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

MARCH — APRIL, 1920

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(262 FED.)

JUDGES

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

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Hon. JULIAN W. MACK, Circuit Judge.....Chicago, Ill.
Hon. SAMUEL ALSCHULER, Circuit Judge .....Chicago, Ill.

[1] Appointed April 23, 1920. [2] Died March 14, 1920. [3] Appointed February 18, 1920.

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COURT OF APPEALS OF DISTRICT OF COLUMBIA

Hon. CONSTANTINE J. SMYTH, Chief Justice.....Washington, D. C.
Hon. CHARLES H. ROBB, Associate Justice.....Washington, D. C.
Hon. JOSIAH A. VAN ORSDEL, Associate Justice.....Washington, D. C.

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CASES REPORTED

CASES

ARGUED AND DETERMINED

IN THE

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

THE DUQUESNE.

(Circuit Court of Appeals, Third Circuit. January 8, 1920.)

No. 2500.

1. COLLISION ⊂⊃98—NOT NECESSARY TO SOUND WHISTLE BEFORE ROUNDING BEND, WHERE STEAMER IS IN VIEW.

   Rule 6 of the supervising inspectors, promulgated under Rev. St. § 4412, requiring steamers rounding a short bend or point, which would prevent an approaching steamer being seen at 600 yards, to sound a whistle, was not violated by failing to whistle, where the bend was sufficiently long and flat to permit the approaching steamer to keep the other in sight continuously for at least a mile.

2. COLLISION ⊂⊃98—GUARD AND FORECASTLE LIGHTS NOT A SUBSTITUTE FOR COLORED STACK LIGHTS.

   In determining the responsibility for a collision between steamers, guard and forecastle white lights, customarily used, but not required by law, cannot be considered as a substitute for, or an excuse for not using, the colored stack lights required by rule 6 of Rev. St. § 4233 (Comp. St. § 7948.)

3. COLLISION ⊂⊃104—MANNER OF REBUTTING PRESUMPTION THAT FAILURE TO SHOW COLORED STACK LIGHTS CAUSED ACCIDENT.

   A steamer, which did not show colored stack lights at the time of a collision, as required by rule 6 of Rev. St. § 4233 (Comp. St. § 7948), can escape the presumption of fault only by showing that the failure to obey the rule positively could not have contributed to the collision.

4. COLLISION ⊂⊃105—FAILURE TO SHOW COLORED STACK LIGHTS AS CONTRIBUTING CAUSE.

   Evidence that lights on a steamer's tow were doubtless concealed by a river fog, that its guard lights were not so high as its stack lights, etc., *held* to establish that the failure to show the colored stack lights as required by rule 6 of Rev. St. § 4233 (Comp. St. § 7948), probably contributed to the collision.

5. COLLISION ⊂⊃ 105—EVIDENCE ESTABLISHING FAILURE TO SHOW COLORED STACK LIGHTS.

   In a collision case involving two steamers with tows, conflicting evidence, including an admission by a member of the libeled steamer's crew that one of her stack lights was not burning soon after the collision, and

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testimony that both stack lights were on the same electric circuit, etc., *held* to establish that the libeled steamer's colored stack lights were not burning at the time of the collision, as required by rule 6 of Rev. St. § 4233 (Comp. St. § 7948).

Appeal from the District Court of the United States for the Western District of Pennsylvania; Charles P. Orr, Judge.

Libel by the Diamond Coal & Coke Company against the Steamboat Duquesne; the Carnegie Steel Company, claimant. From a decree dismissing the libel, the libellant appeals. Reversed, with directions.

Lowrie C. Barton, of Pittsburgh, Pa., for appellant.

Reed, Smith, Shaw & Beal and John G. Frazer, all of Pittsburgh, Pa., for appellee.

Before BUFFINGTON and WOOLLEY, Circuit Judges, and MORRIS, District Judge.

WOOLLEY, Circuit Judge. On the night of October 23, 1917, the Steamboat "Duquesne" was bound down the Monongahela River with a spike tow of seven heavily laden steel barges. These barges were placed ahead of the steamboat and were arranged in three tiers of two barges each, with the remaining barge in front. The Steamboat "Monitor" with a tow of seven empty flats ahead was bound up stream. The night was dark. Some rain had fallen and a rain fog hung on the water. The river was about a thousand feet wide. The channel was about midway the river and parallel with the two shores. Both steamboats with their tows held courses in or near the channel.

The "Duquesne" in descending the river had passed a bend and had straightened out her course. When the tows of the two steamboats were from 200 to 500 yards apart, the "Monitor" sighted the starboard light on the forward barge of the "Duquesne's" tow. Being the ascending steamer with the right under the rule (Pilot Rules, August, 1911) of selecting the passing manœuvre, the "Monitor" promptly gave one blast of her whistle, indicating her purpose to pass port to port, to which the "Duquesne" responded by an assenting signal.

Both steamers moved their tows to starboard, but before the manœuvre had been completed both captains discovered that collision was imminent. Thereupon, both reversed their engines with the result that the tow of the "Monitor" cleared the tow of the "Duquesne," but the forward barge of the "Duquesne's" tow rammed the "Monitor," causing her to sink and to sustain the damages for which this libel was filed.

The District Court, finding no negligence on the part of the "Duquesne," dismissed the libel. The libellant took this appeal.

The record discloses no pertinent question of law. The issue is solely one of fact and raises the one question: Which steamer by its negligence caused the collision?

The evidence is quite sufficient to prove that the "Monitor" had all lights set and brightly burning. This evidence is reenforced by the admission of the captain of the "Duquesne" that he saw the "Monitor" a mile or more away and kept her in sight. It is also proved that

the "Monitor" was not slow in sighting the "Duquesne's" tow, and that immediately upon observing its lights, she gave a passing signal; and that, considered with reference to the proximity of the two tows, their relative positions, and the brief time at her disposal, the "Monitor" did not unwisely select the signal or negligently carry out the manœuvre.

Thus acquitting the "Monitor" of negligence, we turn to the testimony on which negligence is charged to the "Duquesne." This charge is made upon several grounds:

(1) In violating Rule VI of the supervising inspectors, promulgated under authority of Section 4412 of the Revised Statutes, which requires a steamer navigating a river at a short bend or point, where from any cause a steamer approaching in the opposite direction cannot be seen at a distance of 600 yards, to give a signal of one long sound of the whistle as a notice to any steamer that may be approaching on the other side, and within half a mile of such bend or point.

(2) In violating the Pilot Rules of August, 1911, with respect to tow lights, which requires, when a barge is towed by a steamer ahead, that it shall have a green light on the starboard bow and a red light on the port bow.

(3) In violating the rule respecting steamer lights, presently to be mentioned.

[1] We dispose of the first charge of negligence adversely to the libellant, on the ground that the bend or point in the river which the "Duquesne" was passing was not such as the rule contemplates. The bend was not short at all. It was sufficiently long and flat to enable the "Duquesne" to pick up the "Monitor" and keep her continuously in sight for a mile or more. Similarly, we dispose of the second charge of negligence on a finding that both lights on the tow of the "Duquesne" were properly set and burning.

The question of negligence resolves itself into this: Were the lights on the "Duquesne" itself burning? Of these lights there were two kinds: The guard and forecastle white lights customarily used but not required by law, and the colored stack lights required by Rule 6 of Section 4233 Revised Statutes (Comp. St. § 7948). This rule provides that:

"River steamers navigating waters flowing into the Gulf of Mexico, and their tributaries, shall carry the following lights, namely: One red light on the outboard side of the port smokepipe, and one green light on the outboard side of the starboard smokepipe. Such lights shall show both forward and abeam on their respective sides."

[2, 3] All the lights with which we are now concerned were incandescent electric lights of ordinary candle power. There is much conflict in the testimony as to whether the guard lights and forecastle lights of the "Duquesne" were burning just prior to the collision, from which we find that the forecastle lights were not burning, though at least five of the ten guard lights (two on one side and three on the other) were burning. But as these lights are not required by the rules and laws of navigation (though helpful, perhaps,

in disclosing a craft on which they are burning), they cannot be regarded as substitutes for lawful lights; neither can the fact that some of them were burning exonerate the steamboat from negligence in failing to have burning the lights required by law. Therefore, we regard the issue whether the guard and forecastle lights on the "Duquesne" were burning as of no consequence if it be found that her stack lights were not burning. If her stack lights were out, then the "Duquesne" committed a positive breach of a statutory rule of navigation, promulgated to prevent just such collisions as this one. To escape the presumption of fault arising upon such a breach, she was required, under familiar principles, to show, not that her failure to obey the rule probably did not contribute to the disaster, but positively that it could not have done so. The Pennsylvania, 86 U. S. (19 Wall.) 125, 136, 22 L. Ed. 148.

[4] The lights of the "Duquesne's" tow were low upon the water and were, doubtless, long concealed by the river fog from the view of the captain of the "Monitor." The guard lights of the "Duquesne" were higher but not so high as the stack lights. Had the stack lights been burning, they probably could have been seen above the fog by the "Monitor" in time to have prevented the collision. This inference may fairly be drawn from the fact that the captain of the "Duquesne" saw the lights of the "Monitor" above the fog for at least a mile. Therefore, as we regard this case, it turns at the last on the issue of the "Duquesne's" stack lights.

[5] On this issue it appears that no one on the "Monitor" saw the stack lights of the "Duquesne" before the collision. Six witnesses, officers and deck hands of the "Monitor," testified positively that immediately after the collision and for a short time following the port stack light of the "Duquesne" was not burning. It is a permissible inference, based on testimony that the two lights were on the same circuit, that if the port stack light was out, the starboard stack light also was out. Against this testimony one witness, the captain of the "Duquesne," testified that he observed her stack lights burning a mile and a half above the point of collision, and three witnesses aboard the "Duquesne" testified that they saw the stack lights burning shortly after the collision. None testified that the lights were burning at the time of collision. If this were all the testimony, it would be another instance of the habit of opposing witnesses to swear by their ship and we would have difficulty in deciding where lay the truth. But in this case there was a circumstance which lends force to the testimony of some of the witnesses and justifies the rejection of the testimony of others.

Immediately after the "Monitor" had sunk and her officers and crew had crawled into the pilot house, which remained above the water, the "Duquesne" moved down to within speaking distance. In response to a request by the men for coal and clothes, the captain of the "Duquesne" sent Anderson, the watch of the "Duquesne," over to the "Monitor" in a yawl. While there, the captain of the "Monitor" called Anderson's attention to the fact that there were no stack lights on the "Duquesne." There followed conversation between the

two about the absence of these lights. This conversation was within the hearing of five witnesses whose attention was attracted by it and whose gaze was thereby directed toward the "Duquesne's" stacks. It was this conversation which aroused the attention of these witnesses and caused them carefully to look for lights and which fixed in their minds the recollection that, on looking, they saw none.

Contrary to usual experience in such cases, Anderson, when called to testify for the "Duquesne," admitted that the captain of the "Monitor" had called his attention to the absence of stack lights on the "Duquesne," and testified positively that the red stack light was not burning. Being on the port side, he could not testify about the green stack light because the stacks obstructed his view. After Anderson returned to the "Duquesne," her port stack light came on.

On this testimony, very briefly recited, we think the issue of negligence in failing to keep the stack lights burning as required by law, must be resolved against the respondent. As the respondent has not sustained the burden of showing that this breach of statutory duty could not have been the cause of the collision, the presumption, arising from the breach, that the collision was due to this fault, remains. The Pennsylvania, 86 U. S. (19 Wall.) 125, 136, 22 L. Ed. 148; The Teaser, 246 Fed. 219, 222, 158 C. C. A. 379 (C. C. A. 3d).

The decree below is, therefore, reversed with the direction that the action proceed in harmony with this opinion.

THE DUQUESNE.

MARTIN v. CARNEGIE STEEL CO.

(Circuit Court of Appeals, Third Circuit. January 8, 1920.)

No. 2501.

Appeal from the District Court of the United States for the Western District of Pennsylvania; Charles P. Orr, Judge.

Libel by Emma L. Martin against the Carnegie Steel Company, owner of the Steamboat Duquesne. From a decree dismissing the libel, libellant appeals. Reversed, with directions.

Lowrie C. Barton, of Pittsburgh, Pa., for appellant.

Reed, Smith, Shaw & Beal, and John G. Frazer, all of Pittsburgh, Pa., for appellee.

Before BUFFINGTON and WOOLLEY, Circuit Judges, and MORRIS, District Judge.

WOOLLEY, Circuit Judge. Charles Martin, the engineer of the "Monitor," on watch at the time, lost his life in the collision between the "Monitor" and "Duquesne." His widow, Emma L. Martin, filed this libel in personam against Carnegie Steel Company, owner of the Steamboat "Duquesne," to recover damages for his death, charging negligence of that company's servants in causing the collision. The District Court, finding that the collision was not due to their negligence, dismissed the libel. Thereupon, the libellant took this appeal.

The assignments of error are directed to the decree of dismissal and to the finding on which it was based. As we have reversed the decree on a similar

finding in the companion case of Diamond Coal & Coke Co. v. Steamboat "Duquesne," Carnegie Steel Co., 262 Fed. 1, — C. C. A. —, arising out of the same collision, we must reverse this decree for the same reasons.

At the argument on appeal, the appellee raised a question as to the measure of damages under Pennsylvania statutes. As the District Court did not reach the matter of damages, and, accordingly, made no ruling on the question, we wish to make it clear that the only issue on which we now pass in disposing of this appeal is the one of negligence tried by the District Court and determined by its decree.

The decree below is reversed with the direction to proceed in accordance with this opinion.

DYE v. UNITED STATES.

(Circuit Court of Appeals, Fourth Circuit. October 14, 1919.)

No. 1711.

1. CARRIERS ⟸38—INDICTMENT FOR DISCRIMINATION NEED NOT DESCRIBE DEVICE USED.

   In an indictment for violation of the provision of Hepburn Act (Comp. St. § 8597), making it unlawful to grant any rebate or concession whereby, "by any device whatever," any advantage is given or discrimination is practiced in favor of a shipper, it is not necessary to describe the device used.

2. CARRIERS ⟸38—EVIDENCE SUFFICIENT TO SUSTAIN CONVICTION FOR DISCRIMINATION, IN VIOLATION OF INTERSTATE COMMERCE ACT.

   Evidence *held* to sustain a conviction of defendant, who as agent for a railroad company was in charge of distribution of cars between coal mines, for discriminating in favor of one mine, although it also showed that the discrimination was primarily for his own personal profit, and was without the request or knowledge of the mine owner.

3. CRIMINAL LAW ⟸1173(4)—QUALIFICATION OF REQUESTED INSTRUCTION HARMLESS.

   Qualification of an instruction, requested by defendant, *held* not prejudicial error, in view of the evidence.

In Error to the District Court of the United States for the Southern District of West Virginia, at Charleston; Benjamin F. Keller, Judge.

Criminal prosecution by the United States against I. K. Dye. Judgment of conviction, and defendant brings error. Affirmed.

H. G. Kump, of Elkins, W. Va. (Conley & Johnson and Lilly & Lilly, all of Charleston, W. Va., on the brief), for plaintiff in error

J. Stanley Payne, Sp. Asst. U. S. Atty., of Washington, D. C. (Lon H. Kelly, U. S. Atty., of Gassaway, W. Va., on the brief), for the United States.

Before KNAPP and WOODS, Circuit Judges, and WADDILL, District Judge.

WOODS, Circuit Judge. The defendant was convicted on the first and fifth counts of an indictment charging violation of the following provision of the Elkins Act, as amended by the Hepburn Act (Comp. St. § 8597):

"* * * And it shall be unlawful for any person, persons, or corporation to offer, grant, or give, or to solicit, accept, or receive any rebate, concession, or discrimination in respect to the transportation of any property in interstate or

foreign commerce by any common carrier subject to said act to regulate commerce and the acts amendatory thereof whereby any such property shall by any device whatever be transported at a less rate than that named in the tariffs published and filed by such carrier, as is required by said act to regulate commerce and the acts amendatory thereof, or whereby any other advantage is given or discrimination is practiced. Every person or corporation, whether carrier or shipper, who shall knowingly offer, grant, or give, or solicit, accept, or receive any such rebates, concession, or discrimination shall be deemed guilty of a misdemeanor." 32 Stat. 847; 34 Stat. 584.

On the line of the Coal & Coke Railway Company there are a number of West Virginia coal mines dependent on that company for the transportation of their product to customers in West Virginia and other states. In 1917 there was a car shortage. The Interstate Commerce Commission made a rule for the equitable pro rata distribution of available cars among the mines according to their output.

The railway company made a rating of the mines, showing how many cars each was entitled to receive according to this rule, without discrimination against or in favor of any mine or shipper or consignee. Governed by this rating, an official or employé of the railway made a daily distribution of the available cars. Cars sent to the mines to be loaded with coal for railroad fuel were not charged against the mines on their allotment, but the remaining cars to be used for commercial coal—coal sold to the trade—were allotted, and notice was given to each mine of the per centum of the cars called for by its rating that could be furnished. Thus the number of cars available to each mine for commercial coal was ascertained. Since the price of commercial coal was higher than fuel coal, it was to the advantage of each mine to get as many cars for commercial coal as possible.

The charge of the first count of the indictment is that the defendant was an agent and employé of the Coal & Coke Railway Company and had charge of and supervision over the allotment and distribution of cars to the several mines served by the railway company according to their rating; that on April 18, 1917, when the Dorfee mine was entitled to receive only 5 cars, 70 per cent. of its rating, for commercial coal, the defendant by means of a device, knowingly allotted, distributed, and placed at the Dorfee mine 10 cars which were to be loaded with commercial coal, and which were used for the shipment of commercial coal; that on the same day the other mines mentioned in the indictment standing on the same footing were allotted and received only 70 per cent. of their rating; that this transaction of the defendant was an unlawful discrimination.

The fifth count of the indictment makes a similar charge of discrimination in favor of the Turner mine and against other mines mentioned.

There was no merit in the motion to quash the indictment. The allegation is directly made that the mines discriminated against asked for all the cars for commercial coal indicated by their rating and were furnished only 70 per cent., while the Dorfee mine was furnished much more than the number called for by the rating, and it necessarily follows that this was on its face a substantial discrimination.

[1] It was not necessary to describe the device by which the discrimination was effected. In denouncing discrimination "by any de-

vice" the statute does not mean that a device is necessary to the offense, but that if any device is used the courts are to look through it to the real nature of the transaction. Armour Packing Co. v. United States, 209 U. S. 56, 85, 28 Sup. Ct. 428, 52 L. Ed. 681. For the same reason there was no abuse of discretion in refusing the motion for a bill of particulars as to the nature of the device. Besides, the letters of the defendant and other evidence show that the defendant could not have failed to know the transactions to which the indictment related.

The position that the defendant was tried without having pleaded to the indictment is based on a mistake of fact. The record shows that the defendant did formally enter his plea of not guilty. He then moved to be allowed to withdraw his plea of not guilty and demand a bill of particulars. The motion was refused in its entirety, and hence the plea stood as originally made.

The errors assigned in the charge and in the admission and rejection of testimony are to be considered in the light of the amendment of 1919 of section 269 of Judicial Code (Comp. St. Ann. Supp. 1919, § 1246):

> "On the hearing of any appeal, certiorari, writ of error, or motion for a new trial, in any case, civil or criminal, the court shall give judgment after an examination of the entire record before the court, without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties."

[2] The facts alleged in counts 1 and 5 of the indictment were proved beyond all controversy. But by a motion for a directed verdict of acquittal the defendant asked the trial court to hold that these facts did not constitute an unlawful discrimination as charged in favor of the Dorfee mine and against Buchanon River Coal & Coke Company and other mining companies mentioned, because the government proved additional facts showing that Dye himself, and not the Dorfee mine, got the benefit of the unequal distribution of the cars. These additional facts were that the Dorfee mine in good faith received and loaded the cars as fuel cars in fulfillment of a contract to sell Dye himself fuel coal, and by his direction consigned them to the Pennsylvania Railroad Company; that at Elkins Dye had the cars reconsigned to General Chemical Company at Marcus Hook, Pa., to which he had sold the coal as commercial coal at a price about $1.10 a ton above the price paid for it as fuel coal to the Dorfee mine. The argument is that the discrimination was therefore in favor of Dye himself and not the Dorfee mine against other mines mentioned.

The fallacy seems evident. Taking the cars from the supply available for distribution among the mines for commercial coal diminished the allotment of the Buchanon Company and other mining companies to their disadvantage. It is true that Dye received the main benefit of this wrong, since he sold the coal as commercial coal when he had by deceit bought it at a lower price as fuel coal. But the Dorfee mine also received benefit from the wrong, though unwittingly, for it was enabled to get cars and keep its mines in operation, and sell and ship the coal for which the cars were used, presumably at a profit, although sold at

the price of fuel coal. Dye's appropriation of the chief benefit supplied the motive. His pretense that the cars were for fuel coal, and his written denial to a complaining shipper that such transactions had taken place, made evident his knowledge that he was violating the law. Surely the defendant could not be relieved of the guilt of this discrimination in favor of the Dorfee mine, on the ground of variance between the charge and the evidence, by proof that he clandestinely appropriated to himself the main profit of the discrimination. On the contrary, the inference that he discriminated for his own benefit necessarily implied that there had been discrimination in favor of the Dorfee mine by sending it an excess of cars as a condition precedent to his reaping the principal fruit of the discrimination.

But in addition to that proof of discrimination against other mines or shippers as charged in the indictment would make out the offense, even if the preference to the Dorfee mine was used only as a means of carrying out the unlawful scheme against the other mines without actual benefit to the Dorfee mine. The purpose of Congress was to cut up by the roots every form of discrimination, favoritism, and inequality. Louisville & Nashville R. R. Co. v. Mottley, 219 U. S. 467, 478, 31 Sup. Ct. 265, 55 L. Ed. 297, 34 L. R. A. (N. S.) 671; New Haven R. R. Co. v. Interstate Commerce Commission, 200 U. S. 361, 391, 26 Sup. Ct. 272, 50 L. Ed. 515; Armour Packing Co. v. United States, 209 U. S. 56, 72, 28 Sup. Ct. 428, 52 L. Ed. 681; Louisville & Nashville R. R. Co. v. Mottley, 219 U. S. 487, 496, 31 Sup. Ct. 265, 55 L. Ed. 297, 34 L. R. A. (N. S.) 671; United States v. Union Stock Yard, 226 U. S. 286, 307, 33 Sup. Ct. 83, 57 L. Ed. 226.

It was further contended in support of the motion to direct a verdict of acquittal that the defendant's acts alleged to be criminal were mere administrative irregularities subject to investigation by the Interstate Commerce Commission. The rule under which the cars were to be distributed to the several mines was fair and equitable. The charge and the proof were that the defendant intentionally misapplied this rule so as to effect the illegal discrimination. This was not an administrative act, but a violation of the statute. Pennsylvania Railroad Co. v. Puritan Coal Co., 237 U. S. 121, 35 Sup. Ct. 484, 59 L. Ed. 867.

There is nothing in the point that at the time of the offense Dye was not the general manager, the officer who usually had charge of the distribution of cars. He was proved to be the agent of the railway company who actually directed the distribution.

[3] The defendant requested the following instruction:

"The jury are instructed that the offense of 'discrimination,' as charged in this indictment, is the granting of a preference to a shipper that is not granted to all shippers in substantially the same class, whereby the shipper receiving the same enjoys an unjust advantage over such other shippers, and if the jury believes from the evidence that the fuel coal contracts alleged to have been secured by the defendant and accepted by certain coal mines on the Coal & Coke Railway, and the securing of foreign empty cars for such coal, did not work an injury or injustice to, or discrimination against, the owner of any coal mine served by said railroad, then you should find that the placing of said cars did not constitute a discrimination as charged in the indictment."

After reading this request to the jury the District Judge said:

"I think, gentlemen, that while I indicated I would give that instruction, I can only give it in connection with an explanation, because the question is not necessarily as to whether a mine was favored or discriminated against. The beginning of the instruction illustrates what I want to say; it is 'the granting of a preference to a shipper'; it need not necessarily be in favor of or against a mine, and the contention of the government in this case was that the defendant himself was a shipper, and that the discrimination favored him. Of course, that question is one to be determined under all the evidence in the case; but it is not necessary that a specific mine should be discriminated in favor of or against, if what was done discriminated in favor of a shipper to the detriment of other shippers or other mines."

Error is charged in refusing to give this request as presented, and in qualifying it by the language quoted. The ground of the assignment is that the indictment charged discrimination against particular coal companies therein mentioned in favor of the Dorfee mine, whereas the instruction given allowed the jury to convict if they reached the conclusion that the defendant had discriminated against the mines mentioned in his own behalf. Technically, the assignment is well taken; but there was no evidence upon which the distinction contended for by appellant could be founded.

The discrimination proved in favor of Dye himself, and against the particular coal companies mentioned, was linked by the proof inseparably with discrimination in favor of the Dorfee mine. They were parts of one transaction. The same evidence proved both offenses with equal certainty. For this reason the error in charging that defendant might be convicted if he had discriminated in his own favor was unsubstantial.

The evidence showing discrimination in intrastate shipments and in shipments other than those charged in the indictment was admissible, because it tended to prove a deliberate intent, and thus disprove defendant's claim that the discrimination charged was given only temporarily, for convenience of administration, with the intent to correct it.

There was no error in excluding an order of Morrow, superintendent of transportation, directing that coal shipped as fuel coal and reconsigned as commercial coal should be charged against the mine "from which the car originated." The proof shows conclusively that the defendant, not only had no purpose to charge the cars back to the Dorfee mine, but that he had placed himself in a position where he could not do so.

The official car distribution sheets of the railroad were admissible to prove, not that the cars had been actually used as commercial cars by defendant's order, but that they were not so charged in the official distribution.

It is not necessary to pass on the admissibility of the wheel reports made by conductors showing delivery of cars, for the reason that the fully verified mine reports showed the delivery.

The other requests to charge refused by the court were not argued in the brief and require no discussion, since they were covered by the general charge, or are clearly unsound, or are not responsive to the issues.

Even if there had been distinct errors in the admission or rejection

of testimony, or in the charge, they would not justify reversal. The guilt of the defendant was so conclusively proved that his acquittal would have been a clear miscarriage of justice.

Affirmed.

MARYLAND DREDGING & CONTRACTING CO. v. STATE OF MARYLAND, to Use of BODDIE, et al.

STATE OF MARYLAND, to Use of BODDIE, v. BALTIMORE & O. R. CO. et al.

(Circuit Court of Appeals, Fourth Circuit. October 22, 1919.)

Nos. 1714, 1715.

1. SHIPPING ⟸84(1)—NEGLIGENCE CAUSING DEATH OF STEVEDORE.

A dredge, working in a slip, with two lines on each side to the piers, dropping and tightening alternately, as she worked, which allowed one line to sag while a launch loaded with stevedores was passing, sweeping off a stevedore, who was drowned, *held* in fault, it appearing that the launch signaled and would have passed safely, if the line had been held taut, as customary, but through negligence was not heard nor seen; and the master of the launch also *held* in fault for proceeding, knowing the danger, and without indication that his signal was heard and would be heeded.

2. CARRIERS ⟸240—MASTER AND SERVANT ⟸315—WORKMEN BEING TRANSPORTED NOT "PASSENGERS"; NEGLIGENCE OF INDEPENDENT CONTRACTOR TRANSPORTING EMPLOYÉS CHARGEABLE TO THEIR EMPLOYER.

Workmen being transported to their place of work by the master at his expense and in their work time, are not "passengers," but employés, for whose safety the master must exercise reasonable care; and he cannot relieve himself of this responsibility by employing an independent contractor for their transportation.

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

3. MASTER AND SERVANT ⟸194—STEVEDORES TRANSPORTED TO THEIR WORK NOT FELLOW SERVANTS OF MASTER OF VESSEL.

Where an employer of stevedores, under agreement to transport them to their work, contracted with the owner of a launch to carry them, the master of the launch was not their fellow servant, and for his negligence, contributing to the death of a stevedore, the employer is liable.

Appeals from the District Court of the United States for the District of Maryland, at Baltimore; John C. Rose, Judge.

Suit by the State of Maryland, to the use of Louise Boddie, widow of William Boddie, deceased, against the Baltimore & Ohio Railroad Company and others. Decree for libelant against respondent Maryland Dredging & Contracting Company, and it appeals. Modified.

For opinion below, see 254 Fed. 720.

George Forbes, of Baltimore, Md. (Joseph N. Ulman and Knapp, Ulman & Tucker, all of Baltimore, Md., on the brief), for Maryland Dredging & Contracting Co.

Benjamin H. McKindless, of Baltimore, Md. (Charles W. Main, of Baltimore, Md., on the brief), for State of Maryland, to the use of Louise Boddie and others.

Frank Gosnell, of Baltimore, Md. (Marbury, Gosnell & Williams and Jesse Slingluff, all of Baltimore, Md., on the brief), for Patapsco Ship Ceiling & Stevedore Co.

Before PRITCHARD, KNAPP, and WOODS, Circuit Judges.

WOODS, Circuit Judge. [1] In the summer of 1917, the dredge Chesapeake was working in a slip in Baltimore harbor. The Baltimore & Ohio Railroad Company owned the land adjacent to the slip, and had employed for the work the Empire Engineering Company, and it in turn had employed the Maryland Dredging & Contracting Company, owner of the Chesapeake. The dredge was made fast to the piers by two lines on each side. When it was not in operation, these lines were sufficiently taut and elevated above the water for a launch to pass under. When the dredge was operating, the lines were alternately slack and taut as the bucket of the dredge went up and down. Launches frequently passed the dredge, going under these cables when they were taut. The Patapsco Ship Ceiling & Stevedore Company in the course of business carried its workmen from place to place in the harbor. For this purpose they sometimes used their own launches, and sometimes hired the launches of other owners. By contract the employment and pay of the workmen commenced from the time they embarked to be carried to the place of work.

On August 25, 1917, the Stevedore Company contracted with the owner of the launch Rosa to carry a number of its workmen from the pier adjacent to the slip in which the Chesapeake was dredging to the place where they were to work. The Rosa having taken on the stevedores undertook to pass under the cables of the Chesapeake. While passing one of the cables fell on the launch and knocked off the stevedore, William Boddie, who was sitting in the stern. Boddie was drowned, and the state of Maryland filed this libel for the benefit of Louise Boddie, widow of William Boddie, against the Baltimore & Ohio Railroad Company, the Empire Engineering Company, Maryland Dredging & Contracting Company, and the Patapsco Ship Ceiling & Stevedore Company, alleging that his death was due to the negligence of all the respondents. The owner of the launch was not made a party. The District Court held (1) that the dredge was at fault and liable; (2) that since the Dredging Company was abundantly solvent it was unnecessary to decide whether the Baltimore & Ohio Railroad Company and the Engineering Company were exempt from liability on the ground that the Dredging Company was an independent contractor; (3) that even if the master of the launch was at fault, and its owner liable, no decree could be entered against him because he was not a party to the action; (4) that the Stevedore Company could not be held liable for any negligence in the navigation of the launch because the owner of the launch was an independent contractor.

We think the first finding is well supported by the evidence. The dredge cannot claim, without limitation, the privileges of a vessel resting at anchor. True, the vessel itself was stationary, but it was

at work with movable lines stretched over the water under which its master knew launches passed from time to time; and he knew, also, that for their safe passage watchfulness and care were required to heed the signal of approach, to keep taut the line under which a launch was about to pass, and to warn any approaching launch not to attempt to pass under a line when he was about to slacken it. On conflicting evidence, the District Judge held that the Rosa did give a blast of her whistle to indicate her intention to pass under the lines then taut; that the master of the dredge or the engineer set to watch on the stern should have heard and heeded the signal; that the watch was negligent in not seeing the launch, especially after her signal, and either warning her not to try to pass or holding the lines taut until she passed. These conclusions having strong support in the testimony of witnesses before the court are not subject to review here.

We think the District Judge was right in the opinion he intimated that the navigator of the launch was also negligent. The master of the launch knew the great danger of attempting to pass under the lines when the dredge was in operation, and he knew, also, that if not then in operation it might begin to operate at any moment. Although his boat was loaded with men, all of whose lives would be imperiled if the lines fell while he was passing, he subjected them to the hazard of the passage, on the chance that the master or watchman on the dredge had heard and would heed his signal, although he had had no response to it and no evidence of assent to his passage. This was negligence for which we can find no excuse.

[2] Some authorities hold that employés being transported to their place of work in pursuance of a contract with the master, the transportation being a part of their compensation, are passengers. Klinck v. Chicago City Ry. Co., 262 Ill. 280, 104 N. E. 669, 52 L. R. A. (N. S.) 76, Ann. Cas. 1915B, 177, and authorities cited; note 19 L. R. A. (N. S.) 718. But by the great weight of reason and authority such workmen, in course of transportation, sustain the relation of employés for whose safety the master must exercise reasonable care. Northern Pacific R. R. Co. v. Peterson, 162 U. S. 346, 355, 16 Sup. Ct. 843, 40 L. Ed. 994; Martin v. Atchison, Topeka, etc., R. R. Co., 166 U. S. 399, 17 Sup. Ct. 603, 41 L. Ed. 1051; note 12 L. R. A. (N. S.) 856.

We are unable to agree that the Stevedore Company can escape the consequences of the negligence of the master of the launch on the ground that its owner was employed as an independent contractor. Doubtless the owner of the boat was an independent contractor as between himself and the Stevedore Company, and in his relation to the general public. For any negligence the consequences of which would fall on the Stevedore Company he would be liable over to the Stevedore Company. For any injury inflicted by his negligence on the outside public, such for example as an injury to another boat by collision, the owner of the launch as an independent contractor would be liable to the exemption of the Stevedore Company. Sturgis v. Boyer et al., 24 How. 110, 16 L. Ed. 591; The Eugene F. Moran, 212 U. S. 466,

29 Sup. Ct. 339, 53 L. Ed. 600; Casement v. Brown, 148 U. S. 615, 13 Sup. Ct. 672, 37 L. Ed. 582; Wilmington Railway Bridge Co. v. Franco-Ottoman Shipping Co., 259 Fed. 166, — C. C. A. —, Fourth Circuit, filed January 7, 1919.

But the Stevedore Company having contracted to convey its employés to their work, its obligation to use reasonable care in the carriage is implied as a part of the contract; and it cannot shift this obligation to another by an independent contract to which the employés were not parties and to which they did not assent. Water Co. v. Ware, 16 Wall. 566, 21 L. Ed. 485; City & S. Ry. Co. v. Moores, 80 Md. 348, 30 Atl. 643, 45 Am. St. Rep. 345; Atlanta & F. R. Co. v. Kimberly, 87 Ga. 161, 13 S. E. 277, 27 Am. St. Rep. 231; John J. Radel Co. v. Borches, 147 Ky. 506, 145 S. W. 155, 39 L. R. A. (N. S.) 227; note 66 L. R. A. 148, 150; Hussey v. Franey, 205 Mass. 413, 91 N. E. 391, 137 Am. St. Rep. 460; 14 R. C. L. 99. There is no evidence that Boddie or any other employé consented to look to the owner of the launch for the safety of their transportation.

[3] The master of the launch whose negligence contributed to the death of Boddie was not a fellow servant of the workmen on the launch. In New England R. Co. v. Conroy, 175 U. S. 323, 20 Sup. Ct. 85, 44 L. Ed. 181, overruling Chicago, etc., R. Co. v. Ross, 112 U. S. 377, 5 Sup. Ct. 184, 28 L. Ed. 787, the Supreme Court held the conductor of a freight train to be a fellow servant of the train crew. There has been much difference of judicial opinion on the question whether under the general admiralty law the master of a vessel is a fellow servant of the crew, or the representative of the owner for whose negligence resulting in personal injury to a seaman the owner would be liable. The Osceola, 189 U. S. 158, 23 Sup. Ct. 483, 47 L. Ed. 760; The Hamilton, 207 U. S. 398, 28 Sup. Ct. 133, 52 L. Ed. 264; Gabrielson v. Waydell, 135 N. Y. 1, 31 N. E. 969, 17 L. R. A. 228, 31 Am. St. Rep. 793; Thompson v. Hermann, 47 Wis. 602, 3 N. W. 579, 32 Am. Rep. 784; Scarff v. Metcalf, 107 N. Y. 211, 13 N. E. 796, 1 Am. St. Rep. 807; notes 31 Am. St. Rep. 807, and 21 Ann. Cas. 110.

But the question was settled by the following statute:

"In any suit to recover damages for any injury sustained on board vessel or in its service seamen having command shall not be held to be fellow servants with those under their authority." Act March 4, 1915, c. 153, § 20, 38 Stat. 1185 (Comp. St. § 8337a).

Hence, even if the launch had been the property of the Stevedore Company and the master its employé he would have been its representative, and for his negligence it would be liable to the workmen it had contracted to transport.

But, even if that were not true, Boddie and the other workmen were not fellow servants of the servant of one with whom the Stevedore Company had contracted to perform for it its contract obligation for their safe transportation. It chose to displace its own servants with the servants of another master, and it cannot be heard to say that the servant of that other over whom it had no control was a fellow servant of its own workmen. 18 R. C. L. 762, and cases cited; Bernheimer

v. Baker, 108 Md. 551, 70 Atl. 91, 129 Am. St. Rep. 458; City & S. Ry. Co. v. Moores, 80 Md. 348, 30 Atl. 643, 45 Am. St. Rep. 345; Charron v. Northwestern Fuel Co., 149 Wis. 240, 134 N. W. 1048, 49 L. R. A. (N. S.) 162, Ann. Cas. 1913C, 939.

The result is that the owner of the launch is not a necessary party, and that the Stevedore Company is liable equally with the Dredging Company for the damages found by the District Court. A decree will be entered, so modifying the decree of the District Court.

Modified.

ROWE v. DROHEN et ux.*

(Circuit Court of Appeals, Second Circuit. November 26, 1919.)

No. 5.

HUSBAND AND WIFE ⊂=149(4)—PROPERTY RESULTING FROM WIFE'S BUSINESS NOT SUBJECT TO HUSBAND'S CREDITORS.

Where, after a husband was deeply indebted and insolvent, a wife on her own capital entered business and acquired property, the spouses cannot be treated as partners, and the profits of the business subjected to claims of the husband's creditors, though he assisted in the business and at times spoke of it as his; the business being that of the wife, who furnished the capital.

Rogers, Circuit Judge, dissenting.

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

Bill of Murle L. Rowe, as trustee of James L. Drohen, bankrupt, against James L. Drohen and Mabel R. Drohen, his wife. From a decree dismissing the bill (245 Fed. 684), complainant appeals. Affirmed.

Herman J. Westwood, of New York City, and Nelson J. Palmer, of Dunkirk, N. Y. (Murle L. Rowe, of Dunkirk, N. Y., and Louis G. Monroe, of Fredonia, N. Y., of counsel), for appellant.

Nugent & Heffernan and Warner & Woodin, all of Dunkirk, N. Y. (T. P. Heffernan, of Dunkirk, N. Y., of counsel), for appellees.

Before WARD, ROGERS, and HOUGH, Circuit Judges.

WARD, Circuit Judge. March 1, 1916, James L. Drohen was adjudicated a bankrupt on his own petition, and on September 15 his trustee, Rowe, filed a bill in equity against him and his wife under section 70e of the Bankruptcy Act (Comp. St. § 9654), praying that they might be required to convey to him certain pieces of real estate in the city of Dunkirk, N. Y., standing in the name of Mrs. Drohen, the leases in his and her names of certain moving picture theaters, together with their furniture and equipment, also a balance of account in the Merchants' National Bank of Dunkirk in the name of Mrs. J. L. Drohen, all of which property the plaintiff charged was acquired out of the proceeds of J. L. Drohen's business and fraudulently transferred to Mrs. Drohen or purchased in her name for the purpose of hindering, delaying, and defrauding his creditors. Judge Hazel dis-

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

*Certiorari denied 251 U. S. —, 40 Sup. Ct. 396, 64 L. Ed. —.

missed the bill, and his opinion is reported in 245 Fed. 684. The plaintiff's counsel states his theory of the situation as follows:

"The complainant now feels that it has justified the statement, made earlier in the brief, that in the latter part of December, 1906, or early in 1907, while the Dunkirk Theater was in contemplation, or about the time the parties were getting ready to open it, the two defendants entered into the fraudulent and unconscionable agreement or understanding that, if the venture should prove a success, they would both declare that the business was hers, and point to the bank account as proof, while, if it turned out a failure, they would both assert that the venture was his, and point to the lease and the contracts he had made as evidence thereof; the result of which would be that, if it should succeed, success should inure to their benefit through her apparent ownership, while, if it should fail, creditors on the executory agreements or his own future creditors might seek in vain for their money, for, to use Drohen's own language, in a similar case later, where the venture did fail, 'I have a large judgment against me.'"

The bill alleges that on the 1st day of December, 1906, and for some time previous thereto, James L. Drohen was insolvent and at no time thereafter had any property whatever, unless that claimed in the bill belonged to him. Furthermore the plaintiff concedes that all of the property so claimed was the direct result of the success of a little moving picture show called the Bijou Theater opened in Dunkirk in February, 1907.

In March, 1906, Mrs. Drohen, her husband, and her mother lived in a small house inherited by Mrs. Drohen and her mother from her father. March 31 of that year Mrs. Drohen bought a small additional property, 414 Central avenue, paying $500 down, lent her by a warm personal friend, and securing the balance of the purchase money by mortgage. What property there was in the family at that time belonged to her, and the plaintiff does not contend that James L. Drohen had any interest whatever in these premises. In 1905 James L. Drohen was being sued for infringement of a patent, and April 23, 1906, an interlocutory decree was entered against him on the merits, which ripened in January, 1910, into a final decree for some $10,000.

In 1906 Mrs. Drohen opened a little notion store in the Central avenue house, and, and while engaged in that business her attention was attracted to a moving picture show. Concluding that this would be a good business venture, she sold out her stock in trade, and December 12, 1906, opened a bank account in the Merchants' National Bank of Dunkirk in the name of Mrs. J. L. Drohen, with a credit of $300 given to her personally by the bank, and in February, 1907, started the Bijou Theater in a vacant store, 303 Lion street. Subsequently, in 1909, she opened another little moving picture theater in the neighboring town of Silver Creek, where she employed a manager named Geitner, and in 1910 she built a larger theater in Dunkirk, known as the Drohen Theater.

During the whole of this period James L. Drohen managed the theaters, made some leases and contracts in his own name, and often spoke and acted as if the business were his own. While the conduct of the defendants during this period of 10 years was sometimes more consistent with ownership in James L. Drohen, and sometimes with ownership in his wife, the plaintiff's theory does not commend itself

to us at all. To state in detail all the particulars and weigh the evidence would make an interminable opinion. Suffice it to say that in the small town of Dunkirk it could not but be perfectly apparent to every one that all the property here involved was the result of these moving picture enterprises. Whether the business failed or succeeded, the unpaid creditors of the business would look to these properties for payment. The creditors existing at the beginning of the business in 1906 were James L. Drohen's and they were, in view of this moderate enterprise, of considerable amount. If it was intended to hinder, delay, or defraud creditors, these are the creditors who would have been considered. As against them it would have been more natural to put the bank account in the name of Mabel R. Drohen than in that of Mrs. J. L. Drohen, and Drohen could have drawn checks on such an account under authority from Mrs. Drohen. It would have been still more natural to let her sign the checks, as she might well have done, only about 3,000 checks having been drawn in about 10 years. Moreover as to such creditors he would have been careful not to speak of it as his, or to contract in his own name. Everything was done for a long time after the business was obviously a success openly and with such inconsistencies as preclude a premeditated purpose to defraud. Just such inconsistencies are what might be expected in dealings between husband and wife, and they rebut any inference of the calculated conspiracy which the plaintiff suggests. Schreyer v. Scott, 134 U. S. 405, 10 Sup. Ct. 575, 33 L. Ed. 955.

