship is carrying the charterer's goods? Or do they also cover risks which frustrate or delay the voyage before the goods are taken on board? Say, in going to the port of loading, and during the loading there.

"Where such and such perils are to be 'always excepted,' the shipowner seems to be relieved from liability for any failure to perform his contract, if caused by those perils, whenever they may have occurred. But where the

clause runs 'during the voyage always excepted,' as it frequently does, there may be an ambiguity in the word 'voyage.'

"If the vessel is to proceed to a different port from that at which she is lying, and load there, the voyage thither is considered to be part of the chartered voyage, even though the vessel be allowed by the charter to take, and in fact takes, a cargo outwards for other merchants, and although in doing so she proceeds first to another port, out of the route to the loading port. And if the vessel is prevented or delayed in getting to the loading port, or if the loading is prevented, or a loss occurs during the loading at that port by a peril excepted 'during the voyage,' the exception applies.

"So, again, where the vessel is lying at her port of loading, if she has to move from the place at which she is lying to a loading berth, the 'voyage' to which the exceptions relate commences as soon as she breaks ground to go to that berth.

"But it seems that the exceptions do not apply to matters which may happen before the ship has entered upon the voyage dealt with by the charter party. So that, if she were disabled by perils of the sea while still completing a voyage on which she was engaged at the time of chartering, the shipowner would not be excused.

"If the ship is to be loaded at the place where she is lying, it does not appear to be settled whether the 'voyage' may begin before she has commenced her transit, in such a sense that the exceptions may relate to risks during or prior to the loading. In Crow v. Falk it was decided that it did not. But that decision has more than once been dissented from."

In view of these authorities, I think it is clear that the point must be decided against the charterers' contention.

2. The second ground of dispute concerns the sum of $67.50 that was paid to three Japanese firemen who were employed by the master at Ladysmith. The owners were bound by the charter party to furnish a full complement of officers, seamen, engineers, and firemen for a vessel of the Buckingham's tonnage, and to pay their wages. The charterers' contention is that this sum of $67.50 was paid to the firemen as wages for doing that particular work, and therefore is not a proper charge. The evidence satisfies me, however, that the money was not paid for firing, but for work done in discharging the cargo at St. Michael's, and was paid by the express authority of the charterers themselves. Indeed, the item appeared in the account rendered by the master of the Buckingham on his return to Seattle, and was approved and paid by the charterers at that time without objection. No reason whatever has been shown for opening that settlement, and the objection to this item seems to be an afterthought, probably suggested by subsequent controversies over other matters.

3. A similar remark may be made concerning the charterers' claim of $108, which is said to be an overcharge for boarding several men who were sent by the charterers to St. Michael's to help in discharging the cargo. These men were not seamen, nor in the employ of the ship, but were carried by the captain without other charge than $1 per day for boarding. The charterers claim that 40 cents per day is the usual rate paid upon the Pacific Coast for boarding, but I do not think it necessary to decide whether the claim is well founded, for this item also was included in the account rendered by the master upon his return, and was paid without a word of objection, and no reason has been shown for opening that settlement.

4. The charterers further assert that they should be allowed the sum of $1,900 for damages suffered by the wrongful conduct of the master of

the Buckingham at the port of St. Michael's. Upon this point the libel contains the following statement:

"That on the arrival of the said vessel at St. Michael's it was the duty of the said master, under the terms of the charter party, to proceed to a place designated by the consignee of the cargo, to discharge the same, but the master did not and would not proceed to the place so designated until the consignee paid him the sum of $100. That, on account of the misconduct of the master in this behalf, the vessel was detained eight days, whereby libelants sustained damages in the sum of $300 per day, or $2,400. That libelants have only received $500 on this account, leaving a balance still due libelants from the owners of the vessel of $1,900."

To make the meaning of this paragraph clear, it is necessary to state what took place at St. Michael's. When the Buckingham reached the port on June 28th, the harbor was still closed by ice, and the ship came to anchor in 33 feet of water about 5½ miles out in the open roadstead. Her draft at this time was nearly 23 feet. The captain walked ashore on the ice, entered the ship at the customhouse on the 29th, and notified the two consignees of the cargo on the 30th; but, as long as the ice remained, it was impossible to begin unloading. The ice went out on July 3d. The customhouse declared the harbor open on July 4th, and on that day the ship moved to a point about 4 miles from the town, and again anchored in 33 feet of water. The work of discharging went on from July 4th to July 15th, when the vessel was again moved a mile nearer the shore, where she lay in about 24 feet of water. On July 13th the general cargo was completely discharged, and also a portion of the coal that constituted the remainder of her load. On that day the consignee of the coal, the Northern Commercial Company, asked to have the ship brought further in, but the master at first refused, because he regarded the conditions as unsafe, and repeated his refusal shortly afterward. The consignee then offered the master $100 if he would do as he was asked, and he finally consented and accepted the money, but upon the further condition that one of the consignee's steamboats should be lashed alongside, that a competent pilot should take the ship in without obliging her to use her own steam, and that she should be helped out of the harbor if bad weather came on. The discharge of the coal was completed on July 19th, and the master thereupon presented a claim for eight days' demurrage, contending that the lay days expired on July 13th, counting the time from July 1st, while the consignee contended that the time should not be counted before July 5th, conceding that four days' demurrage was due, and signing a letter to that effect. The agreed rate of demurrage was $300 per day, but, as the master had no authority to collect any money on this account, the dispute was referred to San Francisco for adjustment. It was there taken up by counsel, and, after considerable negotiation, was compromised by the payment of $500 to the charterers. The agreement concerning the carriage of the coal provided that the ship should take it to St. Michael's, "or as near thereto as the vessel can safely get," and the consignee's objection to the charterers' claim for eight days' demurrage was that the master did not bring the Buckingham as close as he might have done with safety, and thus increased the cost and delay of discharging. The charterers now assert that they were entitled to claim eight days'

demurrage, and that they could have collected it from the consignee if the master's refusal had not furnished the company with a valid counterclaim which compelled the compromise for $500. Accordingly it is now sought to recover from the ship the balance of $1,900.

To the allowance of this item I think there are several objections. First, the charterers have offered no evidence from which the dispute can be satisfactorily determined. The charter for the carriage of the coal was not produced, and there is not sufficient evidence otherwise concerning the number of lay days, and the time when they were to begin. Second, since the charterers elected to compromise the dispute with the consignee, and accepted $500 in full settlement, it is not easy to see upon what ground they can set up this claim against the ship. It is by no means clear that they could have recovered $2,400 from the consignee; and I confess I do not see how they can transform a claim against the consignee for demurrage, that has already been settled and ended, into a live claim against the ship for the misconduct of the master. But, third, I do not find the needful evidence that the master's conduct was wrongful. Without going into the details of the testimony, I am satisfied that he acted with caution and propriety. He was careful of the ship in a strange harbor, as he was bound to be, but there is no evidence at all that he kept the ship as far out as possible in order to extort money for bringing her in. The consignee made no claim at the time that its rights were being disregarded, but urged the master, simply as a favor, to come closer to the shore, and paid the $100 as a gratuity in recognition of this service. At the end of the discharge the consignee was so well satisfied as to pay the master $25 more as a further expression of satisfaction. Moreover, by express agreement, the master was the charterers' agent in the discharge of the cargo, and for this service he was paid $250. Mr. Griffiths, one of the charterers, testified that "his conduct was very satisfactory in regard to the discharge." Surely, to permit the recovery of this item of $1,900 from the ship in the face of these objections, is scarcely possible.

5. The charterers have deducted £122 7s., hire for three days, which are said to have been lost on the second voyage, because of the vessel's failure to furnish a full complement of firemen. It appears from the testimony that on August 9th, a few days after the return from St. Michael's, the vessel was ordered to Vancouver. Her three firemen had refused duty, and three laborers were employed, who fired the vessel on the trip to Vancouver. Here the refractory firemen were arrested and imprisoned for 24 hours, after which they deserted the ship altogether. The captain made efforts to obtain men to take their places, but was unable to do so, and after remaining at Vancouver until August 15th the ship was fired across Puget Sound to Nanaimo by the engineers and the donkeyman. No time was lost upon this passage, which only occupied a few hours. The testimony has satisfied me that the delay at Vancouver was due, not to the absence of the firemen, but to the failure of the charterers to furnish money to disburse the ship at that port. They had agreed to furnish money to the ship for a commission of 2½ per cent., and it was their delay in furnishing the necessary funds that compelled the ship to remain at Vancouver for two of the three days

that are now in controversy. With regard to the remaining day, which is averred to have been lost on the voyage between Vancouver and San Francisco, I am also of opinion that the testimony does not establish the charterers' contention. As I have already said, no time was lost on the passage to Nanaimo. When the ship left that port she was still without firemen, but arrangements had been made with three of the crew, the donkeyman, and one of the engineers to perform this duty. She stopped at Victoria in another effort to obtain firemen, and spent 15 or 16 hours in the vain attempt to secure them. There seems to have been a strike at that time among the firemen along the Pacific Coast, but, for whatever reason, the effort was unavailing. The time spent at Victoria was undoubtedly lost by reason of the ship not having a full complement of men, and for this loss the charterers would be entitled to an allowance, if it were not for the fact that the charter party expressly provides that for delay arising from such a cause no allowance is to be made unless the delay is longer than 24 hours. It follows, therefore, that the loss and expenses which the charterers claim to have suffered by reason of the delay cannot be allowed.

6. Neither, as I think, is the claim to be allowed for a further delay of 37 hours at San Francisco any better founded in fact. The charterers aver that the captain improperly refused to accept a cargo of dynamite that was offered him on Saturday, August 31st, and that he should have received it at that time, and immediately proceeded upon a voyage to Noyo, a port further south on the California coast, instead of delaying to sail until Tuesday morning following. As I read the testimony, however, the facts are otherwise. The dynamite was not offered to the captain before Monday, when it was received, after proper provision had been made for its careful stowage. The ship did not sail upon Monday, because the shippers of the cargo had sent on board 14 men, who were to be transported to Noyo to unload the cargo there; and, owing to certain customs regulations, they could not be carried upon a British vessel between two American ports without being put upon the ship's articles. In order that this formality might be observed, it was impossible to sail before Tuesday morning.