The real question is, With whose capital was this successful series of adventures started? because their profits belong to the owner of that capital. The evidence is quite clear that this capital was Mrs. Drohen's, and though the success was largely due to her husband's management and skill, her right to the profits was in no way affected by that fact. Aldridge v. Muirhead, 101 U. S. 397, 25 L. Ed. 1013; Merchant v. Bunnell, *42 N. Y. 539. It would be quite natural that, in managing, he would often act and speak as if he owned the business. We should not expect to find formal agreements to be made and the usual business precautions to be taken between husband and wife. If the conduct of the parties is consistent with honesty, we should adopt that theory, rather than the very artificial conspiracy which the plaintiff suggests. The conclusion of the trial judge, who saw and heard the witnesses, is entitled to great weight in an appellate court, and we are entirely satisfied with it.

The decree is affirmed.

HOUGH, Circuit Judge (concurring). That plaintiff has not proved "the fraudulent and unconscionable agreement" adverted to in the opinion of WARD, J., I agree. There was no definite plan or meeting of minds, except that which customarily springs from matrimony—i. e., an agreement to work together.

In 1906 the husband was deep in debt and determined not to pay, wherefore the common American habit of keeping whatever flowed into the family coffer in the husband's name was deliberately changed for the plan of keeping everything in the wife's name. But the hus-

band transferred nothing to his wife, because he then had nothing worth mentioning to transfer.

The evidence shows only the practice, so well known in this country, of the man "doing business in his wife's name," i. e., making the wife owner of the fruits of the debtor husband's labor, in consideration of support and protection. To be sure the measure of support is usually (as here) what the husband takes, and the protection is only required (as here) against old creditors, but the plan is as yet, I think, lawful in this country.

We cannot treat husband and wife (as such) as partners, and permit the creditors of one to demand an accounting; and rarely does the married pair enter into that formal relation, for to do so (assuming its possibility) would usually defeat the avowed object of both, which is to shield the husband behind the wife. This may, I think, be done as to earnings after the shield is erected.

It is plain enough that this husband often spoke of the business of Mrs. Drohen as "his," and boasted of "his" success. But the evidence falls far short of proving "reputed ownership," even if that doctrine obtained in the United States—which, however, is not the case.

For these reasons, I concur in affirming the decree.

ROGERS, Circuit Judge (dissenting). I do not concur in the conclusion which my Associates have reached. The trustee in bankruptcy of James L. Drohen is, in my opinion, entitled to make available to the creditors certain assets which stand in the name of the bankrupt's wife.

The claim is that the wife in 1907 began the moving picture business in the Bijou Theater in Dunkirk in December, 1906, and that her husband acted as her agent in its management. The husband at that time was insolvent; a judgment having been entered against him on April 23, 1906, in the sum of $10,723.30, which still remains wholly unpaid. In addition to that indebtedness, he was liable on a bond dated July 12, 1904, and given to the Title Guaranty & Trust Company, upon which judgment has since been entered in the sum of $17,321.02, upon which judgment he has paid nothing. According to the testimony of the husband, the wife had not been engaged in any business of any kind prior to entering upon the moving picture business in the Bijou Theater. He also testified that his wife had no property of any kind at that time, except her interest in the house where they were living. The house belonged to his wife and mother-in-law, and was sold subsequently for $2,500 or $3,000.

A week after the judgment for $10,723.30 was entered the husband, on April 30, 1906, closed the account which he had always kept in the Merchants' National Bank of Dunkirk; and on December 12, 1906, an account was opened in the same bank in the name of the wife. It is somewhat significant that it was not opened in the name of Mabel R. Drohen, nor in that of M. R. Drohen, but in that of Mrs. J. L. Drohen. Prior to that time she had never had a bank account. It does not appear that she ever drew a single check against that account. Some 3,000 checks were before the court below, and every one of them was

signed in the husband's handwriting. The profits realized in the moving picture business were all deposited to the credit of this account. The record discloses that the husband drew checks against this account to pay for his lodge dues as well as for his clothing, and to pay the family doctor's bills, and the bills for groceries, meats, coal, gas, electricity, and other family expenses. He purchased with funds drawn from his wife's bank account an automobile, and in applying to the secretary of state for its registration and for renewals of that registration he had in 1914, 1915, and 1916, three times described himself as owner and swore to it. In other words, he exercised the same dominion over the bank account of his wife that he had exercised over his own. While the proceeds of the business were deposited to her credit, the liabilities stood against him. The lease of the Bijou Theater ran to him as lessee, and the contracts for electric current for the theater and other supplies, as well as with the employés, were made in his name. As late as 1916 he gave his note for $5,000 to the Goodman Piano Company of Cleveland, Ohio, for a fotoplayer No. 40, which was to be used in the theater. The reserve seat tickets issued for admission to reserved seats in the Drohen Theater had the following printed thereon:

"Theater ticket. Drohen Theater, James Drohen, *Owner* and Manager."

From the time the Drohen Theater was opened in 1910 Mrs. Drohen handled all these tickets. She testified she did not know whether she ordered them printed, or whether he did, but said, if he ordered them, she knew all about it. The record shows that there was no agreement on the part of the wife to pay to the husband any salary for his services, and that there was no accounting to her for any moneys he saw fit to draw from her bank account. The Bijou business having proved a success, a second theater, called the Drohen Theater, was opened in Dunkirk, and later another in Silver Creek, and still another in Jamestown. The leases in these enterprises ran to the husband as the party of the second part, and contracts were made as before in his name, and the proceeds realized from the theater enterprises were deposited in the wife's account.

I do not accept the theory that the husband was simply the wife's agent. The record discloses a conversation between Mrs. Drohen and a third party, in which Mrs. Drohen objected to something Drohen was thinking of doing in the business, and Mrs. Drohen remarked that she wished Drohen would not do it, but it would not do her any good to say anything, as he would do as he wanted to anyway. The reason why he did as he wanted, rather than as she wished, is disclosed in another conversation between Drohen himself and a contractor, who was making certain alterations in one of the theaters, in which Drohen said that he had to do business in his wife's name, because he did not dare to have anything in his own name. That the business was his, and that he carried it on in his wife's name, explains everything.

But the understanding that the business was to be carried on in the wife's name was not always consistently carried out, although the proceeds of the business were always consistently placed to her credit

in the bank. The Jamestown theater was not a success, and the wife testified that that was his venture, and that she had nothing to do with it, although she admitted that the checks to cover running expenses were paid out of her account. When Drohen found that that particular venture was not a success, he wrote the agent representing the lessor, "I am sorry to say that I am busted, and cannot pay the rent" of the theater any more. The result of those business operations carried on by the husband in the wife's name, and into which she had little or nothing of money or experience to put at the beginning, may be seen in the following excerpt from her testimony:

"I own at the present time the following pieces of real estate: The Drohen theater, and the Blood lot. The house and lot on Fourth and Eagle streets my mother and I own. Those are the only pieces of real estate I own. In addition to that I have the fixtures and personal property at the Bijou Theater, the fixtures and personal equipment at the Drohen, one-quarter interest in the equipment, lease, and fixtures of the Silver Creek theater, and then such household goods as I have. I have no other property besides that, which I recall. I also have a $500 certificate, or a certificate calling for $500 capital stock in the Mann Company. I bought that. It was in my name. That was bought out of the proceeds of the moving picture show ventures that I spoke of."

What Drohen himself thought about it appears from what he said to Judge Fisher when he was taking, in his own name, the lease of the Jamestown theater. He stated:

"That he owned the new Drohen Theater in Dunkirk, free of incumbrances, in his own name; that he owned the Bijou Theater in Dunkirk, and the Bijou Theater in Silver Creek, all in his own name, with no judgments against him; and that he was worth over $40,000."

It is said that statements made by the husband, and not known by or assented to by the wife, are not binding upon her. They are to be considered, however, in connection with all the circumstances of the case, and if the testimony shows that husband and wife were parties to an unconscionable and fraudulent agreement or understanding that they should engage in the moving picture business under such conditions that if the venture should prove a success they should be in a position to say that the business was hers, as shown by her bank account, and if it turned out a failure to say that the venture was his, as shown by the leases and the contracts, then his acts and declarations during the pendency of the illegal enterprise, even if made in her absence, affect them both. This being in brief outline the facts disclosed by the testimony, what is the law that is applicable to them?

Do the facts of the case at bar show good faith on the part of Drohen and his wife, and that he acted really in what was done simply as her agent, or was he in fact a principal? In answering that question it is to be kept in mind that direct evidence is not necessary to prove fraud, but circumstantial evidence is sufficient. That principle of law is well settled. Beardsley v. Duntley, 69 N. Y. 577; Montreal River Lumber Co. v. Mihills, 80 Wis. 540, 50 N. W. 507; Woolenslagel v. Runals, 76 Mich. 545, 43 N. W. 454; Trimble v. Reid, 97 Ky. 713, 31 S. W. 861; Bank of North America v. Sturdy, 7 R. I. 109; Bronson v. Vaughn, 44 W. Va. 406, 29 S. E. 1022; Grier v.

Dehan, 5 Houst. (Del.) 401; Granrud v. Rea, 24 Tex. Civ. App. 299, 59 S. W. 841. In Beuerlien v. O'Leary, 149 N. Y. 33, 38, 43 N. E. 417, 418, the New York Court of Appeals declares that fraud "can seldom be proved by direct evidence." In Kaine v. Weigley, 22 Pa. 183, the court, speaking through Chief Justice Black, says that—

"When creditors are about to be cheated, it is very uncommon for the perpetrators to proclaim their purpose, and call in witnesses to see it done. A resort to presumptive evidence, therefore, becomes absolutely necessary to protect the rights of honest men from this as from other invasions."

And in Montgomery Web. Co. v. Dienelt, 133 Pa. 585, 19 Atl. 428, 19 Am. St. Rep. 663, the court, speaking through Chief Justice Mitchell and criticising the charge of a trial judge, comments as follows:

"But the substantial defect of the charge is in its treatment of the items of evidence, one by one, without at any time directing the view of the jury to their united force. There probably never was a case of circumstantial evidence that could not be blown to the winds by taking up each item separately, and dismissing it with the conclusion that it does not prove the case. The cumulative force of many separate matters, each perhaps slight, as in the familiar bundle of twigs, constitutes the strength of circumstantial proof."

The property of a debtor belongs to his creditors, and he cannot transfer or conceal it with a view of hindering, delaying, or defrauding them. But a distinction exists between property and services. It may be conceded that a man's services, time, talents, and industry are his own, to use or not to use as he sees fit. The law may compel him to give up his property for the payment of his debts, but it may be conceded that it does not compel him to employ his time or talents for the benefit of his creditors.

At common law a married woman could not engage in trade or business in her own name for her personal profit. The reason was that she could make no contracts and her earnings belonged to her husband. The law has been changed by statute in this country and in England, and for years a married woman in the state of New York, where Drohen and his wife resided, has been expressly authorized by statute to engage in trade or business as if unmarried. Bodine v. Killeen, 53 N. Y. 93.

For the same reason a married woman at common law had no power to authorize her husband to become her agent. Capacity to act by agent depends on capacity in the principal to do the act himself which he authorizes his agent to perform. But when the wife's disability to contract was removed, she acquired the right to appoint her husband as her agent, to perform for her whatever acts of business she is capable of performing for herself. She may therefore constitute her husband as her agent within the sphere in which she is competent to appoint an agent. Voorhees v. Bonesteel, 16 Wall. 16, 21 L. Ed. 268. And in the case just cited the court said:

"Under the laws of New York a married woman may manage her separate property, through the agency of her husband, without subjecting it to the claims of his creditors, and it is held that she is entitled to the profits of a mercantile business conducted by the husband in her name, if the capital is furnished by her and he has no interest but that of a mere agent."

That was the law of New York then, in 1872, and for years prior thereto. And of course it is the law of that state now. Knapp v. Smith, 27 N. Y. 277; Buckley v. Wells, 33 N. Y. 518; Draper v. Stouvenel, 35 N. Y. 507; Sammis v. McLaughlin, 35 N. Y. 647, 91 Am. Dec. 83; Owen v. Cawley, 36 N. Y. 604; Abbey v. Deyo, 44 N. Y. 343; Woodworth v. Sweet, 51 N. Y. 11; Bodine v. Killeen, 53 N. Y. 93; Stanley v. National Union Bank, 115 N. Y. 122, 22 N. E. 29.

When a business is carried on in the wife's name and by her husband as her agent, it becomes necessary to determine whether the arrangement is one made in good faith, or whether her name is used as "a cover and a fraud" to protect what belongs to the husband in whole or in part. That ownership in the wife cannot be employed as "a cover and a fraud" to cheat creditors is abundantly established upon the authorities.

In Abbey v. Deyo, supra, the court held it to be well settled that a married woman could carry on business on her separate account through her husband as her agent, and that the fact that the husband gave his services without compensation other than his support, which she provided out of the income of the business, would not give his creditors any interest in the profits. But that case, and all the cases so far as I am aware, requires good faith. In Abbey v. Deyo the court said:

"The judge charged the jury that they were to find whether the plaintiff was in fact carrying on business herself, her husband acting merely as her agent, or whether the business was in fact her husband's, and the agency a form or device for carrying on business with his own means and her son's services. If the former, he charged them that the wife could hold the property. If the latter, he charged them that the property belonged to the creditors, and the wife must be defeated. This was the precise question for the jury to decide, and it was clearly and fairly placed before them. Their decision is conclusive here."

In Knapp v. Smith, supra, the New York Court of Appeals, speaking through Chief Justice Denio, said:

"Where the husband is indebted and insolvent, as was the case here, there is generally more or less reason to suspect that such arrangements are adopted as a cover to disguise the substantial ownership of the husband and to defraud the creditors. Whether, in a given case, the transaction is sincere and bona fide, or a colorable device to cheat the creditors of the husband, is a question of fact, to be determined by the jury or other forum intrusted with decision of such questions."

In Seitz v. Mitchell, 94 U. S. 580, 24 L. Ed. 179, the Supreme Court declared that purchases of property, real or personal, made during coverture by the wife of an insolvent debtor are justly regarded with suspicion, and that she cannot prevail in contests between his creditors and her, involving their right to subject property so acquired to the payment of his debts without overcoming by affirmative proof the presumption against her. "Such," said the court, "has always been the rule of the common law; and the rule continues, though statutes have modified the doctrine that gave the husband absolutely the personal

property of the wife in possession, and the right to reduce into his possession and ownership all her choses in action."

In Glidden, Murphin & Co. v. Taylor, 16 Ohio St. 509, 91 Am. Dec. 98, it appeared that the husband used the money of his wife in establishing and conducting the business professedly as her agent and the business made large profits. There was no contract between them as to his compensation, and no accounts were kept between the parties. He applied a part of the proceeds to the support of the family, used some of them for his own purposes, and invested the rest in real and personal property in the name of his wife. The court allowed the creditors of the husband to subject the property so purchased to payment of his debts.

In Lachman v. Martin, 139 Ill. 450, 28 N. E. 795 (1891), a judgment for $1,802.43 had been obtained against one Martin and another and execution was returned unsatisfied. The bill sought to subject to the payment of the judgment certain lands the title to which was in the name of Martin's wife. It was claimed that Mrs. Martin had purchased with her own funds one-half of the stock of an Illinois corporation, and that the money with which the property was purchased had been earned in the business of this corporation, while her interest in it was under the management and control of her husband acting therein as her agent. The profits which she derived from the corporation brought her between $25,000 and $30,000, which she had invested in farms and stock, which at the time of the hearing had so increased in value as to be worth $50,000. The Illinois statute gave a married woman the right to have her own separate property, and to make contracts and do business as a feme sole, and declared that she might avail herself of the services and agency of her husband in the conduct of her business or management of her property, "without necessarily subjecting it, or the profits arising from his management, to the claims of his creditors." The court, upon the facts disclosed in the case, held that the property in these farms was subject to the rights of the husband's creditors. The court said:

"But an insolvent debtor cannot use his wife's name as a mere device to cover up and keep from his creditors the assets and profits of a business which is in fact his own. The marriage relation affords many opportunities for conducting schemes to defraud creditors, and hence transactions between husband and wife, which have the appearance of being fraudulent, will be closely scrutinized. It is a question of fact, to be determined from all the circumstances of the case, whether or not the husband is carrying on his own business, or is merely managing his wife's business. It must clearly appear that the wife is the bona fide owner of the capital invested in the business, and that the accumulations, which result from the conduct of the business, are the legitimate outcome of the investment of her property."

In Murphy v. Nilles, 166 Ill. 99, 46 N. E. 772 (1897), the court held that where a wife furnishes capital to her husband and allowed him to employ it in speculations on his own account and in conducting the business the profits derived therefrom are subject to the claims of his creditors. In the course of the opinion the court again declared that—

"An insolvent debtor cannot use his wife's name [nor her capital] as a mere device to cover up and keep from his creditors the assets and profits of a business which is in fact his own."

In Talcott v. Arnold, 54 N. J. Eq. 570, 35 Atl. 532 (1896), the court held that while a debtor cannot be compelled to work for his creditors, still, if he puts his latent property-earning ability into action, equity will apply any property created to the payment of his debts. It declared that a wife may employ her husband as a servant in the management of her separate business, but that a court of equity will closely scrutinize the case, to determine whether the employment is bona fide and whether the business is clearly the wife's; that if the husband, in conducting the wife's business, is a servant of the wife under a bona fide employment, then his services in the business will not subject any portion of the property to the claims of the husband's creditors. In this New Jersey case it appeared that after the failure of a firm in which the husband was a partner the wife advanced to him $10,000, which she had received from the estate of her uncle. The husband was an inventor, and carried on a series of experiments, and caused to be issued in his wife's name a number of patents, from which large sums of money were realized, and a portion of the proceeds was put in property in the wife's name. All the contracts in the business were made in her name, and the property in which the business was conducted and the bank accounts were also in her name. No contract of employment was proved, and the entire course of conduct showed that the husband was master of the business, over whom the wife exercised no control, and from whom she expected no account. The court held that the business was the husband's, and its proceeds would be applied to the payment of his debts. The husband and the wife testified that they had entered into an agreement at the time the $10,000 was advanced by which he assigned to her the patents issued and to be issued, in consideration that she should pay him $1,200 a year, and should pay all the shop expenses for the development of the patents.

The court declared it found no foundation in the testimony to support the theory that the business which was carried on ostensibly in the name of the wife was in fact the business of the wife. "Now," said the Vice Chancellor in his opinion, "the entire history of the business, from the year 1879 down, is convincing that she let him have her money whenever he wished it, without a question, and that he put all the patents in her name, for the purpose of securing his property to his family in case of business trouble, while in fact he retained as complete control over it as if he was its absolute owner. Every step taken in the business was the offspring of his thought and will alone. In all the transactions it is perfectly obvious that everything was left to him. His wife naturally had but the faintest knowledge of the work in which he was engaged, and exercised no oversight over the conduct of the business." The bank accounts were in the name of the wife, and he drew checks under a power of attorney from her. Contracts made were made in her name. The property in which the machines were manufactured was in her name. "But," said the Vice

Chancellor, "it seems to me transparent that all this was merely colorable. It was the husband who suggested the agency, who settled the terms of the contracts, who received and deposited the money arising from them, and who spent it, with no expectation, on his part or on her part, that he would ever be called upon to account to her for its receipt or expenditure. He kept no books of account, except of the most meager and partial kind of the receipts and expenses of the business. The wife never asked for an accounting, and never expected any, and he knew that she never expected any."

This case was reversed in the Court of Errors and Appeals (55 N. J. Eq. 519, 37 Atl. 891), but solely on the ground that that court believed, and the Vice Chancellor did not, in the substantial truth of the testimony of the husband and the wife concerning the agreement made between them. The court said their testimony was uncontradicted, and was corroborated by their conduct ever since the alleged making of the bargain. The court declared that—

"On the grounds above stated, we believe the contract to have been made bona fide for valuable consideration on both sides, and without any improper design."

In Taylor v. Wande, 55 N. J. Eq. 491, 37 Atl. 315, 62 Am. St. Rep. 818, the New Jersey Court of Errors and Appeals declared that a court of equity would carefully scrutinize the employment of an insolvent husband by a wife engaged in carrying on a business on her own account. In the circumstances of that particular case the court said it could find nothing in the facts which indicated that the husband acquired any interest in the profits or earnings of the business. "Had the husband's services been rendered to her gratuitously," it was said, "such would probably be the conclusion, for the debtor is not obliged to work for the benefit of his creditor; but when, as in this case, the services were rendered upon compensation, not shown to be unusual compensation for such services, it is beyond doubt that the profits and earnings of the business belonged to the wife, notwithstanding they were in part due to the husband's skillful services, precisely as they would do, had she employed a stranger of like ability to carry on the business."

In Mayers v. Kaiser, 85 Wis. 382, 55 N. W. 688, 21 L. R. A. 623, 39 Am. St. Rep. 849, it is laid down that the mere fact that the wife employs her husband as her agent to carry on her business in her name, will not give his creditors a right to have their claims paid out of the profits of the business, especially where the husband has been paid by the wife for his services. And so in Martin v. Remington, 100 Wis. 540, 76 N. W. 614, 69 Am. St. Rep. 941. In Kendall v. Beaudry, 107 Wis. 180, 184, 83 N. W. 314, 316, the court points out that there must be good faith and then says:

"In ascertaining the existence of this element, the question is whether the debtor does in fact give or hire his services to another, the fruits thereof to belong to that other, or does he merely exert himself under the color of another's name, with the understanding or purpose that the fruits of his exertion shall be his, but screened by that other's name from his creditors. The former situation satisfies all that is meant by the expression 'good faith' in

this connection. * * * He may be led to so act because of the hopelessness of attempting to devote his efforts to a business of his own, where they would be rendered abortive by the prompt attack of creditors as soon as they became at all productive. Such motive or reason is not inconsistent with the good faith of the transaction."

In Boggess v. Richard's Adm'r, 39 W. Va. 567, 20 S. E. 599, 26 L. R. A. 537, 45 Am. St. Rep. 938, the court held that a husband may engage in business with his wife's capital in her name and on her credit for her benefit; but if, owing to his skill and labor, large profits accrue therefrom over and above the necessary expenses and indebtedness of the business, including the support of himself, his wife and family, a court of equity will justly apportion such profits between his wife and his existing creditors.

The record in this case has convinced me that husband and wife were not acting in good faith, and that the husband had an interest in the proceeds of the moving picture business which his creditors are entitled to reach, and I think the judgment should have been reversed.

BORMAN et al. v. UNITED STATES.

(Circuit Court of Appeals, Second Circuit. November 20, 1919.)

No. 35.

1. SALES ⟸4(3)—"BAILMENT" DISTINGUISHED FROM "SALE."

Where articles are delivered by one person to another, who is to perform labor on them or to manufacture them into other articles for the former, the transaction is a "bailment"; but if the person who receives the articles may deliver in return articles which are not the product of those received, the transaction is in fact a "sale."

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

2. CONSPIRACY ⟸33—TITLE TO LININGS FURNISHED BY UNITED STATES TO MANUFACTURING CONTRACTOR DOES NOT PASS.

Under a contract between the United States and one of the defendants for the manufacture of leather jerkins, which required the United States to furnish the linings, *held*, that title did not pass, so that the contractor and a confederate, who conspired to obtain linings from the United States in excess of needs and sell the same, etc., were guilty of violating Criminal Code, §§ 36, 37 (Comp. St. §§ 10200, 10201).

3. CRIMINAL LAW ⟸1178—ERROR WAIVED WHERE NOT MENTIONED IN RECORD OR BRIEF.

In a prosecution against a contractor, who manufactured leather jerkins for the United States, and another, for conspiracy to defraud the United States, etc., in violation of Criminal Code, §§ 36, 37 (Comp. St. §§ 10200, 10201), where it appeared that the contractor disposed of linings furnished by the United States, title to which did not pass to him, it was unnecessary to inquire whether, at the time he demanded the linings, disposed of, he knew that they were in excess of his requirements, where there was no evidence in the record, and nothing was said in the argument concerning it.

Manton, Circuit Judge, dissenting.

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

Jacob A. Borman and another were convicted under Criminal Code, §§ 36, 37, of conspiring to apply to their own use property of the United States, and of conspiring to sell, convey, and dispose of such property, and they bring error. Affirmed.

Wood, Molloy & France, of New York City (Henry P. Molloy and Melville J. France, both of New York City, on the brief), for plaintiffs in error.

Francis G. Caffey, U. S. Atty., of New York City (Robert A. Peattie, Asst. U. S. Atty., of New York City, of counsel), for the United States.

Before WARD, ROGERS, and MANTON, Circuit Judges.

ROGERS, Circuit Judge. The plaintiffs in error (hereinafter called defendants) have been convicted upon an indictment which in the first count charged them with having unlawfully conspired to apply to their own use certain property of the United States, and in the second count charged that they unlawfully conspired to sell, convey, and dispose of the same property. The indictment is based on the following provisions of the Criminal Code (Act March 4, 1909, c. 321, 35 Stat. 1096 [Comp. St. §§ 10200, 10201]):

"Sec. 36. Whoever shall steal, embezzle, or knowingly apply to his own use, or unlawfully sell, convey, or dispose of, any ordnance, arms, ammunition, clothing, subsistence, stores, money, or other property of the United States, furnished or to be used for the military or naval service, shall be punished as prescribed in the preceding section.

"Sec. 37. If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than ten thousand dollars, or imprisoned not more than two years, or both."

The testimony shows, and defendants admit, that defendant Borman caused to be shipped to defendant Phillips about February 25, 1918, some 2,664 yards of linings which Phillips received and which had been furnished by the government to the defendant Borman to be used in making up leather jerkins under contracts which will be more fully referred to—which jerkins were intended to be used by the military forces of the United States. The 2,664 yards of linings were delivered at various times on the demand of Borman made upon the Quartermaster's Department to be used under the contracts, and which were in excess of the amount of linings it was necessary for the government to furnish. It appears that defendant Phillips, acting under Borman's direction, sold this extra lining material for the sum of about $6,000, checks for which were delivered to Borman, who in turn indorsed them over to an employé, who, at the direction of Borman, deposited the check to his (the employé's) credit in his bank. The money was afterwards applied to the use of the defendants. And the defense relied upon is that at the time the defendants appropriated these linings to their own use the title was not in the United States.

It appears that two contracts were made between the United States and the Borman Sheep Lined Coat Company, one on September 27, 1917, and the other on October 20, 1917. Contract No. 1112 calls for the manufacture of 63,000 leather jerkins, and is on a blank printed in part and typewritten in part. It has printed on it that it is "to be used for all purchases of supplies, clothing, wagons, harness, bacon, etc., which are purchased in bulk or large quantities to be delivered at depots or to purchasing quartermasters." It contains a typewritten statement that the supplies are "to be manufactured from materials furnished in part by the Quartermaster Corps, and to be delivered at the depot of the Quartermaster Corps, U. S. Army, Philadelphia, Pa." It states that "the government is to furnish lining, buttons, and rings only; contractor is to furnish all other materials"; also that "the materials furnished by the government are to be received by contractor f. o. b. New York, N. Y.; * * * contractor to be liable for any loss of or damage to any of the materials furnished by the Quartermaster Corps from any cause whatsoever while in his possession. All rags and clippings from the linings shall remain the property of the United States and be delivered with the finished jerkins."

Contract No. 1464 calls for the manufacture of 50,000 leather jerkins, and is on a blank also printed in part and typewritten in part. Like the first contract it states that it is to be used for all purchases of supplies, etc. It contains the following provision:

"The government is to furnish the lining and buttons only. Contractor to furnish all other materials. The lining and buttons to be received by contractor f. o. b. New York. All rags and clippings from linings furnished by the government delivered at the Philadelphia depot of the Quartermaster Corps, U. S. Army, without expense to the United States for packing or transportation; contractor to be liable for any loss of or damage to any materials furnished by the Q. M. Corps, U. S. Army, from any cause whatsoever while in contractor's possession."

Both contracts specify the amount to be paid for each jerkin and then provide as follows:

"That for and in consideration of the faithful performance of the stipulations of this contract, the contractor shall be paid, at the office of the contracting officer, or by a disbursing officer designated by him to make payments, the prices stipulated in this contract for those supplies delivered and accepted; and, except as otherwise provided, payments will be made as soon after the acceptance of each delivery as is practicable and funds on hand for the purpose will admit."

Both contracts provide:

"That the articles herein contracted for shall be examined and inspected, without unnecessary delay after being delivered, by a person or persons appointed by the United States; and upon such inspection, the articles found to be in all respects as required by this contract shall be received and become the property of the United States. Any and all articles that may, upon such inspection, be condemned or rejected, shall be removed from the premises by the contractor within 10 days after the said contractor or his agent shall have been notified of such rejection; otherwise, at the risk and expense of the contractor."

Counsel for the defendants argue that the contracts show that the transactions involved a sale of the materials which the government

furnished, as the word "purchases" and "purchased" necessarily imply a sale; so that at the time of the delivery of the linings to the contractor the title passed out of the United States and to the contractor, the amount finally to be paid by the government for the finished jerkins being reduced by the amount due to the government for the linings furnished.

[1, 2] It is elementary that where articles are delivered by one person to another, who is to perform labor upon them or to manufacture them into other articles for the former, the transaction is a bailment; but if the person who receives the articles may deliver in return articles which are not the product of those received, the transaction is in effect a sale. Now it is not necessary to inquire, for reasons which will presently appear, whether under the provisions of the contracts herein involved the delivery of these linings involved a bailment or a sale, whether the contractor was bound to use the linings which the government delivered, or whether other linings might have been used in their stead. Neither is it conclusive that the blanks used in filling in the terms of the contracts contained the words "to be used for all purchases of supplies." The government was undoubtedly purchasing supplies, and they were to be manufactured in part from materials furnished by it and in part from materials furnished by the contractor. But for the purpose of the argument we shall assume that under the contracts there was a sale of the linings, and not a bailment. Then the question arises whether or not under the sale the title had passed to the linings herein involved.

This court had under its consideration in Re Liebig, 255 Fed. 458, 166 C. C. A. 534, the question as to the time when title passes under a sale. We said in the case cited that in sales the transfer of title depends upon the intention of the parties however indicated. And in Hatch v. Oil Co., 100 U. S. 124, 25 L. Ed. 554, the general rule was said to be that the agreement as to the passing of title is just what the parties intended to make it, if the intent can be collected from the language employed, the subject-matter, and the attendant circumstances. We think the intent of the parties to these two contracts is clearly indicated in the language they employed.

The provision already referred to which provided that the contractor was to be liable to the United States for any loss of or damage to any of the materials furnished by it would seem to indicate that the title to the property continued in the government and had not passed to the contractor. If the title had passed out of the United States, the property was the property of the contractor, and there was no necessity for such a provision.

Moreover, it was provided, as we have seen, that "all rags and clippings from the linings 'shall remain' the property of the United States"; that is to say, the title in the rags and clippings must under this language have been all the time in the United States. If the title to the linings had passed out of the United States at the time of their delivery to the contractor, the title to so much of the linings as subsequently became rags and clippings originally passed along with the rest, and it could not properly have been said that as to

them the title should continue or "remain" in the United States. Some other language would have been necessary to indicate that the United States was to be reinvested with the title which it lost when the linings were delivered. Assuming, then, a sale, it is clear that the title could not have been intended to pass until the linings were cut out, and then only as to so much as were used in the jerkins.

In view of what has been said, it is not necessary to consider certain cases which have held that contracts in some particulars not unlike those in this case have held that the transaction amounted to a sale and not a bailment. Power Co. v. Burkhardt, 97 U. S. 110, 24 L. Ed. 973; Hargraves Mills v. Gordon, 137 App. Div. 695, 122 N. Y. Supp. 245. Neither is it important to consider a class of cases of which Dixon v. London Small Arms Co., Ltd., 1 App. Cases, 632, is the most notable, in which the courts have considered whether such contracts result in a sale or in an agreement for service.

An important fact is that these linings were not obtained in accordance with any contract. The government was under no contractual obligation to furnish them. It was only contractually obliged to furnish the amount of linings necessary to enable the contractor to manufacture the number of jerkins contracted for. Another important fact is that the amount of the linings the government was to furnish was not furnished altogether, but as required and called for by the contractor. The Quartermaster's Department made an allotment to each contractor of the amount of the material he was entitled to receive under each contract, and material was issued from time to time as called for. When Borman in New York applied to the Quartermaster's Department for material the officials there called up the department in Philadelphia and said: "Mr. Borman is here for material; is it all right to give it to him?" So that Borman, using the contract as a reason for his demand, asked for his material in excess of what he was entitled to under his contract, and obtained the 2,664 yards of the linings which he sold. This yardage cannot be said to have been obtained in accordance with any contractual obligation.

Moreover, as it was never cut, but remained in the form in which it was received, no title passed, and it continued to be the property of the government. And the clandestine manner in which it was sold and the proceeds put in the name of Borman's employé indicates that Borman very well knew that it was not his property, and that he knew he was acting dishonestly in what he did. The court in his charge said:

"In other words, as reasonable men, pass upon this situation and all the evidence in the case, and determine whether or not these defendants acted as honest men or as dishonest men; and if you conclude that they acted dishonestly, whether their intent and purpose was knowingly to apply to their own use property of the United States, and whether their purpose was to unlawfully sell, convey, and dispose of property of the United States."

And it was also charged:

"That these defendants cannot be convicted in this case, unless the jury believe from the evidence to a moral certainty and beyond a reasonable doubt

that they conspired to apply the linings to their own use, or conspired to unlawfully dispose of them knowing that the linings belonged to the United States."

Under the charge, as given, Borman could not have been convicted if the jury believed that Borman honestly thought that he had obtained title to the 2,664 yards of linings which he sold. We must conclude, therefore, not only that the linings which he sold were as a matter of law the property of the United States, but that defendants did not believe that the title to the linings had passed from the government to Borman.

[3] Under the circumstances it is not important to inquire whether Borman, at the time he demanded the additional yards of linings, knew that they were in excess of the amount which he was entitled to receive under the contracts. There is no evidence upon that subject in the record, and nothing was said concerning it upon the argument in this court; and we must assume that Borman did not obtain possession by a trick or by fraud. If possession had been obtained by a trick and animo furandi, title, according to many cases, would not have passed. See Kerr on Fraud and Mistake, pp. 10, 11; Cole v. Northwestern Bank, L. R. 10 C. P. 354, 373; Whitehorn Brothers v. Davison, [1911] 1 K. B. 463, 470; Oppenheimer v. Frazer, [1907] 2 K. B. 50, 70; Kingsford v. Merry, 1 H. & N. 503; Regina v. Middleton, L. R. 2 C. C. 38; Bailey v. State, 58 Ala. 414; State v. Williamson, Houst. Cr. Cas. (Del.) 155; Cooper v. Commonwealth, 110 Ky. 123, 60 S. W. 938, 52 L. R. A. 136, 96 Am. St. Rep. 426; Wolfstein v. People, 6 Hun (N. Y.) 121; Goff v. Golt, 5 Sneed (Tenn.) 562.

The defendants are in this court, as they were in the court below, admitting that they obtained the linings wrongfully, that they sold them wrongfully, and that they appropriated to their own use wrongfully the moneys realized from their sale. They seek to escape upon a technicality the punishment which the Criminal Code of the United States imposes. In this they cannot succeed. The defense interposed is not tenable. The title to the 2,664 yards continued in the United States.

Judgment affirmed.

MANTON, Circuit Judge (dissenting). The defendants below were charged in the indictment with having conspired to commit an offense against the United States, by applying to their own use jerkin linings, the property of the United States. The prosecution proceeded upon an alleged violation of sections 36, 37, of the Criminal Code of the United States.

The defendant Borman was engaged in business under the name of Borman Sheep Lined Coat Company and had contracts with the government to furnish in all 113,000 leather jerkins. Under the terms of the contracts, the Quartermaster's Department delivered to Borman quantities of linings to be used in the making of jerkins. On the 25th of February, 1918, Borman caused to be shipped to the defendant Phillips 2,664 yards of such linings, which were delivered

to Borman pursuant to the contracts with the government. Phillips, acting under the instructions of Borman, sold the linings for $6,000, and the check therefor was delivered to Borman, who indorsed it over to an employé, and this was deposited to the employé's credit in his bank.

The main inquiry is whether the linings in question were the property of the United States at the time they were sold under Borman's instructions. The District Judge charged the jury, as a matter of law, that the title to the linings was in the United States at the time of their sale by the defendants, or at the time of the commission of the crime as charged. It is the contention of the defendants that the contracts were of manufacture and sale, and that the possession of the linings by them was not by mere bailment, with a contract of service. An examination of the language of the contracts will reveal that the transaction is referred to as a purchase and sale of the jerkins; the purchaser being the government. In order to make a valid sale of the jerkins to the government, it was necessary for the contractor to pass a good title, not only of the materials which he purchased and placed in the jerkins, but each and all of the materials which went to make up the manufactured product; otherwise the sale would amount to a portion of the jerkins—such of the materials as were purchased by the contractor and placed in the jerkins. The linings were delivered to the contractor in bulk, and the inquiry is whether title thereto passed and when it passed. The contracts provided in part as follows:

"Contract for supplies to be delivered in bulk at depots and the purchasing quartermaster for distribution or use in manufacture, etc. To be used for all purchases of supplies, clothing, wagons, harness, etc., which are purchased in bulk or large quantities to be delivered at depots or to purchasing quartermasters."

"Contract for army clothing (to be used exclusively for the manufacture of army clothing where raw material is furnished by the United States)."

It would appear that a purchase of jerkins was intended, and not a contract for service upon materials furnished by the government.

Another form of contract used by the government, which is in evidence, but is not the contract under which the lining was sold, reads in part:

"8. *Title to Material Furnished.*—Unless otherwise expressly provided herein, all materials paid for or furnished by the government under this contract, and all parts and pieces thereof and clippings therefrom, in whatsoever form or process of manufacture, shall be and remain the property of the government, and, while in the contractor's possession, shall be suitably marked as such by the contractor, in the manner directed by the contracting officer, so as to be identified as the property of the government."

This, it will be observed, indicates a manufacturing service. The word "purchase" is not used, and the tenor of the provisions is that the contractor is to return to the government, in manufactured form, the materials which it furnished.

Purchase implies a substitution of one owner for another. The word "purchase," as used in the title of the contracts, must be considered in its usual and ordinary meaning, for the contracts are ex-

clusively concerned with the buying of supplies by the government, and the word "supplies" indicates a contract of purchase, and not one of service.

Section 3 of the contracts provides:

"3. That the articles herein contracted for shall be examined and inspected, without unnecessary delay in being delivered, by a person or persons appointed by the United States; and upon such inspection the articles found to be in all respects as required by this contract shall be received and become the property of the United States. Any and all articles that may, upon such inspection, be condemned or rejected, shall be removed from the premises by the contractor within ten days after the said contractor or his agent shall have been notified of such objection; otherwise, at the risk and expense of the contractor."

If the goods on inspection are rejected, they do not become or remain the property of the United States, but remain the property of the contractor, who is obliged to remove the same at his own expense. Nothing in the contracts requires the contractor to part the rejected jerkins and, while keeping for himself the portion supplied by him, return to the government the linings supplied by it. On the contrary, the contractor in such a case would be required to furnish in place of the rejected jerkins, completed ones complying with the terms of the contract, and when he has done so, he would be free to dispose of the rejected jerkins for his own benefit. It will be noted that the other contract referred to (not involved here) provided that all materials throughout the entire process of manufacture, remain the property of the United States; but it is further provided that, in case of rejected goods, "the government shall be paid by the contractor a sum equal to the actual cost or market value at the time of such rejection of all materials furnished hereunder by the government for the making of such articles."

The specifications provide the kind of materials used for linings. These were what the government was to furnish to the manufacturer, and the government was necessarily to get its own linings back. If they have always remained its own, it would not insist that the linings be of a certain kind. A buyer of leather jerkins would so insist. The contracts refer to the price paid, and that indicates the sum which the seller will receive in exchange for his completed product. The contracts further provide that, in case of the failure of the contractor to perform any part of the contracts, the government shall have the right to supply the deficiency by procurement in the open market, or otherwise purchase any of the supplies so required, at such places as it may elect. This is to be done at the expense of the contractor. It is the usual provision of the contract expressing the legal right of any buyer in a contract of bargain and sale to buy in the open market an article similar to that to which the seller has agreed to deliver to him, and to charge the seller the excess in price over the price contracted for, where breach of contract results.

If it were a mere contract of service, another rule of damages would apply involving the cost to get the work done by another. The idea of the contract, that only upon acceptance shall the jerkins become the property of the government, was intended to mean that then only

would the title pass to the government. This imposed upon the manufacturer the entire responsibility for the goods, the process of manufacturing, and the result of such process. Under the terms, the contractor became liable for any loss of or damage to the materials furnished by the government, and the government inspector might inspect the goods and reject any of the articles or materials because of inferior workmanship. In the case of such rejection, the materials necessarily were thrown back upon the contractor, and it became the duty of the contractor to produce, at his cost, other materials to take the place of the rejected, and make satisfactory jerkins. It is clear to me that there was a sale of the linings in question, and not a bailment thereof. Power Co. v. Burkhardt, 97 U. S. 110, 24 L. Ed. 973; Hargraves Mills v. Gordon, 137 App. Div. 695, 122 N. Y. Supp. 245.

Since it appears that the contracting parties by their written contracts intended a contract of manufacture and sale of the jerkins, title to the parts of the constituent parts of said completed product were the subject of a sale. In Buffum v. Merry, 4 Fed. Cas. No. 2112, Judge Story said:

"It was not a contract whereby the specific yarn was to be manufactured into cloth wholly for the plaintiff's account and at his expense, and nothing but his yarn was to be used for the purpose. There the property in the yarn might not be changed; but here the cloth was to be made of other yarn as well as the plaintiff's, the warp of the plaintiff's yarn, the filling of the defendant's. The whole cloth, when made, was not to be delivered to the plaintiff, but so much only as at 15 cents per yard would pay for the plaintiff's yarn at 65 cents per pound. What is this but the sale of the yarn at a specified price, to be paid for in plaids at a specified price."

In Dixon v. London Small Arms Co., Ltd., 1 App. Cases, 632, a somewhat similar case, Lord Chancellor Cairns said:

"Now, * * * in order to answer that question you must turn to the contract itself. * * * Therefore * * * in substance the result of the whole is this: What I may call the raw material for the barrel, the steel tube, is supplied by the government at a certain price; the butt or stock of the rifle is supplied by the government at a certain price; all the other component parts of the arm have to be provided or made (for the contract is consistent with either view) by the contractors. The whole component parts have to be inspected from time to time by the officers of the government. They have the right from time to time to reject any part of the arm while in the course of manufacture, which is not consistent with the contract and the specification; and when the whole is, to use the technical term, 'assembled,' when all the pieces of the arm are put together, then if it complied with the specification, and in that case only, it is to be taken over and accepted by the government, and the property in it is to pass to the government, and, on the other hand, the price is to be paid for the article to the contractors. * * * The question then has to be asked: During this process, what is the position of the person who is called the contractor? He is clearly not a servant of the crown. That was not contended. There is no contract of service whatever between him and the crown. He is not an officer of the crown, engaged in the service of the crown. Is he, then, an agent of the crown? * * * I cannot find any ground whatever for contending that the contractor is an agent of the crown. He is a person who is a tradesman, and not the less a tradesman because he is engaged in works of a very large and extensive character; he is a tradesman manufacturing certain goods, for the purpose of supplying them according to a certain standard, which is laid before him as a condition on which the goods will be accepted. During the time of the manufacture the property, at all events, in that which concerns the present case, namely,

the property in the lock, or the breech action of the rifle, is not the property of the crown. The materials are not the materials of the crown. If the respondents make the lock themselves, the materials are provided by the respondents, and the respondent's work upon those materials, not as the agents of the crown, but as conducting their own work and their own manufacture for the purpose of supplying the complete arm. * * * I can find here no delegation of authority—no mandate from a principal to an agent; I find here simply the ordinary case of a person who has undertaken to supply manufactured goods, who has not got the goods ready manufactured to be supplied, and who has to make and produce the goods in order to execute the order which he has received. I find him engaged in that work on his own account up to the time when the article is completed and handed over to, and accepted by, the person who has given the order. I therefore arrive at the conclusion that there is not here on the part of the respondents that which amounts in any way to the character or the status of an agent, a servant, or an officer of the crown."

Lord O'Hagan said:

"The contract was not of service, but of sale, for the contractors' own benefit, of certain commodities, fulfilling certain conditions and to be paid for on certain terms; and if those conditions were fulfilled, whether by their own workmanship or articles provided at their instance, I apprehend the crown could not have rejected the commodities; as, on the other hand, its rights of rejection on nonfulfillment until the moment of delivery remained intact, a state of things difficult to be reconciled with the theory of agency or service."

In effect, the delivery of the linings in question was in part payment of the cost or price of the finished product. The parties evidently intended this. The price paid to the contractor was reduced to the extent of the value of the linings. The question of title must necessarily turn upon the intention of the contract and the intent of the parties as therein made plain.

But it is said that because of the provision, "All rags and clippings from the lining shall remain the property of the United States and be delivered with the finished jerkins," a clear indication is given by the parties that title to the linings vested in the government at all times. But, to me, the requirement for such a provision indicates that the parties intended just the reverse. If the lining material did not vest in the contractor on the delivery to him by reason of the nature and effect of the contract itself, the clause would be entirely unnecessary and without meaning, because, in such case, they would be reserved to the government by the very force of its title, without the necessity of such a clause or reservation. On the other hand, if the title to the lining material did become the property of the contractor on delivery to him, then such a reservation has both meaning and effect, and constitutes an exception to the general grant of the linings. When the government indicated a wish to accept such linings in the contract offered in evidence (Defendants' Exhibit D, Contract 108—not involved here) it said:

"All unused material furnished by the government shall remain the property of the United States, be properly prepared for shipment and held for such disposition as may be necessary by the government. All rags and clippings from material furnished by the government shall remain the property of the United States."

From the foregoing, it is apparent that the government, when intending to reserve ownership in property which it furnishes to the

contractor, can and does plainly express its intent therefor. The language of the contract, since it is drawn by the government, must be presumed to be that of the government. It is the general rule that exceptions and restrictions are to be construed strictly against the writer of the contract, and not to be extended beyond a fair import of the language expressed, except by necessary implication. Duryea v. Mayor, 62 N. Y. 592. It was well said in Mallory v. Willis, 4 N. Y. 76:

"Whatever the motive was, the express provision requiring Willis to return the offals and a specific quantity and quality of flour for a given quantity of good merchantable wheat, taken in connection with the other provisions of the contract, implies the exclusion of any claim or right of the plaintiffs to any greater quantity of flour, whatever the quantity produced was, and I think it is fairly implied that the surplus, if any, was to belong to Willis."

In Clarkson v. Stevens, 106 U. S. 505, 1 Sup. Ct. 200, 27 L. Ed. 139, Stevens had been under a contract to build a ship for the United States. Materials for the ship were delivered at Stevens' dock and under contract, were there received by the United States official, and stamped "U. S.," and "became the property of the United States." It was claimed that the contract provision made the ship built from these materials also the property of the United States as it was built. It was held that title to the unfinished vessel remained in Stevens, and that no property therein vested in the United States. The court said:

"For the inference is obvious, from the particularity of such a provision, that the larger interest would not be left to mere intendment."

I am of the opinion that title to the linings passed when delivered to the contractor and that the transaction as to the linings was a sale thereof and not a mere bailment. It was therefore error for the court to charge, as a matter of law, that the title remained in the government. Exception was taken to this charge, and, in my opinion, presents error which requires reversal from this judgment.

REEDER et al. v. UNITED STATES.*

(Circuit Court of Appeals, Eighth Circuit. November 19, 1919.)

No. 5355.

1. INDICTMENT AND INFORMATION ⊜71—SUFFICIENCY OF ACCUSATION.
A crime is made up of acts and intent, and these must be set forth in the indictment with reasonable particularity of time, place and circumstances.

2. CONSPIRACY ⊜43(11)—INDICTMENT FOR SEDITIOUS CONSPIRACY.
An indictment under Criminal Code, § 6 (Comp. St. § 10170), for conspiracy to prevent, hinder, and delay by force the execution of the Selective Draft Act May 18, 1917, *held* sufficient.

3. CONSPIRACY ⊜43(11)—INDICTMENT UNDER ESPIONAGE ACT.
Counts in an indictment under Espionage Act June 15, 1917, tit. 1, § 4 (Comp. St. 1918, § 10212d), respectively charging conspiracy to violate

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

*Certiorari denied 251 U. S. —, 40 Sup. Ct. 346, 64 L. Ed. —.

sections 2 and 3 of the act by attempting to cause insubordination, disloyalty, and refusal of duty in the military and naval forces, and to obstruct the recruiting and enlistment service, *held* sufficient.

4. INDICTMENT AND INFORMATION ⊂=129(1)—JOINDER OF COUNTS.
Counts charging separate and distinct offenses grounded upon the same transaction may properly be joined in an indictment, under Rev. St. § 1024 (Comp. St. § 1690).

5. CRIMINAL LAW ⊂=508(9), 780(1)—TESTIMONY OF ACCOMPLICES.
While it is the better practice for courts to caution juries against too much reliance upon testimony of accomplices, there is no absolute rule of law preventing conviction upon the testimony of accomplices, if juries believe them.

6. CONSPIRACY ⊂=27—OVERT ACTS.
Acts of defendants *held* to constitute overt acts in furtherance of the conspiracy charged.

7. ARMY AND NAVY ⊂=40—OBSTRUCTING RECRUITING OR ENLISTMENT.
The offense of obstructing or attempting to obstruct the recruiting or enlistment service of the United States, within Espionage Act June 15, 1917, tit. 1, § 3 (Comp. St. 1918, § 10212c), may be committed by the use of words, and it is not essential to conviction that defendants' words or acts actually prevented recruiting or enlistment.

8. CRIMINAL LAW ⊂=423(1)—EVIDENCE OF ACTS OF CONSPIRATORS.
Where the evidence showed that an organization formed by defendants affiliated with other organizations for a common and unlawful purpose, an act of such other organizations in furtherance of the common purpose is evidence against all the conspirators.

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

Criminal prosecution by the United States against Walter M. Reeder, J. T. Cumbie, B. F. Bryant, T. A. Harris, Mack F. Clark, and M. E. Stuart. Judgment of conviction, and defendants bring error. Affirmed.

Patrick S. Nagle, of Kingfisher, Okl., for plaintiffs in error.

Herman S. Davis, Asst. U. S. Atty., of Frederick, Okl. (John A. Fain, U. S. Atty., of Lawton, Okl., on the brief), for the United States.

Before CARLAND and STONE, Circuit Judges, and ELLIOTT, District Judge.

ELLIOTT, District Judge. The indictment against the plaintiffs in error, hereinafter referred to as defendants, is in three counts. The first, under section 6 of the Criminal Code (Act March 4, 1909, c. 321, 35 Stat. 1089 [Comp. St. § 10170]), charges a conspiracy to hinder and delay by force the execution of a law of the United States approved May 18, 1917 (40 Stat. 76, c. 15), entitled "An act to authorize the President [of the United States] to increase temporarily the military establishment of the United States, * * *" and by force to procure arms and ammunition, and to arm themselves with the same, and while armed to combine and offer resistance to the authority of the United States and to the enforcement and execution of said act of Congress, proclamations, etc.; the second count charges a conspiracy to cause and attempt to cause insubordination, disloyalty, mutiny, and refusal of duty in the military and naval forces of the United States,

and to induce, entice, persuade, and coerce the persons named in this count of the indictment to refuse to submit to and to perform their duties as a part of the military and naval forces of the United States; and the third count charges defendants with conspiracy to obstruct the recruiting and enlistment service of the United States, to the injury of the service of the United States.

Defendants were convicted upon all three counts, and sentenced for a term of six years upon the first count and for a period of two years each upon the second and third counts, the terms of imprisonment to run concurrently.

[1] The first contention of the defendants is that the court erred in overruling the demurrer to the indictment, insisting that no facts were alleged in the indictment under which a court could decide whether they were sufficient in law to sustain a conviction.

In criminal cases prosecuted under the laws of the United States, the accused has the constitutional right to be informed of the nature and cause of the accusation. The indictment must set forth the offense with clearness and all necessary certainty to apprise the accused of the crime with which he stands charged, and every ingredient of which the offense is composed must be accurately and clearly alleged. The object of an indictment is, first, to furnish the accused such a description of the charge against him as will enable him to make his defense and avail himself of his conviction or acquittal for protection against a further prosecution for the same cause; and, second, to inform the court of the facts alleged, so that it may decide whether they are sufficient in law to support a conviction if one should be had. For this facts are to be stated, not conclusions of law alone. A crime is made up of acts and intent; and these must be set forth in the indictment with reasonable particularity of time, place and circumstances. U. S. v. Cruikshank et al., 92 U. S. 542, 23 L. Ed. 588.

[2] The statute under which the first count of the indictment is drawn provides that—

> "If two or more persons * * * conspire to overthrow, put down, or to destroy by force the government of the United States, * * * or to oppose by force the authority thereof, or by force to prevent, hinder, or delay the execution of any law of the United States, * * * they shall each be" punished.

It will be observed that under this particular statute an overt act is not made an ingredient of the offense, and the first inquiry is as to the sufficiency of the indictment under this statute. Has the pleader substantially complied with the rule of law as admirably stated in U. S. v. Cruikshank et al., supra?

The indictment designates the time and the place of the alleged offense definitely. It names the defendants, and alleges that they did then and there knowingly, willfully, unlawfully, and feloniously conspire, etc., with other persons named in the indictment to knowingly, willfully, unlawfully, and feloniously hinder and delay the execution of a certain law of the United States, designating it as the act of Congress approved May 18, 1917, giving the title of the act, and referring also to the proclamations of the President of the United States and

regulations in aid of said act. The indictment further alleged that the defendants knowingly, willfully, unlawfully, and feloniously opposed by force the authority of the United States, its agents and officers, in the enforcement of said act, proclamation, and regulations in so far as their provisions applied to persons subject to military duty and service thereunder, and particularly in so far as the same applied to Wright, Ratcliffe, Blackwood, and others named in the indictment. It is further alleged that the defendants did conspire, combine, and agree together with persons named in the indictment by force to procure arms and ammunition, and to arm themselves with the same, and while armed to offer individual and combined resistance to the authority of the United States and to the enforcement and execution of said act of Congress, proclamation, and regulations, to the end that they would thereby hinder, delay, and prevent the said persons from being drafted into and inducted into the military forces of the United States; alleging further that such persons and each of them were citizens of the United States within the state of Oklahoma, having registered in said state and not having been exempted from military service as provided in said act, and that they were then and there under the duty to submit to being drafted into the military service of the United States under the provisions of said act, etc.

It will be noted that this count of the indictment with both clearness and certainty alleges the conspiracy of the defendants, entered into for the purpose of committing the offense therein specified, describing it in the words of the statute which creates it, and to these allegations is added the names of the persons with whom they conspired, and who, with others, were to be influenced by them, together with allegations of intent and purpose, and that they were armed and prepared to carry out the purpose of the conspiracy by force. The conspiracy in this count is the gist of the crime, and every ingredient of the offense is accurately stated, and apprises the accused of the crime with which they stand charged. Clearly the accused were furnished by the allegations of this count of the indictment with such a description of the charge against them as would enable them to make their defense and avail themselves of their conviction or acquittal for protection against a further prosecution for the same cause.

[3] Counts 2 and 3 of the indictment are drawn under the provisions of the act of June 15, 1917 (40 Stat. 217, c. 30), which provide that:

"If two or more persons conspire to violate the provisions of sections two or three of this title, and one or more of such persons does any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be punished," etc. Title 1, § 4 (Comp. St. 1918, § 10212d.)

This statute prohibits two or more persons conspiring to willfully cause or attempt to cause or incite or attempt to incite insubordination, disloyalty, mutiny, or refusal of duty in the military or naval forces of the United States, in the first instance; and, in the second, to willfully obstruct or attempt to obstruct the recruiting or enlistment service of the United States.

The second count of the indictment sets forth the offense charged fully and clearly in the language of the statute, and in addition thereto, with the evident purpose of preventing uncertainty or ambiguity, further alleges elements entering into and constituting the offense, as the time, place, the persons conspiring, whom they conspired with, and that the purpose of this conspiracy with the persons last named in the indictment was to knowingly, willfully, unlawfully, and feloniously combine, conspire, confederate, and agree with each other and with the persons last named in the indictment to cause and attempt to cause insubordination, disloyalty, mutiny, and refusal of duty in the military forces of the United States; and in said count it is specifically alleged that the defendants did conspire, combine, confederate, and agree with each other and the persons named in the indictment to induce, entice, persuade, and coerce Monroe Wright, and others in said count named, to fail and refuse to submit to and perform their duties as a part of the military and naval forces of the United States, when called for duty under the provisions of the act of May 18, 1917, known as the Selective Service Law, and the proclamation and regulations duly promulgated thereunder.

This count further alleges that the persons last named, with whom defendants conspired, were citizens of the United States, alleging their ages, and that they had submitted to and had been registered in accordance with the terms of said act, and it is then alleged that it was the purpose and intent of the defendants that these various persons named in the indictment, when called for duty and service in the military and naval forces of the United States, were to be disloyal to the United States, and were to mutiny and rebel against the authority of the United States, and refuse to perform their duties as a part of the military and naval forces of the United States. Thereupon overt acts are alleged, specifying the time and the place of meeting of defendants in pursuance of this unlawful conspiracy, and that it was for the purpose of effecting the object thereof, and it recites with definiteness and certainty the time, place, and substance of what was done by defendants pursuant to said alleged conspiracy and for the purpose of effecting the same.

The references to the allegations of the second count are true as to the third count, except the conspiracy alleged in the third count is a violation of that provision of the statute prohibiting obstructing the recruiting and enlistment service of the United States.

It will be seen, therefore, that this indictment is not subject to the criticism that it is uncertain, vague, or indefinite. The conspiracy charged is set out with particularity, and counsel for defendants has failed to point out any insufficiency in the statements of any of these counts, and has failed to name a single subject or particular in which there is any uncertainty or any indefiniteness. The indictment is definite and certain as to time and place, with the names of the parties charged with having entered into the conspiracy—even the identical place where it is alleged the conspiracy was formed, "at Mack Clark's farm," is set forth—and the intent and purpose with which the conspiracy was formed; and the indictment does not stop there, but par-

ticularizes the individuals whom the defendants are alleged to have intended to influence, and just what the defendants would influence them to do and not to do, with the manner in which this was to be accomplished.

It will therefore be seen that the question is not presented here as to whether or not each count of this indictment is sufficient to describe a statutory offense in the language of the statute, because the pleader has fully covered the provisions of the statute in the different counts of the indictment, and in addition thereto has definitely alleged facts and circumstances which include all material elements entering into the ingredients of the offense charged. Clearly the indictment furnished the accused with a description of the charges against them which would enable them to make their defense and avail themselves of their conviction or acquittal for protection against a further prosecution for the same cause. It fully informed the court of the facts relied upon, and the court rightly decided they were sufficient in law to support a conviction, if one should be had, and properly overruled the demurrer to the first, second, and third counts of the indictment. Cochran v. U. S., 157 U. S. 286, 15 Sup. Ct. 628, 39 L. Ed. 704.

[4] Objection is made that the court denied the motion of the defendants that they should be proceeded against upon only one count of the indictment to be elected and designated by the prosecution. These three counts are for the same transaction, and the allegations of the separate counts are stated within a distinct and separate provision of the statute; each being entirely independent of the others. This is permissible by express statute of the United States. R. S. § 1024 (section 1690, U. S. Comp. Stat.). The purpose of pleading the same transaction in several counts as to the manner or means of its commission is to avoid at the trial an acquittal by reason of any unforeseen lack of harmony between the allegations and the proof. In Dealy v. U. S., 152 U. S. 542, 14 Sup. Ct. 681, 38 L. Ed. 545, the Supreme Court of the United States said:

"It is familiar law that separate counts are united in one indictment, either because entirely separate and distinct offenses are intended to be charged, or because the pleader, having in mind but a single offense, varies the statement in the several counts as to the manner or means of its commission, in order to avoid at the trial an acquittal by reason of any unforeseen lack of harmony between the allegations and the proofs. * * * Yet, whatever the purpose may be, each count is in form a distinct charge of a separate offense, and hence a verdict of guilty or not guilty as to it is not responsive to the charge in any other count."

See Corbin v. U. S., 205 Fed. 278, 125 C. C. A. 114; Kreuzer v. U. S., 254 Fed. 34, 165 C. C. A. 444; Boone v. U. S., 257 Fed. 963, — C. C. A. —.

It may be added that the longest term of imprisonment imposed by the trial court upon any of the three counts of the indictment was no greater than that which might have been imposed upon either count, and the terms of imprisonment run concurrently. The sentence imposed, therefore, does not exceed that which might properly have been imposed upon conviction under any single count.

There is an exception to the failure of the court to direct a verdict

of not guilty at the close of the plaintiff's evidence. The question of the sufficiency of the evidence to sustain a verdict of guilty was not raised in the trial court by a renewal of the motion at the close of all of the evidence, and it may not now be urged by the defendants, unless, in our discretion, we determine to consider it. We find in the record no sufficient reason for the exercise of such discretion.

Defendants' exceptions numbered 2 to 7, inclusive, are largely devoted to the consideration of the effect of the testimony, and therefore to the weight to which it is entitled. The jury having seen the witnesses and heard the evidence, the weight that should be attached to the statements of the witnesses, complained of by counsel for defendants, was a matter peculiarly within the province of the jury. The record contains proof of the existence in the state of Oklahoma, where this cause of action arose, of an organization the declared purpose of which was to do the very thing prohibited by the statute above cited, and that these defendants, acting as members of such organization, actually conspired, agreed, and confederated together to do the things the indictment alleges against them and for the purposes alleged in the indictment. Numerous overt acts were shown, including the defendants arming themselves and others, and agreeing to do by force and violence the things prohibited by the statute above quoted.

Defendants object to the testimony of the witness Parker, alleging he was permitted to testify to what one of the defendants told him. The record discloses that he was present with defendants at a meeting, and that his testimony, complained of here, was an account of a report made by one of the members of the organization as a part of the proceedings at this meeting. This testimony was competent as to all defendants present.

[5] Defendants contend they were convicted on the testimony of Monroe Wright, a coconspirator, and that his uncorroborated testimony was insufficient to warrant such conviction. Wright was only one of a number of witnesses who testified to the circumstances attending the formation of the organization to which these defendants belonged, as well as an account of different meetings held by members of the organization, defendants and others. The facts and circumstances, independent of what was said and done at the meetings, tend to support and corroborate the statements of the witness Wright. The record contains no request that the court caution the jury against too much reliance upon the testimony of this witness as an accomplice, and against believing such testimony without corroboration; and while it is the better practice for courts to caution juries against too much reliance upon testimony of accomplices, and to require corroborating testimony to give credence to such evidence, there is no absolute rule of law preventing convictions upon the testimony of accomplices, if juries believe them. Caminetti v. U. S., 242 U. S. 470, 495, 37 Sup. Ct. 192, 61 L. Ed. 442, L. R. A. 1917F, 502, Ann. Cas. 1917B, 1168; Bishop, Crim. Proc. (2d Ed.) § 1081, and cases cited in the note.

[6] Defendants insist that the alleged overt acts are not such as contemplated in the provisions of the statute alleged to have been violated, being merely a series of acts embraced within the original con-

federation. If we understand the argument presented by counsel, it is that, because they occurred upon the date upon which the proofs showed the meeting was held and the purpose of the organization disclosed, they were not acts intended to carry into effect the original agreement. The conspiracy was complete when the agreement was entered into. Immediately thereafter defendants participated in holding further meetings, securing additional members of the organization, securing arms and ammunition, appointing one of defendants the representative of that organization to go to Chicago for conference with the I. W. W., and to act with them against the government of the United States in violation of the particular statute in question—all overt acts within the allegations of the indictment.

Counsel for defendants argues that the defendant Stuart's name is mentioned but three times in the record. This goes to the sufficiency of the evidence, and that question is not here for our consideration. In passing, however, it may be noted that we find much in this record in criticism of an attempt to minimize the part this defendant assumed in this prohibited transaction. It is very evident upon the face of the record that he was one of the moving spirits in the enterprise; that he was one of the first to report to the meeting at Mack Clark's farm, when he presented a report there of 75 or 100 that he had secured to join the organization and who were ready for action. The fact that he had taken this action before this meeting at Clark's farm and presented the report there as an encouragement for organization for this unlawful purpose, does not relieve him of responsibility for the agreement that was then and there entered into; nor does it tend to relieve him from responsibility for the completed offense, which is evidenced by overt acts of other coconspirators subsequent to the meeting.

[7] Defendants then contend that language is not proximately capable of causing insubordination, disloyalty, mutiny, and refusal of duty in the military and naval forces of the United States, or obstructing the recruiting service of the United States, unless the circumstances assure that it will reach members of the actual forces, or conflict with agencies of the recruiting service, as the case may be, and, further, that there was nothing said or done by defendants that ever reached members of the actual forces of the United States, or conflicted with any of the agencies of the recruiting service, and that it does not appear that a single person was ever influenced to the detriment of the government by anything said or done by the alleged conspirators.

The answer to this objection is that the indictment alleges the names of certain persons, whose ages are given and their citizenship alleged, with the further allegation that they had registered and were liable for service, and that defendants conspired with the persons so named with the intent and purpose to do the things prohibited by this statute. The Circuit Court of Appeals of the Fifth Circuit, in Deason v. U. S., 254 Fed. 259, 165 C. C. A. 547, properly construed the provisions of the act of June 15, 1917, making it an offense to willfully obstruct the recruiting or enlistment service of the United States, wherein the

court said: The word "obstruct" is not used as the equivalent of "prevent," but rather of "to make difficult," and to warrant conviction for its violation it need not be shown that defendants' words or acts prevented recruiting or enlistment.

The jury, having considered the testimony and the facts and circumstances, determined this question against the defendants, and there is substantial evidence to sustain such finding.

[8] The court refused to strike out and take from the jury testimony which defendants say was practically an assumption that the organizations known as "W. C. U." and "I. W. W." were and are illegal and outlaw organizations, without proving the same by competent evidence. An examination of this record discloses that all of this testimony had relation to the common purpose of violating the provisions of the statute, the proclamation, and regulations as charged, and that these organizations were working with defendants in the carrying out of the intents and purposes of the alleged conspiracy. A conspiracy has been shown, and these other organizations entered into that conspiracy. An act of such organizations in furtherance of the common purpose is evidence against all coconspirators; and this is so, though the conspirator committing the act was not a defendant in the case being tried. Clune v. U. S., 159 U. S. 390, 16 Sup. Ct. 125, 40 L. Ed. 269; Isenhouer et al. v. U. S., 256 Fed. 842, — C. C. A. —.

That the plans and purposes of these defendants were not consummated is due to no fault of theirs. It is clear that the organization of which they were members had for its purpose the violation of the statutes of the United States in question. It is equally clear they were each of them active in the formation of this organization, with a full understanding of its unlawful purpose, and cooperated toward effecting its object.

Finding no prejudicial error, the judgment of conviction is affirmed.

MARTIN v. IMBRIE et al.

(Circuit Court of Appeals, Second Circuit. December 10, 1919.)

No. 39.

1. ACTION ⊂⊃22—BILL FOR SPECIFIC PERFORMANCE, BUT SEEKING DAMAGES, TO BE TREATED AS LAW ACTION.

A bill for specific performance of an alleged contract to purchase certain corporate stock and sell one-half to plaintiff, but really seeking damages for the refusal to sell half the stock to plaintiff, should have been treated as a common-law action for breach of contract.

2. JOINT ADVENTURES ⊂⊃1—FOR INDEFINITE PERIOD TERMINATE AT WILL OF EITHER PARTY.

An arrangement for an indefinite period, under which defendants were to purchase corporate stock at a specified price for joint account of plaintiff and defendants, could be terminated at the will of either party.

3. JOINT ADVENTURES ⊂⊃5(2)—EVIDENCE SUFFICIENT TO SHOW TERMINATION.

Evidence *held* to sustain a finding that defendants had terminated a contract for purchase of stock for joint account by notifying plaintiff of such termination.

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4. APPEAL AND ERROR ⊂=197(4)—OBJECTION THAT EVIDENCE WAS OUTSIDE ISSUE TOO LATE ON APPEAL.

In equitable action for specific performance of a contract for purchase of stock for joint account, where evidence regarding the termination of the contract was received without objection, the plaintiff cannot contend on appeal that the termination of the contract should have been pleaded.

5. APPEAL AND ERROR ⊂=171(3)—QUESTION NOT RAISED BELOW CANNOT BE CONSIDERED.

Where a case is tried below on a theory that a particular matter is within the issues, it cannot be contended on appeal that such matter was without the pleadings.

6. JOINT ADVENTURES ⊂=5(2)—TERMINATION OF CONTRACT PROVABLE UNDER GENERAL DENIAL.

In suit on contract for purchase of stock for joint account, a general denial authorized defendant to show that the contract had been terminated at the time of the transactions involved.

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

Bill for an accounting by George A. Martin against William Morris Imbrie and others copartners trading and doing business as William Morris Imbrie & Co. Decree for defendants, and complainant appeals. Affirmed.

Arthur N. Sager, of New York City (William A. Griffith, of Pittsburgh, Pa., of counsel), for appellant.

Rabenold & Scribner, of New York City (Mark Hyman and Allan R. Campbell, both of New York City, of counsel), for appellees.

Before ROGERS, HOUGH, and MANTON, Circuit Judges.

MANTON, Circuit Judge. A bill of complaint filed by the appellant alleged that the appellees on the 14th of November, 1919, entered into a contract by the terms of which the appellees were to purchase common stock of the Cambria Fuel Company for the joint benefit of the parties to this litigation. This stock was to be purchased at a price not to exceed $10 per share. The appellant agreed not to purchase any of the stock, but to refer all the persons who offered any of the stock to him for purchase to the appellees, so that all purchases of this stock for the joint benefit of the parties, under the agreement, would be made through the appellees. It further alleges that certain purchases were made in the months of November and December, 1910, and further that during the years 1912 to 1916, appellees purchased common stock of the Cambria Fuel Company to the extent of 3,608 shares; that 2,500 shares of this stock were offered to the appellant, and he declined to purchase the same, and referred the seller to the appellees as probable purchasers of the stock. It is then alleged that, because of this agreement referred to, the appellees were the agents and trustees of the appellant, and that the appellant was ready and able to pay his share toward the purchase of said stock, and demanded that the appellees account for this stock as to any dividends paid, and directing that one-half the stock thus purchased be delivered over to the appellant upon payment of the

just and correct amount due and owing by the appellant. From the record, it does not appear that this stock was of a peculiar kind, or was not purchasable in the market. The appellant has proceeded for specific performance of a contract which deals merely with personal property. The relief he seeks really is money damages for the refusal to sell one-half of this stock to him, in addition to his share of the dividends as may have been declared. The contract is purely one of an agreement to sell stock or an interest in stock to the appellant, which, if broken, entitled the appellant to maintain an action for damages for breach of a simple contract. There could be no trust created as to this stock, unless the appellant had some property in the stock, as it was at the time in the custody of the appellees. The case was tried in equity, but should have been treated as a common-law action for breach of contract.

[1] Upon the merits of the claim, we are of the opinion that the court correctly decided against the claim of the appellant. The Cambria Fuel Company was a corporation organized under the laws of the state of Wyoming, with a capital stock of $2,000,000. Its business was mining coal and maintaining a general store and electric power plant near the mines; 1,500,000 of this stock was common stock of the par value of $10, and the agreement to purchase for the account of the appellant and appellees, made shortly prior to December 10, 1910, is not disputed. The agreement itself was oral. The fact of its existence has support in letters exchanged, indicating the purchase of stock for the joint or common account of the parties in the months of November and December, 1910. Upon the trial, such an agreement was not disputed. The appellees were bankers having an office in New York City. The appellant testified that in November, 1910, he called at the appellees' office and had an interview, which constitutes the agreement on which he seeks to maintain this action. Then and there it was agreed that common stock from time to time be purchased by the appellees as cheaply as it could be purchased, with a view of ultimately controlling the interests of the Cambria Fuel Company. All the common stock was to be divided as bought from time to time, and the appellant was to pay one-half of the purchase price and receive in return one-half of the stock. The price limit of the purchase was fixed at $10.

The appellees' claims do not materially differ from this version of the agreement. The appellant has not received one-half of the stock, nor paid therefor; that is, the purchases made beginning May 23, 1911, and ending April 25, 1916; and the reason therefor is asserted to be that this contract was terminated about January, 1911. The reason for the termination, as given, is that the appellant's partner was in charge of the funds, books, and offices of the Cambria Fuel Company, at Cambria, Wyo., being its secretary and treasurer during the year 1910. It was said unauthorized withdrawals were made from the funds of the Cambria Fuel Company, and unauthorized indebtedness incurred by one Law, a partner of appellant, and that these matters were called to the attention of the appellees, and resulted in an investigation by the directors of the Cambria Fuel Com-

pany. Report of this investigation was submitted at a directors' meeting on January 21, 1911, and a record thereof was made in the minutes of the company, resulting in a demand at the meeting for the resignation of the appellant's partner, Mr. Law. The appellant opposed this, and renominated Mr. Law as secretary and treasurer, and in the contest which ensued the appellant and his partner were defeated.

Then, the appellees testified, they told appellant they would give appellant no further interest in any purchase of said stock. They terminated the contract, and so stated on two or three occasions within a few weeks after January, 1911. This testimony was not refuted or denied by the appellant, and stands uncontradicted. The opportunity to make denial thereof was accorded the appellant, for he was present in court during the trial and after this testimony of the appellees was given. During this period from January 31, 1911, to March, 1916, the appellant did not institute a suit, nor even demand an accounting or damages. He did ask for a reconsideration of the appellees' decision to permit of no further interest for appellant in the purchases, and this they refused. The appellant states that he was refused information as to the purchases in 1912. The coal properties were of a speculative kind, with all the uncertainties of mines and markets, and the value of the stock was very uncertain, and subject to many contingencies. The war produced a high value for coal because of the shortage, and the prices thus obtained made the stock more valuable, and this undoubtedly gives rise to the present demands and this litigation.

[2] We are of the opinion that, assuming the appellant's version of the contract to be the truthful one, it was for an indefinite time and an arrangement which might be terminated at the will of either party. It could not be binding forever, and it was not an agreement that required mutual consent before its termination. Karrick v. Hannaman, 168 U. S. 328, 18 Sup. Ct. 135, 42 L. Ed. 484. In Marston v. Gould, 69 N. Y. 220, a similar arrangement was made for the purchase of stock for a joint account. No time was fixed for the operations. The court said:

"The arrangement could have been terminated at any time by the mutual consent of the parties, or at the option of either upon notice to the other. The connection was dissolvable at the will of either of the parties."

[3] The appellees exercised their right to dissolve the arrangement and terminate it as stated above, and the determination below of this question of fact has ample evidence to support it, and, indeed, stands uncontradicted in the record.

[4-6] The appellant contends that it was necessary for the appellees to plead a rescission of the contract, for this defense was open to them. The answer denied the existence of the contract. The issue then presented was whether there was a binding and enforceable contract at the time of the purchase of the stock in question. The evidence as to the termination of the contract was not objected to, and the question of pleading was not raised at the trial, either by objection or motion. Effect must therefore be given to the rule that

where the parties, with the assent of the court, united in trying a case on the theory that a particular matter is within the issues, that theory cannot be rejected when the case comes up for review. San Juan Light Co. v. Requena, 224 U. S. 89, 32 Sup. Ct. 399, 56 L. Ed. 680.

We are of the opinion that the theory of the appellant that a rescission should have been pleaded cannot now be presented upon this appeal. Huse v. U. S., 222 U. S. 496, 32 Sup. Ct. 119, 56 L. Ed. 285; Grant Bros. v. U. S., 232 U. S. 647, 34 Sup.. Ct. 452, 58 L. Ed. 776. But, aside from this rule, we are of the opinion that, on a general denial, it was permissible for the appellees to prove that the contract was terminated at the time of the purchase of the stock in question.

The decree below is affirmed.

HOROWITZ et al. v. UNITED STATES.*

(Circuit Court of Appeals, Second Circuit. December 19, 1919.)

No. 23.

1. CRIMINAL LAW ⊜1149—DISCRETION TO GRANT BILL OF PARTICULARS.
   Denial of a motion for bill of particulars by defendants in a criminal case is a matter of discretion, and not reviewable, except in case of plain abuse of discretion.
2. INDICTMENT AND INFORMATION ⊜127—COUNTS FOR USING AND SELLING GOVERNMENT PROPERTY WHICH MAY BE JOINED.
   Counts, each charging defendants with applying to their own use and selling, at the same place and about the same time, cloth, the property of the United States, furnished under the same contract to be used in making clothing for soldiers of the army, in violation of Criminal Code, § 36 (Comp. St. § 10200), *held* properly joined under Rev. St. § 1024 (Comp. St. § 1690).
3. ARMY AND NAVY ⊜40—UNLAWFUL SELLING OF CLOTH FURNISHED FOR ARMY CLOTHING CRIMINAL OFFENSE.
   The unlawful selling of cloth, furnished by the United States to be made into clothing for use of the army, *held* an offense within Criminal Code, § 36 (Comp. St. § 10200).
4. ARMY AND NAVY ⊜40—INDICTMENT FOR SELLING PROPERTY FURNISHED FOR ARMY USE SUFFICIENT.
   In an indictment under Criminal Code, § 36 (Comp. St. § 10200), for unlawfully selling property of the United States furnished for use of the army, it is not necessary to state how the property came into possession of defendants.
5. CRIMINAL LAW ⊜730(14)—ARGUMENT OF COUNSEL NOT PREJUDICIAL ERROR.
   In prosecution for selling property of United States furnished for the army, remarks made to the jury by counsel for the prosecution concerning existence of war and the need of clothing, taken in connection with those of the judge, when objection was made, *held* not to constitute prejudicial error.

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

Criminal prosecution by the United States against Hyman Horowitz and Benjamin Horowitz. Judgment of conviction, and defendants bring error. Affirmed.

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

*Certiorari denied 251 U. S. —, 40 Sup. Ct. 396, 64 L. Ed. —.

Fitzgerald, Stapleton & Mahon, of New York City (E. N. Zoline and L. D. Stapleton, both of New York City, of counsel), for plaintiffs in error.

Francis G. Caffey, U. S. Atty., of New York City (F. M. Roosa, of New York City, of counsel), for the United States.

Before WARD, ROGERS, and MANTON, Circuit Judges.

WARD, Circuit Judge. This is a writ of error to a judgment of conviction of Hyman Horowitz and Benjamin, his son, upon an indictment under section 36, U. S. Criminal Code (Comp. St. § 10200), which reads:

"Whoever shall steal, embezzle, or knowingly apply to his own use, or unlawfully sell, convey, or dispose of, any ordnance, arms, ammunition, clothing, subsistence, stores, money, or other property of the United States furnished or to be used for the military or naval service shall be punished as prescribed in the preceding section."

The indictment contains six counts, in each of which both defendants are charged with willfully, feloniously, and knowingly, applying to their own use, and knowingly, feloniously, and unlawfully selling certain pieces of woolen cloth in the first five counts, and 10 bales of cotton drilling in the sixth count, all being property of the United States intended to be used for the military service, on six separate occasions between November 8 and December 11, 1917. Counts 2, 3, 4, and 5 were dismissed during the trial against Hyman Horowitz, and 3 and 5 as against Benjamin Horowitz; both being convicted on the first and sixth counts, and the jury disagreeing as to Benjamin Horowitz on counts 2 and 4.

October 22, 1917, the corporation of Horowitz & Marcowitz, of which Hyman Horowitz was vice president and Benjamin Horowitz was an employé, entered into a contract with the Quartermaster's Corps of the United States Army for the manufacture of 150,000 pairs of woolen breeches. The woolen cloth and cotton drilling were to be furnished by the United States, and were to remain, including rags and clippings, the property of the United States. The verdict of the jury conclusively settles the fact that the defendants did commit the offenses charged.

[1] The defendants moved for a bill of particulars, which motion was denied. This was a matter of discretion, not to be reviewed, except in case of plain abuse of discretion, of which we discover no evidence. The defendants were not surprised or misled, or in any way prejudiced, by want of this information. Indeed, what was asked for amounted to a complete discovery of the whole of the government's case.

[2] The joinder of these separate offenses and the trial of the defendants together was entirely proper within section 1024, U. S. Rev. Stat. (Comp. St. § 1690), which reads:

"When there are several charges against any person for the same act or transaction, or for two or more acts or transactions connected together, or for two or more acts or transactions of the same class of crimes or offenses, which may be properly joined, instead of having several indictments the whole may be joined in one indictment in separate counts; and if

two or more indictments are found in such cases, the court may order them to be consolidated."

The several charges were connected together and were of the same class of offenses. The same persons were charged in each count with acts connected together, viz. applying to their own use, etc., property of the same person which was to be used in the same contract at the same place and about the same time and they were charged with exactly the same offense in each count. McElroy v. United States, 164 U. S. 76, 17 Sup. Ct. 31, 41 L. Ed. 355, on which the defendants rely, was quite different. In it four separate indictments were consolidated, which charged different classes of crime, viz. two for assault with intent to kill and two for arson. Five of the defendants were indicted in three of the indictments, and only three of them in the fourth. The instant case is more like Pointer v. United States, 151 U. S. 396, 14 Sup. Ct. 410, 38 L. Ed. 208.

[3] It is argued that section 36 applies only to cloth, and not to clothing. It is said that cloth has been held by the Supreme Court to be a different thing from clothing. Arnold v. United States, 147 U. S. 494, 13 Sup. Ct. 406, 37 L. Ed. 253. The construction of every statute depends upon its own language and intent. Arnold v. United States was a revenue case, and a decision that cloth and clothing are different things in respect to custom duties does not prove that cloth is not included as a similar thing to "clothing" under a criminal statute. We think the general words with which the classes enumerated in this section end, "all other property of the United States furnished or to be used for the military or naval service," make it clear that cloth is covered as property similar to clothing. Indeed, having in mind the mischief to be corrected, it is inconceivable that Congress intended to protect clothing, and leave such property as cloth, intended for use in making it for the military or naval service, unprotected.

[4] It is further argued that the motion in arrest of judgment should have been granted, because the indictment did not state how the property came into the possession of the defendants. This might be so, if the government were charging the crime of embezzlement, although such an objection at the end of the trial, without any previous demurrer or motion to quash, might well be held too late. Moreover, there being no reason to think that the defendants were surprised, misled, or prejudiced in any way, the indictment must be held sufficient under U. S. Rev. Stat. § 1025 (Comp. St. § 1691), which reads:

"No indictment found or presented by a grand jury in any District or Circuit or other court of the United States shall be deemed insufficient, nor shall the trial, judgment, or other proceeding thereon be affected by reason of any defect or imperfection in matter of form only, which shall not tend to the prejudice of the defendant."

The offense charged was, in the words of the statute, that the "defendants had knowingly," etc., "applied to their own use" and sold the property in question. The statute does not restrict the offense to acts of servants, agents, or bailees, who, coming rightfully into possession of property, subsequently misappropriate it. Any one who does the things specified in the act commits the offense and is liable to punishment. The first word of the section is "whoever."

There is nothing in the objection that the court struck out the first count, and therefore the defendants should not have been convicted under it. In a colloquy with counsel, Judge Learned Hand did say, no doubt inadvertently, that the first count was stricken out; but before the colloquy ended he stated that the first count remained as against both Hyman Horowitz and Benjamin Horowitz. It is also complained that he did not state with sufficient clearness to the jury in his charge what counts remained for their consideration, and upon which of them the defendants could be convicted. The best evidence that the jury comprehended the situation clearly is that their verdict was against Hyman Horowitz on two counts, 1 and 6, and against Benjamin Horowitz only on two, 1 and 6, disagreeing as to 2 and 4.

[5] One reading the quotations from the United States attorney's summing up to the jury, of which the plaintiffs in error complain, separately, might infer that the jury must or at least may have been improperly inflamed; but taken with the whole address, and especially with the judge's remarks on the two occasions when the defendants' counsel objected at the time, we are quite clear that they could not have been:

"It is a crime which it seems to me demands your utmost consideration in this hour. It is a crime which—well, I cannot get a word bad enough to describe it, gentlemen, at this time when the boys need clothing, when they need this cloth for clothing, when men are giving their blood, and when all you men are giving your money—

"Mr. O'Gorman: If your honor please, on behalf of the defendant Hyman Horowitz, I object to the remarks of the prosecutor, which are calculated to divert the attention of the jurors from the issue before them. It is an attempt to inflame and prejudice the jury, and is objectionable, if not reprehensible.

"The Court: I think he only meant to impress them with the seriousness of the conditions before them, just as you were talking about the seriousness of it to the defendants.

"Mr. Roosa: Yes, your honor.

"Mr. O'Gorman: But he is diverting the attention of the jury from the thing which is before them. I take exception to your honor's refusal.

"The Court: You have not asked me to do anything for you yet.

"Mr. O'Gorman: To instruct the jury to disregard his reference, that is, the reference of the prosecutor which he has just made, and to admonish the prosecutor not to repeat them. The defendants are entitled to a fair, impartial trial of this case on the issues framed by the pleadings.

"The Court: Absolutely. * * *

"You know that every great war is attended with its profiteers, and its thieves, and you know how difficult it is—

"Mr. O'Gorman: If your honor please, I regret I must again object to this summation of counsel; counsel is obviously and intentionally diverting the attention of the jury from the issues in this case. This is clearly an attempt to inflame and influence and prejudice the jury, and to appeal to their sympathies.

"The Court: No, I don't think so; if he confines himself to the questions that are at issue here.

"Mr. O'Gorman: I ask an exception, if your honor please, on behalf of both defendants.

"The Court: Confine yourself to the issues, but you may state that they are important issues to both sides; I will allow that, as I allowed the defendants to state that it was important to them. I don't think you ought to refer to the instance of the war."

The judgment is affirmed.

LEDERER, Collector of Internal Revenue, v. NORTHERN TRUST CO. et al.*

(Circuit Court of Appeals, Third Circuit. January 7, 1920.)