7. There remain for consideration three items which the ship avers have been improperly deducted from the hire due by the charterers. One is the sum of $11.47, excess of exchange upon London over the true rate, charged upon cash advanced to the master; the second is $108.75, being an overcharge for bunker coal furnished to the ship's galley; and the third is $100, charged for the use of certain gear belonging to the charterers on board the ship. In my opinion, all of these sums have been improperly deducted. The uncontradicted testimony shows that the rate charged for exchange was one penny too high, and this amounts to the disputed sum of $11.47. With reference to the second item, the testimony satisfies my mind that the charge for coal was much too high, and that no more than about 105 tons were probably consumed, for which the charterers have been paid in full. As for the use of the charterers' gear at Barbadoes while the vessel was being repaired, the only competent evidence upon the subject goes to show that, if any of it was used, it was a comparatively insignificant por-

tion; and, moreover, as all the gear was afterwards sold to the ship for $30, it seems out of all reason to charge $100 for the use of only part of it for a short time.

Decrees may be entered in accordance with this opinion.

In re ALLENDORF.

(District Court, N. D. Iowa, E. D. May 14, 1904.)

No. 327.

1. BANKRUPTCY—DISCHARGE—GROUNDS FOR REFUSAL.

Where it appeared that a bankrupt who had been in business as a retail merchant but a short time conducted his business in a somewhat careless manner, and also that his stock had been damaged by fire, and a fire sale held, the mere fact that the value of the stock, as appraised by his trustee, was not as great as it apparently should have been, estimated by deducting the amount of sales from the invoice prices, or that the amount of cash paid out, as shown by his check stubs, was short of the amount taken in from sales, is not sufficient, alone, and against his denial, to justify the refusal of his discharge on the ground that he concealed property and money from his trustee.

2. SAME—FAILURE TO KEEP BOOKS.

To warrant the withholding of a discharge for failure of the bankrupt to keep books or records, or for his destruction of them, it must be shown that such failure or destruction was with intent to conceal his financial condition.

3. SAME—OBTAINING CREDIT BY FALSE STATEMENT.

The omission by a bankrupt to state an item of indebtedness in a statement made at the request of a wholesale house to which he had previously sent an order for goods cannot be considered as rendering it a materially false statement, made for the purpose of obtaining other goods, which were not ordered until eight months thereafter—the goods ordered at the time having been paid for in the meantime—so as to defeat the right to a discharge under Bankr. Act, § 14b, cl. 3, as amended by Act Feb. 5, 1903, c. 487, 32 Stat. 797 [U. S. Comp. St. Supp. 1903, p. 411].

In Bankruptcy. On petition for discharge, and specifications of objection thereto.

Mears & Lovejoy, for bankrupt.
Gates & Leffring and C. D. Kern, for opposing creditors.

REED, District Judge. Henry Allendorf was adjudged a bankrupt, by this court, upon his own petition, June 17, 1903. On November 16th following he filed a petition for discharge, and certain of his creditors in due time thereafter filed specifications of objections in opposition thereto, upon the grounds, in substance, that the bankrupt had, (1) while a bankrupt, knowingly and fraudulently concealed from his trustee property belonging to his estate in bankruptcy; (2) with intent to conceal his financial condition, destroyed or failed to keep books of account or records from which such condition might be ascertained; (3) obtained property from one of the objecting creditors upon a materially

¶ 2. See Bankruptcy, vol. 6, Cent. Dig. § 752.

false statement in writing made to such creditor for the purpose of obtaining such property.

1. The bankrupt was a retail merchant doing business at Waterloo, in Blackhawk county; and in support of the first of the specifications it is urged that the testimony shows that he has failed to account for, or turn over to his trustee, a considerable portion of his stock of goods, and all of the money received from sales of goods and other sources from some time in January, 1903, to the time he was adjudged a bankrupt. The alleged failure to account for or turn over all of his stock of goods is based upon the ground that the estimated value made by the trustee of the goods coming to his possession is some $2,500 less than the difference between the original cost thereof, as shown by the invoices or bills of the same, and the purchase price of others, and the amount of bankrupt's sales from such stock during such time. The evidence fails to show the basis upon which the trustee made his estimate of the value of the stock, and does show that in the latter part of December, 1902, the stock was largely damaged by fire, for which damage the bankrupt received some $3,300 insurance thereon. In January following the bankrupt conducted or held for several days what he calls a "fire sale," at which his goods were sold in many instances below cost. He also claims that the amount of insurance received by him did not cover the full damage to the stock by fire. It also appears that after the fire some new goods were added to the stock; also a secondhand stock purchased by the bankrupt from a Mr. Billings, for which he was to pay $2,800, and upon which he did pay $1,500 in cash. In this transaction with Billings the bankrupt claims that he was greatly deceived in the value of these goods; that in fact they were not worth to exceed $600. Some litigation grew out of this transaction, and Billings replevied some of the goods, and the matter was adjusted in some way—by the bankrupt paying to Billings something more—and the bankrupt says, "I paid Billings some $1,725, altogether, and did not get $200 out of it." It seems to be admitted that there is a discrepancy between the estimated value of the stock by the trustee, and its value as shown by the invoice of its purchase and the amount paid Billings, less the sales therefrom. It is quite apparent that there might and probably would be a wide difference in the estimated value of such a stock. The bankrupt explains that the apparent discrepancy in values is because of the damage to the stock by fire, and of sales at less than cost during the continuance of his "fire sale." No accurate computations are made in regard to these shrinkages, nor could there well be. The alleged concealment of money is made to appear by taking the gross amount of cash received from sales of goods and other sources from early in January, 1903, the most of which was deposited in bank, and deducting therefrom the checks drawn against such deposits, as shown by the stubs of such checks. Upon this basis there appears to be a shortage of something over $1,000. The bankrupt, however, says that some of the checks made by him upon the bank are not shown upon the stubs, and the checks themselves were not preserved. The testimony seems to sustain this view. The bankbooks do not show the different checks, but only the gross amount returned at time of balancing the books. The bankrupt also says that payments of expenses and some

other items were made from the store, and did not pass through the bank. Estimating all of these amounts that he could, there appears to be about $500 still unaccounted for. At the time of his examination in July, 1903, at the first meeting of the creditors (and this is the testimony upon which the creditors mainly rely upon this hearing), the bankrupt was 34 years old; had a family, consisting of his wife and two small children, which were supported from this business. He had never conducted a business prior to beginning this, which was in November, 1901, but had been a clerk in different establishments, at salaries varying from $15 to $20 a week. It is very apparent that he is not or was not a careful business man; that this business was conducted in a loose and careless manner; and it is a fair inference from all the testimony that whatever shortage there may be in the value of his stock, or money received in the course of business, is due largely to this and the damage caused by fire, and not to a fraudulent concealment by the bankrupt from the trustee of any of his property. The bankrupt positively denies that he has concealed or withheld any of his property not exempt from execution from the trustee, and it is not made to appear that he had any of it in possession or under his control at the time of his examination, or the taking of the testimony upon this hearing. It cannot, therefore, be said, from the testimony submitted in support of this specification, that he has willfully and knowingly sworn falsely, or has fraudulently concealed from the trustee any money or other property belonging to his estate in bankruptcy.

2. To warrant the withholding of a discharge for a failure of the bankrupt to keep books or records, or for his destruction of them, such failure or destruction must be with intent to conceal his financial condition. This bankrupt did not fail entirely to keep books. He kept a cashbook, showing the amount received from the daily sales of goods and from other sources, and most of the payments for goods, expenses, and other matters; also a bankbook, and the original invoices or bills of goods purchased. He kept no daybook, blotter, or ledger. The testimony shows that the clerks or salesmen were furnished small salesbooks, made of thin sheets of paper, arranged to fold or double over a piece of carbon paper. Upon a sheet so folded, the article sold and the price were entered, and in doing this a copy was made at the same time by means of the carbon paper. The sheet or slip was then torn off, and sent with the amount of the purchase to the cashier; the salesman retaining the copy. At the close of the day the amounts from these various slips were ascertained and entered upon the cashbook, and the slip destroyed soon after. The specification of the destruction of books or records is based upon the destruction of these slips. There is no testimony from which it can be found that the failure to keep a more complete set of books, or that the destruction of these slips, was with intent to conceal the financial condition of this bankrupt; and, in the absence of such testimony, it cannot be so held.

3. Did the bankrupt make a materially false statement in writing to one of the objecting creditors for the purpose of obtaining property from such creditor? It appears that some time prior to September 9, 1902, the bankrupt wrote to one of the objecting creditors, requesting it (a copartnership) to send him a bill of goods on credit. The amount

is not shown. Before sending the goods, the creditor requested of the bankrupt a statement of his financial condition. In response to this request the bankrupt on September 9th wrote the creditor as follows:

"Waterloo, Iowa, Sept. 9th, 1902.

"Messrs. Lindeke, Warner & Schurmeier, St. Paul, Minn.—Gentlemen: Enclosed please find statement of my standing as near correct as I can remember.

"Now the reason that I am behind in my payments, I had to put in a heavier stock than I intended on account of the competition in this city, and I suppose I bought of too many people which I am not doing this fall. My sales have increased every month since in business, and if they continue to do so I will not owe a cent by Jan. 1st. If you consider my credit good enough to ship my order I would first like to ask you to cancel the Wool Dress Goods, as I have all I can use in that line.

"Hoping to hear from you favorably, I am,

"Yours Truly, Henry Allendorf."

The statement inclosed in this letter is upon a printed blank addressed to, and apparently furnished by, the creditor, and is as follows:

"Gentlemen, the following is a correct statement of our financial condition on Sept. 9, '02:

Assets.

Stock of merchandise	$ 5,000
Cash on hand and in bank	50
Store furniture and fixtures	400
Total assets	$ 5,450
Insurance on stock	$ 3,500
Annual sales	12,000

Liabilities.

Bank indebtedness	$ 200
Money borrowed from friends and relatives	
Other borrowed money	
Mortgages	
Merchandise indebtedness.	
[Names and amounts stated] Total	1,041
Other small bills, about	250
Total	$ 1,491

"[Signed] Henry Allendorf."