No. 2496.

1. COURTS ⟸366(6)—DECISIONS OF STATE COURTS CONSTRUING INHERITANCE TAX LAWS BINDING ON FEDERAL COURT.
Decisions of state courts, construing inheritance tax laws of state, are binding on the federal courts.

2. INTERNAL REVENUE ⟸25—DEDUCTION OF STATE COLLATERAL INHERITANCE TAX FOR ASSESSMENT OF FEDERAL ESTATE TAX.
In view of the history of the Legislature, collateral inheritance taxes imposed by the state of Pennsylvania under Collateral Inheritance Tax Act 1887, §§ 1, 5, 9, 15, is a tax on the estate as distinguished from a tax on the inheritance, and the amount of taxes paid thereunder may be deducted as a charge against the estate of a decedent allowed by the laws of the jurisdiction in computing the net estate under Act Cong. Sept. 8, 1916, §§ 201–203 (Comp. St. §§ 6336½b–6336½d) imposing a federal tax on the transfer of the net estate of decedent.

In Error to the District of the United States for the Eastern District of Pennsylvania; J. Whitaker Thompson, Judge.

Action by the Northern Trust Company and Henry R. Zesinger, executors under the will of Lewis W. Klahr, deceased, against Ephraim Lederer, Collector of Internal Revenue. There was a judgment for plaintiffs (257 Fed. 812), and defendant brings error. Affirmed.

The Collector of Internal Revenue assessed the decedent's estate with a tax under the provisions of Sections 201, 202 and 203 of the Act of Congress of September 8, 1916, entitled "An Act to increase the revenue and for other purposes." 39 Stat. 777, Comp. St. 1918, §§ 6336½b, 6336½c, 6336½d. The executors claimed that in ascertaining the value of the decedent's "net estate" as a basis of assessment, in the way provided by Section 203 of the act, there should have been deducted from the gross estate the collateral inheritance tax of $39,450.92, due and subsequently paid the Commonwealth of Pennsylvania under the Act of Assembly of May 6, 1887 (P. L. 79). This deduction, had it been allowed, would have reduced the net estate of the decedent in the amount of the state tax, and, correspondingly, would have reduced the assessment of the Federal tax in the sum of $2,331.56. The Collector of Internal Revenue refused to allow the deduction. On appeal, the Commissioner of Internal Revenue approved the Collector's assessment. The executors paid the tax under protest and brought this suit to recover it. By stipulation, the issue was tried before the District Judge, who, on an opinion reported at 257 Fed. 812, entered judgment for the executors of the estate for the latter sum and interest. This writ, prosecuted by the Collector, brings the judgment here for review.

The applicable provisions of the cited statutes are as follows:

The Act of Congress of September 8, 1916, provides, inter alia:

Title II. Estate Tax.

"Section 201. That a tax (hereinafter * * * referred to as the tax), equal to the following percentages of the value of the net estate to be determined as provided in section two hundred three, is hereby imposed upon the transfer of the net estate of every decedent dying after the passage of this act."

"Section 203. *Net Value of Estate, How Determined.*—For the purpose of the tax the value of the net estate shall be determined—

"(a) In the case of a resident, by deducting from the value of the gross estate—

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

*Certiorari denied 252 U. S. —, 40 Sup. Ct. 483, 64 L. Ed. —.

"(1) Such amounts for funeral expenses, administration expenses, claims against the estate, * * * and such other charges against the estate, as are allowed by the laws of the jurisdiction, * * * under which the estate is being administered."

The Collateral Inheritance Tax of the General Assembly of Pennsylvania of May 6, 1887, provides, inter alia:

"Section 1. * * * That all estates, * * * passing from any person, who may die seized or possessed of such estates," to collaterals "shall be * * * subject to a tax of five dollars on every hundred dollars of the clear value of such estate or estates, * * * to be paid to the use of the commonwealth. * * * All owners of such estates, and all executors and administrators and their sureties, shall only be discharged from liability for the amount of such taxes * * * by having paid the same over for the use aforesaid."

Section 5 provides that before the executor or administrator shall pay any legacy or share in the distribution of an estate subject to the collateral inheritance tax, he shall deduct therefrom the tax at the rate prescribed in Section 1 and pay it to the Commonwealth.

Section 9 provides that the Register shall issue duplicate receipts for the tax when paid by an executor or administrator, which, when countersigned by the Auditor General, shall be "a proper voucher in the settlement of the estate."

Section 15 authorizes the Orphans' Court, on discovery by the Register that the tax has not been paid, to cite the executor or administrator to appear and show cause why the tax should not be paid.

Francis Fisher Kane, U. S. Atty., and Robert J. Sterrett, Asst. U. S. Atty., both of Philadelphia, Pa. (R. D. Thurber, of New York City, of counsel), for plaintiff in error.

William Henry Snyder and William M. Stewart, Jr., both of Philadelphia, Pa., for defendants in error.

Before BUFFINGTON and WOOLLEY, Circuit Judges, and MORRIS, District Judge.

WOOLLEY, Circuit Judge (after stating the case as above). The question is: Whether the collateral inheritance tax imposed by the Pennsylvania Act of 1887 falls within the deductions allowed by section 203 of the Federal estate tax Act of 1916 in arriving at the value of the "net estate" on which alone the Federal act imposes the tax. In other words: Is the amount which the decedent's estate paid the Commonwealth of Pennsylvania as a collateral inheritance tax either (a) "an administration expense," or (b) "a claim against the estate," or (c) one of "such other charges against the estate, as are allowed by the laws of the jurisdiction * * * under which the estate is being administered?"

This controversy concerns broadly the privileges which governments make the subject of "death duties"—the privilege of giving and the privilege of receiving property on death, and the conditions imposed and price exacted by the State for the exercise of those privileges. Magoun v. Illinois Trust & Savings Bank, 170 U. S. 283, 287, 18 Sup. Ct. 594, 42 L. Ed. 1037; Maxwell v. Bugbee, 250 U. S. 525, 40 Sup. Ct. 2, 64 L. Ed. —.

The question here turns on the nature of the two taxes, Federal and State. It concerns generally the Federal tax, which both parties concede to be an estate tax, that is, a tax that relates not to an interest

to which some person has succeeded by inheritance, bequest, or devise, but to an interest which has ceased by reason of death; and it is imposed not upon the interest of the recent owner or upon his privilege to dispose of it, but upon the transfer of the interest in its devolution. The nature of the Federal tax being conceded, the matter for decision concerns particularly the nature of the collateral inheritance tax of Pennsylvania, and raises the question, whether that tax is an estate tax, which, like the Federal tax, concerns an interest which has ceased upon death, the burden of which is imposed upon the estate of a decedent, as claimed by the executors, or is a legacy or succession tax, which concerns the privilege of receiving such an interest, the burden of which is imposed upon the legatee or other beneficiary, as claimed by the Collector.

The bearing of this question on the case in hand is, that if the collateral inheritance tax of Pennsylvania is an estate tax and is therefore a "charge" against the estate "allowed" in its settlement by the laws of Pennsylvania, then the refusal of the Collector to deduct the amount of the tax from the gross in ascertaining the net estate of the decedent as a basis of assessment was unwarranted. If, on the other hand, it is a tax charged not against the estate, but against the legatee as a condition imposed upon the transfer of the legacy, then the net estate of the decedent, determined without deducting the collateral inheritance tax paid the Commonwealth of Pennsylvania, was properly computed under the Federal act and the tax assessed against the same was lawful.

The nature of collateral inheritance taxes has been the subject of many decisions, both Federal and State. The general principle of such of them as are termed legacy and succession taxes, when not otherwise affected by statutory provisions, is that the tax is upon the legacy before it reaches the hands of the legatee, whose property it becomes only after it has yielded its contribution to the State and after it has suffered a diminution to the amount of the tax in return for the Legislature's assent to the bequest. Knowlton v. Moore, 178 U. S. 41, 20 Sup. Ct. 747, 44 L. Ed. 969, following United States v. Perkins, 163 U. S. 625, 16 Sup. Ct. 1073, 41 L. Ed. 287; Magoun v. Illinois Trust & Savings Bank, 170 U. S. 283, 18 Sup. Ct. 594, 42 L. Ed. 1037; Mager v. Grima, 8 How. 490, 493, 12 L. Ed. 1168.

But in looking for the nature of the collateral inheritance tax under consideration, it is not necessary to seek light from statutes and decisions of other states, for the act shows its nature by its own clear expressions aided by interpretations repeatedly made by the Supreme Court of Pennsylvania.

The act provides that "all estates * * * shall be subject" to the tax; that executors and administrators shall pay the tax; that until they pay it they shall not be discharged; that the Auditor General's receipt for its payment shall be a proper voucher in the settlement of the estate; and that in stating an account in the Orphans' Court the tax shall be allowed and deducted before a balance for distribution is struck.

The tax, which operates practically as a deduction from the share of the beneficiary, is, nevertheless, charged against and paid by the estate. In using the words "all estates" shall be subject to the tax, the Supreme Court of Pennsylvania has held that the Legislature contemplated the property of the decedent, not the interest therein of the legatee or distributee, Del Buto's Estate, 45 Leg. Int. 474; Howell's Estate, 147 Pa. 164, 23 Atl. 403; that the tax is imposed only once, and that is before the legacy has reached the legatee and before it has become his property; that it must be retained and paid by the executor or administrator who has the decedent's property in charge; that which the legatee really receives is not taxed at all; his property is that which is left after the tax has been taken off, Finnen's Estate, 196 Pa. 72, 46 Atl. 269. In Jackson v. Myers, 257 Pa. 104, 101 Atl. 341, L. R. A. 1917F, 821, where the question was squarely raised, the Supreme Court decided that the collateral inheritance tax of Pennsylvania is not levied upon an inheritance or legacy but upon the estate of the decedent, holding that what passes to the legatee is simply the portion of the estate remaining after the State has been satisfied by receiving the tax.

[1] These decisions by the Supreme Court of Pennsylvania, construing a statute of its own state, are binding on this court in a case of this kind. From these decisions it appears to be settled in Pennsylvania that the collateral inheritance tax of that state is an estate tax, not a legacy tax, and that as such it is levied upon and made a charge against the estate of the decedent.

Consistently with this view, the Supreme Court of Pennsylvania recently held, in a situation just the reverse of this, that in determining the amount of a decedent's estate for the purpose of assessing the Pennsylvania collateral inheritance tax, the Federal estate tax under consideration should first be deducted as a charge against the estate. Knight's Estate, 261 Pa. 537, 104 Atl. 765.

[2] We are of opinion that the collateral inheritance tax of Pennsylvania clearly falls within the provision of the Federal act as a "charge" against the estate of a decedent "allowed by the laws of the jurisdiction * * * under which the estate is being settled," and is, therefore, properly deductible from the gross estate in determining the net estate against which the Federal tax is assessed. There is, therefore, no occasion to go further and decide the other questions raised at the argument, whether the State collateral inheritance tax is also an "administration expense," or a "claim against the estate," similarly deductible under Section 203 of the Federal act in ascertaining the decedent's net estate as a basis of taxation. A consideration of these aspects of the tax would require us to reconcile at least two opposing decisions rendered under state statutes with different provisions, Corbin v. Townshend, 92 Conn. 501, 103 Atl. 647; In re Sherman's Estate, 179 App. Div. 497, 166 N. Y. Supp. 19; and to determine whether the terms "administration expenses" and "claims against the estate," as found in the statute, are restricted to or expanded beyond their ordinary meaning.

As this case arose before the Act of February 24, 1919 (40 Stat. 1057, c. 18) by which the terms of the Act of September 8, 1916, were materially changed, this decision has no bearing on the later statute.

The judgment below is affirmed.

KING et al. v. BARR et al.*

(Circuit Court of Appeals, Ninth Circuit. January 5, 1920.)

No. 3313.

1. EQUITY ⊕114—INTERVENER CANNOT CHALLENGE JURISDICTION OF COURT.
An intervener cannot challenge the court's jurisdiction, because, if the court is without jurisdiction, the proceedings are void and without effect upon the intervener, and also because equity rule 37 (198 Fed. xxviii, 115 C. C. A. xxviii) provides that interventions shall be in subordination to and in recognition of the propriety of the main proceeding.

2. JUDGMENT ⊕299(1)—NECESSITY OF CORRECTING DURING CURRENT TERM OF COURT.
Errors in final judgments can only be corrected by appeal, unless steps be taken in the trial court for that purpose during the term in which the judgment was entered.

3. EQUITY ⊕114—INTERVENTION AFTER ENTRY OF FINAL DECREE BARRED BY LACHES.
Where the final decree in a suit involving the receivership of a corporation to satisfy mortgage demands had been entered some six months before a bondholder filed an application to intervene which challenged the validity of the entire proceeding, *held*, that trial court did not abuse its discretion in denying such petition, with leave to contest the disposal of funds remaining in the receiver's hands, in view of the fact that the petitioner had known of the pending proceeding long before entry of the final decree.

Appeal from the District Court of the United States for the Central Division of the District of Idaho; Frank S. Dietrich, Judge.

Application by E. A. King to file a petition of intervention, in behalf of himself and those who wish also to intervene, against Robert H. Barr and others. From an order denying the application, the applicants appeal. Affirmed.

W. C. Bristol, of Portland, Or., for appellants.

Eugene A. Cox, of Lewiston, Idaho, and Richard W. Montague, H. H. Parker, Joseph Simon, Wirt Minor, and John H. Hall, all of Portland, Or., for appellees.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

ROSS, Circuit Judge. The present appeal is from an order denying (without prejudice to certain specified rights) the appellant King's application to file a proffered petition in intervention in a suit commenced in the court below November 19, 1915, growing out of the undertaking by the Lewiston Land & Water Company, Limited (hereinafter called the Land Company), a corporation organized under the laws of the state of Idaho, to plant fruit trees upon certain lands adjacent to the city of Lewiston, in that state, the necessary water for the ir-

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

*Rehearing denied February 9, 1920. Certiorari denied 252 U. S. —, 40 Sup. Ct. 481, 64 L. Ed. —.

rigation of which was to be furnished through an extensive water system by a subsidiary water company called Lewiston Sweetwater Irrigation Company, and to sell in small tracts to the public on the installment plan the lands so improved and watered. The money with which to do those things was, at least in large part, procured by borrowing it upon bonds, secured by trust deeds or mortgages, and in part by certain so-called gold notes, likewise secured. At the time of the commencement of the suit, which was brought by a holder of stock in the Land Company named Barr, a resident and citizen of the state of Washington, on his own behalf and in behalf of all other such stockholders similarly situated, the Land Company had outstanding portions of four different issues of such bonds, the first three of which issues were secured by trust deeds or mortgages upon certain specified and distinct portions of the lands, and the fourth covering all of the lands owned by the company, including those embraced by the first three mortgages. In each of the instruments the Idaho Trust Company (hereinafter called the Trust Company, and which was also an Idaho corporation) was made trustee.

In Barr's bill of complaint it was alleged, among other things, that of the lands owned by it the Land Company had then sold 3,320.52 acres in small tracts to purchasers residing in various parts of the United States, for a price aggregating $1,312,236.25, and that there was then owing to it from purchasers and unpaid on contracts of sale approximately $487,115, of which $150,000 was then due and collectible under the terms of the contracts, and that the Land Company still owned 4,054 acres of such lands, of the value of $1,500,000; that the Land Company was then in debt in the aggregate amount of $1,250,000, of which $907,000 was in the form of bonds secured by mortgages or trust deeds made to the defendant Trust Company as trustee, covering the property of the Land Company; that of the first issue of the bonds referred to all but $20,000 had been paid, and of the second issue all but $41,000 had been paid, and that of the third issue there remained outstanding $172,000 in amount; that all of the outstanding bonds of the first two issues had then, "in great measure," been taken up and replaced by the fourth issue of bonds, known as refunding bonds of date October 1, 1911, of which refunding bonds there was then outstanding and in the hands of many holders scattered throughout the United States the amount of $605,000 in the aggregate. It was alleged that the semiannual interest upon the refunding bonds due April 1, 1915, and October, 1, 1915, respectively, was then due and unpaid, and of the principal thereof $25,000 became due and payable October 1, 1915, which likewise remained unpaid, and that the semiannual interest upon the second issue became due and payable October 1, 1915, and was then due and unpaid. It was alleged that the Land Company was also indebted on various notes, accounts, and other obligations in the aggregate amount of $264,000, a large part of which was then secured by various notes, stocks, and other properties of the Land Company, in addition to all of which taxes upon the real property of the Land Company in the amount of $29,000, including penalties and interest, were then delinquent, certificates of such delinquency having been then issued; that the time for

redemption of a considerable part of the property would very shortly expire, to wit, December 15, 1915, and unless provision was made for the payment thereof the title of the property would pass to the purchasers, and be lost to the Land Company and its creditors; that further taxes, with penalties and high rates of interest, would soon accrue and become delinquent, and that the Land Company owed other debts, approximating $7,000, which constituted liens upon its lands superior to the lien of the mortgages and trust deeds; that the Land Company was in imminent danger of insolvency, and that the appointment of a receiver or receivers of its property was essential to the protection of both the company and its creditors.

The defendant Trust Company answered the bill of complaint, admitting most of its averments, and joining in the request for the appointment of a receiver or receivers, and also filed a cross-bill, in which it alleged, among other things, that on or about October 1, 1911, the Land Company issued the refunding bonds in the sum of $1,050,000, chiefly for the purpose of taking up and retiring its previously existing indebtedness, and issued to the cross-complainant, as trustee, the mortgage securing them that has been mentioned, a part of the lands covered by it being subject to the prior mortgages issued by the Land Company to the extent specified in the bill of complaint, and setting forth other reasons why it was necessary for the protection of the property that a receiver or receivers be appointed to take possession and administer the property under the orders of the court, and for such other relief as should be appropriate, including the foreclosure of the mortgages. Two receivers were appointed by the court—one being the president of the Trust Company, who resided at Lewiston, and the other being a resident of Portland, Or., where the Land Company maintained its financial headquarters, by whom funds were obtained for the preservation of the title to the property and the protection of the orchards through the issuance of receivers' certificates.

After referring to the many difficulties experienced by both the court and the receivers in preserving and protecting the property during the years it was under such administration, the court below said in its opinion:

"The suit was brought in the Central division of the district, and was there pending when, on February 9, 1918, in order to facilitate further proceedings, the parties, through their attorneys of record, stipulated in writing that it be tried and a decree entered at Boise, in the Southern division, with the same effect as if tried in open court at Moscow, in the Central division, and pursuant to this stipulation a hearing was had upon the pleadings already referred to and a supplemental answer and cross-bill filed by the Trust Company, and decree was entered at Boise on February 15, 1918. Thereafter, upon March 28, 1918, by stipulation of all the parties, and for the purpose of making certain corrections in the original decree, an amended final decree was signed and filed as of February 15, 1918. It appearing from the supplemental cross-bill that the first and second mortgages had in the meantime been fully paid, and that therefore the fourth mortgage constituted a first lien upon all the lands, except those covered by the third mortgage, the decree in effect determined the total amount of outstanding receivership indebtedness, including the receivers' certificates, allocated to the lands covered by the third mortgage a sum which was deemed to be a just proportion

thereof, and to all other lands covered by the fourth mortgage the balance of such expenses, and authorized the sale of the lands in two corresponding groups, the one subject to the lien of the third mortgage, with directions to apply the proceeds arising from the sales, first, to the payment of the amount of the receivership expenses so apportioned, and, second, to the discharge of the refunding bonds. The receivers were appointed special masters to conduct the sale, and after some delay a sale was reported of the lands covered by the third mortgage, by which only enough money was realized to discharge the receivership indebtedness apportioned thereto, and the same was confirmed upon the acceptance by the bidder of the condition that within a certain designated period the holders of these bonds might, by paying their ratable part of the amount bid, come in and share proportionately in the property purchased. The bid reported for the property under the fourth mortgage was rejected, and a resale ordered, and upon the second sale an offer was received, which was confirmed, after being so modified by requirements of the court as to provide an amount of cash sufficient to pay the balance of the receivership indebtedness, and for the coming in of all bondholders within a designated time and upon specified terms and sharing in the purchase. The last order was made in July, 1918, and thereupon certificates of sale were issued and possession of the property was delivered to the purchasers, and pursuant to the orders of the court the proceeds of the sales were applied to the discharge of the receivership indebtedness.

"On November 2, 1918, three years after the receivers were appointed, and six months after decree, and long after the expiration of the term at which the decree was entered, and at a time when the court was no longer in possession of either the property or the funds arising from the sales thereof, the petitioner, who is the holder of some of the refunding bonds taken by him in exchange for holding of prior issues, informally by mail tendered his proposed bill of intervention, with request for leave to file. During the three years which had elapsed since the commencement of the action many proceedings had been taken by the receivers, and there had been many transactions with third persons, all upon the apparent assumption of the propriety of the suit and of the orders and decrees appointing the receivers, and conferring authority upon them, and confirming their accounts. Moneys were received and paid, contracts were entered into, and titles were passed. With one exception, which has no relation to the questions here involved, during all of this time no bondholder appeared to protest or suggest. So far as appears, the court and its officers and the trustee were permitted to carry the responsibility of working out the perplexing problems as best they could. The petitioner, with his counsel, resided at Portland, where, as already stated, one of the receivers lived, and where much of the business of the company was transacted. It affirmatively appears that he knew of the receivership at a comparatively early date, and in the absence of an averment to the contrary it must be presumed that he had such knowledge practically from the beginning."

Within about a month after the issuance of the refunding bonds and the execution of the mortgage securing them, the petitioner exchanged the bonds of the first three issues held by him for such refunding bonds. The mortgage securing the latter expressly showed, upon its face, that it was designed to provide the funds necessary to pay the then existing indebtedness of the company, and also further funds with which to continue the operations of the company.

[1] The contention made in the assignment of errors, and also in the brief of the appellant, that the court below was without any jurisdiction of the case, is obviously without any merit, first, because, if so, all of its proceedings were absolutely void, and consequently without effect upon the appellant; and, secondly, because it is only in a valid pending proceeding in which any party is under any circumstances

permitted to intervene—equity rule 37 (198 Fed. xxviii, 115 C. C. A. xxviii) declaring, among other things:

"Any one claiming an interest in the litigation may at any time be permitted to assert his right by intervention, but the intervention shall be in subordination to, and in recognition of, the propriety of the main proceeding."

Assuming, as we must for the purpose of disposing of the further contentions of the appellant, jurisdiction of the cause by the court to which the application for leave to intervene was made, we find from the record that all of the property in question had been disposed of under and by virtue of the decree of the court made and entered more than six months before the appellant applied to intervene, save only such proceeds thereof as remained in the hands of the receivers and special masters, as to which the court entered the order which is the subject of this appeal and which is in the following words:

"It is ordered that the application of E. A. King (and two others) to intervene be and the same is hereby denied, without prejudice to the right of said applicant, upon making a showing that he is the holder of bonds and that his interests as such holder are or will be affected by the accounts of the receivers or special masters yet to be acted upon, and that he is no longer desirous of relying upon the trustee to protect such interests, to apply for leave to intervene for the purposes of such accounts, and not for the purpose of questioning the validity of the decree or of any order heretofore made."

[2] The final decree was entered at Boise, Idaho, February 15, 1918, and it appears from the affidavit of the petitioner's counsel that the petition for and the accompanying bill in intervention were not delivered to the clerk of the court for the judge until November 2d of the same year, more than six months after the entry of the final decree establishing the rights of the respective parties to the suit, and long after the expiration of the term of the court during which the decree was entered. Nothing is better settled than that errors, if any, in a final judgment, can only be corrected by appeal, unless steps be taken in the trial court for that purpose during the term at which such judgment is rendered. Bronson v. Schulten, 104 U. S. 410, 415, 416, 26 L. Ed. 797, and cases there cited.

The proffered bill of intervention is so voluminous (covering 127 pages of the printed record) that it is practically impossible within the proper limits of an opinion to make even a general statement of its various allegations, the purpose of which is, in part at least, to open up and again try the issues determined by the final decree already entered in the case, necessitating, also, if permitted, the bringing into the suit of new parties.

[3] That the petitioners had ample opportunity to intervene in the suit prior to the entry of the final decree and set up any and every right possessed by them as bondholders (which ownership is the basis of every right asserted in the proposed bill of intervention) we think sufficiently appears from the admitted knowledge by their counsel of the proceedings in the case at least as early as June, 1916, nearly two years before the entry of the final decree.

The record shows that the disposal of a portion of the property as directed by that decree involved the sale of that portion by the trustee, for which a bid was made by a committee of a majority of the holders

of the refunding bonds, and that to hear the parties in interest in regard to that matter the judge of the court below, in part, at least, for the convenience of the parties and their counsel, took the trouble to go to the city of Portland in July, 1918, where two meetings were held before the judge, at the first of which the counsel for the petitioners was personally present, and the second of which he failed to attend—purposely, we can but conclude, from one of the letters to him, printed in his own reply brief on this appeal. That meeting resulted in this order, confirming the sale of the property last referred to, which was filed by the clerk of the court August 10, 1918:

"Order Confirming Sale of Number 4 Properties.

"Now, at this time, coming on to be heard the application of the special masters for an order upon their report and supplemental report in respect of the bids made at the foreclosure sale of the properties of the Lewiston Land & Water Company, Limited, covered by the mortgage known as the Refunding Bond Mortgage or Mortgage No. 4;

"The parties of record appearing by their respective counsel, the masters being present in person, Morris Bros. and John Latta, bondholders, appearing by Wirt Minor, Mrs. E. J. Jeffery, a bondholder, appearing by J. L. Conley, the Security Savings & Trust Company appearing by R. L. Sheppard, and the holders of receivers' certificates appearing by Hon. Joseph Simon and Blain B. Coles; the matter having been set for hearing heretofore and on the 16th day of July, 1918, and having for the convenience of the parties, in order that all might be represented, been continued to this date, the court having heard and considered the reports of the masters and matters presented by counsel and by the various parties represented, and being advised in the premises:

"It is now here ordered that the bid presented by the masters, entitled 'Bid of Refunding Bondholders,' submitted by the bondholders' committee, and approved by W. C. Bristol and Wirt Minor, be accepted in accordance with its terms, except, however, that the bidders shall comply with the following conditions:

"(1) That said bidders pay into court within nine days from this date, to wit, on or before August 3, 1918, the amount necessary to liquidate the outstanding and unpaid receivers' certificates and adjudicated claims, with accrued and accruing receivers' costs and expenses, and the costs and expenses of this proceeding, amounting to $120,000.

"(2) That there be placed in the hands of the masters on or before said time, for delivery to the bidders, a deed of the Lewiston Land & Water Company, Limited, conveying its right, title, and interest in and to the property sold under foreclosure.

"(3) That the said bidders on or before said date file with the masters an assignment to John H. Hall, on behalf of the bondholders under the mortgage known as No. 3 mortgage, given by the Lewiston Land & Water Company, Limited, of the bidders' interest in a one-third part of the spray rigs and orchard and farm machinery purchased with general funds during the course of the receivership, such one-third to be designated and selected by the masters; and authority to the masters to sell, assign, and transfer to the said John H. Hall, representing said bondholders, said one-third of the above-mentioned personal property, the remaining two-thirds thereof to be transferred by the masters' certificate of sale to the bidders.

"(4) It is further ordered that upon compliance with the terms and conditions above set forth by the bidders the sale upon such bid be and thereupon is confirmed, and that upon such compliance the masters be and are hereby authorized and empowered to execute and deliver to the Security Savings & Trust Company, named in said bid as the holder of title thereunder, a certificate of sale of the properties so sold.

"Dated this 25th day of July, 1918.

"Frank S. Dietrich, Judge."

Counsel for the petitioners contends that the recital in the foregoing order of his approval of the bid was without justification and improper. Let that be admitted, and the fact remains that he had the opportunity of objecting to it and failed to do so, and, according to his own affidavit, made no attempt to intervene until about 3½ months after the filing of the order August 10, 1918. The court below was of the opinion that, when the application to intervene was made, the term at which that order was entered had expired, saying:

"The court officers in the Idaho district all reside and maintain their offices at Boise, and courts in the Northern, Central and Eastern divisions are as a rule held open only long enough for the dispatch of business ready for disposition within a few days after court convenes. The terms in the Central division are fixed by law for the second Monday in May and the first Monday in November of each year. Section 78, Judicial Code (Comp. St. § 1063). In 1918 the term was adjourned without day on May 24th. As we have seen by stipulation the cause was transferred for trial and decree and for other purposes, and it is thought that all the parties assumed and acted upon the assumption that all proceedings requisite to the foreclosure and settlement of the receiver's account were to be taken at Boise, where the terms are held open quite continuously. In that view the last orders referred to are to be deemed to have been taken during the February term in the Southern division, and that term expired with the opening of the September term."

We are inclined to agree with the court below in that respect, but, regardless of that view, are of the opinion that the court committed no abuse of the discretion with which it was invested, under the circumstances of the case that have been mentioned, in denying the petitioners' application to file the proffered bill, and in limiting their right to the particulars specified in the order from which the appeal was taken.

The order is affirmed.

UNITED STATES v. NATIONAL SURETY CO.*

In re BALD EAGLE MINING CO.

(Circuit Court of Appeals, Eighth Circuit. December 10, 1919.)

No. 201.

BANKRUPTCY ⊜349—CLAIMS OF UNITED STATES AND SUBROGATED SURETY ENTITLED TO EQUAL PRIORITY.

Under Rev. St. § 3466 (Comp. St. § 6372), which gives the United States priority over other creditors of the estate of an insolvent or bankrupt debtor, and section 3468 (section 6374), providing that, "whenever the principal in any bond given to the United States is insolvent, * * * and * * * any surety on the bond * * * pays to the United States the money due upon such bond, such surety * * * shall have the like priority," where the United States has a claim against the estate of a bankrupt, and the surety on the bankrupt's bond securing such claim has paid the same to the extent of the obligation of its bond, the United States as to the remainder of its claim and the surety as to the amount paid are entitled to equal priority.

Hook, Circuit Judge, dissenting.

Petition to Revise Order of the District Court of the United States for the Eastern District of Missouri; David P. Dyer, Judge.

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

*Granting certiorari 251 U. S. —, 40 Sup. Ct. 396, 64 L. Ed. —.

In the matter of the Bald Eagle Mining Company, bankrupt. On petition by the United States as a creditor to revise an order allowing equal priority to the claim of the National Surety Company. Affirmed.

W. L. Hensley, U. S. Atty., and Benjamin L. White, Asst. U. S. Atty., both of St. Louis, Mo.

Frank E. Williams, of St. Louis, Mo. (S. W. Fordyce, Jr., John H. Holliday, Thomas W. White, and Lucius W. Robb, all of St. Louis, Mo., on the brief), for respondent.

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

CARLAND, Circuit Judge. The petitioner by this proceeding seeks to have revised in matter of law an order of the District Court made December 31, 1918, confirming certain orders of the referee with reference to the claims of respondent against the estate of the Bald Eagle Mining Company, a bankrupt. The undisputed facts are as follows:

On November 3, 1917, the respondent filed two claims against the estate of the bankrupt, for $3,000 and $150, respectively, which were allowed on the same day. On the 12th day of December, 1917, the United States filed a claim against the estate of the bankrupt for $9,912.84, which was allowed on the same day, and it was further ordered and directed that said claim be accorded priority over all other claims, except those for wages and taxes. On March 12, 1918, the respondent filed a motion with the referee for leave to amend its two claims above mentioned, by claiming priority for the same equal to that of the United States. The motion was granted on March 25, 1918. The United States filed a petition for review. The proceedings were duly certified, and after a hearing the District Court affirmed the order of the referee. It is this last-named order which the United States seeks to have revised.

The claim of the United States against the bankrupt was for damages suffered by them by reason of the failure of the bankrupt to perform its contract with the government for supplying coal at Jefferson Barracks, Mo., after deducting from said damages payments made by the respondent. The claim of the respondent for $3,000 was for money paid the United States by reason of its being surety on the bond of the bankrupt given to secure the faithful performance of the coal contract above mentioned. The claim of respondent for $150 was for money paid the United States by respondent by reason of its being surety upon the bond of the bankrupt to secure the faithful performance of a contract to furnish bituminous lump coal to the United States arsenal at St. Louis, Mo. In each instance the amount paid was the full amount of the bond. The question for decision is as follows: Has the United States and the respondent an equal priority to the extent of the amount of their respective claims, or has the United States exclusive priority as against all other claims until the full amount of its claim is paid? The applicable statutes are as follows:

Section 3466, R. S. (Comp. St. § 6372):

"Whenever any person indebted to the United States is insolvent, or whenever the estate of any deceased debtor, in the hands of the executors or administrators, is insufficient to pay all the debts due from the deceased, the debts due to the United States shall be first satisfied; and the priority hereby established shall extend as well to cases in which a debtor, not having sufficient property to pay all his debts, makes a voluntary assignment thereof, or in which the estate and effects of an absconding, concealed, or absent debtor are attached by process of law, as to cases in which an act of bankruptcy is committed."

Section 3468, R. S. (Comp. St. § 6374):

"Whenever the principal in any bond given to the United States is insolvent, or whenever, such principal being deceased, his estate and effects which come to the hands of his executor, administrator, or assignee, are insufficient for the payment of his debts, and, in either of such cases, any surety on the bond, or the executor, administrator, or assignee of such surety pays to the United States the money due upon such bond, such surety, his executor, administrator, or assignee, shall have the like priority for the recovery and receipt of the moneys out of the estate and effects of such insolvent or deceased principal as is secured to the United States; and may bring and maintain a suit upon the bond, in law or equity, in his own name, for the recovery of all moneys paid thereon."

There is no question as to the meaning of section 3466. In the cases specified in said section, the United States has beyond question undoubted priority. When we come to section 3468, it is claimed by counsel for the United States that it must be so construed as to be of no force or effect, except in cases where the United States has no claim whatever to be satisfied, and it appearing in the present case that the United States has a claim against the estate of the bankrupt, said section is inoperative. The ground of this contention is that the priority granted by section 3466 still attaches to the claim of the United States, even as against the claims of respondent, and that no priority exists in favor of respondent until the claim of the United States is fully paid. If this contention is sound, we must read into section 3468, a proviso at the end of the last clause but one of the section, reading as follows:

"Provided that said United States has no claim against the insolvent estate."

We do not think we have any authority to interpolate such a proviso. We are of the opinion that, while the general priority of the United States is undoubted, it is within the power of Congress to qualify or limit this priority, and that by the enactment of section 3468 it has been provided that in the cases mentioned in said section the priority of the United States has been transferred to a surety who has paid the penalty of a bond in full, notwithstanding the latter still has a claim against the insolvent. It is claimed by counsel for the United States that the surety in a case like the one at bar has no priority, unless he pays all of the debt or debts due from the bankrupt to the United States. The section which we are endeavoring to construe does not provide that the surety shall pay all the debt or debts due from the bankrupt estate to the United States, but only the money due upon such bond, and it is conceded that the respondent did this. It paid

all the debt for which it was obligated as surety. If it should pay any more, it would be a mere volunteer, and not entitled to the right of subrogation as to the excess. It is not material, if the contention of counsel for the United States is right, whether the claim of the United States arises out of the same transaction as that of respondent or not.

It is contended and it is no doubt the law that the priority of the sovereign exists in full force and vigor, unless qualified by express words. But we have express words in section 3468. We think that sections 3466 and 3468 should be construed together, so as to give both force and effect; the United States retaining its priority as to the balance of its claims against the bankrupt estate, and the respondent standing on a level with them as to its claim. No case has been cited, nor have we found one, deciding the question involved. The cases cited simply establish the proposition that, where the title of the United States and the citizen concur, the title of the United States, except so far as the Legislature has thought fit to interfere, shall be preferred, and that where the principal in any bond given to the United States is insolvent, and any surety on the bond pays to the United States the money due upon such bond, such surety shall have the like priority for the recovery and receipt of the moneys out of the estate and effects of such insolvent as is secured to the United States. These rights are all given by the sections quoted and citation of other authority is unnecessary. Respondent's rights must be determined by section 3468. What its rights would be under the equitable doctrine of subrogation is not involved. The unreasonableness of the contention of counsel of the United States is made to appear when we consider a case where different bonds have been given by an insolvent to the United States with different sureties. One surety pays the full penalty of the bond on which he is liable, but he can have no priority until he has paid all the other bonds on which he is not liable.

We do not think the application to amend the claims of respondent by claiming priority constituted the filing of new claims after the year allowed by law.

Appeal No. 5362 is dismissed.

Judgment affirmed.

HOOK, Circuit Judge (dissenting). Section 3466 of the Revised statutes, which provides that "whenever any person indebted to the United States is insolvent * * * the debts due to the United States shall be first satisfied," is a statutory adoption for this country of a public policy which has prevailed in England from a very early day. The right is one of preference in the sovereign over the claims of all private persons, and is of universal application. No other statute should be construed to impair or lessen it, unless the intention to do so is clearly manifested.

With the above in mind, let us look at section 3468, R. S., which provides that—

"Whenever the principal in any bond given to the United States is insolvent, * * * and * * * any surety on the bond * * * pays to the United

States the money due upon such bond, such surety * * * shall have the like priority. * * *"

This is no more than a statutory declaration of the equitable doctrine of subrogation in favor of sureties. See United States v. Ryder, 110 U. S. 729, 4 Sup. Ct. 196, 28 L. Ed. 308. There is nothing in the language employed or in the decisions of the courts applying it to indicate that it should be given a more enlarged construction. In the case of private rights subrogation is not allowed to work loss or injury to a lien or preferred creditor whose claim has not been wholly discharged, although the surety may have paid in full his obligation for part of it. See National Bank of Commerce v. Rockefeller, 98 C. C. A. 8, 174 Fed. 22, by this court. Much less should it be allowed to impair or lessen the sovereign preferential right of the government. In Reg. v. O'Callaghan, 1 Ir. Eq. 439, it was held that the surety of a person indebted to the government who pays the indebtedness does not succeed to the government's right of priority, if there be a further amount owing it, though on a different account.

My Brothers say that such a construction of section 3468 is contrary to its express language and would deprive it of efficacy. It might be said that a contrary construction lessens materially the unqualified language of section 3466. I think, however, both sections may be construed to give each full effect according to its terms. That should always be done, if possible. The government's priority by section 3466 is over all private claims. The right given by section 3468 to the surety who pays his obligation in full is a "like priority"; that is to say, a priority over all private claims. But there is nothing in this to imply, and it does not follow, that the surety is thereby raised to an equal or pro rata status with the government as regards an unpaid demand it holds against the common debtor or his estate, whether on the same or another account. Statutes declaratory of old principles of public policy or of the common law should receive the old constructions, and in that way apparent inconsistencies may be avoided.

I think the order of the trial court should be reversed.

COPPER PROCESS CO. v. CHICAGO BONDING & INS. CO.

(Circuit Court of Appeals, Third Circuit. January 5, 1920.)

Nos. 2490–2494.

1. TRIAL ⊂=59(1)—ORDER OF PROOF IN SHOWING FRAUD NOT ERROR.
Where a surety on the bond of a seller asserted that plaintiff buyer was party to the seller's fraud in procuring the bond, proof of the seller's fraud followed by proof of the buyer's connivances cannot be objected to on the ground of the order of proof.

2. FRAUD ⊂=52—LATITUDE IN PROVING FRAUD IS ALLOWED.
When fraud is alleged great latitude of proof is allowed, and accordingly it is proper to show party's participation in fraud by showing what was said and done, leading up to the transaction.

3. FRAUD ⊂=16—SUPPRESSION OF TRUTH MAY BE.
Fraud may be committed by the suppression of truth as well as the suggestion of falsehood, but the law distinguishes between passive con-

cealment and active concealment, in that in active concealment there is implied a purpose of design.

4. FRAUD ⊂=17—SUPPRESSION OF TRUTH TO BE FRAUD MUST CONSIST OF MORE THAN SILENCE.

As a general rule, to constitute fraud by concealment or suppression of truth, there must be something more than silence; that is, there must be some occasion which imposes on one person the legal duty to speak in order that he may be placed on an equal footing, in which case failure to state a material fact is equivalent to a concealment, and amounts to fraud equally with an affirmative falsehood.

5. PRINCIPAL AND SURETY ⊂=57—EVASION AMOUNTING TO FRAUD IN PROCURING BOND.

Where a bonding company, before becoming surety on a bond contingent for an iron company's faithful performance of a contract of sale, asked the officer of plaintiff if it had made any advances on the contract, etc., and plaintiff's officer gave an evasive answer, which, while true as far as it went, did not disclose that plaintiff had made advances to the iron company under a special contract, such evasion amounted to fraud.

6. PRINCIPAL AND SURETY ⊂=160—EVIDENCE OF AGREEMENT WITH PLAINTIFF FOR ADVANCES TO SELLER ADMISSIBLE WHERE SELLER'S SURETIES ASSERTED CONCEALMENT WAS FRAUD.

After plaintiff contracted with an iron company for the purchase of large quantities of iron at a price little, if any, above cost, the parties entered into an agreement whereby plaintiff advanced to the iron company a large sum of money under a vague contract, but which, among other things, required the iron company to give bonds for faithful performance, *held* that, where plaintiff's officer, on being interrogated by the surety's representative, denied having made any advances under the contract to the iron company, the agreement was in any event admissible in evidence to show plaintiff's fraud.

7. EVIDENCE ⊂=104—EVIDENCE OF SUBSEQUENT RELATIONS BETWEEN PARTIES ACCUSED OF FRAUD.

Where the surety on the bond of a seller asserted that the seller was guilty of fraud in procuring the same, and that the buyer connived, evidence of subsequent acts of the buyer and of the seller is admissible to show the relationship between the parties at the time the fraud was committed.

8. APPEAL AND ERROR ⊂=1047(1)—RULING ON EVIDENCE NOT TO BE DISTURBED UNLESS HARMFUL.

While erroneous rulings in jury trials are presumptively injurious, the tendency is to enlarge the sphere of the trial judge in the admission and exclusion of testimony, and not to disturb the judgment, where it affirmatively appears that his rulings, if erroneous, were harmless.

In Error to the District Court of the United States for the Eastern District of Pennsylvania; J. Whitaker Thompson, Judge.

Five actions by the Copper Process Company against the Chicago Bonding & Insurance Company, which were consolidated and tried as one. There was a judgment for defendant, and plaintiff brings error. Affirmed.

Francis Shunk Brown and William Findlay Brown, both of Philadelphia, Pa., for plaintiff in error.

Layton M. Schoch and Harry S. Ambler, Jr., both of Philadelphia, Pa., for defendant in error.

Before BUFFINGTON and WOOLLEY, Circuit Judges, and MORRIS, District Judge.

WOOLLEY, Circuit Judge. These writs-of-error bring here for review five judgments of the District Court entered on verdict in a proceeding wherein five actions were consolidated and tried as one. The Copper Process Company was plaintiff; the Chicago Bonding and Insurance Company was defendant. The actions were on bonds of the defendant company, each for $52,400, given the plaintiff company to assure performance by the Bird Coal and Iron Company of its undertakings in the same number of contracts between it and the Copper Company for the sale and delivery of pig iron. The Iron Company defaulted on all five contracts. The Copper Company sued the Bonding Company on all its corresponding bonds; verdicts were rendered and judgments entered for the Bonding Company; whereupon the Copper Company sued out these writs-of-error.

The record is a large one; the specifications of error are fifty-nine in number. Of these, twelve are directed to the judge's charge; the remaining forty-seven concern rulings on the admission and exclusion of testimony. Whether any particular ruling or instruction involved error, and if so, whether such error was prejudicial or harmless, it is impossible to determine by considering each ruling or instruction separately and alone. It is only possible after reading the whole record in order to ascertain the real issues and to find the theory on which the trial judge tried them. Experience shows that when a trial judge is wrong in his conception of the issues, or of the principles of law applicable to them, his errors are likely to be many and also to be prejudicial; but if, on the other hand, the trial judge has properly grasped the issues and has tried them under applicable law, his errors are likely to be few and harmless.

On this theory of review, we shall follow the case in outline as pleaded and tried.

The Copper Company's statements of claim filed in the five actions are identical, except as the contracts for whose performance the several bonds were given called for pig iron deliveries in different months of the year 1917, beginning with the month of June and ending with the month of October. In each statement of claim it appears that the Copper Company declared on the indemnity bond of the Iron Company, as principal, and the Bonding Company, as surety, for $52,400, alleging, first, the execution of the bond, and, second, its breach by the Iron Company, making the bond by reference a part of the pleading. The bond assures the performance of the contract in customary terms, and, by reference, embodies the contract. The contract provides for the purchase by the Copper Company and sale by the Iron Company of 4,000 tons of Talladega pig iron of a given analysis during a given month at the price of $13.10 per ton delivered f. o. b. Talladega, Alabama, payments to be made on a given date.

The contracts bear date March 13, 1917; the bonds April 3, 1917.

Turning to the record, it appears that at the trial the Copper Company, to support the averments of its pleadings, formally and briefly proved the execution of the bonds, the breach of the contracts by the

Iron Company, and the resultant damages, and rested on the liability of the Bonding Company for indemnity.

The Copper Company has assigned but one error in the trial of its case in chief. This relates to a ruling of the trial judge in allowing the Bonding Company to lay grounds for contradiction. We dispose of this assignment here as involving no error.

So far, there was nothing in the case out of the ordinary. The trouble began with the Bonding Company's defence, and its defence began with its pleadings.

The defence of the Bonding Company, as pleaded, was, in the main, twofold:

First. That the contracts appended to the bonds when sued on were not the contracts appended to and covered by the bonds when issued; and that, in consequence, the contracts of indemnity sued on are not the contracts of indemnity which it executed and delivered.

Second. That it was induced to enter into the bonds by fraud of the Iron Company with the knowledge and connivance of the Copper Company.

These defences, as pleaded, were, in a word, non est factum and fraud.

To sustain the first defence, the Bonding Company introduced evidence tending to show that the bonds of indemnity into which it entered with the Copper Company did not cover contracts between the Copper Company and the Iron Company for the purchase and sale, monthly, of 4,000 tons of pig iron at $13.10 a ton as declared by the Copper Company in its pleadings, but covered, on the contrary, other contracts purported to have been entered into by the Copper Company and Iron Company, for the purchase and sale, monthly, of 2,000 tons of pig iron at $26.20 a ton; that copies of the supposed contracts between the two companies containing the items last given were certified to the Bonding Company by the Iron Company and were appended to the bonds when they were executed and delivered to the Copper Company; that between the time of their delivery and the bringing of these suits, the copies of the contracts so appended were removed from the bonds and copies of the real contracts substituted for them, during all of which time the bonds and accompanying copies of contracts were in the possession and control of the Copper Company. By this evidence, the Bonding Company offered to support its charge that there was a substitution of contracts and that the substitution was the act of the Copper Company. This evidence was, of course, controverted. On this issue of substitution there was ample evidence, properly admitted under the pleadings, for a finding by the jury in favor of the Bonding Company. As the jury's verdict for the Bonding Company was based either on this issue of substituted contracts or on the next issue of fraud, the Copper Company is concluded by the verdict on this issue.

[1] That the Bonding Company was induced to enter into its indemnifying undertakings by fraud and gross misrepresentations of the Iron Company is not seriously disputed by the Copper Company. Its position is that it was not a party to the fraud and was ignorant

of the misrepresentations. In its case in chief, the Bonding Company, in order to sustain its defence of fraud by the Iron Company and connivance by the Copper Company, first introduced testimony of the Iron Company's fraud and misrepresentations, to which many of the Copper Company's exceptions were noted and errors assigned, and then introduced testimony to show the relation of the Copper Company to the Iron Company by the acts of their officers and to show also the part which the Copper Company, through its officers, took in conniving at the fraud of the Iron Company. Obviously, no exception can be taken to this order of establishing connivance by one party in the fraud of another.

The substance of this testimony was that the Copper Company was not at any time concerned in any business other than its transactions with the Iron Company; and that the Iron Company had as its one asset an interest in an option or arrangement with Ladenburg, Thalman & Company of New York, for the operation of a blast furnace at Talladega, Alabama, which had long been out of use. When the Iron Company was practically without funds or tangible assets, it entered into the five contracts with the Copper Company on March 13, 1917, whereby it undertook to sell and deliver to the Copper Company, monthly, for a period of five months, 4,000 tons of pig iron at $13.10 a ton; a price in the Birmingham district, little, if any, above cost of production. With these contracts made, the two companies entered into another contract referred to at the trial as the "Underlying Agreement" or the "Y" agreement, reciting the five contracts just mentioned and providing, in consideration thereof, for an advance or payment by the Copper Company to the Iron Company of the sum of $50,000, and a further sum of $25,000, both sums to be placed to the credit of the Iron Company in the Commercial Trust Company at Philadelphia; the latter sum, however, to be drawn on by the Iron Company by voucher checks showing that the money was to be paid for certain purposes specified in the agreement, the one pertinent to this case being "Premium on surety bond, believed to be $2,700." This agreement further provided that if the Iron Company should be prevented by fire, strikes, riot, mob, or earthquake from making deliveries on the 20,000 tons of pig iron covered by the five contracts referred to, then the Iron Company would sell and deliver to the Copper Company its full production of pig iron of whatever grade and quality, at a price of $7.50 per ton below the market price. The curious feature of this agreement is, that nowhere in it is there provision for repayment or return to the Copper Company of the moneys it agreed to advance to the Iron Company. This agreement was signed some time in March, 1917, and, in part performance, the Copper Company placed $75,000 in bank to the credit of the Iron Company.

With these contracts made and outstanding, the Iron Company, in carrying out its undertaking to give the Copper Company bonds assuring the performance of its sales contracts, applied to the Bonding Company for five bonds of $52,400 each. To induce the Bonding Company to enter into these bonds, an officer of the Iron Company

supplied the Bonding Company with certified copies of what purported to be its pig iron contracts with the Copper Company, which showed that the sale and delivery covered, not 4,000 tons a month at the suspiciously low price of $13.10 a ton, as actually called for by the contracts, but 2,000 tons a month at what was then about the market price of $26.20 a ton. On this representation, Evans, an agent of the Bonding Company, went to Philadelphia and met one Wilson, an insurance broker, through whom the Iron Company was negotiating for bonds. Evans was shown what purported to be an engineer's report of the property, and an inventory and a financial statement of the Iron Company. He was informed that the Iron Company had $75,000 to its credit in the Commercial Trust Company (verified by letter from the depository) which was represented as money arising from the sale of stock; owned 2,511.5 acres of ore land; and possessed total assets of $1,360,650. In addition to statements previously made by the Iron Company in its application for bonds and by Wilson, the insurance broker, that no advance of any character had been made the Iron Company by the Copper Company under the contracts, an officer of the Bonding Company asked the Secretary of the Copper Company, prior to the delivery of the bonds, whether his Company had made any advance payments against iron deliveries under these contracts, to which the Secretary replied, "Absolutely not."

To aid the Iron Company in carrying out its undertaking in the "Y" agreement to obtain indemnity bonds for the protection of the Copper Company on the sales contracts, for which the Copper Company had provided $2,700, the President and Secretary of the Copper Company went to the bank with Wilson, who had received from the Iron Company a check drawn to his order for $6,000. There the President of the Copper Company endorsed Wilson's $6,000 check and got from the bank a draft for a like sum. With the bonds prepared for signature and with this $6,000 draft, the Secretary of the Copper Company accompanied Wilson to Detroit. On arriving in that city, the Secretary had the draft cashed at a local bank and turned the whole $6,000 over to Wilson. What Wilson did with it does not appear. This large sum of money was drawn and disbursed supposedly for the payment of premiums on the bonds, when, in fact, the aggregate amount of all premiums was but $655. Only this sum reached the Bonding Company. After the money had been paid Wilson, Evans, an agent of the Bonding Company, at its Detroit Office, delivered the bonds to the Secretary of the Copper Company, in the possession of which concern they remained until suit. The bonds were executed on or about April 3.

When the transactions were reported to its home office on or about May 1, 1917, the Bonding Company immediately made disclaimer and also made formal tender of the premiums paid.

The Iron Company breached its first contract in June; in fact, it delivered no iron under any of the five contracts. Testimony was offered and admitted of acts and conduct of officers of the Copper Company, following the transactions concluded by the Bonding Com-

pany's disclaimer and the Iron Company's breaches, tending to show the close relationship of the two companies and their control by the same officers. The evidence was, substantially, that the President of the Copper Company assumed control of the funds of the Iron Company on its failure to perform its sales contracts; stopped payment on checks at his will; controlled its directorate by his nominees; and in July and August caused it to vote for his protection a bond issue of $500,000 and notes to the amount of $750,000.

It was in the admission of evidence tending to establish these facts that most of the court's rulings now assigned as error were made. While there is a great number of assignments of error, the errors assigned may fairly be grouped, as was done in the plaintiff's brief, according to the subject matter to which they relate, as follows:

(1) Exception to the so-called "Underlying Agreement," admission of evidence relating thereto and charge to the jury as to the effect thereof.

(2) Exceptions to admission of evidence of misrepresentations made to the Bonding Company by officers and agents of the Iron Company without the Copper Company's knowledge and charge to the jury as to the effect thereof.

(3) Exceptions to admission of evidence of subsequent transactions between the Copper Company and the Iron Company and charge to the jury as to the effect thereof.

The record shows that the judge had a thorough grasp of the case; that he carefully kept in mind throughout the trial the precise issues made by the pleadings; and that, in his rulings, he was liberal in admitting testimony to sustain them. These issues and the manner in which they should be tried are nowhere better stated than by counsel for the Copper Company himself when addressing the judge on an objection to an offer of testimony. He said:

> "The questions that arise in this case are these: First, as I understand it, were the bonds executed? Second, was there any fraud in the procurement of the bonds? Third, has there been any variation of the terms of the contract since the bonds were executed to release the surety? These are the three questions involved in this case and *any evidence that directly or indirectly bears on that is entirely appropriate.*"

[2] This statement is in accord with the practice everywhere, that when fraud is alleged, great latitude of proof is allowed, and every fact or circumstance from which a legal inference of fraud may be drawn is admissible. Any such fact, no matter how insignificant, may be shown, provided it bears at all on the point in issue. Accordingly, it is proper to prove a party's participation in the fraud by showing what was said and done leading up to the transaction, De Ruiter v. De Ruiter, 28 Ind. App. 9, 62 N. E. 100, 91 Am. St. Rep. 107; what was said and done at the time the fraud was committed, Crump v. United States Min. Co., 7 Grat. (Va.) 352, 56 Am. Dec. 116; and, within certain limits, what was said and done after the commission of the fraud. Salmon v. Richardson, 30 Conn. 360, 79 Am. Dec. 255; 12 R. C. L. 429, 430, and cases.

[3-6] It is of the manner in which the trial judge applied these

familiar principles of law in his rulings that the Copper Company complains. Its most serious complaint relates to the admission in evidence of the "Y" agreement, which, it asserts, was error, first, because the agreement had no relation to the fraud and misrepresentations of the Iron Company; and, second, because no duty rested on the Copper Company voluntarily to disclose its existence or its provisions to the Bonding Company. This contention—which covers the first group of assignments of error—raises the question, whether the Copper Company was guilty of fraud by suppressing facts which the Bonding Company was entitled to know.

Fraud may be committed by the suppression of truth as well as by the suggestion of falsehood. 12 R. C. L. 305, and cases. But the law distinguishes between passive concealment and active concealment, the distinction being that in active concealment there is implied a purpose or design. As a general rule, to constitute fraud by concealment or suppression of the truth there must be something more than mere silence, or a mere failure to disclose known facts. There must be some occasion or some circumstance which imposes on one person the legal duty to speak, in order that another dealing with him may be placed on an equal footing. Then a failure to state a material fact is equivalent to concealment of the fact and amounts to fraud equally with an affirmative falsehood. Pickering v. Day, 3 Houst. (Del.) 474, 95 Am. Dec. 291; 12 R. C. L. 305, 306, 307, 308, and cases.

We are not prepared to say—assuming the relations of the two companies otherwise free from fraud—that if the Copper Company had allowed the Iron Company to negotiate alone for the bonds, it would have been its duty to seek out the Bonding Company and inform it of the "Y" agreement. But that was not what happened. The Copper Company was rendering personal as well as financial aid to the Iron Company in securing the bonds which it exacted for its own benefit. Its officer came into direct communication with an officer of the Bonding Company and discussed the bonds. In that discussion, the Bonding Company was endeavoring to ascertain what risks it would incur on entering into the proposed indemnifying obligations. The Bonding Company, speaking through an officer, asked the Copper Company, addressing its Secretary, whether any advances had been made against the contracts it was about to assure. To that question, the Copper Company, through its Secretary, responded: "Absolutely not." If the Secretary made that reply (which he denied) he made it with full knowledge of the "Y" agreement.

What bearing had the "Y" agreement on the Bonding Company's indemnity risks? That agreement provided for an advance by the Copper Company to the Iron Company of $75,000. Just the character of the agreement it is difficult to define—whether an advance against contract deliveries of pig iron, an out-and-out loan of money, or a partnership contribution—at any event, the Copper Company paid the Iron Company $75,000 and *recited* as a "consideration" for this payment the five sales contracts in question.

These facts appearing in the "Y" agreement itself, connected with

the unusual feature that nowhere in it was there provision for the repayment or return of the money so advanced, show several things. Linking the sales contracts to the "Y" agreement by express recital and making the sales contracts a consideration for the "Y" agreement show an intimate relation between them. But for the existence of the five sales contracts there would have been no reason for making the "Y" agreement. Whatever its character, whether an advance against iron deliveries, or a loan, the Copper Company was in position, when monthly deliveries began, to deduct at will from its monthly payments the sum or parts of the sum the Iron Company owed it. If, in the last analysis, the advance was in the nature of a partnership contribution, it was even more material to the risk. With a contract outstanding, having all these provisions and possible constructions, the Copper Company, when asked by the Bonding Company concerning advances, was under legal obligation to tell about it. That question was the *circumstance* that raised in the Copper Company a legal duty to speak; and, on its failure, transformed what otherwise might have been passive silence into active concealment. The Bonding Company was seeking facts affecting the degree of its responsibility. The "Y" agreement was such a fact. It was, therefore, the legal duty of the Copper Company, when responding to the inquiry, to disclose it and to disclose it fully. The question having been asked for the purpose of ascertaining the risks involved in the situation, any equivocal, evasive, or misleading answer, calculated to convey a false impression, even though literally true as far as it went, was fraud. Pidcock v. Bishop, 3 Barn. & Cress. 605; 12 R. C. L. 309, 310, 311, and cases. It will not do for the Copper Company to say that it answered correctly when its Secretary said, on his own construction of the instrument, that no advances had been made against iron deliveries. Even if this be its correct construction, the answer given was but a half truth, for the "Y" agreement was a fact which showed the financial and contractual relations of the two companies. As such, it was material to the risks which the Bonding Company would incur in assuring to one the undertaking of the other. Failure to disclose this fact, under the circumstance of being asked for it, was an active concealment of the fact. As the fraudulent character of the concealment was provable only by the admission in evidence of the thing concealed, we are of opinion that admission of the agreement was not error, and that the agreement, together with the circumstance of its concealment, constituted evidence sufficient to sustain a finding of fraud by the jury.

In the second group of exceptions we find no error in the admission of evidence of misrepresentations made by the Iron Company without the plaintiff's knowledge. This because it was necessary, first, to show the Iron Company's fraud and misrepresentations before it was possible to show the Copper Company's connivance therein. Evidence of connivance was present, and was sufficient, we think, to submit to the jury.

[7] In the third group of exceptions covering the admission of evidence of subsequent acts of the Copper Company and the Iron

Company, we find no error. The admission of evidence of this kind must ordinarily be guarded, but it was admissible in this case for the purpose of showing by its outgrowth what was the relation of the two companies at the time the fraud was committed. Salmon v. Richardson, 30 Conn. 360, 379, 79 Am. Dec. 255.

[8] In our review of this entire record, we have considered singly and in groups the rulings of the court assigned as error and find only a few open to question, any one of which, if technically error, is harmless error. We recognize that in the theory of the law, erroneous rulings in jury trials are presumptively injurious, yet the tendency is to enlarge the sphere of the trial judge in the admission and exclusion of testimony and not to disturb the judgment when it affirmatively appears that his rulings, if erroneous, were harmless. Fillippon v. Albion Vein Slate Co., 250 U. S. 76, 39 Sup. Ct. 435, 63 L. Ed. 853; Norfolk & Western Ry. Co. v. Gillespie, 224 Fed. 316, 320, 139 C. C. A. 552.

The judgment below is affirmed.

WALTER et al. v. ATHA. ATHA v. WALTER et al. In re BLANCHARD.

(Circuit Court of Appeals, Third Circuit. December 31, 1919.)

Nos. 2484, 2510.

1. BANKRUPTCY ⟸228—FINDINGS OF REFEREE ON UNCONTRADICTED EVIDENCE NOT ENTITLED TO WEIGHT GIVEN FINDINGS ON CONFLICTING EVIDENCE.

While a finding of fact by a referee on conflicting evidence will not be disturbed, unless there is cogent evidence of mistake, yet, if the referee's finding be a deduction from established facts or uncontradicted evidence, the judge is at liberty to draw his own inferences and deduce his own conclusions.

2. BANKRUPTCY ⟸467—FINDINGS OF TRIAL COURT ON UNCONTRADICTED EVIDENCE NOT CONCLUSIVE ON APPEAL.

Where the findings of fact of the bankruptcy court, which were in conflict with those of the referee, were based on deductions from uncontradicted evidence, the appellate court need not follow them, but may deduce its own conclusions, just as the trial court can disregard findings of referee.

3. BANKRUPTCY ⟸340—EVIDENCE HELD TO SHOW THAT CLAIMANT LENT STOCK TO HER SON, THE BANKRUPT, AND NOT TO A CORPORATION.

Evidence on behalf of claimant, the mother of a bankrupt, *held* to show that she lent stock to her son, the bankrupt, and not to a corporation in which he was interested and which pledged the same.

4. BANKRUPTCY ⟸340—CLAIMS BY RELATIVE CLOSELY SCRUTINIZED.

Claims of relatives of a bankrupt should be closely and carefully scrutinized, remembering, however, that the honest or dishonest character of such claim is not to be determined by mere relationship.

5. BANKRUPTCY ⟸314(1)—DUTY OF BANKRUPT TO REIMBURSE ONE LENDING HIM STOCK TO PLEDGE.

Where a mother lent her son corporate stock for the purpose of enabling the son to pledge the same and obtain funds for a corporation in which he was interested, the son was under an implied duty to reimburse his mother for expenses incurred in recovering the shares, because of his failure to return them, and such expenses may be proven as a claim on the son's bankruptcy.

Appeal from the District Court of the United States for the District of New Jersey; Thomas G. Haight, Judge.

In the matter of Theodore C. E. Blanchard, bankrupt. From an order of the District Court (253 Fed. 758), allowing as reduced the claim of Emeline C. Blanchard, Effe B. Walter and another, as executors of the estate of claimant, since deceased, appeal, and Benjamin Atha, as trustee, cross-appeals. Reversed, with directions to the District Court to allow claim in full.

Vredenburgh, Wall & Carey, of Jersey City, N. J. (Albert C. Wall, of Jersey City, N. J., and William F. Allen, of New York City, of counsel), for Effe B. Walter and others.

Robert H. Southard, of New York City, for Benj. Atha, trustee, etc.

Before BUFFINGTON and WOOLLEY, Circuit Judges, and MORRIS, District Judge.

WOOLLEY, Circuit Judge. In the proof of claim and amended proof of claim filed by Emeline C. Blanchard in the bankrupt estate of her son, Theodore C. E. Blanchard, there is an item of $271,155. On petition by the Trustee for its rejection or reduction, the Referee allowed the item in full. On review, the District Court reduced it to one-fourth and later allowed it for one-half of its amount. From the order of the District Court, the claimant took this appeal, charging error to the court in not allowing the item in full. On cross-appeal, the Trustee assigns as error, first, the action of the court in not wholly expunging the item from the claim; and failing in this, second, its action in allowing the item for one-half of its amount instead of for one-fourth.

As the case is stated in the opinion of the trial judge, 253 Fed. 758, we shall do no more than give in outline the facts on which we think the case turns.

The transactions out of which this controversy arose extended over a period of twenty years or more. They began shortly after the death of the claimant's husband, who, having been one of the founders of The Prudential Insurance Company of America, left to his widow and several children a large number of shares of the highly valuable stock of that corporation. Three of his children, William W. Blanchard, Fred. C. Blanchard, and Theo. C. E. Blanchard, used their shares freely in borrowing money with which to embark upon various enterprises, which failed with singular regularity. The one with which we are here concerned was Blue Ridge Enameled Brick Company. As the financial needs of this and other projects exhausted their resources, the sons appealed to their mother from time to time and obtained her shares on which to raise the funds they required. These transactions, initially small in amount, were many in number. The first one bearing on this controversy involved $1176^{48}/_{100}$ shares, representing in the aggregate shares which the mother had at previous times and in smaller amounts turned over to her sons. These were pledged on a note of the Brick Company for $205,000, dated August 1, 1904, endorsed by the three sons and the mother, and negotiated with the

Fidelity Trust Company of Newark, N. J. In April, 1908, the Trust Company called this loan and also four loans of the three sons, amounting to $507,000, on which were pledged 2445$^{96}/_{100}$ shares of Prudential stock, variously owned.

Milton E. Blanchard, another son, took up the loan of the Brick Company and in return obtained from that Company a new note for $216,411.67, dated April 6, 1908, secured by the endorsement of the same three sons and by the pledge of 1225$^{12}/_{100}$ shares of the mother's Prudential stock. The mother was not an endorser on this note.

Milton held the note until 1914, when all three sons who had engaged in the brick business, as well as the Brick Company itself, were in bankruptcy. In this state of affairs, Milton demanded payment and threatened to sell his mother's shares pledged with the note. Whereupon the mother bought the note from him, and on its endorsement to her, regained possession of her stock. The sum which she thus paid is the item in dispute in her claim against the bankrupt estate of Theo. C. E. Blanchard.

The mother's original proof of claim for this sum was based on her right of action as endorsee of the note against Theo. C. E. Blanchard, one of the endorsers. Her amended proof of claim was made on the ground that she had loaned her shares from time to time, in different amounts,—until they aggregated the number recovered from Milton—unto her three sons, William W., Fred. C., and Theo. C. E. Blanchard, for use by them personally in borrowing money for their various projects,—among them the Brick Company,—upon promises by them, jointly and severally made, to return the same; and that, upon the failure of Theo. C. E. and the others to keep their promises, she was compelled to lay out and expend the amount claimed in order to recover her shares.

The argument on the law of this case has taken a wide range, involving questions of rights and liabilities of endorsers, co-sureties, and contribution, arising out of the finding of the learned trial judge that the mother's loans of her shares were to the Brick Company and not to her sons personally. Before we are called upon to consider these questions of law, we must first ascertain the precise character of the transactions between the mother and her sons, and determine, as a matter of fact, whether she loaned her shares to her sons to enable them to finance the Brick Company, or whether she loaned her shares to the Brick Company, and thereby financed it herself.

[1, 2] The testimony on which this case was submitted first to the Referee, then to the District Court, and now to this court, to determine, as a fact, the character of the transactions between mother and sons is unusual in that it was nowhere in conflict and the credibility of no witness was at any time attacked. The learned trial judge was mindful of the rule prevailing in this circuit against disturbing a finding of fact by a Referee, based on conflicting evidence and involving questions of credibility, unless there is cogent evidence of mistake; In re Partridge Lumber Co. (D. C.) 215 Fed. 973, 976; but proceeded to a finding opposite to that of the Referee under the rule, that if the Referee's finding be a deduction from established facts or uncontra-

dicted evidence, the judge, reviewing the Referee and having before him the same facts, is at liberty to draw his own inferences and deduce his own conclusions. In re New York & Philadelphia Package Co. (D. C.) 225 Fed. 219, 221; Baumhauer v. Austin, 186 Fed. 260, 108 C. C. A. 306; Ohio Valley Bank Co. v. Mack, 163 Fed. 155, 158, 89 C. C. A. 605, 24 L. R. A. (N. S.) 184. We do not believe we are expanding the latter rule beyond its proper limits by extending it to ourselves on this appeal.

[3] In proof of her claim, the mother showed that her three sons lunched with her and her daughter weekly, and at these luncheons the sons would represent to her their need for money to carry on their business and would ask her to loan them her Prudential shares. The mother was far advanced in years and timid. To these requests she would usually demur; though later she would uniformly yield. In representing their needs, the sons frankly told the mother the uses for which they wanted her stock, among which was the raising of money for the Brick Company, assuring her that the loans to them would be perfectly safe and promising always to return them as soon as possible. The shares when taken were pledged by the sons with the Trust Company on their own notes and on notes of their business enterprises, among them the Brick Company.

These transactions began when the mother's inheritance of 2000 shares of Prudential stock was intact, and after the sons' inheritances had been exhausted in their various undertakings. They continued until the most of the mother's inheritance had been transferred from her possession to pledges on the notes of the Brick Company and of her sons, and until their bankruptcy ensued.

The advanced age of the mother must, of course, be considered in appraising her testimony, yet the very simplicity with which it was given lends force to it. Her testimony tended to prove that while she knew of the Brick Company as one of her sons' enterprises, she was not conscious of having loaned her shares to it. The following excerpt from her testimony shows its character:

"Q. Do you know about this company borrowing any money?

"A. No, I do not, not specially. I loaned my stock to my boys. * * *

"Q. Can you remember whether there was a written agreement with your son Theodore as to what he should do with this stock of yours?

"A. Why, I loaned it to the boys whenever they wanted it. They knew they could have it when they needed it."

A daughter, always present at the luncheons, testified to the conversations between the mother and her sons, to their requests for the loan of her Prudential shares, and to the delivery by the mother of her certificates to her sons.

The testimony of Fred. C. and William W. Blanchard went directly to the point that the loans were personal to the three sons. True, the testimony of the daughter was that of a witness interested in the outcome of the controversy; but it is doubtful that the testimony of these two sons was affected by any financial interest. Added to this testimony was that of John R. Hardin, Esq., who, by reason of his relation to the Blanchard family as counsel for many years, was intimate-

ly acquainted with their business affairs. He had, however, no knowledge of this transaction at its inception, and, therefore, could not testify that the transfer of shares by the mother to the sons was personal to them. He testified, however, on his knowledge of the conduct of the family business, that he believed the shares were loaned by the mother to the sons. If his testimony was admissible, it would be conclusive of the issue. But the learned trial judge considered it incompetent, and therefore rejected it. Even with Mr. Hardin's testimony out of the case, we are satisfied that the claimant has, on other testimony, established, prima facie, a right to the allowance of the item in dispute.

In opposition to its allowance, the Trustee produced no evidence that Mrs. Blanchard ever had transactions of any kind with the Brick Company beyond the fact that she was at one time the holder of 100 of its 6000 shares of capital stock and at another time the holder of 300 shares. He offered no testimony in contradiction of the testimony for the claimant that the loans of the mother's shares were to her sons personally, except a paper, dated July 5, 1901, when the sons began to borrow and use the mother's shares in raising money for the Brick Company. This paper bears the signature of Emeline C. Blanchard, and is addressed to the Fidelity Trust Company, and purports to be a continuing authority given the Brick Company to pledge her shares of stock with the Trust Company in borrowing money. This paper was signed more than three years before the date of the first Brick Company note, and it was given by Mrs. Blanchard on the demand of the Trust Company, as stated by its President, in order that it might have recourse without question to her stock pledged as collateral, in the event of default on the note by the maker.

We do not regard this transaction as inconsistent with the claimant's proofs that her loans were made to her sons personally. Some of the loans made to her sons were admittedly made for use by them in raising money for the Brick Company. They could not get money from the Trust Company for the Brick Company on her shares unless her shares were put in a position that the Trust Company could have recourse to them in the event of the Brick Company's default. The Trust Company's demand upon Mrs. Blanchard for written authority to pledge the shares was one that is quite customary in banking circles when a bank is loaning money to a person offering as collateral the securities of another; and compliance with such a demand is quite customarily made by the owner of securities so loaning them. From this paper, made under the circumstances testified to, we cannot draw the inference that Mrs. Blanchard loaned her shares to the Brick Company. The paper evidences nothing but her purpose to place her shares in position to enable her sons to realize on them.

In our examination of the record, we find that no witness testified that Mrs. Blanchard loaned her shares to the Brick Company. Oppositely, several witnesses testified affirmatively and positively that she loaned her shares to her sons. While the force of the testimony of some of these witnesses is modified by varying degrees of interest, we cannot, in the absence of their impeachment, reject it. Unless we

wholly disregard their testimony, the claimant must prevail, for opposed to their testimony the Trustee produced nothing. Aside from the direct testimony of witnesses that the mother loaned her shares to her sons, the natural and probable inferences, lawfully to be drawn from the transactions, as evidenced by the acts and conduct of the participants throughout a long period of time, are, that she loaned her shares to her sons, not as agents of the Brick Company as a disclosed principal (Whitney v. Wyman, 101 U. S. 392, 396, 25 L. Ed. 1050), but to them personally for their use in raising money for the Brick Company and their other undertakings.

[4] In reaching this conclusion, we have endeavored carefully to keep in mind the rule that a claim of a relative of a bankrupt should be closely scrutinized; remembering, however, that the honest or dishonest character of such a claim is not to be determined by mere relationship. Davis v. Schwartz, 155 U. S. 631, 638, 15 Sup. Ct. 237, 39 L. Ed. 829; Estes v. Gunter, 122 U. S. 450, 456, 7 Sup. Ct. 1275, 30 L. Ed. 1228; Ohio Valley Bank Co. v. Mack, 163 Fed. 155, 156, 89 C. C. A. 605, 24 L. R. A. (N. S.) 184; Baumhauer v. Austin, 186 Fed. 260, 265, 108 C. C. A. 306.

[5] On this finding of fact, the claimant's right (or that of her personal representatives) to the full allowance of the disputed item in her claim is established certainly under one of several familiar principles of law, namely, on her son's implied contract to reimburse her for expenditures she was required to make in recovering her shares because of his failure to keep his promise to return them.

We direct that the District Court modify its order by allowing in full the item of the claim in dispute, and that the costs of this case, both in the District Court and in this court, be paid by the Trustee out of the estate of the bankrupt as a cost of administration.

McCAFFREY et al. v. DAY et al.

(Circuit Court of Appeals, Ninth Circuit. January 5, 1920.)

No. 3295.

1. MINES AND MINERALS ⟸83—DEED AND CONTRACT TO FURNISH MONEY FOR DEVELOPMENT HELD SEPARATE TRANSACTIONS.

In an action for failure to comply with a mining contract, evidence regarding the deeding of mining property in certain proportions to plaintiffs, who had an option on the property, and defendants, who furnished the necessary money, and the execution on the following day of a contract under which defendants agreed to furnish money for developing the property, *held* to sustain findings that the contract was not a part of the consideration for the deeds.

2. MINES AND MINERALS ⟸83—EVIDENCE ESTABLISHING COMPLIANCE WITH CONTRACT TO FURNISH MONEY FOR DEVELOPMENT.

In an action against a defendant for refusing to furnish money for the development of mining property under a contract committing the operation and development of the mine to defendant's best judgment, uncontradicted evidence that the location of a claim was probably invalid until certain location work had been done, that property was inaccessible,

that completion of a nearby power plant would save considerable money, etc., *held* to sustain findings that defendant did not act arbitrarily or in bad faith in refusing to advance more money.

Appeal from the District Court of the United States for the District of Montana; George M. Bourquin, Judge.

Suit by Edward McCaffrey, R. C. McCaffrey, and Mary Dena McCaffrey against Harry L. Day, Mrs. Harry L. Day, whose true name is Helen D. Day, J. D. Finley, and Mrs. J. D. Finley. Judgment for defendants, and plaintiffs appeal. Affirmed.

Graves, Kizer & Graves, of Spokane, Wash., for appellants.

W. W. Zent, of Spokane, Wash., Isham N. Smith, of Seattle, Wash., John H. Wourms, of Wallace, Idaho, and C. B. Nolan and William Scallon, both of Helena, Mont., for appellees.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

ROSS, Circuit Judge. A careful examination of the record in this case satisfies us of the correctness of the judgment of the court below denying the rescission of the contract between the parties, sought by the suit. The bill was based upon the alleged failure and refusal of the appellee Day to comply with the terms of the contract, and upon the allegation that such refusal by him was arbitrary and in bad faith, and "not in the exercise of his judgment, or of any discretion conferred upon him by the agreement."

The contract related to certain mining property situated in Lincoln county, Mont., consisting of the Heron lode mining claim, the Cabinet lode mining claim, the Galena lode mining claim, and a mill site known as the Cabinet mill site, situated on Callahan creek, in Troy mining district. In 1910 the property belonged to a corporation called Big Eight Mining Company, and during that year it was leased to the appellant R. C. McCaffrey (one of the complainants below) by the company, with an option to purchase the same within a certain stated time for $50,000; deeds therefor being placed in escrow with Northwestern Loan & Trust Company, to be by it delivered to the purchaser upon the payment of the purchase price. The lessee entered into possession of the property under the lease and commenced working the ground, in which undertaking he was joined by his son and co-complainant below, Edward McCaffrey, during the progress of which work they shipped a number of cars of lead and zinc ore; the appellant Edward McCaffrey, who was a plumber, having invested in such work a considerable amount of money out of his business, stated to be from $15,000 to $20,000. His father was a prospector and miner. The appellee J. D. Finley (a defendant below) was vice president and a director of the Exchange National Bank of Spokane, Washington, of which bank Day was also a director, and he was a friend of the McCaffreys, and acted for them in their dealings regarding the property here in question. As the time approached for the exercise of the option to purchase the property, the McCaffreys, through Finley, opened negotiations with an eastern corporation called Grascelli Chemical Company for the advance of the necessary $50,000 with which to

make the purchase, and for the development of the property, which negotiations were pending at the time Finley, for the McCaffreys, applied to Day with the same end in view; Finley preferring the latter for the reason, particularly, that he was an experienced and competent mining man, as well as one of abundant means. That he was experienced and competent is sufficiently shown by the fact that he had been the manager of the large and important Hercules mine of that section of the country.

The evidence shows that Finley knew nothing about mining, but that he was himself able to advance the $50,000 with which to effect the purchase of the property, and told Day, as well as the younger McCaffrey, that he was willing to do so if necessary, but, being anxious to interest Day, for the reason that has been stated, went with him in the fall of 1912 to see the property. While no one, we think, can justly claim from the evidence in the case that the property had been sufficiently opened up to be called a mine, Day, according to his own testimony, regarded it as a good prospect—so good, indeed, that he said he would, with Finley, advance, in certain proportions, the necessary $50,000 to make the purchase and $50,000 more for the development of the property. But when it came, as it did, according to the evidence, to the proposition that such purchase money be so advanced upon an assignment of the lease and bond, Day, after an examination of the papers by one of his attorneys, and consultation with him, refused the proposition. Thereafter, time being of the essence of the escrow agreement, haste became necessary, and Day, having then gone to Spokane, summoned his attorney, Mr. Wourms, there, who arrived at Spokane on the morning of the 15th of January, 1913, when, according to his testimony, Day handed him the abstract of title to the property and requested him to examine it as expeditiously as possible and advise him respecting it; that about the time of Wourms' completion of the examination of the abstract Finley and the younger McCaffrey came to the room of the hotel where he and Day were, and that he informed them that, while there were some minor defects in the abstract, it was sufficient, but that he wished to see the deeds that were in escrow, and which were to be delivered upon the payment of the money, and that he and McCaffrey then went to the Northwestern Loan & Trust Company to see the deeds, where the cashier of the bank allowed him to examine them, but said that they had been notified by the Big Eight Mining Company not to deliver them; that he and McCaffrey then returned to the hotel, where they found Finley and Day, to whom he reported the result of the visit to the Trust Company, including his report that the deeds were sufficient, and—

"advised them that the thing to do was to prepare deeds, immediately, make a tender. That seemed to appeal to all the gentlemen present, and they began to discuss for some little time as to the interest that each one was to have. I was interested," said the witness, "in Mr. Day's interest. Mr. Day insisted on 55 per cent., and there was some talk backward and forward, and the one remark that I recall that Mr. McCaffrey made was that that would only give himself and his father 25 per cent.; that they had spent two years on the property and that wasn't enough. Mr. Day then suggested that 51, what he wanted was control, and he wouldn't go in unless he did get control, and 51 per cent. was just as good for control as 55; that he was willing to

reduce his demand to 51 per cent. That was agreed upon, and I immediately proceeded to prepare a deed from the McCaffreys to Mr. Harry L. Day. I completed that deed; as I recall it Mr. McCaffrey and Mr. Finley went away."

The witness further testified that he and Finley then went to the bank to get the money, and that on the way Finley told him that he might just as well prepare a deed for him also, which the witness did before going to the bank. The deeds so prepared by Wourms were from the McCaffreys to Day and Finley for 51 and 14 per cent., respectively, in the property, to pass to and through the McCaffreys from the Big Eight Company. The witness further testified that immediately after he had prepared the deed for Finley the two proceeded to the Exchange National Bank, where Day directed that he be given $50,000 in money which was done, and, it being heavy, he and the younger McCaffrey took it in a taxicab to the Northwestern Trust Company and made the necessary tender. The witness further testified that the next morning, January 16th—

"Mr. Finley came to our rooms at the hotel, that we used as a kind of a workshop, and informed me that he thought that Mr. Day and himself ought to enter into an agreement for the purpose of putting up the money; that the McCaffreys were not able to advance any money to amount to anything in the development of the property; and as I recall it I told Mr. Finley that I didn't see any need of it; that the mining partnership law of the state of Montana was sufficient for all purposes, and Mr. Finley then went away. Mr. Day came to the room a short while afterwards, and informed me that he had seen Mr. Finley, and that they had agreed that they would enter into an agreement with the McCaffreys for the purpose of advancing some money, and requested me to put their agreement, as he narrated it to me, into form. I proceeded to do so, and it was discussed backward and forward, and several drafts made of it that morning by Mr. Day and Mr. Finley and myself.

"Q. That would be on the morning of the 16th? A. On the morning of the 16th.

"Q. Of January? A. On the morning of the 16th of January, as I recall it; and finally we succeeded in getting a draft that was satisfactory to Mr. Finley and to Mr. Day. Then Mr. Edward McCaffrey came to the rooms with reference to the agreement; he read it over, and he asked me whether I would object to going up to Mr.—

"Q. Henley's? A. Henley's, I think; Henley's office; and we went up to Mr. Henley's office, Mr. McCaffrey and myself.

"Q. Do you remember about the time that you got to Henley's office? Is there anything that occurred there— A. I believe Mr. McCaffrey will recall it. We waited quite a while for him to return from lunch; that is, he was out when we went up there.

"Q. Well, now, when Henley came in, and as the result of the visit that you made to his office there, was there any addition made to the agreement as it then stood? A. As I had written the agreement, there was no proviso in it that if any of these causes should arise that would absolve these people from—Mr. Day and Mr. Finley from—working the property, unless the conditions that made it necessary to desist putting up the money should be permanent, that they should in the future time be obliged to go ahead, and he suggested to me that there ought to be some phraseology of that class in the agreement. And I told Mr. Henley, in the presence of Mr. McCaffrey, that personally I didn't see any objection to adding an arrangement of that kind.

"Q. And are you able to refer to the particular clause that was added to the contract, on account of the suggestion made by Mr. Henley? A. Yes, sir; a clause in paragraph 8, after the comma, in the fifth line from the bottom of that paragraph, reading like this: 'But nothing herein shall be

construed to finally release the said parties of the first part from their obligation to furnish said money as aforesaid, unless the obstacles to the operation and development of the same shall be permanent.'

"Q. And then was there a redrafting of the contract as it was amended? A. I took the matter up with Mr. Day and Mr. Finley, and told them that I thought that was fair, and there was no objection, and I redrafted such portions of the contract as was necessary to insert that clause."

In substance the clause so suggested is found in the contract which it is sought by this suit to rescind. It appears from the testimony of both Finley and the McCaffreys that the former was their representative in the transactions in question, and from the testimony of both Finley and Edward McCaffrey that the latter was present several times during the discussions regarding the matter on the 16th day of January, 1913, when the terms of the agreement were finally settled and reduced to writing byWourms; and while Edward McCaffrey does not deny requesting Wourms to go, or going with him, to Henley's office, he does positively deny that the latter was his attorney. We insert a brief excerpt from the testimony of that witness:

"Do you remember going to Mr. Henley's office on the 16th, or were you to Mr. Henley's office during the time that these negotiations were carried on? A. I don't remember of it.

"Q. Do you remember going there in company with Mr. Wourms, and waiting during the noon hour until Mr. Henley returned? A. I don't remember.

"Q. In reference to this agreement? A. I don't remember it at all.

"Q. Well, would you say that you were not? A. I couldn't say whether I was or I wasn't; I don't remember.

"Q. Well, now, again trying to refresh your recollection in reference to that, do you remember going to Mr. Henley's office? Mr. Henley was acting as attorney for you, wasn't he? A. No, no; never was.

"Q. Never acted for you in any way? A. No capacity at all; never.

"Q. You never consulted him? A. Never consulted him in regard to any of my business at all.

"Q. Well, in regard to this business? A. No; nor no business.

"Q. Now, do you remember going to his office—

"Mr. Graves: I submit that he has just said that he didn't.

"The Court: Well, that doesn't necessarily dispose of this question; it is cross-examination.

"Q. Do you remember about this provision being inserted in this contract at the instance of Mr. Henley, when you and Wourms were present: 'But nothing herein shall be construed to finally release the said parties of the first part from their obligation to furnish said money as aforesaid, unless the obstacle to the operation and development of the same shall be permanent.' A. Well, I told you that I didn't see them papers; never seen them until the day I signed them at the bank; never seen them, nor no part of them; had nothing to do with the making, and know nothing about it."