At the date of this statement the bankrupt was owing his wife's mother and another lady some $800 or $900, and this amount and about $375 owing to another creditor are not stated in the list of his liabilities. Upon receipt of this letter and this statement, the creditor shipped to the bankrupt the goods ordered. The testimony of the bankrupt shows that the credit so obtained was afterwards settled and paid by him in January or February following. Afterwards, and on May 15, 1903, the bankrupt ordered by letter from this creditor a bill of goods amounting to $63.39, and on May 20th, another order amounting to $32.50, both of which were filled, and the goods soon after shipped to the bankrupt. The creditman of this creditor testifies that the order of May 15th was the first the firm had received from the bankrupt for several months, and that before approving it he looked up their information on Allendorf, and read his statement of September 9, 1902, and,

on the strength of that, approved the order and shipped the goods, and that the order of May 20th, was also approved and the goods shipped on the strength of such statement. Conceding, without so deciding, that a materially false statement made prior to the amendment of February 5, 1903, to the bankruptcy law (chapter 487, 32 Stat. 797 [U. S. Comp. St. Supp. 1903, p. 409]), may be shown, to defeat a discharge in proceedings commenced since that amendment, do the facts shown sustain this specification? That the omission by the bankrupt from this statement of the amounts owing by him to his relatives and to the other creditor, if knowingly or purposely done, would be a material false statement, may be conceded. Does it, however, fairly appear that such statement was made for the purpose of obtaining the goods ordered May 15th and 20th, respectively? The statement was made at the request of the creditor, when it received the order for goods, some time prior to September 9, 1902, and to induce it to fill that order. There is nothing in the statement, nor in the letter of the bankrupt inclosing it to the creditor, to show that it was to be a continuing statement or representation of the bankrupt's financial standing—in fact, the statement is expressly limited to his condition on September 9, 1902—and the testimony of the creditman of this creditor and the letter of the bankrupt conclusively show that it was made to secure the bill of goods prior to September 9th only. Between that date and May 15th following (more than eight months) there was no dealing between these parties, and there is no evidence from which it can be fairly inferred that the statement was made for the purpose of obtaining the goods shipped upon the orders of May 15th and May 20th. To defeat a discharge, the bankrupt must have obtained property upon a materially false statement made in writing for the purpose of obtaining such property. The statement in question was not made for the purpose of obtaining the property shipped to the bankrupt by this creditor on May 15th and 20th, respectively, nor any other property for which he is now owing.

It follows that the specifications of objection in opposition to the discharge are not sustained by the evidence, and the discharge must be granted, and it is so ordered.

Ex parte POWERS.

(District Court, W. D. Kentucky. January 5, 1904.)

1. HABEAS CORPUS—FEDERAL COURTS—PRISONER IN CUSTODY UNDER CRIMINAL CHARGE BY STATE.

A person in prison under a conviction by a state court on an indictment charging him with being accessory to a murder, and pending an appeal from such conviction, is not "in custody in violation of the Constitution or of a law or treaty of the United States" within the meaning of Rev. St. § 753 [U. S. Comp. St. 1901, p. 592], and such section does not authorize his discharge on habeas corpus by a federal court, on the ground that during his trial he was deprived of rights guarantied him by the federal Consti-

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¶ 1. Jurisdiction of federal courts on habeas corpus proceedings, see note to In re Huse, 25 C. C. A. 4.

See Habeas Corpus, vol. 25, Cent. Dig. § 44.

tution. However erroneous the judgment of conviction may have been, his imprisonment is legal until the charge made in the indictment has been finally adjudicated by the state courts.

2. SAME.

A writ of habeas corpus from a federal court cannot be made to perform the office of a writ of error to review a judgment of conviction in a state court in a criminal case of which it had jurisdiction; and, even where it is claimed by the defendant that some right under the Constitution of the United States has been denied him, a federal court will not ordinarily interfere by writ of habeas corpus, but will leave him to his remedy by direct proceedings for review in the state courts, and by writ of error from the Supreme Court of the United States if his claims should be there decided adversely.

Habeas Corpus.

Sims & Grider and H. C. Howard, for petitioner.

EVANS, District Judge. The petitioner, who is in the Jefferson county jail under sentence of death, asks for a writ of habeas corpus. Section 753, Rev. St. U. S. [U. S. Comp. St. 1901, p. 592], so far as applicable to the petition before me, expressly provides that "the writ of habeas corpus shall in no case extend to a prisoner in jail, unless where he * * * is in custody in violation of the Constitution or of a law or treaty of the United States," etc. The petitioner shows that he is in jail under a conviction had in a state court upon an indictment charging him with being accessory to the murder of William Goebel. It also shows that he has appealed from the judgment of conviction, and that the appeal is pending in the Court of Appeals of the state.

Of the indictment for the offense charged the state court undoubtedly had jurisdiction, and its judgment, however erroneous, is not a nullity. It cannot be maintained that being in jail under such a conviction upon such a charge is of itself a being in "custody," in violation of the Constitution or of any law or treaty of the United States. No provision of the Constitution or of any law of the United States in terms forbids such a result from such a cause. Conceding this, it is nevertheless suggested that during the progress of the trial which resulted in his conviction the petitioner was denied all the rights secured to him by the fourteenth article of amendments to the Constitution of the United States. Certainly, if the averments of the petition be true, it may be hard to escape the conclusion that he was manifestly denied some, at least, of those rights. But, if so, is this the proper tribunal or now the proper time so to adjudge, or to give the relief to which he might be entitled as a citizen and as a man? There can be but one answer to the inquiry. The petitioner is not in jail primarily, or in the sense in which we must view the case, for any cause except that which comes through the processes of law resulting from his indictment upon the charge upon which he was tried and convicted, to wit, that of being accessory to the murder of Goebel. To imprison him after a conviction upon that charge, or in advance of a conviction thereon, under process issued upon the indictment itself, is in no sense a violation of the Constitution of the United States, or of any law or treaty thereof. In the legal sense, that is the only ground of his imprisonment, and it would necessarily so appear in any return to a writ of habeas corpus.

It is quite true that in a certain secondary or remote sense it might be said, if the averments of the petition be taken as true, that, if he had not been denied his rights under the fourteenth amendment, he would not have been convicted; but, even if that were true, it would only affect the conviction, and not the imprisonment, which would continue if the conviction were set aside and a new trial granted, especially as this court could not admit to bail pending another trial in another court. But we cannot look at the case from the standpoint last indicated, nor treat the real cause of imprisonment as being anything except the charge made in the indictment and the conviction thereon. The imprisonment appears to be the result of the charge made in the indictment, and not in any palpable sense the result of the denial, during the progress of a trial upon that charge, of his rights under the fourteenth amendment. If it be true that the petitioner, at his trial, was denied any of the rights guarantied by the fourteenth amendment, this is not the tribunal to review the proceeding.

Section 753, Rev. St. [U. S. Comp. St. 1901, p. 592], plainly limits the power of the federal courts to cases where the "custody" is in violation of the federal Constitution or laws. It excludes the power to correct by writs of habeas corpus mere errors in the proceedings of some other court having jurisdiction. There is no right to a writ of error from this court to a state court, either directly, or indirectly through the medium of the writ of habeas corpus, though under some circumstances and in a certain modified sense this court might have the right to proceed under section 753 to ascertain whether an imprisonment itself was in violation of the Constitution or laws of the United States, or was inflicted in a case of which the state courts had no jurisdiction. But ordinarily this court, so long as there is or may be an appeal in due course of law from a judgment of a state court in a criminal case, cannot and should not review that judgment, even where the rights of a citizen, under the Constitution or laws of the United States, are alleged to have been denied. Other tribunals are given that power. In some cases it is true, especially where no appeal is allowed by law, the cause of the confinement of a prisoner in a jail, and even the grounds of his conviction of an offense, may be looked into, to see if such confinement is outside of the jurisdiction of the court, or is in violation of the Constitution or laws of the United States. Ex parte Green (C. C.) 114 Fed. 959; Ex parte Comingore (D. C.) 96 Fed. 552. Unquestionably in this instance the petitioner had the right under the laws of Kentucky to an appeal to the Court of Appeals, and, if the constitutional questions have been properly raised in the record in the state court, he will, as a matter of right, be entitled to a writ of error from the United States Supreme Court, should the Court of Appeals affirm the judgment against the petitioner. It is not for this court to interfere with those processes. The right to review the proceedings by which the petitioner was convicted is vested in other tribunals, and this case is not like one where an appeal is denied, or where the trial court had no jurisdiction or other extreme cases.

Besides these considerations, other matters may be alluded to. Without having the record in the state court before me, and without expressing any opinion upon its contents, or whether it raises certain constitu-

tional questions, it may be said that if, in fact, it presents those questions in such a way as to entitle the petitioner to a writ of error from the Supreme Court of the United States, then clearly this court should not anticipate the action of that court, and especially as no writ of error would be necessary or allowable, if the Kentucky Court of Appeals should reverse the judgment against the petitioner. If, on the other hand, the constitutional questions are not so raised in the record as to entitle the petitioner to go to the Supreme Court, then it is not for this court to say that there was error in the proceedings in the state court in a case within its jurisdiction, by its denial to the petitioner during the trial of his rights under the Constitution of the United States. It would not, in that contingency, appear that any of those rights were properly claimed before the state court by the petitioner, or were improperly denied by that court. It necessarily results, under our dual system of government, that the federal tribunals ought not to interfere by writs of habeas corpus with the administration of the state criminal laws, except in clear and urgent cases, where no other available remedy is open. The authorities leave no doubt of the soundness of this conclusion.

The fourteenth article of amendments to the Constitution of the United States, after making all persons born in the United States or naturalized therein citizens of the United States, provides, first, that no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; second, that no state shall deprive any person of life, liberty, or property without due process of law; and, third, that no state shall deny to any person within its jurisdiction the equal protection of the laws. These are provisions, not only of extraordinary, but of paramount, importance, and it is settled clearly enough that the word "state" in this amendment includes its officers, its courts, and other governmental agencies. All of them are included in the prohibitions of the constitutional provision. Chicago, etc., R. R. v. Chicago, 166 U. S. 233, 17 Sup. Ct. 581, 41 L. Ed. 979, and cases cited. If it were not so, the amendment would be futile. True, the rights indicated are guarantied by the organic law; but, in order that even the Supreme Court of the United States may enforce the guaranty, the right claimed must be asserted in some form, and its denial by the state court must in some way be shown upon the record. Otherwise the court can get no tangible hold upon the question.