The record shows that the two deeds, as well as the contract, were signed and acknowledged before a notary public at the same time, to wit, January 17, 1913. The contract in its first, second, and third paragraphs, respectively, set forth the interest of each of the parties in the property, that is to say, fifty-one one-hundredths in Day, fourteen one-hundredths in Finley, and thirty-five one-hundredths in the McCaffreys jointly; and the fourth, fifth, and sixth paragraphs recited in substance that in the judgment of the respective parties the proper development and operation of the property required the installation of

suitable mining and milling machinery and other equipment, and their desire to develop, equip, and operate the property, and the willingness of Day and Finley to advance money in proportion to their ownership, for that purpose, upon condition that such advances should bear a specified rate of interest and be repaid out of the first profits derived from the operation of the property, or, in the event no such profits should be earned, that they should have the right to remove therefrom all of the machinery, etc., with certain other provisions, in the event of a sale of the property, not necessary to be mentioned. The foregoing were followed by paragraphs 7 and 8, which are as follows:

"(7) Now, therefore, in consideration of the premises, and the mutual benefits which will accrue to the parties hereto, it is hereby agreed that the parties of the first part [Day and Finley] will advance, in proportion to their ownership in the property, as it may be required in the judgment of said Harry L Day, the money necessary to operate and further develop and equip the said property up to and not exceeding the sum of fifty thousand ($50,000) dollars. This money to be furnished on the express condition that the parties of the first part shall be reimbursed for their advances together with interest thereon from date said sums are furnished, at the rate of six per cent. (6%) per annum out of the first profits arising from the operation of the property. In the event that there be no profits, they shall have the right to remove therefrom any and all machinery and improvements which may be placed thereon and shall credit the actual cash value of all said machinery and improvements, at the time they are removed, on the account for money advanced by them, or in the event of the sale of the said property before the parties of the first part shall have been fully repaid for their advances with interest thereon as aforesaid, the parties of the first part shall first be reimbursed for any and all advances made by them, with interest thereon as aforesaid, from the money derived from the sale of said property, before any of the proceeds thereof shall be divided among the owners of the property.

"(8) It is hereby further agreed that, if the duty on ores and metals be reduced by Congress, or if, in the course of the operation and development of the property, the physical condition should be such, or if from any other cause or causes beyond the control of the said parties of the first part, it shall in the judgment of the said Harry L. Day not be profitable and advantageous to continue the installation of machinery and the development and operation of the property, then and in that event the said parties of the first part shall not be obliged to make further advances, nor to continue the operation or development of the said property, even though they have not advanced the full sum of fifty thousand ($50,000) dollars at that time; but nothing herein shall be construed to finally release the said parties of the first part from their obligation to furnish said money as aforesaid, unless the obstacles to the operation and development of the same shall be permanent."

The contract further gave to Day and Finley an option to purchase the interests of the McCaffreys in the property, and in the event of its transfer to a corporation an option to purchase their stock in such corporation at the same price and on as good terms and conditions as they (the McCaffreys) might be offered by third parties—such option to be exercised within 30 days after receiving a like notice of the offer. It further provided that Day, or some person designated by him, should at all times have the general management and control of the property, and that, in the event a corporation should be organized to take it over, Day, or such person or persons as he might select, should be elected president or general manager thereof—

"it being the intention of the parties to this agreement that the said Harry L. Day, by reason of his ownership of fifty-one one-hundredths (51/100) of

the mining claims hereinbefore described, and of his long and successful experience as an owner and operator of mines, shall have the control and management of the said property and of the corporation to be hereafter organized."

It is insisted on behalf of the appellants that the contract was an essential part of the consideration for the deeds from the McCaffreys, which consideration failed in a material part by reason of Day's refusal "arbitrarily and in bad faith, and not in the exercise of his judgment or of any discretion conferred upon him by the agreement," to advance the money or to do anything required of him thereby, in consequence of which the appellants are entitled to a decree rescinding the contract and requiring the reconveyance by Day and Finley of their interests in the property, upon the return to them of such amounts of money as the court should deem equitable.

[1, 2] The court below found the evidence to be insufficient to show that the contract was a part of the consideration for the deeds, and in that view we agree. We think that fairly shown by the specific facts testified to by the witness Wourms, and which found strong support in the testimony of Day. We also agree with the court below that the proof fails to show that the latter acted in bad faith or arbitrarily. It undoubtedly shows that the McCaffreys, as well as Finley, were anxious and insistent that he proceed promptly to install machinery and work the property, and even suggested the erection of a mill. The complete answer to such suggestions is that by the agreement of the parties the development and operation of the property was left to the honest judgment of Day. He testified, among other things, that he found that the location of the Galena claim was invalid, for the reason that there had been no discovery of mineral within its boundaries, and that therefore he directed the extension of a tunnel on one of the other claims into the Galena ground for the purpose of making the necessary discovery, and that for the protection of the property, in the event it should prove to be a valuable one, it was desirable to locate some adjoining ground and to acquire a claim called Thomas claim, all of which took more or less time, and of which all of the parties to the agreement were informed; that the location of the property was about six miles from the railroad, the roads poor, and the hauling of ore and supplies therefore necessarily costly, especially when the snows were on the ground; that in the event a mine should be found in the property an independent production of power for the operation of a mill would be very costly, but that a nearby mine was being equipped with electric power by means of water from which power might be furnished through the operator of it, with whom he was on friendly terms and who had actually consented to supply it—that plant costing about $350,000. None of these matters so testified to by Day are denied, and we think they furnish very good and sufficient reasons for the delay that occurred in the expenditure of any large sum of money; but the evidence shows without conflict that a very considerable amount of development work was done from time to time under Day's direction, in which the appellants joined up to, indeed, a very short time preceding the commencement of this suit.

We discover nothing in the record tending to show any desire on Day's part to take any unfair advantage of his associates, and are of the opinion that the judgment of the court below is right; and it is accordingly affirmed.

HINES, Director General of Railroads, v. RITTENBERG et al.

(Circuit Court of Appeals, Fourth Circuit. October 7, 1919.)

No. 1735.

1. RAILROADS ⟸484(3)—ORIGIN OF FIRE QUESTION FOR JURY.
Whether a fire starting on the roof of a house near defendant's railroad tracks, which spread and destroyed other property, was caused by sparks from the engine of a train passing a few minutes before, *held*, under the evidence, a question for the jury.

2. RAILROADS ⟸453—STATUTORY LIABILITY FOR INJURY BY FIRE NOT DEPENDENT ON NEGLIGENCE.
In an action against a railroad company for destruction of property by fire communicated by an engine on its road, under Civ. Code S. C. 1912, § 3226, providing that railroads shall be responsible in damages to any person whose property may be injured by fire communicated by its locomotive engines, as construed by the Supreme Court of the state, absence of negligence is not a defense.

3. RAILROADS ⟸249—STATUTE IMPOSING LIABILITY FOR FIRES CONSTITUTIONAL.
Civ. Code S. C. 1912, § 3226, making railroad companies liable for injuries caused by fire communicated by their engines, regardless of the question of negligence, *held* constitutional.

In Error to the District Court of the United States for the Eastern District of South Carolina, at Charleston; Henry A. Middleton Smith, Judge.

Action by Gus Rittenberg, in his own right and as trustee for certain insurance companies, against Walker D. Hines, Director General of Railroads. Judgment for plaintiff, and defendant brings error. Affirmed.

P. A. Willcox, of Florence, S. C. (Benjamin H. Rutledge, Simeon Hyde, and Octavus Cohen, all of Charleston, S. C., and S. M. Wetmore, of Florence, S. C., on the brief), for plaintiff in error.

Louis M. Shimel and J. N. Nathans, both of Charleston, S. C. (Nathans & Sinkler, Smythe & Visanska, and A. T. Smythe, all of Charleston, S. C., on the brief), for defendants in error.

Before KNAPP and WOODS, Circuit Judges, and WADDILL, District Judge.

KNAPP, Circuit Judge. This action was brought to recover damages for the loss by fire at St. Stephens, S. C., of certain buildings and stocks of goods belonging to plaintiff. The fire is alleged to have been caused by sparks from a locomotive operated by defendant as part of the equipment of the Atlantic Coast Line Railroad Company. These facts appear:

[1] The town of St. Stephens consists mainly of a row of buildings along the railroad right of way, which there runs nearly north

and south. In the early afternoon of Sunday, March 10, 1918, a freight train of 36 loaded cars passed through, running north at the rate of 20 to 30 miles an hour. Not long afterwards fire was discovered on the roof, midway between eaves and ridge, of a house occupied by Mrs. Keller, in which a hole had been burned "the size of a barrel head." From there the fire spread to adjoining buildings, one after another, until most of the row was destroyed, including plaintiff's property. At the time the fire was first seen a high wind was blowing from the west; that is, towards the buildings that were consumed. South of St. Stephens for a couple of miles or more the grade of the railroad ascends to the north, though through the town the grade is practically level. The locomotive in question was lighter than those of more modern type, but adequate for the train it was hauling.

There was further testimony by a witness, who said he was standing at his gate close by the right of way, about three-quarters of a mile from plaintiff's store, when this train passed; that it was running very fast, and the engine "exhausting very hard"; that cinders were thrown out, which set fire to the dry grass on his lot; that some 10 minutes later, after he "whipped this fire out," he looked up the road and saw people running across the track "over towards Mr. Rittenberg's side to the fire—the fire that broke out there." Another witness said that he was near St. Stephens, on his way from church, as this train passed him; that after he crossed the railroad at the station cinders fell on his hat, "came down swift and fast, a lot of them"; that soon after he got to the station he heard the cry of "Fire!" and saw that the roof of Mrs. Keller's house was burning, "about five or six feet from the chimney." Mrs. Keller testified that there had been no fire in her house that day for cooking or other purposes, "only the lighting of a lamp early that morning." Occupants of adjacent houses on either side, and of the other houses nearby, testified that no fires had been lighted in their respective dwellings during that day. In a word, the testimony is undisputed and convincing that the fire which proved so destructive originated in the roof of Mrs. Keller's house and from an external cause; and it seems evident from the proofs recited and other circumstances of record that the question whether this initial fire was started by sparks or cinders from defendant's locomotive was a question of fact, which was properly submitted to the jury. Grand Trunk R. Co. v. Richardson, 91 U. S. 454, 471, 23 L. Ed. 356; Iowa Central Ry. Co. v. Hampton E. L. & P. Co., 204 Fed. 961, 123 C. C. A. 283; Chicago & E. R. Co. v. Ohio City L. Co., 214 Fed. 751, 131 C. C. A. 57; Hutto v. Railway Co., 81 S. C. 572, 62 S. E. 835.

[2] The defendant insists, however, that, even if the jury were warranted in finding that the fire was caused by sparks from this locomotive, nevertheless a verdict should have been directed in its favor, because the locomotive was proven to have been equipped with a standard spark arrester in perfectly good condition. In other words, it is contended that any presumption of negligence arising from the fact that the fire may have been started by defendant's locomotive

was fully rebutted, and the absence of any negligence established, by conclusive evidence that the locomotive, including the spark arrester, was in good order and carefully operated. But this contention appears unavailing in view of a statute of South Carolina (Code of 1912, § 3226), and the construction given the same by the Supreme Court of that state. The statute reads as follows:

"Every railroad corporation shall be responsible in damages to any person or corporation whose buildings or other property may be injured by fire communicated by its locomotive engines, or originating within the limits of the right of way of said road in consequence of the act of any of its authorized agents or employés, except in any case where property shall have been placed on the right of way of such corporation unlawfully or without its consent, and shall have an insurable interest in the property upon its route for which it may be so held responsible and may procure insurance thereon in its own behalf."

That this statute makes a railroad company liable, under such circumstances as are here considered, although the company is not negligent, has been repeatedly held by the courts of South Carolina. Thus, in Thompson v. R. & D. R. Co., 24 S. C. 366, the Supreme Court says:

"Nothing is said in the act about negligence, and the very fact of such omission shows that the object of the act was to eliminate any question of negligence, inasmuch as under the law as it previously stood the company would be liable only in case of negligence. We are, therefore, forced to conclude that the purpose of the act was to dispense with any inquiry into that subject, for it declares the company liable for property destroyed by fire, originating on its right of way from any act of any of its agents, without any qualification whatsoever, either as to negligence or otherwise."

Again, in Rogers v. Florence R. Co., 31 S. C. 378, 383, 9 S. E. 1059, 1060, the same court says:

"It will be observed that the question of negligence cannot arise under this act, because the company is to be held liable, where the fire originates within its right of way, in consequence of the act of any of its authorized agents or employés, without regard to the fact of negligence one way or the other."

And in Hunter v. Columbia, etc., R. R. Co., 41 S. C. 86, at page 91, 19 S. E. 197, 199, the following is said:

"This statute, therefore, creates a special and exceptional liability upon every railroad company for any damages done to the property of another by fire communicated by its locomotive engines, irrespective of any negligence on its part."

That this is the settled construction of the statute is affirmed or assumed in the subsequent cases of Hutto v. Railroad Co., 81 S. C. 567, 62 S. E. 835, Brown v. Railroad Co., 83 S. C. 557, 65 S. E. 1102, and Birt v. Railway Co., 87 S. C. 239, 69 S. E. 233.

[3] The validity of such a statute, so construed and applied, is upheld by the Supreme Court of the United States in St. Louis & San Francisco Ry. Co. v. Mathews, 165 U. S. 1, 17 Sup. Ct. 243, 41 L. Ed. 611. From the learned and instructive opinion in that case, it suffices to quote the following (165 U. S. on page 26, 17 Sup. Ct. 252, 41 L. Ed. 611):

"Railroad corporations, in order the better to carry out the public object of their creation, the sure and prompt transportation of passengers and goods, have been authorized by statute to use locomotive engines propelled by steam generated by fires lighted upon those engines. It is within the authority of the Legislature to make adequate provision for protecting the property of others against loss or injury by sparks from such engines. The right of the citizen not to have his property burned without compensation is no less to be regarded than the right of the corporation to set it on fire. To require the utmost care and diligence of the railroad corporations in taking precautions against the escape of fire from their engines might not afford sufficient protection to the owners of property in the neighborhood of the railroads. When both parties are equally faultless, the Legislature may properly consider it to be just that the duty of insuring private property against loss or injury caused by the use of dangerous instruments should rest upon the railroad company, which employs the instruments and creates the peril for its own profit, rather than upon the owner of the property, who has no control over or interest in those instruments. * * * The statute is not a penal one, imposing punishment for a violation of law; but it is purely remedial, making the party, doing a lawful act for its own profit, liable in damages to the innocent party injured thereby, and giving to that party the whole damages, measured by the injury suffered."

As the case at bar was brought under the South Carolina statute and falls clearly within its terms, we perceive no reason for denying its full and controlling application. If the fire which destroyed plaintiff's property was "communicated" by defendant's locomotive—and the testimony permitted the jury to so find—the statute imposes liability for the resulting damage, even if defendant was in no wise negligent. That this is the meaning and intent of the statute in such case has been repeatedly held by the highest court of the state, and its construction of the enactment must be accepted. The question is not open to further discussion.

The case of Savannah Fire & Marine Ins. Co. v. Pelzer Manufacturing Co., 60 Fed. 39, decided at circuit in 1894, and apparently much relied upon by defendant, seems to be distinguishable. In that case suit was brought by an insurance company subrogated to the rights of the owner, and the railroad company defended on the ground that it had been released from liability by express contract. The opinion indicates that in view of those facts the question of negligence arose independent of the statute. Assuming, however, that anything said by Judge Simonton implies that a suit under the statute may be defeated by proof of defendant's freedom from negligence, we must decline to follow the decision for reasons above stated. All the other cases cited by defendant have been examined and found to be inapplicable, because they involve only the common-law rule of liability or turn upon statutes which were held not to eliminate the question of negligence.

We are therefore constrained to hold that defendant is liable, whether negligent or not, if the locomotive operated by his agent started the fire. It follows that the question of defendant's negligence was immaterial, and should not have been submitted to the jury. It also follows that defendant cannot justly complain of the refusal to give a requested instruction, even if entitled thereto on the assumption that negligence was involved, because the charge actually given is more favorable than defendant had the right to ask.

Exception is taken to the denial of defendant's motion for a new

trial on the ground that the damages awarded by the jury, $40,000, are alleged to be excessive. But as plaintiff testified to a loss of more than $69,000, to say nothing of the fact that he was examined before trial, it seems obvious that there was no abuse of discretion in allowing the verdict to stand. This being so, the question is not reviewable in this court.

The record discloses no reversible error, and the judgment must therefore be affirmed.

UNITED STATES v. UNION BANK OF CANADA.
SAME v. ROYAL DUTCH WEST INDIA MAIL CO.

(Circuit Court of Appeals, Second Circuit. December 10, 1919.)

Nos. 60, 28.

ALIENS ⊂=50—EXCLUSION OF CONTRACT "LABORER" LIMITED TO MANUAL WORKERS.

The word "laborer," as used in the contract labor provisions of Immigration Acts, Act Feb. 20, 1907, §§ 2, 4, and Act Feb. 5, 1917, § 5 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 4289¼c), is limited to manual laborers, and neither a bookkeeper in a bank nor a clerk in a steamship office is within the prohibition.

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

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

Actions by the United States against the Union Bank of Canada and against the Royal Dutch West India Mail Company. Judgments for defendants, and the United States brings error. Affirmed.

Francis G. Caffey, U. S. Atty., of New York City (V. H. Rothwell, Asst. U. S. Atty., of New York City, of counsel), for the United States.

Carter, Ledyard & Milburn, of New York City (Walter F. Taylor, of New York City, of counsel), for Union Bank of Canada.

Burlingham, Veeder, Masten & Fearey, of New York City (Van Vechten Veeder and William Paul Allen, both of New York City, of counsel), for Royal Dutch West India Mail Co.

Before WARD, ROGERS, and MANTON, Circuit Judges.

WARD, Circuit Judge. In the first case there is a writ of error to a judgment in favor of the defendant directed by Augustus N. Hand, J., in an action brought by the United States against the Union Bank of Canada to recover a penalty of $1,000 for violation of section 4 of the Immigration Act of February 20, 1907, which reads:

"Sec. 4. That it shall be a misdemeanor for any person, company, partnership, or corporation, in any manner whatsoever, to prepay the transportation or in any way to assist or encourage the importation or migration of any contract laborer or contract laborers into the United States, unless such contract laborer or contract laborers are exempted under the terms of the last two provisos contained in section 2 of this act."

Section 2 provides for the exclusion of contract laborers, the relevant portions being:

"Sec. 2. That the following classes of aliens shall be excluded from admission into the United States: * * * Persons hereinafter called contract laborers, who have been induced or solicited to migrate to this country by offers or promises of employment or in consequence of agreements, oral, written or printed, express or implied, to perform labor in this country of any kind, skilled or unskilled: * * * And provided further, that skilled labor may be imported if labor of like kind unemployed cannot be found in this country: And provided further, that the provisions of this law applicable to contract labor shall not be held to exclude professional actors, artists, lecturers, singers, ministers of any religious denomination, professors for colleges or seminaries, persons belonging to any recognized learned profession, or persons employed strictly as personal or domestic servants."

The defendant bank, a corporation of the Dominion of Canada having opened a branch in New York City, brought from its branch in Toronto one Schilling, agreeing to employ him at a salary as assistant accountant in its New York office and paying the cost of his transportation. The question is whether Schilling was a contract laborer within the meaning of the act.

The first legislation on the subject was in chapter 164, Laws 1885, section 3 of which made it an offense subject to a penalty of $1,000 to encourage in any way the importation of any alien "to perform labor or service of any kind under contract or agreement" in the United States.

Section 5 provided exceptions as follows:

"* * * Nor shall this act be so construed as to prevent any person, or persons, partnership, or corporation from engaging, under contract or agreement, skilled workmen in foreign countries to perform labor in the United States in or upon any new industry not at present established in the United States: Provided, that skilled labor for that purpose cannot be otherwise obtained; nor shall the provisions of this act apply to professional actors, artists, lecturers, or singers, nor to persons employed strictly as personal or domestic servants."

While this act was in force Rev. E. Walpole Warren was called by the Church of the Holy Trinity to the city of New York as its pastor. The government brought suit against the church for the penalty and the defendant demurred. We overruled the demurrer—36 Fed. 303—in view of the language of the act—section 3, "labor or service of any kind," and of the specific exceptions; section 5, which did not include ministers. But the Supreme Court—143 U. S. 457, 12 Sup. Ct. 511, 36 L. Ed. 226—reversed the judgment, holding that the title of the act, "An act to prohibit the importation and migration of foreigners and aliens under contract or agreement to perform labor in the United States, its territories, and the District of Columbia," and the mischief which Congress intended to prevent, as shown by the reports of committees of Congress on the subject, demonstrated that only manual laborers were intended to be excluded.

Chapter 551, Laws 1891, § 5, amending section 5 of the act of 1885, added to the exemptions these words:

"Nor to ministers of any religious denomination nor to persons belonging to any recognized profession nor professors for colleges or seminaries."

In the case of United States v. Laws, 163 U. S. 258, 16 Sup. Ct. 998, 41 L. Ed. 151, the defendant Laws brought a chemist from Germany to Louisiana under contract to perform services there. The Circuit Court of Appeals of the Sixth Circuit certified the question whether this was within the prohibition of the act of 1885. The court answered the question in the negative, referring to the amendment of 1891, which had been subsequently passed, as making the intention of Congress as found in the case of Holy Trinity Church still plainer.

Chapter 1134, Laws 1907, entitled "An act to regulate the immigration of aliens into the United States," by section 2 prohibits the entry of aliens under contract "to perform labor in this country of any kind, skilled or unskilled"; the last two provisos being:

"And provided further, that skilled labor may be imported if labor of like kind unemployed cannot be found in this country: And provided further, that the provisions of this law applicable to contract labor shall not be held to exclude professional actors, artists, lecturers, singers, ministers of any denomination, professors for colleges or seminaries, persons belonging to any recognized learned profession, or persons employed strictly as personal or domestic servants."

Section 4 made it a misdemeanor to assist the entry of such contract laborers in any way "unless such contract laborer or laborers are exempted under the terms of the last two provisos contained in section 2 of this act."

These provisions, taken together, make a strong support for the argument that all contracts for labor are within the prohibition of the act, unless specifically exempted. This was the view taken by Judge Neterer in Ex parte Kunijiro Toguchi (D. C.) 238 Fed. 632. Nevertheless, we think the decision in Scharrenberg v. Dollar S. S. Co., 245 U. S. 122, 38 Sup. Ct. 28, 62 L. Ed. 189, holds that the act of 1907, like the prior acts on the subject, prohibits only the entry of manual laborers under contract to perform labor in the United States. In that case the defendant brought 19 Chinamen from Shanghai to San Francisco, there to ship as seamen on the American registered steamship Mackinaw. The court held, Mr. Justice Clarke writing, that these men were not under contract to perform labor in the United States, but on the high seas, which would have been enough to dispose of the case; but he also held as a second ground that a seaman was not a laborer. If so, an alien imported to perform labor as a seaman on vessels enrolled for the coasting trade or the inland waters of the United States would not be a contract laborer, within the prohibition of the act. Without inquiring whether an accountant as defined by the defendant's rules is a member of a learned profession, we affirm the judgment on the ground that Schilling was not a laborer within the meaning of the act.

In the second case there is a writ of error to a judgment directed for the defendant by the same judge in an action for a penalty under section 5 of chapter 29, Laws 1917 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 4289¼c), which differs in no material respect as to contract laborers from the act of 1907. The defendant sent a clerk

named Mook from its office in Amsterdam to be employed in its office in New York at a salary of $1,250 per annum and paid the expenses of his transportation. There was an expectation to send him from New York to its office at Paramaribo, Dutch Guiana, after he had familiarized himself with the New York business. The grounds on which the verdict was directed were: First, that this employment at New York was a temporary one in a business of an international character; and, second, that Mook was not a contract laborer at all. Without considering the first reason, we concur in the second.

Judgment affirmed in each case.

ALLEY v. BESSEMER GAS ENGINE CO.

(Circuit Court of Appeals, Fifth Circuit. November 19, 1919. Rehearing Denied December 15, 1919.)

No. 3326.

1. APPEAL AND ERROR ⟸1035—ABSENCE OF JURY TRIAL NOT PREJUDICIAL.
   The judgment of the court on the bar of limitations being sustained by the undisputed evidence, absence of a jury trial was not prejudicial.
2. LIMITATION OF ACTIONS ⟸84(2)—ABSENCE OF DEFENDANT AT ACCRUAL OF CAUSE.
   Rev. St. Tex. 1911, art. 5702, tolling the running of the statute, if defendant be without the state at any time during which the action might be maintained, has no application, where defendant was without the state when the cause of action accrued and did not return within the period of limitations.
3. LIMITATION OF ACTIONS ⟸88—FOREIGN CORPORATIONS NOT WITHOUT STATE DURING LIMITATION PERIOD.
   Defendant foreign corporation was, for purpose of citation on it, not only within the state when plaintiff's cause of action for personal injury accrued, but also never without it during the two years thereafter, so that under Rev. St. Tex. 1911, art. 5687, subd. 6, and article 5702, action was barred; it at all times having local soliciting agents, on whose orders, when approved at the home office, it shipped, article 1861 allowing it to be served by citation on any local agent within the state.
4. CORPORATIONS ⟸668(5)—SERVICE ON "LOCAL AGENT."
   A "local agent," within Rev. St. Tex. 1911, art. 1861, allowing a foreign corporation to be served by citation on its local agent within the state, is one at a given place or within a district.
   [Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Local Agent.]
5. CORPORATIONS ⟸380—CORPORATION AGENT OF ANOTHER CORPORATION.
   A corporation may act as agent of another corporation, unless prohibited by statute.
6. CORPORATIONS ⟸668(5)—SERVICE ON CORPORATION'S AGENTS, IN ABSENCE OF OFFICERS.
   A domestic corporation is capable of being served as local agent of a foreign corporation, though all its officers live without the state; it having agents living in the state, through whom it acts for the foreign corporation.

In Error to the District Court of the United States for the Northern District of Texas; Edward R. Meek, Judge.

Action by Robert F. Alley against the Bessemer Gas Engine Company. Judgment for defendant, and plaintiff brings error. Affirmed.

W. H. Kimbrough, of Amarillo, Tex., Y. W. Holmes, of Comanche, Tex., and Kimbrough, Underwood & Jackson, of Amarillo, Tex., for plaintiff in error.

Cockrell, Gray, McBride & O'Donnell, of Dallas, Tex., for defendant in error.

Before WALKER, Circuit Judge, and FOSTER and GRUBB, District Judges.

GRUBB, District Judge. This was a suit for damage for personal injuries. In the District Court the statute of limitations of two years was held to apply to it, and there was a judgment for the defendant, from which this writ of error is taken.

[1] The plaintiff in error contends that the District Judge erred in determining the issue without submitting it to a jury. The applicability of the statute was presented by demurrers and exceptions to the amended petition and by plea. Evidence was taken in support of the plea. The court sustained the plea, after considering the evidence. No objection to this method of trial was made in the court below, and the parties treated it as being properly tried by the court. In the view we take of it, the judgment of the court may be sustained by the undisputed evidence, and the absence of a jury trial was not, therefore, prejudicial to the plaintiff in error.

[2-4] The injury occurred July 28, 1912, and the suit was filed October 8, 1914, more than two years thereafter. The claim was therefore barred by subdivision 6 of article 5687, Rev. Statutes of Texas, unless the bar was prevented by article 5702, Rev. Statutes of Texas, which provides that, if the defendant be without the limits of the state at any time during which the action might be maintained, the plaintiff has the right to bring the suit after defendant's return to the state, and the time of defendant's absence shall not be taken as part of the time limited by the statute.

The article has been held not to apply to one who was absent from the state when the cause of action accrued and at all times thereafter. Tourtelot v. Booker (Tex. Civ. App.) 160 S. W. 293; Wilson v. Daggett, 88 Tex. 375, 31 S. W. 618, 53 Am. St. Rep. 766; Veeder v. Gilmer, 103 Tex. 458, 129 S. W. 595. If the defendant was at all times a nonresident of Texas, the statute would have run in its favor. The defendant was a Pennsylvania corporation. It solicited orders through a local salesman in Texas, shipped the machines, in response to the orders, after they had been approved at the home office in Pennsylvania, and collected for the shipments in Texas, through its local representatives there. The local salesmen had no right to accept orders or compromise claims. This was the regular course of defendant's business in Texas and was not confined to isolated cases. In the case of International Harvester Co. v. Kentucky, 234 U. S. 579-585, 34 Sup. Ct. 944, 946 (58 L. Ed. 1479), the Supreme Court said:

"In order to hold it responsible under the process of the state court, it must appear that it was carrying on business within the state at the time of the

attempted service. As we have said, we think it was. Here was a continuous course of business in the solicitation of orders, which were sent to another state, and in response to which the machines of the Harvester Company were delivered within the state of Kentucky. This was a course of business, not a single transaction. The agents not only solicited such orders in Kentucky, but might there receive payment in money, checks, or drafts. They might take notes of customers, which notes were made payable, and doubtless were collected, at any bank in Kentucky. This course of conduct of authorized agents within the state in our judgment constituted a doing of business there in such wise that the Harvester Company might be fairly said to have been there, doing business, and amenable to the process of the courts of the state."

We think the part quoted covers this case, and shows that the defendant was doing business in Texas when the cause of action accrued.

If so, then it could be served by citation on "any local agent, within this state, of such corporation." Rev. Stat. of Tex. 1911, art. 1861. The defendant, at the time the cause of action accrued, had two agents, one located at Dallas and one at Laredo, each with a defined territory under his control. A local agent, under the Texas statute, is held to be "an agent at a given place or within a district." W. E. Co. v. Troell, 30 Tex. Civ. App. 200, 70 S. W. 324; W. C. P. & Co. v. Anderson, 97 Tex. 432, 79 S. W. 516. The agents at Laredo and Dallas were local agents, within the meaning of the Texas statute, and capable of being served as such.

[5, 6] As the defendant was doing business in Texas, and had local agents there upon whom service could have been had, when the cause of action accrued, and as the suit was filed more than two years after the injury, the statute is operative to bar the suit, unless the defendant was absent from the state during the period of two years after the cause of action accrued. It is so contended by plaintiff in error. The evidence showed that the defendant had a local agent in Texas, one C. H. Bishop, at Dallas and Laredo, from July 29, 1910, until June 29, 1913. His presence covered the two-year period, except the part of it from June 29, 1913, until July 28, 1914. Was the defendant out of the state during any part of that period? On October 23, 1912, it organized a domestic corporation under the laws of Texas, which acted as its agent in Texas from that date until after the bar of the statute was complete. A corporation may act as the agent of another corporation, unless prohibited by its charter. 3 Thompson on Corporations, § 2156.

The plaintiff in error contends, however, that the domestic corporation was not capable of being served, because all its officers lived beyond the state of Texas. The record shows that the Texas corporation sold 20 gas engines for the parent company prior to the time of the institution of the suit. The Texas corporation could have acted in doing so only through agents, and, if its officers all lived out of Texas, it must have had agents, not officers, who lived in Texas, and through whom such sales were made for it. A corporation can act only through agents. The record also shows that the Texas corporation kept a stock of parts in Texas, to be there furnished to the customers of the parent company. Resident agents were essential also to conduct that business. The Texas corporation also had two

designated principal places of business in Texas, for the purpose of service.

We think the record shows that the defendant was never absent from Texas, for the purpose of citation upon it, during the two years succeeding the accrual of the cause of action on which the suit is brought, and that the bar of the statute of limitations of two years was complete, when the present suit was brought, October 8, 1914.

The judgment of the District Court is affirmed.

THE C. GALLAGHER.

THE SPARTAN.

(Circuit Court of Appeals, Second Circuit. November 12, 1919.)

No. 12.

1. COLLISION ⟸95(2)—OVERTAKING TUG WITH TOW SOLELY IN FAULT.
An overtaking tug, with tow, which unnecessarily attempted to pass between two other tows, *held* solely in fault for collision between her tow and another in Long Island Sound.

2. COLLISION ⟸95(1)—CUSTOM VARYING FROM NARROW CHANNEL RULE JUSTIFIED.
A general practice of west-bound tows in Long Island Sound, when approaching North Brothers Island on a flood tide, to keep to the port side of the channel, to give east-bound tows room to round the island and pass the railroad piers on the north safely, *held* justified, and not in violation of the narrow channel rule.

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

Libel for collision by Rogers & Hubbard, Incorporated, against the steam tug Spartan, claimed by the Hartford & New York Transportation Company, with petition to limit liability by the Goodwin-Gallagher Sand & Gravel Corporation, owner of the tug C. Gallagher, as well as a libel against the Spartan. Libel by E. E. L. Hammer, Public Administrator of Bronx County, as administrator of F. F. Borch, deceased, against the Spartan. From the decree, the claimant of the Gallagher appeals. Reversed.

Foley & Martin, of New York City (William J. Martin and G. V. A. McCloskey, both of New York City, of counsel), for appellant.

Haight, Sandford & Smith and Ellsworth J. Healy, all of New York City (C. B. Smith and E. E. L. Hammer, both of New York City, of counsel), for appellee Hartford & N. Y. Transp. Co.

Harrington, Bigham & Englar, of New York City, for appellee Rogers & Hubbard, Inc.

Before WARD, ROGERS, and HOUGH, Circuit Judges.

WARD, Circuit Judge. August 18, 1915, about 2:30 p. m., the tug Spartan, bound west, with four schooner barges abreast in the first tier and one tailed on in the second tier, behind the starboard

barge in the first tier, had just rounded North Brothers Island in Long Island Sound. She was rapidly overtaking the tug Robert Robinson, with a hawser tow of five boats, three in the first and two in the second tier. At the same time the tug C. Gallagher, close to Riker's Island, was approaching North Brothers Island on her way west with the Goodwin-Gallagher sand-laden scows No. 74, No. 36, No. 44, and No. 8 on hawsers tandem. The tide was flood and the day clear.

The Robinson, as she passed around North Brothers Island, steered a course which passed the Gallagher, which was heading for the black buoy on the north end of the island, starboard to starboard. The Spartan, when close to the Robinson's tow, ported to pass with her own tow, which was 128 feet wide and in all some 600 feet long, between the Robinson's and Gallagher's tows.

Seeing that the clearance was very small, the Gallagher starboarded and the Spartan slowed, with the result that her tow sheered toward the Gallagher's tow, and the Gallagher's tow was swung by a very weak tide coming through the narrow channel between North and South Brothers Islands, and sheered slightly towards the Spartan's tow. Thereupon the Spartan ported, with a view to bring the strain on her starboard hawser, to break her tow's sheer, and then starboarded to straighten the tow out. This is a familiar maneuver, making a course something like a reversed curve, sometimes described as snapping the whip. Notwithstanding this, No. 18, starboard scow in the Spartan's first tier, struck a glancing blow on the starboard side of No. 74, the first barge in the Gallagher's tow, shoving it aside and breaking the line between it and the next boat, No. 36. No. 18 then struck the starboard corner of the stern of No. 36, which was towing stern first, overturning her with her cargo, then striking the next boat, No. 44, and breaking the line between her and the last boat, No. 8, and then overturning No. 8, whose master, Frederick F. Borch, was drowned.

There was plenty of clear water for the Spartan to pass between the Robinson's tow and the New York shore, and the effort to pass between the Robinson's and the Gallagher's tows was reckless in the extreme.

Rogers & Hubbard, Incorporated, owners of the cargo on No. 18, filed a libel against the Spartan. The Goodwin-Gallagher Sand & Gravel Corporation, owner of the tug Gallagher, filed a petition to limit its liability, and also a libel against the Spartan to recover damages to the barges and cargo in her tow. E. E. L. Hammer, public administrator of Bronx county, as administrator of F. F. Borch, deceased, filed a libel against the Spartan to recover damages for his death. The cases were tried together, and the District Judge found both vessels at fault and the owner of the tug Gallagher entitled to limit liability. The owner of the tug Gallagher appealed from each decree.

The District Judge held the Spartan at fault for attempting to pass between the tows of the Robinson and Gallagher, instead of slowing until the Gallagher had passed, and the Gallagher for navigating on the port side of the channel in violation of article 25 of the Inland Regulations (Act June 7, 1897, c. 4, § 1, 30 Stat. 101 [Comp. St. § 7899]).

[1, 2] We think the Spartan was solely at fault. Article 25 requires steamers to keep the starboard side of a narrow channel "when it is safe and practicable." The testimony is quite convincing that hawser tows west bound, in approaching North Brothers Island on a flood tide navigate on the port side of the channel in order to give east bound hawser tows room to round North Brothers Island and pass the railroad piers on the north side in safety. The flood tide in the main channel sets on Oak Bluff and the New York side opposite the northern end of North Brothers Island, and is then deflected slightly toward Riker's Island; this set being somewhat counteracted by the direction of the weaker tide coming through the shallow channel between North Brothers Island and South Brothers Island. We regard this as a reasonable practice, justifying a departure from the general rule described in article 25 and have recognized similar practices at other points. The Three Brothers, 170 Fed. 48, 95 C. C. A. 322; The Transfer No. 21, 248 Fed. 459, 160 C. C. A. 469.

The proctors for the Spartan cite two decisions of the late Judge Adams in the District Court that at this particular point steamers must conform to article 25. The Transfer No. 10 (D. C.) 138 Fed. 221; The Abram F. Skidmore (D. C.) 160 Fed. 265. In those cases there was no evidence of the practice proved in this case, and the decision of the same judge arising out of a collision at a bend in the Harlem River in the later case of the Three Brothers (D. C.) 162 Fed. 388, was reversed (170 Fed. 48, 95 C. C. A. 322), on the ground that local conditions justified a departure from article 25.

Assuming that the Gallagher was on the wrong side of the channel, that fault did not contribute to the collision, because the fact was obvious, and made it the plain duty of the Spartan to pass upon the port side of the Robinson's tow, instead of forcing a passage between the two tows.

The District Judge awarded the sum of $5,000 to Hammer, administrator of Borch, deceased, who was a man of 65 years of age, in good health, of good habits, and earning at the highest $55 a month. His wife had been living for six years previous to his death in Norway. The couple had no children, and there is no accurate evidence of the amount he was in the habit of sending his wife. If we concede it to have been $25 a month, which would certainly have been most liberal, the present value of an annuity of $300 would be $2,400; his expectation of life by the mortality tables being less than eight years. This amount, we think, covers in full the pecuniary damages sustained by the widow, as provided for in section 1904 of the New York Code of Civil Procedure. We cannot award more than the intestate could have paid out of his wages because of the present high cost of living.

The decree is reversed, with directions to the court below to enter a decree in favor of the libelants Rogers & Hubbard, Incorporated, and the Goodwin-Gallagher Sand & Gravel Corporation, for their damages as found against the tug Spartan, with costs, and in favor of Ernest E. L. Hammer, public administrator of the county of the Bronx, as administrator of the estate of Frederick F. Borch, deceased, in the

sum of $2,400, with interest from the date of his intestate's death. Costs of this court to Rogers & Hubbard, Incorporated, and to the Goodwin-Gallagher Sand & Gravel Corporation, against the Spartan.

DE CROISSET et al. v. VITAGRAPH CO. OF AMERICA et al.

(Circuit Court of Appeals, Second Circuit. December 10, 1919.)

No. 79.

1. EQUITY ⊂=149—MISJOINDER OF PARTIES RENDERED BILL MULTIFARIOUS AND DEVOID OF EQUITY.

Misjoinder of parties plaintiff having no interest, and to whom no relief can be granted, renders a bill of complaint multifarious.

2. EQUITY ⊂=149—COMPLAINT FOR INFRINGEMENT OF COPYRIGHTS DEMURRABLE AS MULTIFARIOUS.

One having a proprietorship in a copyright of a drama, and another who was the sole exclusive owner of motion picture rights in and to the drama, may not in one action sue another, alleged to have infringed both copyrights, in the absence of allegations showing a community of interest.

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

Suit by Francis De Croisset, Maurice Le Blanc, and Société des Films Menchen against the Vitagraph Company of America, J. Stuart Blackton, and Albert E. Smith. From a decree dismissing the bill, complainants appeal. Affirmed.

Rogers & Rogers, of New York City (Gustavus A. Rogers and Saul E. Rogers, both of New York City, of counsel), for appellants.

William M. Seabury, of New York City, for appellees.

Before WARD, ROGERS, and MANTON, Circuit Judges.

MANTON, Circuit Judge. By this bill of complaint the appellants seek to enforce their alleged right to infringement of two copyrights. One copyright is upon a drama written by the appellants, De Croisset and Le Blanc, prior to 1909, and copyrighted in the United States on March 3, 1909. There is a copyright claimed to have been procured by one Cromelin on June 6, 1916, for the benefit of the Société des Films Menchen, upon the photoplay of the same name, which was produced by the London Film Company. The appellees produced and exhibited a photoplay entitled Arsene Lupin, which is said to be based upon the same plot, theme, and incidents to which the respective appellants claim rights by the copyrights here mentioned.

The complaint alleges, in paragraph 10, that the Société des Films Menchen "is, and at all the times hereinafter mentioned was, the sole and exclusive owner of motion picture rights in and to said drama." The title of the copyright granted by the United States on March 3, 1909, is as follows: "Arsene Lupin, Piece en Trois Actes et Quatre Tableaux par Francis De Croisset et Maurice Le Blanc"—and the

copyright granted on June 6, 1916, to Paul H. Cromelin for the motion picture photoplay was entitled "Arsene Lupin" by Maurice Le Blanc.

[1, 2] Paragraph 12 of the bill of complaint alleges that this was done for the benefit of the appellant Société des Films Menchen, and "that the aforesaid photoplay was adapted and produced as aforesaid by the London Film Company from the aforesaid work of Maurice Le Blanc and Francis De Croisset." The assignment of the copyright by Cromelin to the Société des Films Menchen is alleged to be on March 27, 1918, and that this assignment was filed in the United States Copyright Office April 11, 1919. The bill of complaint does not disclose how Cromelin reserved any individual right or interest in the copyright after having registered it for the benefit of the Société des Films Menchen. Examining the bill of complaint, it is apparent that neither De Croisset nor Le Blanc have any interest in the alleged infringement of the photoplay copyright, and none is claimed to exist. We have, therefore, a bill in which the appellants have no community of interest. What is alleged is a cause of action for infringement of the dramatic copyright in which De Croisset and Le Blanc alone are interested, and under a separate cause of action a claim for infringement of a motion picture photoplay, the copyright of which, at the date of the commencement of the action, the Société des Films Menchen is alleged to be the sole and exclusive owner. The sufficiency of this complaint was tested by a motion to dismiss the bill, and the District Judge sustained the appellee's motion. The motion was made because of this misjoinder of parties. It was granted without prejudice to any subsequent suit upon the copyright of 1916, and the dismissal was made final as to the rights accruing under the copyright of 1909.

We are unable to reach any other conclusion than that the paragraphs from 6 to 10 of the bill of complaint allege a cause of action in which the individual appellants, De Croisset and Le Blanc, claim an alleged infringement of their copyright of the drama Arsene Lupin, and in which the Société des Films Menchen has no interest. Paragraphs 10 to 13 of the bill of complaint allege that the appellant Société des Films Menchen is the sole and exclusive owner of the copyright of the motion picture photoplay founded upon the same drama. And the fourteenth paragraph of the bill of complaint alleges that the—

"defendants by the production of the motion picture photo play without the consent of the complainants, and in violation of the complainant's rights, and in infringement of the copyright of said drama Arsene Lupin, and in infringement of the motion picture copyright of said drama, and with full knowledge of the rights of the complainants made and caused to be made a motion picture photo play which is the production of the complete story, scenes, situations, characters, and business of the said drama Arsene Lupin."