It is quite impossible, from the averments of the petition before me, to say whether, in a way that meets that requirement, it was insisted upon, and shown or adequately attempted to be shown, at the trial in the state court: Either, first, that any privilege or immunity of the petitioner as a citizen of the United States was denied or abridged by the state court at the trial. This would be a very general claim, of course, and it would be requisite to specify in the record what privilege or immunity was abridged or denied, and how it was done, or at least it ought to be shown in some proper way how any attempt was made to claim such right and how it was denied. Or, second, that the trial and its results, if enforced, would deprive the petitioner of his life without due process of law. This claim should, of course, be made expressly and distinctly, and the record made to show in some proper

way how it was made, the grounds thereof, and how it was denied. Or, third, that the petitioner at the trial was denied the equal protection of the laws. This claim should be made before the state court, and the record made explicit, not only as to the claim, but how it was supported by proof, or offers of proof. Or, at all events, in some proper way these matters must have been or must be called to the attention of one or the other of the state courts, and the decision must have been or must be against them. Sayward v. Denny, 158 U. S. 183, 15 Sup. Ct. 777, 39 L. Ed. 941. We must assume that these claims were or will be properly presented, and that the record will so show.

It is claimed that in December, 1899, upon a proper certificate of his election in the preceding November, William S. Taylor, in the legal and ordinary way, was inaugurated Governor of Kentucky, and entered upon the discharge of his duties, and continued to perform those duties for several succeeding months. In the meantime his election was contested before the Legislature by Wm. Goebel; but while the contest was pending, and prior to its determination, Goebel was shot. While he was on his deathbed a portion of the members of the Legislature undertook to determine the contest, and certain publications, called the "House Journal" and the "Senate Journal" were subsequently printed, and undertook to establish a record of the contest and its result. Possibly while he was alive, but most likely unconscious, the oath of office is claimed to have been administered to Goebel. If done at all, this was accomplished only a very short time before his death. It is claimed that these proceedings were fraudulent and pretended, that the so-called House Journal and Senate Journal were pure fabrications, and that the contest was never in fact determined by the Legislature or a quorum thereof. It may be difficult to reach any other conclusion; but it would seem that these are questions to be determined, at least in the first instance, by the state courts, as questions rather of state than of federal law. In re Duncan, 139 U. S. 449, 11 Sup. Ct. 573, 35 L. Ed. 219.

It is insisted in the petition before me that W. S. Taylor, after being duly qualified as the Governor of the state, and while acting as such, executed and delivered to the petitioner, who accepted it, a full and free pardon for the offense charged in the indictment; that this pardon, under the seal of the state, was exhibited to the state court at the trial; and that it was denied by that court any effect whatever. It goes without saying, in my judgment, that every citizen of Kentucky, equally with all of his fellows, is entitled to the benefits of a free and full pardon given by a Governor, either de jure or de facto. If he be the acting Governor under color of law, his acts, upon every principle of law known to me, are effective, and particularly so until after his title to the office has been finally adjudged to be invalid. See In re Henry Ward, 173 U. S. 454, 19 Sup. Ct. 459, 43 L. Ed. 765. Can one citizen alone be denied the benefits of such a pardon, while all others have the right to such benefits, and still not be deprived of the equal protection of the laws? is a most important inquiry. But, however strong my convictions on the subject might be, it would not follow that I had power to grant the writ prayed for. The ruling of the court may have been erroneous; but, as the state courts are as much bound by,

and as they as much respect, the Constitution and laws of the United States as the federal tribunals, it must be presumed on this hearing that the Court of Appeals in this case will detect, and, if possible, correct, the errors, if any, of the trial court.

Under Kentucky law every person accused of a crime is entitled to be tried by a fair and impartial jury. Const. § 7. Can the petitioner, in a palpable way, be denied this right, while all others are given the full benefit of it? Can the life or liberty of the petitioner, a citizen of the United States, be taken from him by the verdict of a jury, packed and organized for that express purpose by the officers of the state by notoriously public methods, and it still be said that there was no denial to him of the equal protection of the laws? If due process of law and the equal protection of the law do not include a fair proceeding in the selection of a jury, it is quite difficult to see what they do include; for, unless that is done, a trial by a jury would be a mockery. The stream of justice would indeed be poisoned at the fountain-head. See Strauder v. West Virginia, 100 U. S. 308, 309, 25 L. Ed. 664.

It is averred in the petition that the jury in this case was a packed jury, and that the manner of its selection was such as could only result, and was intended to result, in having a jury pledged in advance to convict the prisoner; but even that gives me no right to interfere, for, if we assume the facts to be true as stated, and if the questions of constitutional law growing out of them shall properly and adequately appear in the record of the state court, the remedy of the petitioner is complete through his appeal to the Court of Appeals of the state, and, if that tribunal should concur with the circuit court in denying or ignoring the constitutional rights claimed by the petitioner, the Supreme Court of the United States would doubtless assume jurisdiction upon a writ of error. Nor can it be supposed that this could be prevented by sections 280 and 281 of the Criminal Code of Kentucky, which exclude the right of exception to anything that may be done in the formation of the jury in the trial court; for otherwise every constitutional guaranty could be crippled or destroyed by similar means with ease and facility. Shutting off, or attempting to shut off, consideration by a higher court of such questions, while allowing all others which may affect results involving the life or liberty of the accused to be reviewed and corrected, can have no effect upon the rights or powers of the Supreme Court under the Constitution of the United States, if, indeed, the Court of Appeals itself can constitutionally ignore or be exempted from the duty of enforcing the constitutional rights of the citizen, if appealed to for the purpose. See, especially, Rogers v. Alabama, 192 U. S. 226, 24 Sup. Ct. 257, 48 L. Ed. ——. The constitutional provisions referred to are of higher sanction than any statute or Code, and create rights which it is the duty of the judicial tribunals to protect and enforce, any law of any state to the contrary notwithstanding.

So that, if the questions arising under the fourteenth amendment were, or if they shall be, properly raised and presented, the rights of the petitioner are clear. If not raised or presented, either at the trial or in the Court of Appeals, then those rights would not appear to have been denied by the state courts, and the failure to demand these rights cannot have the effect of giving this court revisory jurisdiction by

means of a writ of habeas corpus. The authorities establish the following propositions, to wit:

1. That judgments of the state courts in criminal cases, of which they have jurisdiction, should not, in general, be reviewed by the federal courts through writs of habeas corpus, but that, where it is claimed in such cases that some right claimed under the Constitution of the United States has been denied, the proper remedy is by a writ of error. Markuson v. Boucher, 175 U. S. 184, 20 Sup. Ct. 76, 44 L. Ed. 124; Tinsley v. Anderson, 171 U. S. 101, 18 Sup. Ct. 805, 43 L. Ed. 91.

2. That the writ of habeas corpus cannot be made to perform the office of a writ of error. Under the latter the inquiry is addressed to errors merely, while in the former the question is whether the proceedings and judgment are nullities. United States v. Pridgeon, 153 U. S. 48, 14 Sup. Ct. 746, 38 L. Ed. 631; In re Schneider, 148 U. S. 166, 13 Sup. Ct. 572, 37 L. Ed. 406; In re Lane, 135 U. S. 443, 10 Sup. Ct. 760, 34 L. Ed. 219.

3. While, under section 753, application for a writ of habeas corpus may be made to the federal courts after a judgment in a criminal case, those courts should ordinarily limit the remedy by that writ to cases in which the judgment or sentence attacked is clearly void by reason of its having been rendered without constitutional power, or without jurisdiction, or in excess thereof. In re Frederich, 149 U. S. 70, 13 Sup. Ct. 793, 37 L. Ed. 653.

4. Though it is somewhat a matter of discretion, yet ordinarily a federal court, even in a case where it is otherwise allowable, will not interfere, by writ of habeas corpus, with a criminal case pending in a state court, in advance of a trial or final determination of the case by the state court. Cook v. Hart, 146 U. S. 184, 13 Sup. Ct. 40, 36 L. Ed. 934; Davis v. Burke, 179 U. S. 399, 21 Sup. Ct. 210, 45 L. Ed. 249. Exceptions to the general rule are found in cases like Davis v. Burke, 179 U. S. 399, 21 Sup. Ct. 210, 45 L. Ed. 249; Boske v. Comingore, 177 U. S. 466, 20 Sup. Ct. 701, 44 L. Ed. 846; Whitten v. Tomlinson, 160 U. S. 231, 16 Sup. Ct. 297, 40 L. Ed. 406; In re Neagle, 135 U. S. 1, 10 Sup. Ct. 658, 34 L. Ed. 55.

5. When the trial court of a state has power and jurisdiction under state laws to try a case for murder, and the prisoner, when convicted, has an appeal of which he avails himself, the federal court, if applied to pending the appeal for a writ of habeas corpus, on the ground that the proceedings were in violation of the Constitution of the United States, should decline to interfere. In re Duncan, 139 U. S. 449, 11 Sup. Ct. 573, 35 L. Ed. 219. This case alone would appear to be decisive of the one before me.

From every standpoint, therefore, it appears clear that this court should not at this stage attempt to interfere, and the application for a writ of habeas corpus is accordingly denied.

CRAWFORD et al. v. EIDMAN, Internal Revenue Collector.

(Circuit Court, S. D. New York. April 8, 1902.)

No. 3,919.

1. DAMAGES—COSTS IN FORMER PROCEEDINGS.
   A suit for the possession of certain real estate had been discontinued by a government officer, who had previously seized the property for violation of law, but who, without right, continued in possession after the discontinuance. *Held*, in an action for damages for thus wrongfully retaining possession, that the amount of costs in the former proceeding, incurred by the plaintiff in the latter case, formed no part of the damages which were recoverable.

2. PUBLIC OFFICERS—LIABILITY—WRONGFUL POSSESSION OF PRIVATE PROPERTY —DAMAGES.
   Where a government officer, who has seized property used for illicit purposes, retains possession of it without color of process after his right to such possession has ceased, he is liable to the owners of the property for the damages suffered by them through such wrongful possession, even though he acted in good faith.

3. SAME—EXEMPLARY DAMAGES—WANTON DISREGARD OF PRIVATE RIGHTS.
   Where a government officer injures a citizen by any official act, he is, in addition to his liability for actual damages, subject to exemplary or punitive damages, if he proceeds in malicious or wanton disregard of the citizen's rights.

At Law. Action for damages.

This action was brought by John G. Crawford and another against Ferdinand Eidman, Collector of Internal Revenue for the Third district of New York. The plaintiffs had purchased at a foreclosure sale a piece of property on which they held a purchase-money mortgage, and which had been seized previously by the defendant on discovering an illicit still on the premises. The defendant removed the still and its appurtenances, without disturbing an engine and boiler which had been placed in the building in order to furnish steam power for factory purposes; and, though the plaintiffs were entitled to possession under the judgment of foreclosure, the defendant continued to retain possession of the building, with internal revenue locks on the doors, on the ground that he might want to sell the engine and boiler as being connected with the illicit still. The plaintiffs made numerous attempts to induce him to surrender the building in its condition at that time, or to remove the engine and boiler and give up the building, or to sell the engine and boiler there and then surrender the building; but he would do nothing. The plaintiffs finally obtained an order from the Commissioner of Internal Revenue, directing the defendant to release the property to them, which order was not obeyed for more than two weeks after its receipt.

On the ground that the defendant had unlawfully prevented them from having the possession and use of their property, the plaintiffs brought this action.

Jacob Fromme and Isaac Fromme, for plaintiffs.

Charles D. Baker and Arthur M. King, Asst. U. S. Attys., for defendant.

WALLACE, Circuit Judge (charging jury). You already understand that this action is brought by the plaintiffs to recover damages for being kept from the possession of their premises, 324 West Twenty-

¶ 2. Torts of public officers, see note to Mayor, etc., of City of New York v. Workman, 14 C. C. A. 534.

Sixth street, during the time that intervened after they acquired right to the possession on the foreclosure sale, and until it was surrendered to them on the 30th day of August, following.

Now, it seems that the plaintiffs acquired title under the foreclosure sale on June 30th. Until that time they had no right to the possession of the premises. It seems that, shortly before, three weeks before, the government, having information that an illegal distillery was being carried on, entered the premises and made a seizure of the personal property found there. The plaintiffs had nothing to do with conducting the illegal distillery. They were entirely innocent. On the other hand, the defendant, representing the government, was perfectly justified in visiting the premises and in removing therefrom all the guilty property; that is to say, all the property which was being used in the conduct of this illicit business. The property was removed in April, the 11th day of April, except an engine and boiler. Now, it is conceded that this engine and boiler were a part of the real estate, that a suit had been commenced by the government to forfeit the real estate, and that, if that suit had proceeded to a decree, the boiler and engine would have been forfeited, as well as the land and building. It appears, also, that the plaintiffs, holding a mortgage upon the property, this being before the foreclosure sale had been consummated, intervened in that suit; and the government, doubtless being advised that they were entirely innocent, permitted its suit to be discontinued.

Now, it is said that the plaintiffs were compelled to pay the costs on the discontinuance of that suit. Very likely they were; but that is a matter with which this defendant has no concern whatever. In all probability, if the defendant had not been kindly disposed toward the plaintiffs, that suit might have been protracted for months, and would not have terminated until there had been a final decree; and in the meantime the property would have been in the possession of the government. But the government officers seemed to recognize that it was just that the suit should be discontinued, and it was discontinued on the 22d day of June. That was the end of that controversy, and the matter of the costs is of no relevancy.

Now, as I have said, on the 30th day of June the plaintiffs acquired a right to the possession of the property. On the 2d day of July, according to the testimony of one of the plaintiffs, he called upon the defendant to be allowed to take possession of the property that had been seized. It seems that, when the officers seized the personal property there, they put padlocks upon the basement door. The boiler and engine were situated in that basement. The basement, according to some of the testimony in the case, was the most desirable part of the building; and, as the building was designed for renting for factory purposes, the use of the machinery, including the engine and boiler, was important. They were located in the basement, and therefore it was that the plaintiffs, anxious to have possession of their property, and anxious to get a tenant into it, made application to the defendant to have the lock removed from the door, so they could have possession.

Here is where the trouble begins, because up to this time there was nothing of which any fair-minded man could reasonably complain. The situation of affairs at that time was this: The boiler and engine was

real estate, or it was not. If it was real estate, it was abandoned when the government abandoned and discontinued its suit for the condemnation of the real estate. If it was not real estate, it was personal property, and it was property which the government was entitled to seize; and then it was the duty of this defendant, and the officers of the government acting under him, within a reasonable time, to remove it from the premises, or, if they chose to keep it there, to keep it there without detriment to the premises. They did not do it. Negotiations ensued. The plaintiffs' lawyers, and the plaintiffs' lawyers' clerks, and the plaintiffs themselves, visited the internal revenue officers, and various interviews took place; and it seems that communications were passing to some extent between the defendant and the Commissioner of Internal Revenue at Washington. The result was that for two months, practically, from July 2d until August 30th, the plaintiffs were kept out of the possession of their property. The defendant may have acted in the best of good faith in doing this; but he must pay for it, if he did it without right. The government of the United States—and you can treat him as the government in this case—has no right to take possession of the real estate of an individual and preclude him from enjoying it, unless it does so under color of process which entitles it to be held by the government. There is nothing of the kind in this case. If the Commissioner of Internal Revenue himself, or the Secretary of the Treasury, assumed to do this without right, the plaintiffs are entitled to compensation; and the person who for the time being represented the government must pay for it. If he has acted honestly in the discharge of his duties, the law authorizes the court to give him a certificate of probable cause; and then the consequences do not fall upon him personally, but the recovery is paid by the government of the United States.

Now, this is about all there is of this case. From July 2d until August 30th the plaintiffs were kept, without right, from the enjoyment of their property; and the question for you to determine is, what verdict are they entitled to? What will compensate them for the loss they have sustained? Well, in the first place, they are entitled, without doubt, to recover the rental value of the premises during the time they were kept out of possession. They were not kept out of possession from the 30th of August until the 1st day of March, 1900; and I do not know of any rule upon which they can recover damages for being kept out of possession during that time. They did not rent the property. They did not rent it the next spring. I do not know why the government was at fault for that. That was the plaintiffs' misfortune. Undoubtedly, if they had had the property in May, they could have rented it more readily than they could in June, or than they could in August, when they got possession. But they did not get title until the 30th of June—the 1st of July, practically. The best season of the year for renting had already gone by. Now, they were kept out of occupation for about two months. The premises remained vacant a year and a half, or more than that. The plaintiffs are entitled to a verdict for the loss of occupation of the premises during the time they were deprived of possession by the government. They are not entitled to any damages upon the theory that they lost an opportunity of renting the premises.

Now, how much was the rental value of the premises during the time they were kept out of possession? The witnesses put it from $2,100 to $2,400 a year; and it seems that, when the plaintiffs did rent it, they rented it for $1,800.

Now, upon all this testimony, you are to determine what was the fair annual rental value of these premises, and allow them for the two months, practically two months, they were deprived of the use of the premises at that value.

Now, there is another issue. This was a wrongful act on the part of the defendant. I do not mean to say that it was an intentionally wrongful act, by any means; but it was an invasion of the rights of these plaintiffs, because, when they demanded possession of the property, it was the duty of the defendant to see to it that they had possession. But it is said here that there were circumstances of oppression, circumstances of wanton disregard of the rights of these plaintiffs by the defendant; and if you find that to be so, then the plaintiffs are entitled to what the law terms "exemplary damages." That is to say, it is in your discretion to award a sum of money as punishment to the defendant for his wanton disregard of the rights of the plaintiffs. And it is for you to say, if you come to the conclusion that the case is one for punitive damages, how much should be allowed to the plaintiffs on that account. But is there anything in the case which leads you to believe that there was any intention or purpose on the part of this defendant to wrong the plaintiffs? There is no doubt that there was some dilatoriness. There was enough dilatoriness to deserve condemnation. No Collector of Internal Revenue, and no other officer of the government, has the right to sit back in his chair, when he has taken possession of a citizen's property, and compel the citizen to run to him for six weeks or two months to find out what is going to be done. He is paid for the discharge of his duties to the citizen, as well as to the government; and it is his business to be active and alert, and to see that the citizens who fall under his jurisdiction are protected in their rights as far as they can be without jeopardy to the government; and it does not do for one officer to turn a citizen over to another, and for another to turn him over to another.

Now, it was entirely natural that the defendant in this case, not being learned in the law, should desire instruction as to his duties and his rights. He applied to the Commissioner of Internal Revenue. The Commissioner of Internal Revenue—I do not know whether he is a lawyer or not—could not decide this grave question without referring it to the Attorney of the United States for the Southern District of New York; and it seems to have taken that learned official several weeks or less to make up his mind, and in the meantime the plaintiffs were kept outside their premises and on the sidewalk.

Now, the question is whether the defendant acted in good faith; that is all. There is some delay which seems to be quite unexplained. On the 13th of August he got instructions from the Commissioner of Internal Revenue to release this property and surrender possession. Suppose he got the letter on the 15th of August; there were about two weeks in which he did nothing, waiting until he got ready, I suppose. Well, I do not suppose he intended to oppress the plaintiffs. I do not

suppose that for a moment. But I do think it was his duty to get up out of his chair, or, if he did not, to send some of his officials to these plaintiffs, and tell them that he had this letter, and that they were entitled to the possession of their property.

Now, gentlemen, I leave this case with you. You will not willingly reach the conviction that this defendant has been guilty of any malicious or wanton conduct. Nevertheless, the evidence is for your judgment. Unless you find he has, then your verdict for the plaintiff will be limited to the loss of rental value of the property during the time they were kept from its possession.

The jury then retired, and, returning, rendered a verdict in favor of the plaintiffs in the sum of $400.

Mr. Baker. I ask for a certificate of probable cause, and make the usual motion for a new trial, and to set aside the verdict as contrary to the evidence and as not warranted by the evidence, and for a stay of 60 days in which to prepare a bill of exceptions.

Certificate of probable cause granted, with 30 days' stay in which to make a bill of exceptions.

GRING v. CHESAPEAKE & DELAWARE CANAL CO.

(Circuit Court, D. Delaware. May 18, 1904.)

No. 232.