These paragraphs of the bill, assuming that Cromelin had a valid copyright, allege a right of action in the Société des Films Menchen for the infringement of the copyright for the motion picture photoplay. It is very apparent that De Croisset and Le Blanc have no interest in this copyright. The pleader here joins the owners of

separate copyrights—first, the copyright proprietor of the play, and then another party which claims to own the motion picture rights without specifying the extent of its interest in those rights. In doing this, the pleader renders his bill multifarious. Tully v. Triangle Film Corp. (D. C.) 229 Fed. 297. Misjoinder of parties plaintiff, having no interest and to whom no relief can be granted, renders the bill of complaint multifarious and devoid of equity. Nor does it appear from the complaint that appellants have any community of interest in the causes of action alleged, and unless some such interest appears they may not be joined in one bill against the appellee. A bill states different causes of action where it seeks to enforce distinct and separate rights of different plaintiffs or distinct and separate liabilities of different defendants. Hale v. Allinson, 188 U. S. 56, 23 Sup. Ct. 244, 47 L. Ed. 380; 1 Corpus Juris, § 25, p. 1064.

The Société des Films Menchen has no interest in any damages suffered by De Croisset and Le Blanc and likewise the latter have no interest in damages suffered by the Société des Films Menchen. There is no allegation in the bill of complaint that Cromelin was the author of the photoplay or that he ever acquired any proprietary rights therein from appellant, De Croisset or Le Blanc, which might have authorized him to procure a copyright registration upon the photoplay based upon the drama written by the author.

It was held by this court that the registration by Cromelin, as pleaded in the complaint there under consideration, was void for the reason that under the copyright no power exists in an agent to copyright anything, as that privilege is reserved to authors or proprietors. Société des Films Menchen v. Vitagraph Co., 251 Fed. 258, 163 C. C. A. 414; Act March 4, 1909, c. 320, § 8, 35 Stat. 1077 (U. S. Comp. Stat. § 9524).

The bill does not allege that the Société des Films Menchen is a licensee, nor is it said to be an assignee, but it is alleged to be the sole and exclusive owner of the motion picture rights in the drama. Such ownership as alleged in the motion picture rights does not include ownership of the copyrights in the drama.

The attempt thus to join two causes of action, in which the appellants have not a common interest against the appellees, made the bill demurrable. The appellants, one having a proprietorship in the copyright, and the other having a proprietorship in an entirely different copyright, may not in one action sue defendants alleged to have infringed both copyrights.

We are of the opinion that the District Judge correctly dismissed the bill without prejudice to proceeding upon the copyright granted in 1916.

The decree is affirmed.

MILLER v. AMERICAN BONDING CO.

(Circuit Court of Appeals, Third Circuit. January 6, 1920.)

No. 2481.

UNITED STATES ⟸67(3)—CLAIMANTS MUST JOIN IN ONE ACTION ON CONTRACTOR'S BOND.

Under Act Aug. 13, 1894, c. 280, as amended by Act Feb. 24, 1905, c. 778 (Comp. St. § 6923), providing that materialmen and laborers on public works may join in one action on the contractor's bond, etc., the right of action is a new one, created by statute, and is not based on a common-law right of trial by jury, and a claimant refusing to proceed to trial at the same time as the other claimants, without offering any reason to the trial court for his refusal, is barred from subsequently maintaining a separate action on the bond.

In Error to the District Court for the Middle District of Pennsylvania; Charles B. Witmer, Judge.

Action by C. E. Miller against the American Bonding Company. From an order striking the case from the trial list (256 Fed. 545), plaintiff brings error. Affirmed.

R. W. Archbald, of Scranton, Pa., and James G. Glessner, of York, Pa., for plaintiff in error.

Charles H. Welles, of Scranton, Pa., and F. B. Bracken, of Philadelphia, Pa., for defendant in error.

Before BUFFINGTON and WOOLLEY, Circuit Judges, and MORRIS, District Judge.

WOOLLEY, Circuit Judge. An action was brought under the Act of August 13, 1894, c. 280, 28 Stat. 278, as amended by the Act of February 24, 1905, c. 778, 33 Stat. 811 (Comp. St. § 6923), on a bond given the United States by Mark P. Wells, contractor for the construction of certain public works, and American Bonding Company (defendant-in-error), his surety. The plaintiff was the United States for the use of Caesar Francini. C. E. Miller (plaintiff-in-error) was one of several intervening claimants.

At the trial, the use plaintiff and all intervening claimants, except Miller, appeared and successfully prosecuted their claims to verdict. After verdict, and while a motion for a new trial was pending, Miller ordered the case on the trial list for the trial of his claim. The trial judge struck it off pending review by this court on writ-of-error, upon the theory, doubtless, that, if the judgment were reversed, he might allow Miller to litigate his claim with the others in the retrial of the case. In due course, the motion for a new trial was refused, judgment entered, and a writ-of-error issued. On hearing by this court, the judgment was affirmed as to all claims except one, and was reversed as to that one on an error of the court in refusing binding instructions for the defendant. American Bonding Co. v. United States, 233 Fed. 364, 147 C. C. A. 300. As to that one claim, the court entered a formal order for a new trial. Slocum v. New York Life Insurance Co., 228 U. S. 364, 33 Sup. Ct. 523, 57 L. Ed.

879, Ann. Cas. 1914D, 1029. Thereafter, the claim was compromised by the parties and the action ended.

More than two years after review by this court, and long after the judgment had been satisfied, Miller again ordered the case on the trial list. On the defendant's motion to strike it off, Miller took the position that there is nothing in the statute under which the case was brought which required him to prosecute his claim with the other intervening claimants in one trial, and that, in consequence, he was entitled to have his claim adjudicated singly and at a separate trial before a jury of his own selection. The court, thinking otherwise, struck the case from the list. This is the matter brought here for review on this writ-of-error.

The Act of August 13, 1894, provided that persons furnishing materials and labor for the construction of public works, shall, after complying with certain formalities, be authorized to bring suit in the name of the United States for their use against the contractor and his sureties. This statute gave each of such persons a separate and independent right of action on the bond, permitting as many suits against the surety as there were claimants, and as many trials as there were suits. This involved manifold inequities. It left claims of the United States on a parity with the claims of others; it permitted inequalities of recovery between claimants of the same class when the bond proved inadequate; it afforded no opportunity for contest by one claimant against the claim of another in preserving the security from diminution; it subjected sureties to multiplicity of suits and made possible divergent rulings by different courts on the same issues, resulting in prejudice and confusion. To overcome these and perhaps other disadvantages arising out of this statute, Congress, by the amendatory Act of February 24, 1905, did two things, first, it assured to the United States priority in its claims, Illinois Surety Co. v. Peeler, 240 U. S. 214, 218, 36 Sup. Ct. 321, 60 L. Ed. 609; and, second (while preserving the original right of action to materialmen and laborers), it provided:

"That where suit is so instituted by a creditor or by creditors, *only one action shall be brought*, and any creditor may file his claim *in such action* and be made *party thereto* within one year from the completion of the work under said contract, and not later. If *the recovery on the bond* should be inadequate to pay the amounts found due to *all* of said creditors, judgment shall be given to each creditor pro rata of the amount of the recovery."

It is clear from this amendment that Congress did not change the liability of sureties or withdraw from claimants their remedy on bonds for the construction of public works, previously provided by the Act of 1894; but changed simply the manner, and also the time, in which their remedy against sureties should be asserted. To overcome the inequalities and infirmities of the original statute, Congress intended, after the claims of the United States had been satisfied, to unite all claimants in a single proceeding, A. Bryant Co. v. N. Y. Steam Fitting Co., 235 U. S. 327, 337, 35 Sup. Ct. 108, 59 L. Ed. 253, to the end that, all matters in controversy between all claimants and the surety, as well as between the claimants themselves, arising out

of the obligations of the bond, should be litigated in one action, resulting in one recovery, in which, on the bond proving inadequate, distribution should be pro rata of the amount recovered.

This was, without doubt, the general intent of Congress. Whether there is any exception to it, we are not called upon to decide, because, in this case, none was claimed. If Miller was entitled to a separate trial by a jury of his own selection, or if he had a right to decline to submit his claim for trial with his co-intervenors, it could only have been because of some matter or circumstance addressed to the judgment or discretion of the trial judge, taking him out of the general provisions of the statute and placing him within some exception of the statute. No such matter or circumstance was claimed by Miller. He did not even move for a continuance of the case. As shown in the opinion of the learned trial judge, what Miller did was this;—being represented by counsel in court

"when the case was called for trial, after issue joined and the usual publication of the list, [he] *refused* and neglected to submit his claim for adjudication *without apparent reason or excuse.*"

Miller's action against this surety is not based on any right of action involving a common law right of trial by jury. It is based solely on the new right of action created by the statute "upon the terms named." Texas Cement Co. v. McCord, 233 U. S. 157, 34 Sup. Ct. 550, 58 L. Ed. 893; Illinois Surety Co. v. Peeler, 240 U. S. 214, 217, 36 Sup. Ct. 321, 60 L. Ed. 609. These terms provide for one action for all claimants, after the United States has been satisfied, and one recovery for all, under which distribution is made on the claims proved according as the security is adequate or inadequate. In this scheme of the statute, the necessary implication is, that there shall be one trial of the "one action." By refusing to submit his claim to trial in the manner and at the time afforded by the statute, without offering to the trial judge any reason or excuse which might have removed him beyond its general terms—as to the possibility of which we express no opinion—Miller waived the right of action which the statute gave him. As the right of action which Miller thus discarded could in no way have been revived and restored to him in the subsequent proceedings, it is not necessary to review those proceedings in search for irregularities involving error.

The order of the court below must, therefore, be affirmed.

GENERAL FIREPROOFING CO. v. TERAMI.

(Circuit Court of Appeals, Second Circuit. December 19, 1919.)

No. 73.

1. SALES ⟸52(3)—CORRESPONDENCE ADMISSIBLE ON QUESTION OF PARTIES TO CONTRACT.

On the question whether a contract of defendant to sell was with plaintiff, or with the T. Company, mentioned in defendant's letter to plaintiff, and as against contention that a letter from plaintiff to defendant and said letter from defendant to plaintiff, together with a letter of credit of a bank, constituted a closed contract between plaintiff and defendant for sale by defendant to plaintiff, *held* prior and subsequent letters between defendant and the T. Company were admissible as throwing light on the letters between plaintiff and defendant.

2. SALES ⟸53(1)—PARTIES TO CONTRACT QUESTION FOR JURY.

Whether a contract for sale was by defendant with plaintiff, or with the T. Company, *held* not a question to be determined by the court, construing merely the two letters between plaintiff and defendant, but a question of fact for the jury, on all the correspondence, including prior and subsequent letters between defendant and the T. Company, and the oral testimony.

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

Action by Fumio Terami against the General Fireproofing Company. Judgment for plaintiff, and defendant brings error. Reversed.

William H. Griffin, of New York City (James M. Beck, of New York City, of counsel), for plaintiff in error.

Elkus, Vogel, Gleason & Proskauer, of New York City (Joseph M. Proskauer and Wesley S. Sawyer, both of New York City, of counsel), for defendant in error.

Before WARD, ROGERS, and MANTON, Circuit Judges.

WARD, Circuit Judge. This is a writ of error to a judgment directed by the court in favor of the plaintiff on the merits, leaving to the jury only the question of the amount of the plaintiff's damages.

[1, 2] There is no dispute that the defendant agreed to sell 3,000 boxes of tin plate for export to Japan, but the question is whether the contract was made with Terami or with the Tsunoda Company, Incorporated. The complaint alleges that the contract was with Terami, the plaintiff, while the answer alleges that it was with the Tsunoda Company, though the plaintiff had an interest of some kind in it. The plaintiff offered in evidence two letters as follows:

"New York City, April 26, 1917.

"General Fireproofing Co., 395 Broadway, New York City—Gentlemen: I have now the pleasure of handing you an order for the following:

"3,000 boxes of coke tin plate I.C.W.

"20" x 14"—112 sheets—100 lbs. at $9.713 per box f.o.b. mill.

"Shipments to be made during August and September, 1917.

"I requested the Bank of Taiwan to issue a confirmed letter of credit for the above amount, in your favor, to be available against shipping documents, which I believe you have duly received.

"Trusting you will give this order your careful attention, I remain,

"Yours truly, F. Terami."

"April 27, 1917.

"Mr. Fumio Terami, 233 Broadway, New York City.

"Our B.O.P.O. X-780 (T-3348)

"Dear Sir: We have received your letter of April 26th, which we understand is a confirmation of the letter order from the Tsunoda Company, Incorporated, dated April 19th, and which called for the following:

"3,000 boxes of I.C.W. tin plate 20x14—112 sheets, 100 lbs. per box in tin-lined cases packed for export at $9.85 per box, f.o.b. New York. The freight allowance from Sparrows Point, Md., to New York, on this order is 10½c. per 100 lbs., and an additional allowance of 3.2c. per 100 lbs., which represents half of the difference between the freight rate from the Pittsburgh district and Sparrows Point to New York.

"It is also understood that the confirmed letter of credit to which you refer in your letter is the letter of credit issued by the Bank of Taiwan, Limited, under date of April 23d, and applying on this same order from the Tsunoda Company.

"We are glad indeed to have been able to enter the order for this material, and sincerely trust we may continue our present pleasant relations.

"Yours very truly, The General Fireproofing Company,
"K. L. Brockway, Export Department."

The defendant offered in evidence two earlier letters of April 17th and 19th; the latter being referred to in the letter of April 27th:

"April 17, 1917.

"Attention of Mr. Brockway.

"The General Fire Proofing Company, 395 Broadway, New York—Gentlemen: We beg to confirm our verbal order to you of this morning for 3,000 boxes of I.C.W. tin plate 20x14—112 sheets—100 lbs. in tin-lined cases packed for export, at $9.85 f.o.b. New York, with freight allowed from Pittsburg, Pa., to New York, if shipment is made to the West Coast direct from the mill. Shipping instructions will be furnished you later.

"You will receive instructions from us to-morrow in reference to payment for these goods, or letter of credit. Thanking you for the quotation, and trusting this may lead to considerable business between our firms, we are,

"Very truly yours, Tsunoda Company, Inc.,
"Tsunoda."

"April 19, 1917.

"The General Fire Proofing Company, 395 Broadway, New York City—Gentlemen: Referring to your favor of April 17th and our letter dated April 17th ordering 3,000 boxes of I.C.W. tin plate 20x14—112 sheets, 100 lbs. per box, in tin-lined cases packed for export, at $9.85 per box, f.o.b. New York: Allow us to confirm this order with the agreement made to-day as to a freight allowance of 10½ cents per hundred pounds from Sparrows Point, Md., and 3.2 additional allowance.

"This arrangement was entered into with your Mr. Brockway, as we understood the material to be in the Pittsburg field or Youngstown, and freight allowance from that point to New York would be made to us, and in figuring our quotation we figured this way, and the additional 3.2 cents was allowed specially to cover the loss that would have been incurred on the basis of freight allowance from Sparrows Point, Md.

"Thanking you very sincerely for your courtesy in this matter, and hoping that this may lead to large and continuous business between our firms, we are,

"Yours very truly, Tsunoda Company, Inc.,
"Tsunoda."

These two letters and letters subsequently written by the defendant to the Tsunoda Company were excluded on the ground that the letters of April 26th and 27th, together with the letter of credit of the Bank of Taiwan, constituted a closed contract with Terami.

We think the court should have admitted, not only these two letters excluded, but subsequent correspondence between the defendants and the Tsunoda Company, which were also excluded. The two letters threw light upon the letters of April 26th and 27th. Quite plainly the defendants wished to make it clear that they were under but one contract, and that contract was with the Tsunoda Company, as to which they were secured by the Bank of Taiwan's letter of credit. Upon the two letters of April 26th and 27th, together with the letter of credit, we cannot say that the contract was with Terami. It is true that subsequently the defendants, in letters to him and to the Tsunoda Company, spoke of the order for the tin plate as made by Terami through the Tsunoda Company, or as being on account of Terami, or of Terami's order through the Tsunoda Company, or that the plate was bought by the Tsunoda Company and sold to Terami. But their correspondence was continuously and consistently with the Tsunoda Company. The correspondence between the defendants and the Tsunoda Company and Terami should have been admitted, so as to determine from it, together with the testimony of the witnesses, whether the defendants' contract was with the Tsunoda Company or with Terami. The original order given by the Tsunoda Company disclosed nothing to show that it was acting for an undisclosed principal and, if it were, the defendants could insist upon the contract with the Tsunoda Company, if made with it, whether it was buying for or on account of or as broker of Terami. Moore v. Vulcanite Co., 121 App. Div. 667, 106 N. Y. Supp. 393. It was not a question to be determined by the court, construing merely the two letters of April 26th and 27th, but a question of fact, to be determined by the jury upon all the correspondence and the testimony of the witnesses.

The appellant has filed 235 assignments of error, and a brief of 221 pages, citing a multitude of decisions. The exhibits, not printed in chronological order, are unusually confusing. Under these circumstances, we shall say no more than the foregoing for the guidance of the court on a new trial.

Judgment reversed.

THE OLD RELIABLE.

RELIABLE TOWING CO. et al. v. LITTLE KANAWHA LOG & TIE CO.

(Circuit Court of Appeals, Fourth Circuit. October 7, 1919.)

No. 1724.

1. TOWAGE ⟸11(11)—TUG RESPONSIBLE FOR INSECURE MOORING OF TOW.
   A tug owner, contracting to tow loaded barges up Ohio river, and compelled by state of water to temporarily tie them up at an intermediate port, *held* responsible for their being properly secured, and liable for loss due to their breaking away on a rise in the river, owing to insufficiency of the lines.

2. TOWAGE ⟸11(11)—TUG NOT LIABLE FOR LOSS OF BARGE LEFT IN POSSESSION OF OWNER.
   A tug, contracting orally to tow three barges on Ohio river, with no time limit, which took two, leaving the other for a second trip, *held* not

liable for loss of the third barge, which remained in possession of the owner, by breaking from its moorings during a rise of the river.

3. TOWAGE ⊂⊃15(3)—TUG HELD LIABLE FOR SALVAGE SERVICE TO, BUT NOT FOR VALUE OF, BARGE.
Where a barge broke adrift through negligence of a towing tug, but was salvaged by the owner without serious damage, the tug was properly charged with expense of salvage, but could not be required to pay for the barge.

4. TOWAGE ⊂⊃15(3)—MEASURE OF DAMAGES FOR LOSS OF TOW STATED.
In admiralty, the measure of recovery for goods lost is the price at place of purchase, together with freight, insurance, and other charges of transportation.

5. TOWAGE ⊂⊃15(3)—ALLOWANCE OF INTEREST IN CASE OF INJURY TO TOW DISCRETIONARY.
Refusal of the court to allow interest on recovery from a towing tug for loss of property *held* within its discretion.

Appeal from the District Court of the United States for the Northern District of West Virginia, at Parkersburg; Alston G. Dayton, Judge.

Suit by the Little Kanawha Log & Tie Company against the steamboat Old Reliable (the Reliable Towing Company, claimant) and the Fidelity & Deposit Company of Maryland. Decree for libelant, and respondents appeal. Modified.

See, also, 256 Fed. 112.

Lowrie C. Barton, of Pittsburgh, Pa. (George W. Johnston, of Parkersburg, W. Va., on the brief), for appellants.

Reese Blizzard, of Parkersburg, W. Va., for appellee.

Before PRITCHARD, KNAPP, and WOODS, Circuit Judges.

WOODS, Circuit Judge. In this libel for breach of a towing contract the decree of the District Court was in favor of the libelant. In October, 1917, Reliable Towing Company made an oral contract with the Little Kanawha Log & Tie Company for its tug, Old Reliable, to tow three barges loaded with cross-ties from Parkersburg, W. Va., to McKeesport, Pa. As no time limit was specified, the contract implied performance within a reasonable time, considering the distance, the speed of the vessel, the stage of the water, and other circumstances. The Old Reliable, not having power to tow the three barges at once, took the barges No. 68 and No. 131 in tow, leaving the third, No. 111, for another trip. Owing to the stage of the water the dams above were down, so that the barges could not at the time be towed above Sistersville. They were tied up there to await more favorable conditions. Temporary stop and delay at Sistersville were expected by the owner of the barges, for it sent a man there to ask that the tug be sent back for the third barge. Under the conditions stated there was no breach of contract or negligence in stopping the barges at Sistersville.

The barges were tied abreast at Sistersville with insufficient lines, and consequently a sudden and great rise in the river broke them away. One of them, 131, was caught by libelant, and salvaged with little

damage; the other, 68, struck a pier of the Parkersburg bridge and was lost, with nearly all of its cargo. Both parties allege negligence in failing to securely tie the barges at Sistersville, and each imputes the duty and the negligence to the other.

[1] The owner of the barges and cargo had under the contract no responsibility for them after they were taken in tow by the Old Reliable. The facts that it lent lines to be used in making fast the barges, either at Sistersville or McKeesport, and that Frazier, one of its subordinate employés, assisted in tying them at Sistersville, do not prove that it assumed responsibility for the security of the barges. It did not represent the lines to be sufficient, and its assisting employé was not in charge of the work for it, nor authorized to waive any of its rights. It is not pretended that there was any consideration for the alleged assumption of responsibility. The correspondence immediately after the loss shows conclusively that the Towing Company attached no blame to the libelant. The evidence seems to us conclusive that the obligation was on the master of the Old Reliable to make the barges fast, that he did not use due care, and that the loss resulted from his negligence in this respect.

[2] The third barge, No. 111, which never left the possession of the libelant, was carried away by the force of the ice movement in the river and became a total loss. The breach of the contract to tow was not the proximate cause of the loss, and therefore the Old Reliable cannot be held for the loss and the salvage. St. L., I. M. & S. Ry. Co. v. Commercial Union Ins. Co., 139 U. S. 223, 237, 11 Sup. Ct. 554, 35 L. Ed. 154.

[3] There was error in the allowance of the damages. Barge No. 131 was salvaged at a cost of $50, properly chargeable to respondent, but it was not materially damaged. There was no conversion of the barge by respondent, nor do we find evidence of abandonment by libelant to the respondent; its value, $400, should not have been charged to respondent.

[4] The value of the ties at place of destination was charged to respondent, 93 cents for No. 1, and 83 cents for No. 2. The profit, which we understand to mean the difference between the original cost, together with freight and insurance, other costs of transportation, and the selling price, was to be 15 cents on each tie. In admiralty the measure of recovery for goods lost is the price at the place of purchase, together with freight, insurance, and other charges of transportation without profit. The profit, 15 cents each, should be deducted, and the ties charged at 78 cents for No. 1 and 68 cents for No. 2.

[5] The District Judge, in the exercise of his discretion, refused to allow interest, and we see no sufficient ground to say that his discretion was abused. The Maggie J. Smith, 123 U. S. 349, 356, 8 Sup. Ct. 159, 31 L. Ed. 175; Pennsylvania R. R. Co. v. Naam Looze Vennoot Schap, 261 Fed. 269, —— C. C. A. ——, Fourth Circuit, filed July 1, 1919.

The following corrected statement will show the amount for which the decree will be entered:

2,335 No. 1 ties @ 78 c. each		$1,821.30
290 No. 2 ties @ 68 c. each		197.20
		$2,018.50
Less 249 ties salvaged, of the value of 78 c. each	$194.22	
Cost of salvage, 25 c. each	62.25	
		131.97
		$1,886.53
Value of barge 68		400.00
		$2,286.53
Salvage of barge No. 131	$ 50.00	
Cost of unloading ties from same	312.48	
Cost reloading	191.14	
		553.62
		$2,840.15
2,250 ft. lines	$ 50.00	
Cash advanced for coal	81.00	
		131.00
Total due libelant from Old Reliable		$2,971.15

Modified.

BRITTON v. UNION INV. CO.*

In re P. B. MANN-ANCHOR CO.

(Circuit Court of Appeals, Eighth Circuit. November 5, 1919.)

No. 5289.

1. BANKRUPTCY ⊂⊃161(1), 188(3), 311(5)—LENDER SECURED BY INVALID WAREHOUSE RECEIPTS ENTITLED TO EQUITABLE LIEN; PAYMENT OF EQUITABLE LIEN NOT PREFERENCE, WHERE BASIS OF LIEN MORE THAN FOUR MONTHS PRIOR TO BANKRUPTCY.

As against the trustee in bankruptcy, who stands in no better position than the bankrupt, one who made loans to bankrupt, secured by instruments representing the grain handled by it, which more than four months before the adjudication were replaced by one receipt, covering grain in various elevators in several states, that did not comply with the state laws governing warehouse receipts, was entitled to an equitable lien; so that, even if the contract was unenforceable, the grain having with consent of the parties been sold and the proceeds turned over to the creditor before the bankruptcy proceedings were initiated, thus making the pledge effective by possession, the situation will not be disturbed, and the creditor need not, as a condition to allowance of its claim for balance due, return the money thus received.

2. BANKRUPTCY ⊂⊃161(1)—PAYMENT RELATES TO TIME OF SECURITY AGREEMENT AS REGARDS PREFERENCE.

Sale of property of bankrupt on which a creditor had an equitable lien, and payment of the proceeds to the creditor, though within four months of bankruptcy, for preference purposes relate back to the date of the contract which they were designed to and did fulfill.

3. BANKRUPTCY ⊂⊃340—BURDEN OF PROOF AS TO PREFERENCE ON TRUSTEE.

Even if, to prevent a preference, there should be absolute identity between grain in bankrupt's elevators pledged and that of the same kind,

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

*Certiorari denied 251 U. S. —, 40 Sup. Ct. 346, 64 L. Ed. —.

quantity, and quality which was sold, with payment of the proceeds to the secured creditor, the trustee had the burden of showing absence of identity.

4. BANKRUPTCY ⟸164—IDENTITY OF PROCEEDS OF PLEDGED PROPERTY AND MONEY PAID PLEDGEE NOT NECESSARY TO PREVENT PREFERENCE.

No preference can be predicated on the fact that the money received from sale of grain pledged by bankrupt was not kept physically isolated till paid to the secured creditor, but was deposited in bank with other money of bankrupt, and a check for the amount immediately given to the creditor.

Appeal from the District Court of the United States for the District of Minnesota; Wilbur F. Booth, Judge.

In the matter of the P. B. Mann-Anchor Company, bankrupt. Order of the referee, holding that certain payments to the Union Investment Company, a creditor, constituted a preference, and that it was not entitled to allowance of its claim till the money so paid was returned, was reversed by the District Court, and Walter F. Britton, trustee in bankruptcy, appeals. Affirmed.

Todd, Fosnes, Sterling & Nelson, of St. Paul, Minn., for appellant.

Lancaster & Simpson and R. G. Patton, all of Minneapolis, Minn., for appellee.

Before SANBORN, CARLAND, and STONE, Circuit Judges.

STONE, Circuit Judge. Appeal from decree of District Court, on petition for review, reversing order of referee in bankruptcy which declared certain payments to appellee to be preferences.

[1, 2] The undisputed facts are that the bankrupt, a grain firm owning a line of elevators, had for some time been borrowing from appellee. These loans were secured by various instruments supposed to represent the grain handled by appellee, such as bills of lading and receipts. More than four months before the bankruptcy adjudication these receipts had been replaced by one receipt covering grain in various elevators in several states. The present controversy revolves around the proceeds of grain covered by this receipt, which grain was sold by a creditors' committee and the proceeds turned over to appellee before, but within four months of, the bankruptcy proceedings. It is admitted that this receipt did not comply with the state laws governing warehouse receipts; therefore no reliance is placed upon it as a warehouse receipt. Appellee's contention is that its course of dealing in connection with its loans, made upon the faith of the receipts replaced by this last one, coupled with the later reduction and realization upon the pledged property before the bankruptcy proceedings began, established its right to an equitable lien on the grain covered thereby. This position is sound, as against a trustee in bankruptcy, who stands in no better position to avoid an equitable claim of this character under these circumstances than the bankrupt itself.

The parties to this transaction, with no thought of forbidden preference, intended that the grain covered by the receipts should be a security for the debt. They sought to impound it for that purpose through the instrument delivered. Upon the faith of this security

loans were procured from appellee. As said by Mr. Justice Holmes, in the case of Sexton v. Kessler, 225 U. S. 90, 96, 32 Sup. Ct. 657, 658 (56 L. Ed. 995):

"So far as the interpretation of the transaction is concerned it seems to us that there is only one fair way to deal with it. The parties were business men acting without lawyers and in good faith attempting to create a present security out of specified bonds and stocks. Their conduct should be construed as adopting whatever method consistent with the facts and with the rights reserved is most fitted to accomplish the result. * * * So the question is whether anything in the situation of fact or the rights reserved prevents the intended creation of a right in rem, or at least one that is to be preferred to the claim of the trustee. The bankruptcy law by itself does not avoid the transaction."

The so-called receipt is no receipt, because it fails to comply with the requirements of the state statutes governing grain warehouse receipts, and it would form no barrier to a proper receipt covering the same grain issued to an innocent person. But it is a part of the evidence of the actual understanding and arrangement between the parties. The grain was, with the consent of appellee and the bankrupt, sold by the committee, and the resulting funds turned over to it by the committee, to be applied to its debt under the above contract. In essence such transactions amount to a reduction to possession of the grain, and a realization thereon by it. This entire transaction was fully consummated before the bankruptcy proceedings were initiated. Although they took place within four months of bankruptcy, yet, for preference purposes, they relate back to the date of the contract which they were designed to and did fulfill. Security Warehousing Co. v. Hand, 206 U. S. 415, 423, 27 Sup. Ct. 720, 51 L. Ed. 1117, 11 Ann. Cas. 789. Even if the contract were unenforceable, which we do not decide, as contended for by appellant, because the receipt failed to conform to the state laws governing grain warehouse receipts, yet it was not inherently vicious, was made and carried out in good faith, and had been fully performed before the bankruptcy proceedings began. Equity will not disturb such a situation. The saving element here, which prevents application of the state statutes invoked by appellant, is that possession of the pledge became effective through possession of the money for which the same was sold by consent of pledgor and pledgee, with the knowledge that such disposition was to be made of the money.

[3, 4] Appellant contends that the identity of the grain pledged was not preserved nor proven. Because of the character of grain, it is rare that receipts, pledges, or contracts with warehousemen regarding it, attempt to segregate the particular grain. The needs of all parties are usually met by description of the warehouse, or receptacle therein, the kind, quantity, and quality of grain. The contract here was of this character. The evidence establishes that the grain sold by the committee met the description of this pledge. There is no testimony showing that it was not the identical grain, if absolute identity be required. Nor is it material that the money received for this grain was not kept physically isolated until paid to appellee. It was deposit-

ed in a bank with other money, and promptly checked out to appellee, so there is no question that the identical amount received for this grain was in the bank and paid the check.

The judgment of the District Court is affirmed.

CAMP BIRD, Limited, v. HOWBERT, Collector of Internal Revenue.*

(Circuit Court of Appeals, Eighth Circuit. November 17, 1919.)

No. 4939.

1. INTERNAL REVENUE ⟸38—RECOVERY BY CORPORATION OF ILLEGAL EXCISE TAX PAID.
   On recovery of excise tax illegally collected from a corporation, the penalty and interest exacted for delinquency in making payment under Act Aug. 5, 1909, § 38(5) *held* also recoverable.
2. INTERNAL REVENUE ⟸38—RECOVERY BY CORPORATION OF EXCESSIVE EXCISE TAX.
   A mining corporation *held* entitled to recover excessive excise taxes paid under Act Aug. 5, 1909, § 38, because of refusal of the Commissioner to make proper allowance for depreciation of equipment.

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

Action by Camp Bird, Limited, against Frank W. Howbert, Collector of Internal Revenue, District of Colorado. Judgment for defendant, and plaintiff brings error. Reversed.

See, also, 249 Fed. 27, 161 C. C. A. 87.

William Story, Jr., of Salt Lake City, Utah (William V. Hodges, James G. Rogers, and George L. Nye, all of Denver, Colo., on the brief), for plaintiff in error.

John A. Gordon, Asst. U. S. Atty., of Denver, Colo. (Harry B. Tedrow, U. S. Atty., of Boulder, Colo., on the brief), for defendant in error.

Before CARLAND and STONE, Circuit Judges, and ELLIOTT, District Judge.

CARLAND, Circuit Judge. This is an action at law brought by the Camp Bird, Limited, hereafter plaintiff, to recover of Howbert, collector of internal revenue for the district of Colorado, hereafter defendant, the amount of certain taxes assessed against the plaintiff under the Excise Tax Law of 1909 (Act Aug. 5, 1909, c. 6, 36 Stat. 112), for the years 1909, 1910, and 1911, which taxes were paid by plaintiff under protest. The trial court rendered judgment in favor of the defendant, and the plaintiff sued out a writ of error. The case was before us at a former term, and this court affirmed the judgment below. 249 Fed. 27, 161 C. C. A. 87.. The case was then removed by the plaintiff to the Supreme Court by writ of certiorari. While the case was pending in that court, one of the Assistant Attorneys General of the United States appeared therein and caused the judgment of affirmance by

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*Certiorari denied 251 U. S. —, 40 Sup. Ct. 344, 64 L. Ed. —.

this court to be reversed on confession of error. Pursuant to said reversal a mandate of the Supreme Court issued to this court for further proceedings in conformity to the judgment of the Supreme Court.

The only question decided by this court at the former hearing was that the action of the plaintiff was barred by section 3225, U. S. Rev. Stat. (Comp. St. § 5948); this being also the ground upon which the trial court denied a recovery. There exists no record as to what the error was that the Assistant Attorney General confessed. We conclude, however, that as the bar of the statute was the only question decided by this court it is in regard to that question we erred in the opinion of the Assistant Attorney General, and we further conclude that, as the case was remanded by the Supreme Court to this court for further proceedings, instead of the District Court, it is our duty to proceed and render such judgment on the merits as this court shall deem proper, regardless of the bar of the statute. Lutcher & Moore Lumber Co. v. Knight, 217 U. S. 257, 30 Sup. Ct. 505, 54 L. Ed. 757. Before proceeding to consider the case on the merits, we deem it proper to say that the power to review the decisions of this court is an important one, and ought to be left as a general rule to the tribunal established by law for that purpose. The case in the court below was tried by the court, a jury being waived. After hearing the evidence the court made findings of fact and conclusions of law, upon which judgment was entered in favor of the defendant, for the reason that under the facts found plaintiff's action was barred by section 3225, supra.

[1, 2] Eliminating the question as to the bar of the statute, which we must assume upon the record was erroneously decided by this court, although no appellate court has passed upon the question, the assignments of error by the plaintiff are as follows: (1) The court erred in deciding that no penalty could be recovered by the plaintiff, as the taxes were not paid within the time required by law. (2) The court erred in rendering judgment for the defendant, as the facts found entitled the plaintiff to judgment for the amount of the taxes illegally collected. In regard to the first assignment of error, we are of the opinion that, where an illegal tax is paid, the fact that it was not paid within the time allowed by law will not prevent the taxpayer from recovering the penalty of 1 per cent. per month paid by him for the nonpayment of the illegal tax, for, if the tax was illegal, it was never due, and therefore the penalty was as much unauthorized as the tax itself. In regard to the second assignment of error, the record shows that the depreciation in the value of the mine was caused by the removal of ores, and that the amount of depreciation allowed by the Commissioner of Internal Revenue for each year was on mine equipment. The court further found as follows:

"That, if the plaintiff is entitled to recover under the law, the amounts are as follows: For the year 1909, for depreciation of equipment, $56,907.20; depreciation of value of mine, $917,697; total depreciation for the year 1909, $974,604.20. The amount allowed by the Commissioner for depreciation to be deducted, $40,615, leaves the net depreciation not allowed $933,989.20, and the tax of 1 per cent. collected on that amount was $9,339.89. For the year 1910, the court finds the depreciation to be, on equipment, $56,907.20; of the value of the mine, $568,129, as claimed in its return; total depreciation,

$625,036.20. The amount allowed by the Commissioner to be deducted $40,615, leaves the amount of depreciation in value for which it would not be liable to taxation $584,421.20, and the 1 per cent. tax collected on that excessive assessment was $5,844.21. For the year 1911, the court finds the depreciations of the value of the mine were: On equipment $56,907.20; value of mine, $617,789.00; total, $674,696.20. The amount allowed and deducted by the Commissioner for depreciation, $40,615, leaves the amount of depreciation not allowed by the Commissioner to be $634,081.20, the 1 per cent. tax on which was paid by the plaintiff amounted to $6,340.81."

It will be seen from these findings of fact that the court found that there was a depreciation in the equipment of the mine for each of the years 1909, 1910, and 1911, amounting to $56,907, which was $16,292.20 each year more than was allowed by the Commissioner; his allowance being $40,615. This would make an overassessment of $16,292.20 each year, which at 1 per cent. would make an illegal tax of $162.92 per year, or $488.76 for the three years. All the remaining excess taxes found to be due by the trial court relate to the depreciation in the value of the mine caused by the exhaustion of ore. Since the case was tried in the court below the cases of Von Baumbach v. Sargent Land Co., 242 U. S. 503, 37 Sup. Ct. 201, 61 L. Ed. 460, U. S. v. Biwabik Mining Co., 247 U. S. 116, 38 Sup. Ct. 462, 62 L. Ed. 1017, and Goldfield Consolidated Mines Co. v. Scott, 247 U. S. 126, 38 Sup. Ct. 465, 62 L. Ed. 1022, have been decided, and these cases hold that in no accurate sense can such exhaustion of the body of the ore be deemed depreciation. There being no other question for determination, our opinion is that the judgment of the court below must be reversed, and the case remanded to that court, with directions to enter judgment upon the facts found in favor of the plaintiff for $488.76, with interest at 8 per cent. from the time the illegal payments were made, and also the penalty of 1 per cent. per month paid on said illegal tax; and it is so ordered.

HUFFMAN v. PAIGE-DETROIT MOTOR CAR CO.

PAIGE-DETROIT MOTOR CAR CO. v. HUFFMAN.

(Circuit Court of Appeals, Eighth Circuit. December 19, 1919.)

Nos. 5330, 5332.

1. PRINCIPAL AND AGENT ⟸33—CONTRACT BY MOTOR CAR MANUFACTURER GIVING EXCLUSIVE RIGHT TO SELL IN SPECIFIED TERRITORY TERMINABLE AT WILL.

   A contract whereby manufacturer of motorcars granted plaintiff exclusive right to sell cars in a specified territory, but which did not obligate plaintiff to buy or defendant to sell any specified number of cars at any given price, and provided for termination if the manufacturer should believe plaintiff was not diligent in selling cars, etc., may be terminated by the manufacturer at will.

2. PRINCIPAL AND AGENT ⟸33—MANUFACTURER OF MOTOR CARS WHO TERMINATED PLAINTIFF'S AGENCY CONTRACT NOT LIABLE FOR ENTICING AWAY PLAINTIFF'S SUBAGENTS.

   Where the contract, giving plaintiff exclusive right to sell motor cars in a specified territory, was terminated by the manufacturer, *held*, that

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plaintiff, who had appointed subagents, could not recover against the manufacturer for enticing away his subagents, where such recovery was based on the supposed wrongful cancellation of the principal contract, which, however, was terminable at the will of the manufacturer.

In Error to the District Court of the United States for the District of Nebraska; Joseph W. Woodrough, Judge.

Action by William L. Huffman against the Paige-Detroit Motor Car Company. There was a judgment for defendant, after demurrer was sustained to each count of the petition, and plaintiff brings error, and defendant assigns cross-errors, based on the refusal of its motion to quash service of summons. Affirmed.

Sidney W. Smith, of Omaha, Neb. (E. G. McGilton, of Omaha, Neb., on the brief), for plaintiff.

Charles B. Keller, of Omaha, Neb., and Sherwin A. Hill, of Detroit, Mich. (George Doane Keller and Howard H. Baldrige, both of Omaha, Neb., Charles B. Warren, William B. Cady, and Sanford W. Ladd, all of Detroit, Mich., on the brief), for defendant.

Before HOOK and STONE, Circuit Judges, and AMIDON, District Judge.

HOOK, Circuit Judge. This was an action for damages by Huffman against the Paige-Detroit Motor Car Company, a corporation of Michigan. The first count of his petition is for a breach of a written contract between them by its wrongful cancellation prior to the specified date of expiration. The second count is for enticing away plaintiff's subagents in the automobile business. The trial court sustained a demurrer to each count for its failure to state a cause of action, and to both for misjoinder. A judgment for defendant followed. There was a third count in the petition, but it is not now in controversy.

[1] By the terms of the contract the defendant granted to the plaintiff the exclusive right to sell Paige automobiles in Nebraska and parts of Iowa and South Dakota. Voluminous provisions defined the basis for future dealings between the parties and their responsibilities to each other and to third persons. Except for an attempt to make their future relation purely that of vendor and purchaser, and their transactions wholly interstate in character, the contract is much like one of agency. This aspect of it is emphasized by the control which defendant reserved over the activities of the plaintiff through provisions for cancellation to which reference will presently be made. The defendant did not obligate itself to sell, nor plaintiff to buy, any specified quantity of automobiles, nor was a determinable quantity fixed in a mutually binding way by the requirements of an established business. The defendant was expressly exempted from such an obligation and from adherence to the schedule of prices and discounts set forth. It was free to decline shipments under the contract, and also free to fix and change prices at will. The contract specified a time when it expired by limitation. The first count of the petition charged that prior to that time the defendant "without just cause

terminated and cancelled said contract." But aside from the provisions above noted, indicating a lack of mutuality of obligation, the contract expressly reserved to defendant the right of cancellation when in its opinion the plaintiff was not working the territory to the best advantage. By another clause it was provided that, if the defendant "believes that the dealer [the plaintiff] is not properly and diligently pushing the sale of its cars, it hereby reserves the right at its election, and without making itself liable in any manner for any claim or action for damages, * * * to cancel and terminate this agreement. * * *" It is quite manifest that the contract merely furnished a basis for future dealings to be observed no longer than was mutually satisfactory. There was no hard and fast commitment of either party, if he chose to break away. Oakland Motor Car Co. v. Indiana Automobile Co., 121 C. C. A. 319, 201 Fed. 499; Velie Motor Car Co. v. Kopmeier Motor Car Co., 114 C. C. A. 284, 194 Fed. 324.

[2] In the second cause of action, plaintiff avers that when the contract with defendant was made he had a valuable selling organization in the territory described, and that he accordingly made contracts with all his subagents to handle defendant's product; that defendant canceled its contract with him without just cause, and willfully and maliciously induced and enticed his subagents to sever and discontinue their relations and break their contracts with him. Fairly construed this complaint seems to rest upon the supposed wrongful cancellation of the principal contract between plaintiff and defendant. In that view it is obvious that no cause of action is stated. The result complained of ensued from an authorized lawful act and nothing is gained by the use of the terms willfully and maliciously. It may be observed that the record, aside from the face of the petition, indicates that the terms of these subcontracts were like those of the principal contract between plaintiff and defendant; that is to say, provisional arrangements at will. Upon a condition like that, see Triangle Film Corporation v. Artcraft Pictures Corporation, 250 Fed. 981, 163 C. C. A. 231. But it is enough to say that no cause of action is stated for a wrongful or malicious interference by defendant in the contract relations between other persons. The above conclusions upon the averments of the petition make it unnecessary to consider whether the two causes of action were improperly joined.

By a motion to quash the service of summons, defendant raised a question of jurisdiction, asserting that it was not doing business in Nebraska, where the action was brought, and that the man personally served there was not its managing agent. We think that the proofs, which need not now be recited, warranted the denial of the motion by the trial court.

The judgment is affirmed.

HOWELL v. DELAWARE, L. & W. R. CO. THE DUNELLEN. THE CHAPIN. THE SCOTIA.*

(Circuit Court of Appeals, Second Circuit. December 10, 1919.)

No. 48.