1. PRELIMINARY INJUNCTION—EX PARTE AFFIDAVITS.

It is a general though not universal rule that a preliminary injunction will not be granted on ex parte affidavits unless in a clear case. The rule admits of important exceptions including, among others, cases in which the function of the preliminary injunction is merely to maintain the status quo until final decree, where comparatively great injury may result from the withholding, and comparatively little can flow from the granting, of such injunction. In such cases the court regards with just discrimination the balance of convenience and hardship, and, in the absence of a final determination of right, aims so to resolve for the time being whatever doubt may exist as to do the most good and the least harm.

(Syllabus by the Court.)

In Equity.

Willard M. Harris and Harry P. Joslyn, for complainant.

Ward & Gray and George L. Crawford, for defendant.

BRADFORD, District Judge. This is a motion for a preliminary injunction on a bill brought by Charles Gring against the Chesapeake and Delaware Canal Company. The bill sets forth in substance that the defendant is a corporation created by special acts of assembly in Delaware, Maryland and Pennsylvania, and owns and controls a canal extending from Delaware Bay at Delaware City, Delaware, to the Chesapeake River at Chesapeake City, Maryland, which is open and navigable as a public highway free for the transportation of goods, commodities and products on payment of the tolls prescribed by law; that the complainant is the owner of certain steam tugs and other vessels and barges, and has for many years been engaged in the business of transporting lumber and other material between ports in North Carolina,

Virginia, Maryland and Pennsylvania by means of his vessels, and of towing barges and vessels with his steam tugs on Chesapeake Bay and river and Delaware Bay and river, and elsewhere, and particularly through the canal, and was and is entitled to use the same for navigation, towing and transportation of freight upon equal terms with other persons making a similar use of it, and without discrimination or undue obstruction or restraint; that during his use of the canal he has always conformed to the regulations of the defendant for the care, preservation, control and management of the canal and the safety of other vessels using it; that for a number of years last past the defendant has unwarrantably interfered with and delayed the progress of his vessels and barges through the canal and its locks, such interference and delay usually occurring on Sunday, while steamers, barges and vessels of other persons similarly navigating the canal have been allowed a free and unmolested passage through it; that the complainant's steam tugs with barges and vessels in tow on many occasions and on days other than Sunday have been unnecessarily and unreasonably delayed and hindered by the defendant in passing through the canal; that the defendant from 1895 to the present time has exacted from the complainant, in addition to the tolls paid by him for transportation through and navigation of the canal, in conformity with its charter and published toll rates, certain fixed pecuniary charges against his steam tugs by the trip or passage each way, whether towing loaded barges through the canal or returning with them light in thirty days, although such steam tugs do not carry and are not so constructed as to carry the commodities to which the toll rates are applicable; that such a charge or tax cannot be imposed upon the ground that the steam tugs are empty of cargo, for the reason that their tonnage capacity is occupied by the machinery, boilers and furniture necessary to enable them to engage in inland and coastwise towing; that such charge or tax is not imposed by the defendant upon all other persons owning tug boats engaged in the business of transporting lumber and other freight and towing the same through the canal; that the collection of the fixed charges or taxes per trip exacted from the complainant was enforced by preventing or threatening to prevent the passage of his tug boats with their tows through the canal until the same were paid or secured to the defendant; that for a number of years last past the defendant has imposed upon the complainant's tug boats, vessels and barges and collected from him as owner thereof greater rates of toll than those collected from other persons making a similar use of the canal; that during all that time he has been compelled by the defendant to pay a toll or tax for each of his steam tugs returning with light barges within thirty days from the time such steam tug passed through the canal with such barges loaded, although the defendant does not exact any charge for the barges towed back light by complainant's tug boats, the toll paid for the cargo when on board a barge insuring the free passage of the barge when returning light within thirty days; that the complainant's barges frequently have been delayed in unloading and reloading and have been unable to return through the canal within that period, and an entrance fee has been imposed upon them varying in amount as between different vessels; that he has been informed by the defendant that, if his barges

make five full trips in any one season, it will refund any charge or charges incurred by them in not returning light within thirty days; that these charges are onerous and injurious to the complainant's business; that the charges or toll against a tug boat while there is none against a light barge in tow, both returning within thirty days, is an unjust and wrongful discrimination in favor of the barge and gives an undue and unreasonable preference and advantage as against the complainant; that the regulation compelling his tug boats and barges to return light within thirty days or else suffer another charge or toll is, where his barges and vessels have paid the rate of toll prescribed for their cargoes, an unwarranted interference with the right of free navigation of the canal; that his steam tugs are duly enrolled and licensed under the laws of the United States for inland and coastwise towing and are properly inspected under the inspection laws of the United States; that their masters and engineers are duly licensed under the laws of the United States and qualified to command and operate them; that the defendant, nevertheless, compels the complainant to secure from it a permit for each of his steam tugs before using steam and towing through the canal, under an assumed right in that behalf; that the defendant arbitrarily reserves to itself the right, if such permit be granted, at any time to revoke the same and withdraw the privilege of using steam on the canal; that no such requirement is made with respect to vessels other than steam tugs engaged in through towing; that the right so claimed by the defendant is not warranted by its charter nor is it a rule for the good government of the canal or for the general convenience of vessels, but, on the contrary, annexes an onerous condition to the exercise by the complainant of the right, secured to him by virtue of the enrollment and license of his steam tugs, to the free and uncontrolled pursuit of the business of inland and coastwise towing and towing vessels engaged in interstate commerce; that the requirement by the defendant of such permit is not imposed on certain other steam tugs engaged in towing on the canal nor on other vessels, barges and steamers navigating it; that the complainant has been notified by the defendant that on and after a certain early day, his steam tugs will be permitted to tow only such vessels and barges as it may designate, included in a list of his boats to be furnished by him to the defendant, and, further, that after such day the defendant must control the canal towing, and, further, that the towing by the complainant of barges and vessels, whether owned by other parties or by him, is but an extension by the defendant of a privilege to him and not a right vested in him, and, further, that on and after such day all barges and vessels, other than those owned by him, towed to the canal by his steam tugs, will be taken in charge by a steam tug controlled by the defendant and towed through the canal at a certain towage rate or rate in addition to the tolls charged on the cargoes of such barges and vessels or on such barges and vessels as empty, and, further, that, if the complainant shall effect an entrance into the canal and tow on it barges other than his own, a towing rate will be imposed on him for each barge towed and the privilege extended to his tug boats of using steam on the canal will be revoked, compelling them as well as such barges, whether belonging to him or to others, to be towed through the canal by a steam tug or steam

tugs controlled by the defendant, thus enforcing payment of a towing charge by the complainant's steam tugs as well as by the barges under his control, in addition to the canal charge for the use of the canal; that the enforcement of such a regulation by the defendant materially affects the free navigation of the canal which ever since it was constructed in or about 1820 has been open to public use for vessels, sailing as well as steam, upon payment of duly established rates of toll on commodities; that the control of the canal towing by the defendant is foreign to its chartered purpose, which is to provide a navigable public highway free for the transmission of commodities on payment of prescribed rates of tolls thereon; that the rules, regulations and restrictions proposed or adopted by the defendant, as above mentioned are an effort on its part arbitrarily to prescribe the use of the canal to such steam vessels, tug boats and other vessels as it may choose; that such restrictions constitute an unlawful interference with the right of private property; that their object is to prevent the free use of steam tugs, including those of the complainant, in the business for which they are licensed under the laws of the United States; that the hindrance and delays to which the complainant has been subjected in the premises by the defendant operate to his prejudice and disadvantage and impose unreasonable restraints and burdens upon subjects of interstate commerce; and that the detentions, delays, interference, discrimination and regulations complained of, if continued, will seriously hinder the complainant in the management of his business and materially impair the value of his floating equipment, to his loss and damage in a large amount, to wit, $20,000. The bill in substance prays, among other things, that the defendant may be perpetually restrained from hindering, delaying or interfering with the passage through the canal, at any time, of the steam tugs, barges or vessels of the complainant or those chartered or managed by him, upon the payment or offer to pay the prescribed rate of tolls on cargo on board; or from charging, demanding or collecting any toll, tax or charge against the complainant or his tug boats, while engaged in aiding, towing or pushing vessels and barges through the canal; or from making any larger charge against the complainant and his tug boats, barges and other vessels for the transportation of freight through the canal than that charged against any other person or company for the transportation of similar freight through it, whether the difference in charge be made by drawback, rebate, or in any other manner; or from charging, demanding or collecting any toll from the complainant and his tug boats and from him and his barges and vessels when returning light through the canal after the expiration of thirty days from the time when tolls were levied and collected on cargoes on board such barges or vessels; or from interfering or preventing the use of steam on the complainant's tug boats in towing on or navigating the canal, or requiring him to secure a permit to use steam or to tow on the canal, or withdrawing or revoking any permit, privilege or right granted by the defendant, or exercised by the complainant with respect to the use of steam and towing on the canal; or from charging, demanding or collecting from the complainant or his steam tugs or barges any charge for towage or towing privilege, in addition to the regular tolls charged against him or his

barges or vessels for the transportation of freight through the canal, or hindering or delaying the passage through the canal of his steam tugs arriving at the locks, with such barges as may be in tow, until such towage charge heretofore or hereafter demanded is paid or secured, or on any pretext whatever, if the regular tolls for the transportation of the freight through the canal are paid or tendered by the complainant or his agents; or from requiring the complainant to give to the defendant a list of his boats; or from controlling the canal towing. The bill also prays for a preliminary injunction restraining the defendant from "any further hindrance or interference pending this cause." In this latter prayer it is not asked that the defendant until the further order of the court or during the pendency of the suit be restrained in like manner as set forth in the prayer for a permanent injunction. It well may be doubted whether a prayer against "any further hindrance or interference" is sufficiently definite or broad enough to include the several kinds of relief specifically mentioned in the former prayer. But, entirely aside from this consideration, there are sufficient reasons why, without the expression at this stage of the case of any opinion touching its merits, a preliminary injunction should be denied. The bill, answer and affidavits present grave questions of law and fact which can satisfactorily be solved only on final hearing after plenary proofs shall have been adduced. The affidavits are numerous, voluminous and conflicting on material points. It would be not only premature but improper to express an opinion as to the merits on the present showing, nor can the court perceive any reason why the preparation of the case for final hearing should entail much delay. It has been at issue since October 19, 1903. It is a general, though not universal, rule, repeatedly enforced in this district, that a preliminary injunction will not be granted on ex parte affidavits unless in a clear case. The rule admits of important exceptions. Those exceptions include, among others, cases in which the function of the preliminary injunction is merely to maintain the status quo until final decree, where comparatively great injury may result from the withholding, and comparatively little can flow from the granting, of such injunction. In such cases the court regards with just discrimination the balance of convenience and hardship, and, in the absence of a final determination of right, aims so to resolve for the time being whatever doubt may exist as to do the most good and the least harm. This case does not fall within the exceptions to the rule. It appears from the bill that some of the regulations complained of have been enforced for years. With respect to these a preliminary injunction would operate, not to preserve the status quo in any legitimate sense, but to change the method and system of the defendant, and possibly cause confusion in the conduct of its business. Nor is there any such exigency as to demand immediate relief by injunction. It does not appear, nor is it alleged, that the defendant is insolvent or has not abundant means with which to respond to the complainant in damages for any wrongs in the premises it may have inflicted or may until final decree inflict on him.

The application for a preliminary injunction must, therefore, be denied; the costs to abide the event of the cause.

McNULTY v. FEINGOLD et al.

(District Court, E. D. Pennsylvania. May 16, 1904.)

No. 1.

1. BANKRUPTCY—DISTRICT COURTS—JURISDICTION.
Bankr. Act July 1, 1898, c. 541, § 2, 30 Stat. 545 [U. S. Comp. St. 1901, p. 3420], conferring on the District Courts of the United States, in the several states, jurisdiction at law and in equity sufficient to enable them to exercise original jurisdiction in bankruptcy, and cause the assets of bankrupts to be collected, reduced to money, and distributed, and to determine controversies in relation thereto, applies to the powers of receivers or the marshal to take charge of property of bankrupts in the possession of third persons after the filing of the bankruptcy petition, and until it is dismissed or a trustee has qualified, when such possession is necessary for the preservation of the estate.

2. SAME—EQUITY JURISDICTION.
Under Bankr. Act, § 67e, as amended by Act Cong. Feb. 5, 1903, c. 487, 32 Stat. 800 [U. S. Comp. St. Supp. 1903, p. 417], providing that, for the purpose of recovery of property of a bankrupt fraudulently transferred, any court of bankruptcy, and any such court which would have had jurisdiction if bankruptcy had not intervened, shall have concurrent jurisdiction of a suit to recover the same, a trustee in bankruptcy was entitled to maintain a suit in equity for an accounting in the United States District Court against fraudulent transferees of certain accounts of the bankrupt, consisting of a large number of items, the actual value of which could only be ascertained by an accounting, though complainants knew the face value of the accounts.

Davison & Seymour, for complainants.
Furth & Singer, for respondents.

HOLLAND, District Judge. The trustee in this case alleges that on the 5th day of October, 1903, the bankrupts transferred to the respondents certain book accounts, amounting to $1,323.81. The day following, to wit, October 6th, a petition was filed in the District Court of the United States for the Eastern District of Pennsylvania praying that the said Louis Wiesen et al., copartners, trading as Wiesen Bros., and the Penn Waist & Suit Company, be adjudged bankrupts; and on the 27th day of October, 1903, the adjudication in bankruptcy was made. The bankrupts admitted in writing they were insolvent on the 5th day of October, 1903; and Elias Wiesen, one of the bankrupts, testified before the referee that he knew between the 15th and 20th days of September that the firm of Wiesen Bros. was in failing circumstances. It is further alleged that the transfer was made without consideration, and that no money was paid for the said transfer, nor were goods or merchandise given in exchange therefor. The bill asserts a want of adequate remedy at law, and prays that the respondents named in the bill be compelled to render an accounting of all sums of money collected by them as proceeds of the accounts assigned or transferred to them by Wiesen Bros. To this bill the respondents demur: (1) That the plaintiffs have an adequate remedy at law; (2) the amount of the accounts is known to the complainants and stated in the bill; (3) the trustee may ascertain all the information necessary in a suit at law to recover the

value of the book accounts, or by an examination of the respondents before the referee.

The parties here have been adjudged bankrupts, a trustee appointed, and suit is instituted by him against third parties for the value of property fraudulently conveyed to them by the bankrupt. It is therefore a controversy at law or in equity, within the provision of section 23 (Act July 1, 1898, c. 541, 30 Stat. 552 [U. S. Comp. St. 1901, p. 3431]), and not a proceeding in bankruptcy, wherein summary proceeding can be had. Bardes v. Hawarden Bank, 20 Sup. Ct. 1000, 44 L. Ed. 1175.

By section 2 of the original bankrupt act (30 Stat. 545 [U. S. Comp. St. 1901, p. 3420]), District Courts of the United States in the several states are invested, within their respective territorial limits, "with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in bankruptcy proceedings * * * to cause the assets of bankrupts to be collected, reduced to money and distributed, and determine controversies in relation thereto, except as herein otherwise provided." This applies to the powers of receivers or the marshal to take charge of property of bankrupts in the possession of third persons after the filing of the petition, and until it is dismissed or the trustee is qualified, when that is absolutely necessary for the preservation of the estate (Bryan v. Bernheimer, 21 Sup. Ct. 557, 45 L. Ed. 814), and would be a proceeding in bankruptcy, as distinguished from a controversy at law or in equity, within the true interpretation of section 23 (In re Rochford, 124 Fed. 182, 59 C. C. A. 388, 10 Am. Bankr. R. 608).

The transfer comes within the prohibition of section 67e of the bankruptcy act, forbidding the transfer of the property within four months prior to the filing of the petition, with intent and purpose on the part of the transferror to hinder, delay, and defraud creditors; and the trustee is authorized to recover and reclaim the same, by legal proceedings or otherwise, for the benefit of creditors. The subdivision of this section was amended by act of Congress of February 5, 1903, c. 487, 32 Stat. 800 [U. S. Comp. St. Supp. 1903, p. 417], as follows:

"For the purpose of such recovery, any court of bankruptcy, as hereinbefore defined, and any such court which would have had jurisdiction if bankruptcy had not intervened, shall have concurrent jurisdiction."

This amendment empowers the complainants to bring their suit in the District Court. The only question to be determined is whether it should be by bill or suit at common law. We have here the question of accounting together with that of fraud involved, both of which are subjects of equity jurisdiction. The face value of these accounts, of course, is known to the complainants; but their actual value is a different matter, and known only to the respondents, who have, no doubt, collected and reduced them to cash so far as this could be done, and their actual value is entirely within their knowledge.

Under the circumstances, we think that this bill should be sustained, upon the authority of the Supreme Court of Pennsylvania in the case of Bierbower's Appeal, 107 Pa. 14. It is there said:

"The fact that in such case an action of assumpsit might be brought against the principal defendant to recover back such excess will not oust the jurisdic-

tion in equity, where the parties and circumstances are such that the remedy afforded in equity is more appropriate and more convenient than at law."

The case of Conyngham's Appeal, 57 Pa. 474, was a case involving a pledge of collaterals, and, because the account between the parties involved a number of items, it was held properly cognizable in equity. The accounts here assigned are in fraud of creditors, consisting of a number of items, the actual value of which can only be ascertained by an accounting, and this can be accomplished more expeditiously and conveniently in this proceeding.

The demurrer is overruled.

GILSON v. MUTUAL RESERVE FUND LIFE ASS'N.

(Circuit Court, W. D. Kentucky. March 29, 1904.)

1. FEDERAL COURTS—JURISDICTION—AMOUNT IN CONTROVERSY.

Where plaintiff sued defendant insurance company to recover dues and assessments amounting to $1,527.25, together with interest, in all amounting to $2,346.50, and prayed judgment against defendant "for the sum of $2,346.50, being the amount of dues and assessments paid to date, with interest" to September 1, 1900, and for interest on the same from that date, and for costs, the fact that the interest was added to the principal did not change it to principal, so as to justify a removal of the cause to the federal courts on the ground that the parties were citizens of different states, and that the amount involved exceeded $2,000, exclusive of interest and costs.

Means & Farnsley, for plaintiff.
Pirtle, Trabue, Doolan & Cox, for defendants.

EVANS, District Judge. In 1885 the plaintiff received a certificate of membership (equivalent to a policy of life insurance) in the defendant company for $5,000. He continued to pay the dues and assessments up to some time in 1901, when, as he avers, the company increased the amount of such dues and assessments far beyond what was stipulated in the contract, and beyond his ability to pay, and thus forced him out of the association. The dues and assessments thus paid by him amounted to $1,527.25, and he has sued to recover that sum, with interest thereon from the respective dates of payment, the aggregate of which on September 1, 1903, was $2,346.50. The prayer of the petition is in this language:

"Wherefore plaintiff prays judgment against the defendant in the sum of $2,346.50, being the amount of dues and assessments paid to this date, with interest on the same to September 1, 1903, and for interest on the same from said date, for the costs herein expended, and for all proper and equitable relief."

The defendant, alleging itself to be a citizen of New York, and the plaintiff to be a citizen of Kentucky, removed the case into this court,

¶ 1. Jurisdiction of circuit courts as determined by amount in controversy, see notes to Auer v. Lombard, 19 C. C. A. 75; Tennent-Stribling Shoe Co. v. Roper, 36 C. C. A. 459.

See Removal of Causes, vol. 42, Cent. Dig. § 130.

and the plaintiff has moved to remand the same to the state court. By the judiciary act now in force, it was competent for the defendant, upon the ground alleged, to remove the case to this court, provided the amount in controversy, exclusive of interest and costs, exceeded the sum or value of $2,000. It is insisted by the defendant's counsel that while the amount of dues and assessments paid was only $1,527.25, and therefore did not exceed $2,000, yet that the prayer of the petition and the claim made by the plaintiff have converted the interest up to September 1, 1903, into principal; and he likens it to a case where there had been a judgment for the amount of principal and interest, such latter case, where suit was brought on the judgment, having been held to be removable if the amount of the judgment was more than $2,000. While, if there had been a judgment, the interest would be merged therein so as thereafter to make the whole debt principal, yet the court is clearly of opinion in the case now before it that the interest has not, by the mere frame of the plaintiff's petition, been transmuted into principal. The utmost that can be said of the petition is that it seeks to recover compound interest, but, in the opinion of the court, it is nevertheless interest, and nothing more, within the meaning of the judiciary act, and consequently it does not appear that the amount claimed in the petition of the plaintiff, exclusive of interest and costs, exceeds the sum of $2,000. Indeed, all except the dues and premiums is expressly claimed as interest, and expressly shown to be interest, and nothing else.

It results that the motion to remand the action to the state court must be, and it is, sustained.

MEMORANDUM DECISIONS.

AMERICAN BRIDGE CO. v. PEDEN. (Circuit Court of Appeals, Seventh Circuit. November 3, 1903.) No. 985. In Error to the Circuit Court of the United States for the Northern District of Illinois. Nathan E. Utt, for plaintiff in error. Simon Kruse, for defendant in error. No opinion. Judgment affirmed. See 120 Fed. 523.

AMERICAN SALES BOOK CO. et al. v. CARTER-CRUME CO. et al. (Circuit Court of Appeals, Second Circuit. April 25, 1904.) No. 193. Appeal from the Circuit Court of the United States for the Western District of New York. M. B. Phillipp, for appellants. Charles H. Duell, for appellees. Before WALLACE, LACOMBE, and TOWNSEND, Circuit Judges. Decree (125 Fed. 499) reversed in open court.

AMERICAN SPIRITS MFG. CO. v. EASTON et al. (Circuit Court of Appeals, Seventh Circuit. October 15, 1903.) No. 1,001. Appeal from the Cir-

cuit Court of the United States for the Northern District of Illinois. Levy Mayer, for appellant. John S. Stevens, for appellee. No opinion. Decree (120 Fed. 440) reversed, and cause remanded.

CAMP et al. v. PEACOCK, HUNT & WEST CO. et al. (Circuit Court of Appeals, Fifth Circuit. January 12, 1904.) No. 1,308. Appeal from the Circuit Court of the United States for the Southern District of Florida. For opinion below, see 128 Fed. 1005. J. N. Stripling, for appellants. C. M. Cooper and J. C. Cooper, for appellees. Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PER CURIAM. A majority of the court is of the opinion that there is no reversible error in the record. Affirmed.

DOWAGIAC MFG. CO. v. MINNESOTA MOLINE PLOW CO. et al. (Circuit Court of Appeals, Eighth Circuit. May 13, 1904.) No. 2,033. Appeal from the Circuit Court of the United States for the District of Minnesota. Fred L. Chappell, for appellant. Ephraim Banning and Thomas A. Banning, for appellees. Affirmed, with costs, without an opinion. For opinion below, see 124 Fed. 736.

EMPIRE STATE-IDAHO MINING & DEVELOPING CO. v. BUNKER HILL & SULLIVAN MINING & CONCENTRATING CO. (two cases). (Circuit Court of Appeals, Ninth Circuit. May 4, 1904.) Nos. 993, 994. Appeal from the Circuit Court of the United States for the District of Idaho, Northern Division. W. B. Heyburn, for appellant. Curtis H. Lindley, Henry Eickhoff, John R. McBride, and Myron A. Folsom, for appellee. Dismissed pursuant to stipulation. See 106 Fed. 471, and 108 Fed. 189.

HOADLEY v. CHASE. (Circuit Court of Appeals, Seventh Circuit. October 21, 1903.) No. 994. Appeal from the Circuit Court of the United States for the District of Indiana. Wm. A. Ketcham and Joseph Wilby, for appellant. Addison C. Harris and D. W. Sims, for appellee. No opinion. Decree (126 Fed. 818) affirmed.

HORAN v. HUGHES. (Circuit Court of Appeals, Second Circuit. March 2, 1904.) No. 141. Appeal from the District Court of the United States for the Southern District of New York. LeRoy S. Gove, for appellant. Peter S. Carter, for appellee. Before WALLACE, LACOMBE, and TOWNSEND, Circuit Judges.

PER CURIAM. Decree of District Court (129 Fed. 248) affirmed, with interest and costs.

KALAMAZOO CORSET CO. v. SIMON. (Circuit Court of Appeals, Seventh Circuit. October 15, 1903.) No. 1,008. In Error to the Circuit Court of the United States for the Eastern District of Wisconsin. Paul D. Durant, for plaintiff in error. Edward P. Vilas, for defendant in error. No opinion. Judgment (129 Fed. 144) affirmed.

LEHIGH VALLEY TRACTION CO. v. HALE & KILBURN MFG. CO. (Circuit Court of Appeals, Third Circuit. May 19, 1904.) Appeal from the

Circuit Court of the United States for the Eastern District of Pennsylvania. Geo. H. Knight, for appellant. S. O. Edmonds, for appellee. Dismissed by consent of counsel, without costs. See 126 Fed. 653.

LEWIS v. ÆTNA INS. CO. (Circuit Court of Appeals, Second Circuit. April 19, 1904.) No. 153. Appeal from the District Court of the United States for the Southern District of New York. This is an appeal from a final decree entered August 20, 1903, in favor of the libelant, for $1,337.71, being the amount found due upon a policy of insurance issued by the respondent to insure the owners of the lighter Stamford. The circumstances attending the stranding of the lighter have been considered by this court in the action brought by this libelant against the tug Quigley and the Barber Asphalt Company. The facts will be found in the opinion filed by the District Court in that case. 123 Fed. 161. The opinion in the case at bar is reported in 123 Fed. 157. John F. Foley, for appellant. Herbert Green, for appellee. Before LACOMBE, TOWNSEND, and COXE, Circuit Judges.

PER CURIAM. The opinion of the District Judge so clearly and satisfactorily considers and decides all the important questions in issue that little can be added that is not repetitional. There is no controversy upon the facts, and, as we agree with the conclusions of law found by the District Judge, we conclude to affirm the decree upon his opinion, with interest and costs.

In re MILES et al. (Circuit Court of Appeals, Eighth Circuit. May 3, 1904.) No. 30. F. L. Hamer, for petitioners. On petition for review. Dismissed, with costs, for want of prosecution.

THE NEW ENGLAND. (Circuit Court of Appeals, First Circuit. April 14, 1904.) No. 488. Appeal from the District Court of the United States for the District of Massachusetts. Thomas J. Gargan, Patrick M. Keating, and Sewall C. Brackett, for appellant. Walter C. Cogswell, for appellee. Before COLT and PUTNAM, Circuit Judges, and ALDRICH, District Judge.

PER CURIAM. Appeal dismissed, for failure of the appellant to cause the record to be printed, as provided by rule 23 (90 Fed. lvii, 31 C. C. A. lvii), with costs for the appellee. See 110 Fed. 415.

In re NEWMAN. (Circuit Court of Appeals, First Circuit. April 26, 1904.) No. 518. Adoniram J. Cushing, for petitioner. Henry C. Cram, for respondents. Before COLT and PUTNAM, Circuit Judges.

PER CURIAM. Petition dismissed, without costs to either party.

NORWICH & N. Y. TRANSP. CO. v. INSURANCE CO. OF NORTH AMERICA. SAME v. SECURITY INS. CO. OF NEW HAVEN. SAME v. FIREMAN'S FUND INS. CO. OF SAN FRANCISCO. SAME v. CHUBB et al. (Circuit Court of Appeals, Second Circuit. April 14, 1904.) Nos. 134–137. Appeals from the District Court of the United States for the Southern District of New York. These causes come here upon appeals from decrees awarding certain proportions of losses of particular and general average underpolicies of marine insurance upon libelant's steamer City of Worcester, which struck on Cormorant Rock, outside New London Harbor, tearing out a part of her forward bottom, and was subsequently stranded by her master near Green's Harbor, not far from New London. The opinion of the District Court

is reported in 118 Fed. 307. Lawrence Kneeland, for appellants. Wilhelmus Mynderse, for appellees. Before WALLACE, LACOMBE, and COXE, Circuit Judges.

PER CURIAM. The opinion of the District Judge most thoroughly and carefully discusses the facts and the single question of law which arises thereon, and, since we fully concur in his findings, reasoning and conclusion, it seems unnecessary to write any further opinion. The decrees are affirmed, with interest and costs.

PHILLIPS et al. v. HEAD. (Circuit Court of Appeals, Eighth Circuit. April 2, 1904.) No. 2,037. In Error to the Circuit Court of the United States for the Western District of Arkansas. W. H. Arnold, Thomas C. McRae, and W. V. Tompkins, for plaintiffs in error. Oscar D. Scott and James D. Head, for defendant in error. Dismissed, with costs, pursuant to the stipulation of the parties. See 114 Fed. 489.

TAYLOR et al. v. SOUTHERN PAC. CO. et al. (Circuit Court of Appeals, Sixth Circuit. October 6, 1903.) No. 1,216. Appeal from the Circuit Court of the United States for the Western District of Kentucky. J. B. Foraker, Edward Lauterbach, Eugene Treadwell, and Augustus E. Willson, for appellants. Humphrey, Burnett & Humphrey, Lawrence Maxwell, Jr., and Maxwell Evarts, for appellees. Dismissed by agreement. See 122 Fed. 147.

THOMAS, Collector, v. HEMPSTEAD. (Circuit Court of Appeals, Third Circuit. March 8, 1904.) No. 13. Appeal from the Circuit Court of the United States for the Eastern District of Pennsylvania.

PER CURIAM. This cause came on to be heard on the transcript of record from the Circuit Court of the United States for the Eastern District of Pennsylvania. On motion of counsel for appellant, it is now here ordered, adjudged, and decreed by this court that the appeal from the said Circuit Court in this cause be, and the same is hereby, dismissed. See 122 Fed. 752.

TONOPAH & S. L. MIN. CO. v. TONOPAH MIN. CO. OF NEVADA. (Circuit Court of Appeals, Ninth Circuit. May 16, 1904.) Nos. 1,075–1077. Appeal from the Circuit Court of the United States for the District of Nevada. Ket Pittman & Dickson and Ellis & Ellis, for appellant. J. C. Campbell, K. M. Jackson, W. H. Metson, and Campbell, Metson & Campbell, for appellee. Motion to dismiss argued by J. C. Campbell, counsel for the appellee, no one appearing for the appellant, and submitted. Motion granted, and appeal dismissed, with costs. See 125 Fed. 389, 400, 408.

END OF CASES IN VOL. 129.