1. COLLISION ⟸70—NEW YORK CITY CHARTER RULE AS TO MOORED VESSELS CAN BE INVOKED ONLY BY VESSELS LEAVING OR ENTERING SLIPS.
New York City Charter, § 879, providing that vessels shall not lie moored at pier ends, except at their own risk, is for the benefit only of vessels entering or leaving adjacent slips, and cannot be invoked in a contest between several barges moored together at the end of a pier.

2. COLLISION ⟸70—PIER END CHARTER REGULATION ADDITIONAL TO OTHER RULES OF NAVIGATION.
New York City Charter, § 879, regulating the mooring of vessels at pier ends, does not render obsolete, but is additional to, other rules of navigation and maritime conduct, whether founded upon Inland Rules or upon accepted general custom.

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

Libel by John S. Howell against the Delaware, Lackawanna & Western Railroad Company, in which the barge Dunellen, her tackle, etc. (the Central Railroad of New Jersey, claimant), the barge Chapin, her tackle, etc. (the New York Central Railroad Company, claimant), and the steam lighter Scotia, her engines, etc. (McAllister Bros., claimants) were made parties under the fifty-ninth rule in admiralty. From an adverse decree, the claimant of the barge Chapin appeals. Affirmed.

Action was originally brought against the Delaware, etc., Railroad Company alone; the other parties have been brought in under the fifty-ninth rule (29 Sup. Ct. xlvi).

In daylight, and weather which requires no consideration, libelant's scow Lex lay fast to the outer end of Pier 33, East River. Outside of her lay the barge Dunellen, and outside of the latter vessel the barge Chapin. The Lex was under charter to the Delaware, etc., Company, and it was that company which had placed her at the pier end.

The steam lighter Scotia came out of the slip between Piers 33 and 32, and in so doing collided with the Chapin. The blow caused all three boats at the pier end to break loose, and the Lex received the damages for which this action was brought against the charterer alone. The charterer admitted liability because of certain agreements in the charter party.

Thereupon said charterer (the Delaware, etc., Company) brought in the Dunellen and the Chapin, alleging as faults (substantially): (1) That these boats had moored outside of the Lex at all; and (2) that in so mooring they had negligently protruded into and blocked up the approach to and exit from the slip out of which the Scotia desired to go. The Chapin then brought in the Scotia, alleging faults not necessary to recite.

The trial judge held that the injuries to the Lex were the direct result of the Chapin's improperly obstructing the egress of the Scotia from her slip, held the Chapin primarily at fault, and exonerated the Lex, Dunellen, and Scotia. Thus in effect the Delaware, etc., Company succeeded in shifting its contractual liability as charterer to the Chapin as a tort-feasor, although under the decree the charterer remained secondarily responsible.

From this decree the claimant of the Chapin appealed, assigning (in substance) for error (1) that the proximate cause of disaster was the faulty navigation of the Scotia; and (2) that the Dunellen and Lex should have been found at fault for lying at the pier end in violation of section 879 of the Charter of the City of New York.

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*Certiorari denied 251 U. S. —, 40 Sup. Ct. 396, 64 L. Ed. —.

Harrington, Bigham & Englar, of New York City (T. Catesby Jones and I. A. Washburne, both of New York City, of counsel), for appellant The Chapin.

Marsh & Wever, of New York City (Charles C. Marsh, of New York City, of counsel), for appellee Howell.

Douglas Swift and E. W. Leavenworth, both of New York City (J. E. Morrissey, of Syracuse, N. Y., of counsel), for appellee Delaware, L. & W. R. Co.

James T. Kilbreth, of New York City, for appellee The Dunellen.

Hyland & Zabriskie, of New York City (Nelson Zabriskie, of New York City, of counsel), for appellee The Scotia.

Before ROGERS, HOUGH, and MANTON, Circuit Judges.

HOUGH, Circuit Judge (after stating the facts as above). Whether the Chapin so protruded into the fairway as to proximately cause collision with the Scotia while the latter was exercising reasonable care is matter of fact decided adversly to the Chapin by the trial judge, and after reviewing the record we find his conclusions supported by evidence, which it would serve no useful purpose to recite. It is, however, here urged as matter of law that, since the Lex and Dunellen were also moored at the pier end in violation of New York Charter (Laws 1901, c. 466) § 879 (set forth at length in The Allemania, 231 Fed. 942, 146 C. C. A. 138), they must be as responsible as the Chapin.

Our views of this local harbor regulation are, we think, plainly stated in The New York Central No. 18, 257 Fed. 405, — C. C. A. —, and The Daniel McAllister, 258 Fed. 549, — C. C. A. —. It was there held, and correctly said below, that section 879 can only be invoked by vessels of the class therein enumerated, viz. those "entering or leaving" a slip adjacent to the pier end at which lie the offending craft. If, therefore, in this case the Scotia had been injured, she would have made out a prima facie case against the Chapin under the act, by showing where that barge was moored; yet it remains possible for vessels at the pier end to affirmatively show, either that their violation of statute neither caused nor contributed to disaster, or that the "entering or leaving" vessel herself contributed thereto.

[1] But this case—with the Scotia exonerated—is between vessels which were all moored in the same illegal manner; between themselves none can point to the statute, and insist that the others are responsible to her by reason of the statute.

[2] The charter regulation does not, of course, take away, nor render obsolete, any other rule of navigation or maritime conduct, whether founded on the Inland Rules or upon accepted general custom as (usually) announced in judicial decisions; it is additional thereto. The Chapin is held solely liable here, not because she lay with other vessels at the end of a pier, but because she incumbered and obstructed the channel in a way deemed faulty without any reference to the pier end statute.

Decree affirmed, with costs to each appellee.

MONK v. HORN.

(Circuit Court of Appeals, Fifth Circuit. January 13, 1920.)

No. 3409.

BANKRUPTCY ⊂=404(2)—EFFECT OF DENIAL IN PRIOR PROCEEDING OF APPLICATION FOR DISCHARGE.

Under Bankruptcy Act, § 14a (Comp. St. § 9598), limiting the time for filing application for discharge to 18 months from date of adjudication, a bankrupt is not entitled, on an application filed in a second proceeding more than 18 months after his first adjudication, to a discharge from debts provable in the first proceeding.

Appeal from the District Court of the United States for the Southern District of Alabama; Robert T. Ervin, Judge.

In the matter of Robert Wiley Horn, bankrupt. On appeal by William H. Monk, Jr., from order granting discharge. Reversed.

Moses Kohn, of Mobile, Ala., for appellant.

William H. Armbrecht and J. Osmond Middleton, both of Mobile, Ala., for appellee.

Before WALKER, Circuit Judge, and GRUBB and JACK, District Judges.

WALKER, Circuit Judge. The appellee was adjudged bankrupt on January 25, 1917, on a voluntary petition filed by him in a proceeding in which no application for a discharge was filed, and which was closed prior to January 25, 1919, when he filed in the same court another voluntary petition, under which he was again adjudged bankrupt. In 1914 the appellant recovered a judgment against the bankrupt, which was a provable debt against the estate of the bankrupt in each of the bankruptcy proceedings. He objected to the granting of an application for discharge made by the bankrupt in the second proceeding, in so far as that application sought a discharge from the debt evidenced by the judgment mentioned, and prayed that that debt be excluded from the operation of any discharge that might be granted under the application therefor. The court ordered a discharge, from the operation of which the debt owing by the bankrupt to the appellant was not excluded.

This court has decided that, under the provision of section 14 of the Bankruptcy Act (Comp. St. § 9598) prescribing the time within which an application for a discharge may be made, a bankrupt, after the expiration of 18 months from adjudication, is not entitled, in a second proceeding, to a discharge from debts provable in the first. In re Bacon, 193 Fed. 34, 113 C. C. A. 358; Bacon v. Buffalo Cold Storage Co., 225 U. S. 701, 32 Sup. Ct. 836, 56 L. Ed. 1264. It appears from the opinion rendered by the District Judge in the instant case that the ruling just referred to was not followed, because it was considered to be inconsistent with the ruling of the Supreme Court in the case of Bluthenthal v. Jones, 208 U. S. 64, 28 Sup. Ct. 192, 52 L. Ed. 390. What was decided in the last-cited case was that a debt was not excluded from the operation of a discharge by the fact that in a former

proceeding, on the same creditor's objection, a discharge was refused, where that creditor, though notified of the second proceeding and that his same debt was scheduled therein, did not participate in any way in that proceeding. The ground of that decision was that the creditor lost the benefit, in the second proceeding, of the refusal of a discharge in the first proceeding, by failing to plead it or bring it to the attention of the court in the later proceeding.

It was not decided in that case that the creditor did not have a valid ground of objection to the granting of the discharge applied for in the second proceeding. It was decided that the creditor's debt was not excluded from the operation of a discharge which was granted without objection from him. The question of the sufficiency of an objection to an application for a discharge, because it was not made within the time prescribed by section 14 of the Bankruptcy Act, was not involved in that case. Nothing said in the opinion rendered in that case indicates that the court had that question in mind. We do not think that the decision in that case is in conflict with the above referred to decision of this court.

We are of the opinion that the ruling in the case of In re Bacon, supra, was correct. Subdivision "a" of section 14 of the Bankruptcy Act creates a limitation in favor of creditors having debts provable against an estate in bankruptcy. Subdivision "b" of that section prescribes the grounds on which an application for discharge may be refused. There is nothing to indicate that the latter provision was intended to control or supersede the former one. The former provision fixes a period of time beyond which a creditor affected by the bankruptcy is not required to remain prepared to prove the existence of a ground of objection to a discharge of the bankrupt. It well may be inferred that it was contemplated that an application for a discharge from any debt affected by an adjudication of bankruptcy should be made within the stated period, whether made in the first proceeding in which such debt was provable, or in a subsequent proceeding.

The provision has the effect of preventing a bankrupt from withholding for an unreasonable length of time from creditors affected by the adjudication of bankruptcy the opportunity of proving the existence of a ground justifying a refusal of the discharge applied for. To give to a subsequent adjudication of bankruptcy the effect of enlarging the time within which a discharge from debts affected by a former adjudication could be applied for would amount to a destruction of the limitation created by the statute. The conclusion is that the court erred in overruling the appellant's motion to exclude his debt from the operation of the discharge applied for and granted.

Because of that error, the decree is reversed.

GRANDI v. UNITED STATES.

(Circuit Court of Appeals, Sixth Circuit. January 6, 1920.)

No. 3278.

1. CRIMINAL LAW ⟸1186(4)—TECHNICAL OBJECTION TO INDICTMENT CHARGE DOES NOT JUSTIFY REVERSAL.
   Although a count of an indictment alleging that defendant, knowing the same to have been stolen, received goods from an interstate shipment, etc., under Act Feb. 13, 1913 (Comp. St. §§ 8603, 8604), did not specifically allege that the goods were stolen, defendant could not have been misled in his defense, and the defect is a technical one, which should be disregarded on appeal, under Comp. St. § 1691, and Judicial Code, § 269, as amended by Act Feb. 26, 1919.
2. CRIMINAL LAW ⟸753(2)—MOTION FOR DIRECTED VERDICT WAIVED BY FAILURE TO RENEW AT CLOSE OF CASE.
   Where defendant's motion for directed verdict, made at close of government's case, was overruled, it was waived, where not renewed at the close of the whole case.
3. RECEIVING STOLEN GOODS ⟸3—RECEIVER OF STOLEN GOODS ASSUMES PERIL OF SAME HAVING BEEN STOLEN FROM AN INTERSTATE SHIPMENT.
   Where defendant knew the goods had been stolen, he received them at peril of their having been stolen while in the course of an interstate shipment, in which case he would be liable under Act Feb. 13, 1913 (Comp. St. §§ 8603, 8604).

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

A. Grandi was convicted of knowingly receiving goods stolen from an interstate shipment in violation of Act Feb. 13, 1913, and he brings error. Affirmed.

Chas. M. Bryan, of Memphis, Tenn., for plaintiff in error.

Wm. D. Kyser, U. S. Atty., of Memphis, Tenn.

Before KNAPPEN and DENISON, Circuit Judges, and KILLITS, District Judge.

KNAPPEN, Circuit Judge. Plaintiff in error was convicted under the Act of Feb. 13, 1913 (37 Stat. c. 50, p. 670 [Comp. St. §§ 8603, 8604]). The indictment contained three counts. The first charged the breaking of the seal of a certain railroad freight car containing an interstate shipment; the second, the stealing of goods from that car; and the third, the receipt and possession of goods knowing that they had been stolen from the car in question, and knowing that they were part of an interstate shipment contained in that car, which was alleged to be under transportation in interstate commerce—the places from which and to which the shipment was being made and the names of the consignor and consignee being stated. The conviction was on the third count alone.

[1] A motion to quash the third count, as not charging that the goods were in fact so stolen, was denied. There is an absence of such specific allegation. But while the count was thus technically subject to criticism, yet, in view of the frame of the indictment taken

as a whole, plaintiff in error could not well have been misled to his prejudice. The count fairly informed the accused of the charge against him, and sufficiently so to enable him to prepare his defense and to protect him against further prosecution therefor. Daniels v. United States (C. C. A. 6) 196 Fed. 459, 465, 116 C. C. A. 233; Bettman v. United States (C. C. A. 6) 224 Fed. 819, 826, 140 C. C. A. 265. The charge that defendant knew the goods to have been stolen naturally implies that the goods had been in fact stolen. The verdict should not be reversed on account of a defect so obviously technical and unsubstantial. U. S. Comp. Stat. 1916, § 1691; Judicial Code, § 269, as amended February 26, 1919 (40 Stat. 1181, c. 48); West v. United States (C. C. A. 6) 258 Fed. 413, 415, — C. C. A. —.

[2, 3] A motion to direct verdict, made at the close of the government's testimony, was overruled. If we were to treat the right to complain as saved (the motion was not renewed at the close of all the testimony, and so was waived), it would not have availed plaintiff in error, for the motion was plainly without merit. There was abundant evidence to sustain a finding that the goods were in fact stolen from the interstate shipment, and that defendant had guilty knowledge thereof. Indeed, if he knew the goods were stolen, he received them at the peril of their proving to have been stolen while in the course of interstate shipment, even if he did not know they were stolen from a shipment of that kind. Kasle v. United States (C. C. A. 6) 233 Fed. 878, 882, 147 C. C. A. 552.

We see nothing in the objection that defendant and one Woods were jointly charged with receiving and having possession of the goods, without setting out in what way the joint receipt was accomplished. Such joint participation was entirely possible, and it was unnecessary to state the details relating thereto.

We see no error in the fact that plaintiff in error was tried in the absence of his codefendant.

The judgment is affirmed.

AMMERMAN v. UNITED STATES.*

(Circuit Court of Appeals, Eighth Circuit. December 15, 1919.)

No. 5267.

1. PROSTITUTION ⟸3—INDICTMENT UNDER WHITE SLAVE TRAFFIC ACT SUFFICIENT.

   An indictment under White Slave Traffic Act, § 2 (Comp. St. § 8813), charging that the transportation was unlawfully and feloniously made "for the purpose of debauchery," *held* sufficient.

2. PROSTITUTION ⟸4—COMPETENCY OF EVIDENCE IN PROSECUTION UNDER WHITE SLAVE TRAFFIC ACT.

   In a prosecution for violation of White Slave Traffic Act, § 2 (Comp. St. § 8813), evidence of prior illicit relations between defendant and the woman transported is competent.

3. CRIMINAL LAW ⟸782(9)—INSTRUCTION AS TO SUFFICIENCY OF EVIDENCE.

   Instruction in a criminal case that the jury were required to decide the questions submitted "upon the strong probabilities of the case," fol-

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

*Rehearing denied March 30, 1920.

lowed by a correct statement of the rule as to exclusion of all reasonable doubt, *held* not erroneous.

4. CRIMINAL LAW ⟸768(3)—COERCION OF JURY.

Statement by the court to a jury that it was the rule of the federal courts that they should be kept together until they had agreed upon their verdict *held* not error, as tending to coercion.

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

Criminal prosecution by the United States against Day Ammerman. Judgment of conviction, and defendant brings error. Affirmed.

Caesar A. Roberts, of Denver, Colo. (John E. Kelley, of McCook, Neb., O. N. Hilton and Leslie M. Roberts, both of Denver, Colo., on the brief), for plaintiff in error.

T. S. Allen, U. S. Atty., of Lincoln, Neb. (F. A. Peterson, Asst. U. S. Atty., of Omaha, Neb., on the brief), for the United States.

Before CARLAND and STONE, Circuit Judges, and ELLIOTT, District Judge.

STONE, Circuit Judge. Error from conviction on one count of an indictment charging transportation of a woman in interstate commerce, for immoral purposes. The errors here urged are: (1) Insufficiency of the indictment. (2) Insufficiency of the evidence. (3) Admission of prior illicit relations between the parties. (4) Erroneous charge. (5) Coercion of the jury.

[1] The attack upon the indictment is based on the claim that it is lacking in any sufficient allegation of the necessary criminal intent. The statute (White Slave Traffic Act, § 2 [Comp. St. § 8813]) condemns such transportation when made "with the intent or purpose on the part of such person to induce, entice or compel her to give herself * * * up to debauchery." The indictment charges that the transportation was unlawfully and feloniously made "for the purpose of debauchery." This is sufficient.

The challenge to the sufficiency of the evidence cannot be sustained.

[2] The evidence of prior illicit relations between accused and the woman charged to have been transported were competent, as bearing upon the element of the intent with which she was this time transported.

[3] The portion of the charge to the jury which is attacked is:

"You are required in a criminal case, such as this, to decide the questions submitted to you upon the strong probabilities of the case; but these probabilities must be so strong as not to exclude all doubts or all possibility of error, but to exclude all reasonable doubts, and when you have attained that degree of conviction, upon which you as prudent men would unhesitatingly act in the most important affairs of life, you can be sure that you have reached that state of conviction that excludes all reasonable doubt."

The objection is to the statement that the jury are to decide "upon the strong probabilities of the case." That portion of the charge is almost verbatim identical with one approved in Dunbar v. United States, 156 U. S. 185, 199, 15 Sup. Ct. 325, 39 L. Ed. 390.

[4] The claim of coercion of the jury is based on a statement made by the court to the jury at the conclusion of the charge, as follows:

"Now, in criminal cases in this court we follow the common-law practice of keeping the jurors all together until the jury have agreed; but the marshal will endeavor to provide you a place to sleep to-night, so as not to keep you up in the jury room.

"The Marshal: We find it a hard matter to get accommodations; still I think we might be able to get accommodations.

"The Court: When you go to the jury room, if you agree on a verdict this evening—it is now a little after 10 o'clock—if you want to take a ballot and see if you can agree within the next half hour, we will be ready to receive your verdict, and that will release you all. If you should not agree, we will have to keep you on hand, and you will continue to deliberate in the morning."

This does not approach coercion.

The judgment is affirmed.

ROBINS v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. November 15, 1919.)

No. 5230.

1. POST OFFICE ⟸35, 48(4)—INDICTMENT FOR USE OF MAILS IN SCHEME TO DEFRAUD.
   The elements of an offense under Penal Code, § 215 (Comp. St. § 10385), are a scheme to defraud and the placing of a letter in a post office for purpose of executing it; so indictment thereunder need not allege that the scheme was to be executed by use of the mails.
2. CRIMINAL LAW ⟸1036(8)—DISCRETION TO CONSIDER INSUFFICIENCY OF EVIDENCE NOT URGED BELOW.
   The sufficiency of the evidence to sustain the conviction may not be urged in the reviewing court, where question was not raised below, unless it in its discretion decides to consider it.
3. CRIMINAL LAW ⟸901—MOTION FOR DIRECTED VERDICT WAIVED.
   Defendant's motion for directed verdict, made at close of government's evidence, was waived; he thereafter introducing evidence.
4. CRIMINAL LAW ⟸1134(4)—REFUSAL OF NEW TRIAL NOT REVIEWABLE.
   Ruling of trial court on motion for new trial is not reviewable in the Circuit Court of Appeals.

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

Paul E. Robins was convicted of a violation of Penal Code, § 215, and brings error. Affirmed.

Ralph Davis, of Memphis, Tenn., for plaintiff in error.

W. H. Rector, Asst. U. S. Atty., of Little Rock, Ark. (W. H. Martin, U. S. Atty., of Hot Springs, Ark., on the brief), for the United States.

Before CARLAND and STONE, Circuit Judges, and ELLIOTT, District Judge.

CARLAND, Circuit Judge. The plaintiff in error, hereafter called defendant, was convicted and sentenced upon the first count of an in-

dictment which charged a violation of section 215, Penal Code (Act Cong. March 4, 1909, c. 321, 35 Stat. 1130 [Comp. St. § 10385]). A demurrer to this count was overruled, and this ruling is assigned as error.

[1] Counsel for defendant has fallen into error in assuming that section 215 of the Penal Code is the same as the old section 5480, United States Rev. Stat. The cases cited in support of the contention that the indictment must charge that the scheme to defraud was to be executed by opening or intending to open correspondence with some person or persons through the post office establishment of the United States, or by inciting some person to open communication with the writer, are no longer the law in this respect. United States v. Young, 232 U. S. 155, 34 Sup. Ct. 303, 58 L. Ed. 548; United States v. Maxey (D. C.) 200 Fed. 997; United States v. Goldman (D. C.) 207 Fed. 1002; United States v. Young (D. C.) 215 Fed. 267. In United States v. Young, supra, the Supreme Court said,

"* * * The elements of an offense under section 215, P. C., are (a) a scheme devised or intended to be devised to defraud, or for obtaining money or property by means of false pretenses, and (b) for the purpose of executing such scheme or attempting to do so, the placing of any letter in any post office of the United States to be sent * * * by the post office establishment."

[2-4] We have no doubt that the first count charged an offense under the statute. The sufficiency of the evidence to sustain the verdict was not raised in the trial court and may not be urged here, unless in our discretion we decide so to do. We do not think that this is a case where our discretion ought to be exercised in favor of the defendant. The motion for a directed verdict made at the close of the evidence for the United States was waived by the defendant in introducing evidence, and the motion was not renewed at the close of all the evidence. The ruling of the trial court on motion for a new trial is not reviewable here.

Judgment affirmed.

THE FORDE.

(Circuit Court of Appeals, Second Circuit. December 10, 1919.)

No. 64.

COLLISION ⊂⇒74—PRESUMPTION AGAINST DRIFTER NOT REBUTTED.

Evidence, if not affirmative proof of negligence of vessel, which, in a harbor, dragged anchor and drifted against another anchored vessel, *held* not to rebut presumption against it; the only watch, at night, in threatening weather, being a landsman, and no one else being called till it was too late to put out the second anchor to prevent damage.

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

Suit in admiralty for collision by the Neptune Line, Incorporated, against the steamship Forde, her engines, etc.; H. Kuhnle, claimant. Decree for libelant, and claimant appeals. Affirmed.

Haight, Sandford & Smith, of New York City (Henry M. Hewitt, of New York City, of counsel), for appellant.

Foley & Martin, of New York City (Geo. V. A. McCloskey, and William J. Martin, both of New York City, of counsel), for appellee.

Before ROGERS, HOUGH, and MANTON, Circuit Judges.

HOUGH, Circuit Judge. On the night of December 13–14, 1917, the steamship Forde lay at anchor on Red Hook Flats, New York Harbor. Libelant's barge Pittston was similarly anchored at a distance which we find to have been nearly 900 feet. The wind was from northeast to east all the 13th, and until about 3 a. m. on the 14th, with an hourly movement never above 39 miles, until between 2 and 3 of the 14th, when it rose to 41; maximum velocities exceeding 29 miles occurred in every hour but one after 5 p. m. on the 13th. Snow began shortly after noon of the 13th, and fell continuously until 2:20 a. m. of the 14th, when it turned to sleet, and so continued for about an hour. When to this undenied description of most unpleasant weather is added the statement of the Forde's master that he looked at his barometer during the evening of the 13th and it was not "very low," we accept the testimony for libelant which describes the night as "threatening."

Certain it is that libelant's master stayed up all night watching events, while the Forde's officers (who were the only crew aboard her) went early to bed, leaving as sole anchor watch a landsman (harbor watchman) whose duty, as described by himself, was to "keep my eye out that nothing is molested or interfered with while the men are sleeping." At about 3 a. m. of the 14th the wind shifted to northwest and blew with a maximum velocity of 88 miles, so that the total movement between 3 and 4 a. m. was 73 miles. In this hurricane the Forde dragged her anchor, and drifted into collision with the Pittston, inflicting the injury for which this action was brought.

Cases of this kind start with the presumption against the drifting vessel stated in The Louisiana, 3 Wall. 164, 18 L. Ed. 85, and since it is not claimed, in this court that the Pittston in any way contributed to disaster, the inquiry is narrowed to the question whether the Forde has affirmatively shown that she was the helpless victim of vis major. That the storm was violent is admitted; that the watchman on the steamer did as he was told, and called the officers when he thought circumstances required it, is proven; but it is also proven by the Forde's own testimony that in threatening weather her deck was left with no one on it to start the second anchor, and the officers did not get on deck and do that obviously necessary act until the vessels were, if not in actual contact, so close that damage was inevitable.

We think such testimony, if not affirmative proof of negligence, wholly fails to rebut the presumption against drifters; and when there is added thereto the fact that the Pittston, similarly situated, put out her second anchor over an hour and a half before collision, we think claimants have failed to justify their conduct. We have not referred to

evidence tending to show that the Forde's second anchor was not in condition to be effective, and that the barometer was giving far more warning of coming trouble than the steamship master admitted. On these points the District Judge made no definite finding, and we think the result below sustainable, without expressing our own opinion thereon.

Decree affirmed, with costs.

THE MARYANNE.*

(Circuit Court of Appeals, Second Circuit. December 10, 1919.)

No. 15.

MARITIME LIENS ⟸70—DECREE FOR COST OF REPAIRS AFFIRMED.

Decree awarding libelant a lien for amount of its claim on a quantum meruit for work done on a steamship affirmed.

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

Suit in admiralty by the Ramberg Iron Works against the steamship Maryanne; Maryanne Shipping Company, claimant. Decree for libelant, and claimant appeals. Affirmed.

Bullowa & Bullowa, of New York City (H. L. Cheyney, of New York City, of counsel), for appellant.

Foley & Martin, of New York City (G. V. A. McCloskey and James A. Martin, both of New York City, of counsel), for appellee.

Before WARD, ROGERS, and MANTON, Circuit Judges.

PER CURIAM. We agree with the District Court that the work was not done on the credit of the owners of the steamer, and therefore the libelant had a lien under the act of June 23, 1910 (Comp. St. §§ 7783–7787).

The libel was on a quantum meruit for $17,175.35, but it was admitted at the trial that $6,053 of the last work done had been paid, so that only the sum of $11,122.35 was in dispute. Of this work the amount of $5,368 was done under a contract which provided "all work and material furnished to be satisfactory to your marine superintendent." The balance of the claim was for extra work to which this clause did not apply. The work called for by the contract having been completed, the libelant could sue upon a quantum meruit, and, though the clause as to satisfaction still governed, it was not made, as is often the case, a condition precedent of payment. It enabled the claimant to show just which part of the work and materials was not satisfactory to its marine superintendent, but no such dissatisfaction was proved.

The evidence convinces us that the agents for the steamer knew all about the extra work, and approved of it. When the bill was presented, the only objection they made was that their marine superintendent, Haslam, must go over it before it was paid. He was called as a wit-

ness before the commissioner, and did not express any dissatisfaction with the work and materials, but only with the charges for the extra work.

The libelant's course of business was that every night the foremen hand into the office time sheets with the names of the men, and the times they worked, and sheets of the material used. The foremen testified that they knew the facts and that their reports were correct. These were checked up in the office with the material that left the shop, and summaries of the amount of time and of the material were entered on yellow sheets which were produced. The original time and material reports had been destroyed in accordance with the usual course of business so that no fraudulent intent is to be inferred. The proof is within Mayor v. Second Avenue R. R. Co., 102 N. Y. 572, 7 N. E. 905, 55 Am. St. Rep. 829. The court below found the charges reasonable and we see no reason for differing.

The decree is affirmed.

WYSONG & MILES CO. et al. v. BANK OF NORTH AMERICA.

(Circuit Court of Appeals, Fourth Circuit. November 4, 1919.)

No. 1738.

BANKS AND BANKING ⊂=270(7)—USURY NOT DEFENSE OR COUNTERCLAIM IN ACTION BY NATIONAL BANK.

Where usurious interest has been taken by a national bank, the remedy given by Rev. St. § 5198 (Comp. St. § 9759), by an independent action to recover the usurious payments is exclusive, and the claim cannot be set up by way of defense or counterclaim in an action by the bank.

In Error to the District Court of the United States for the Western District of North Carolina, at Greensboro; James E. Boyd, Judge.

Action by the Bank of North America against the Wysong & Miles Company and others. Judgment for plaintiff, and defendants bring error. Affirmed.

Thomas J. Jerome, of Greensboro, N. C. (Jerome & Scales, of Greensboro, N. C., on the brief), for plaintiffs in error.

A. B. Kimball, of Greensboro, N. C. (King & Kimball, of Greensboro, N. C., on the brief), for defendant in error.

Before PRITCHARD, KNAPP, and WOODS, Circuit Judges.

KNAPP, Circuit Judge. In this suit by a national bank on a promissory note for $9,000, dated January 4, 1918, the answer alleges, "by way of cross-action or counterclaim," that on previous notes given for loans by plaintiff, running through a series of years and aggregating a large sum, defendant has paid plaintiff usurious and illegal interest to the amount of $6,941.48, and demands judgment against plaintiff for double that amount. The court below on the pleadings dismissed the "cross-action or counterclaim," and ordered judgment for plaintiff for the full amount of the note, with interest from its date, and de-

fendant brings the case here on writ of error. The only question to consider is whether the facts alleged are available to defendant in this action.

The liability of a national bank for taking usurious interest is fixed and defined in the National Banking Act (section 5198, U. S. Revised Statutes [Comp. St. § 9759]), as follows:

"The taking, receiving, reserving, or charging a rate of interest greater than is allowed by the preceding section, when knowingly done, shall be deemed a forfeiture of the entire interest which the note, bill, or other evidence of debt carries with it, or which has been agreed to be paid thereon. In case the greater rate of interest has been paid, the person by whom it has been paid, or his legal representatives, may recover back, in an action in the nature of an action of debt, twice the amount of the interest thus paid from the association taking or receiving the same: Provided such action is commenced within two years from the time the usurious transaction occurred."

Other than this there is no liability, for state statutes of usury are without application. Farmers' & Mechanics' Nat. Bank v. Dearing, 91 U. S. 29, 23 L. Ed. 196. And this liability is enforceable only in a suit against the bank to which the unlawful interest has been paid. Barnet v. National Bank, 98 U. S. 555, 25 L. Ed. 212; Hazeltine v. Bank, 183 U. S. 132, 22 Sup. Ct. 49, 46 L. Ed. 117; Schuyler Nat. Bank v. Gadsden, 191 U. S. 451, 24 Sup. Ct. 129, 48 L. Ed. 258. In the last-named case the Supreme Court says:

"This results from the prior adjudications of this court, holding that, where usurious interest has been paid to a national bank, the remedy afforded by section 5198 of the Revised Statutes is exclusive, and is confined to an independent action to recover such usurious payments."

These decisions cover the instant case and conclusively refute defendant's contention. Its answer sets up no facts which are available as a defense or counterclaim, and the court below was therefore right in rendering judgment for plaintiff on the pleadings.

Affirmed.

BELL & HOWELL CO. v. BLISS et al.

(Circuit Court of Appeals, Seventh Circuit. October 7, 1919. On Petition for Rehearing, December 11, 1919.)

No. 2701.

1. PATENTS ⊂=211(3)—INVALIDITY OF PATENT NO DEFENSE TO ACTION ON LICENSE CONTRACT.
   An exclusive licensee of the right to use a patented machine, the machines to be made and supplied by the licensor for stipulated payments during the term of the contract, cannot dispute the licensor's title, and it is no defense to an action on the contract that the patent is invalid.
2. APPEAL AND ERROR ⊂=1176(2)—COURT CAN DISMISS APPEAL FROM INTERLOCUTORY ORDER.
   An appellate court has power on a proper showing to direct dismissal of a bill, on an appeal from an order granting a preliminary injunction.
3. ACTION ⊂=8—ATTEMPT TO MISUSE POWERS OF COURT TO DELAY ACTION IN STATE COURT.
   A suit for infringement against the owner of another patent and its exclusive licensee will not be entertained by a court of equity, where the

patent sued on was bought by the licensee defendant, and the suit commenced by his direction and at his expense in the name of a dummy complainant, who has no interest therein, for the sole purpose of defeating or delaying actions brought in a state court by the licensor to recover sums due under the license contract.

4. EQUITY ⊂=65(1)—MAXIM OF CLEAN HANDS.
The rule of equity, that a complainant must come with clean hands, is not a matter of defense primarily; but the courts apply it because of the interest of the public, and not as a favor to a defendant.

On Petition for Rehearing.

5. PATENTS ⊂=286—JOINT OWNER MAY NOT BE SUED BY OTHER PART OWNER FOR INFRINGEMENT.
A joint owner of a patent, who has the right to use the same, cannot be sued for its infringement by another part owner.

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

Suit in equity by Donald M. Bliss against the Bell & Howell Company and George K. Spoor. From an order granting a temporary injunction, defendant Bell & Howell Company appeals. Reversed, and bill ordered dismissed.

Appellant entered into a contract with appellee Spoor, whereby the latter secured the exclusive right to use, for a period of five years, a certain machine that embodied a patent held by appellant. It was also agreed that appellant would sell as many machines for $400 each as the licensee might require. In consideration thereof Spoor obligated himself to pay $140,000, in quarterly installments of $7,000 each. Spoor, who was the sole owner of the Essanay Film Manufacturing Company, a film-making company, paid the first four installments, but thereafter defaulted. An action was thereupon commenced, and a judgment rendered against Spoor in the Illinois state court for $28,000. An appeal was taken therefrom and is still pending. At least two other actions were instituted as various installments became due.

While these actions were thus pending, appellee Bliss, the sole complainant, brought this suit against appellant and Spoor, alleging infringement of the so-called Schneider patent, also covering a film-making machine; the usual relief being sought. Briefly stated, the theory of the Bliss suit was that the Schneider patent was prior to and a full anticipation of the Bell & Howell patent; that the latter patent was therefore void, and machines made thereunder by appellant and used by Spoor infringed the Schneider patent. Spoor filed a cross-bill, designated a counterclaim, against appellant, setting forth his contract with appellant, asserting that, if the patent to appellant was invalid, then this contract was void, and in his prayer for relief sought an injunctional order restraining appellant from prosecuting its actions in the Illinois courts, also praying that the contract between him and appellant be declared null and void, and demanding judgment for the $28,000 and interest previously paid.

Appellant by its answer charged appellees with a conspiracy to hinder and delay the collection of the $28,000 judgment, as well as the prosecution of the other actions, and, further charged that the bill of complaint was prepared at the instigation of Spoor; that the so-called Schneider patent was purchased pursuant to an agreement between Spoor and Bliss to assist Spoor in defeating the collection of the amount due appellant under the aforementioned contract.

After issue was joined, appellant moved to dismiss the suit because Bliss "improperly and collusively instituted the cause for the purpose of creating a case cognizable in said United States District Court," and for the further reason "that the plaintiff, Donald M. Bliss, did not come into court with clean

hands, but had been guilty of iniquity touching the matters and things charged in his bill."

Counsel for Bliss moved to strike from appellant's answer the paragraphs charging an unlawful conspiracy between Bliss and Spoor to procure the Schneider patent to hinder and delay the collection of the royalties due under the license contract. Before the hearing was closed, appellant filed additional reasons in support of its motion to dismiss; it being urged that Bliss was only a nominal party, had no interest in the subject-matter of the suit, and that he and one Thompson, agent of Spoor, were guilty of such "iniquity, collusion, champerty, and maintenance" touching the matters charged in the bill as to require the court to deny all relief. Both motions were referred to a master, who heard all the testimony and made a full report.

Upon this report being filed, the court struck out the portions of appellant's answer complained of, denied appellant's motion to dismiss, and later entered an order staying further action in the state court pending the appeal from the first judgment. Appellant on this appeal attacks, not only the injunctional order, but also the refusal of the court to dismiss the bill.

David K. Tone, of Chicago, Ill., for appellant.
John M. Zane, of Chicago, Ill., for appellee Bliss.
David Jetzinger, of Chicago, Ill., for appellee Spoor.

Before BAKER, ALSCHULER, and EVANS, Circuit Judges.

EVANS, Circuit Judge (after stating the facts as above). [1] We find no theory upon which we can sustain the order granting the injunction. The agreement which called for the payment of $140,000, to recover an installment of which appellant brought this action in the state court, was a patent license contract. The two determining paragraphs are:

"The party of the first part hereby gives and grants to the party of the second part the exclusive right to use and to have used the said step printing machine as embodied in the aforesaid letters patent and applications, viz." etc.

"The party of the second part hereby agrees to pay to the party of the first part for the exclusive right to use the step printing machines as herein granted the aggregate sum of one hundred and forty thousand dollars ($140,000.00) consisting of a yearly royalty of twenty-eight thousand dollars ($28,000.00, payable in equal quarterly installments of seven thousand dollars ($7,000.00)," etc.

Other provisions calling for the sale and upkeep of the machines at a stipulated price (in no way involved in any of the state court actions) do not affect the relation of the parties as licensor and licensee.

Such being the position of the parties, Spoor cannot dispute appellant's title. He is estopped by his contract. Chicago & Alton Ry. Co. v. Pressed Steel Car Co., 243 Fed. 883, 156 C. C. A. 395; Siemens Halske Elec. Co. v. Duncan Elec. Co., 142 Fed. 157, 73 C. C. A. 375. It therefore follows that, even though Bliss were successful in this suit in defeating appellant's patent, no benefit would inure thereby to Spoor in any of the pending state court actions. He still would be liable on his contract for these unpaid installments. A reversal of the injunctional order necessarily follows.

[2] Appellant, however, also asks us to dismiss the suit for the various reasons assigned. But our right to so dismiss, even though the injunctional order be vacated, is challenged by appellee, who urges that

on appeal from an interlocutory injunctional order this court is without authority to direct a dismissal.

While many cases may be found where the appellate courts refused to consider the question of dismissal (and for good reasons in those cases), the question of the right to dismiss upon a proper showing is not debatable. Smith v. Vulcan Iron Works, 165 U. S. 518, 17 Sup. Ct. 407, 41 L. Ed. 810; In re Tampa Suburb Railroad Co., 168 U. S. 583, 18 Sup. Ct. 177, 42 L. Ed. 589.

Especially are we justified in considering the motion to dismiss, on the present appeal, for the facts upon which dismissal is asked also necessarily bear upon the question of the alleged abuse of judicial discretion in granting the injunctional order.

[3] Whether we should order a dismissal of the suit, therefore, depends upon the particular facts and circumstances of this case, for a study of which we must more closely examine the findings of the master and the testimony in support thereof. That these findings so made are amply supported by the testimony we are fully satisfied. From the master's report it appears:

That after appellant had obtained its first judgment and pending appeal by Spoor, and after other actions had been instituted against him, Spoor sent his associate, Thompson, to New York to purchase the so-called Schneider patent, for which purpose Spoor advanced $6,500; that such patent was acquired for the avowed object of instituting a suit against appellant, which suit was to be used to defeat or delay appellant's actions in the state court or to force a compromise of them; that Thompson, to more effectively accomplish this object, caused the assignment of the Schneider patent to run to one Bliss, plaintiff in this suit, who was the innocent tool selected to carry out this purpose; that Bliss has no real interest in the patent, and never has had any; in fact, he never hired an attorney to commence suit, nor paid any of the fees, has no voice in the management of the litigation, and is indifferent to the outcome, frankly stating that Thompson agreed to pay all the expenses of the litigation. In short, Bliss stated that he never knew a suit had been commenced in his name, and was ignorant of the contents of the bill as filed.

That this conduct is such as to justify a denial of all relief and a dismissal of the bill can hardly be seriously questioned. The conclusion that the present suit is for the sole purpose of hindering and delaying the proceeding in the state court is most amply supported by the testimony. Nor can the jurisdiction of the state court, upon the facts disclosed and for the relief sought, be questioned. The present suit, then, bluntly expressed, was but a means whereby Spoor, hard-pressed in the state court, using a dummy (Bliss) to conceal his own identity, sought to do indirectly and deceptively what he could not do directly and openly—interfere with the orderly proceedings of the state court. Such action on his part is little less than contempt of that court. Coram v. Davis (C. C.) 174 Fed. 664; Lord v. Veazie, 49 U. S. (8 How.) 251, 12 L. Ed. 1067. That this court should not lend itself to such a purpose, or its aid to such a result will, of course, be at once conceded.

[4] The complainant, entering a court of equity, must come with clean hands. Nor is this court, as argued by counsel for appellees, limited, in applying this maxim, to a case where the iniquitous action is one of which the moving party may personally complain. The rule thus invoked need not be pleaded at all. In fact, it is not a matter of defense primarily. Courts apply it, not to favor a defendant, but because of the interest of the public; courts act sponte sua. 10 R. C. L. 390; Memphis Keeley Institute v. Leslie E. Keeley, 155 Fed. 964, 84 C. C. A. 112, 16 L. R. A. (N. S.) 921; Weeghman et al. v. Killifer et al., 215 Fed. 289, 131 C. C. A. 558, L. R. A. 1915A, 820; Larscheid v. Kittell, 142 Wis. 172, 125 N. W. 442, 20 Ann. Cas. 576.

It may be conceded that the naked legal title to the Schneider patent is sufficient to support a suit thereon by Bliss, but this absence of real interest becomes most material when it further appears that the suit is thus instituted to conceal the identity of the real party and the real object of the litigation.

Another reason in support of the conclusion here reached appeals to us as most persuasive. The real parties plaintiff in this suit are Spoor and Thompson. Confessedly, Bliss only holds the title for them. Upon the testimony before the court, we may not be able to exactly define the precise interest of each; but it affirmatively appears that the two together are the real owners of the Schneider patents. Placing them, then, in their true position, as we are required to do, viz. as complainants in this suit, with the appellant as defendant, we have the anomalous situation of Spoor and Thompson seeking an injunction against appellant for continued infringements committed by Spoor and Thompson. If Spoor and Thompson have any remedy at all, it is not in equity. Future infringements at any time may be stopped by the complainants. If Spoor and Thompson cease using machines, and order no more from appellant, then no further infringement will occur. For past infringements complainants have their remedy at law.

Equity intervenes in patent infringement suits to prevent a multiplicity of actions. Injunctions will be denied, and complainants relegated to their actions at law, whenever the proof fails to show threatened future infringements by the defendant. In the present suit, Bell & Howell infringe only when requested by Spoor and Thompson, the real complainants. Certainly complainants cannot complain of their own conduct, or of actions induced by their conduct.

If this conclusion results in a loss of some or all of their rights under the contract with appellant, then their remedy, if any they have, must be based upon or arise out of the contract. This court will not uphold the present suit, because perchance some one of the parties whose interest is adverse to appellant has, or claims to have, an unstated cause of action against appellant, arising out of a different and distinct state of facts.

The order granting the injunction is reversed, and the cause remanded, with direction to dismiss the bill; the dismissal, however, to be without prejudice to the real parties to institute any suit or action that they may be advised exists in their favor.

On Petition for Rehearing.

In support of a petition for rehearing, counsel for Spoor criticizes that portion of the opinion wherein the court says:

"Another reason in support of the conclusion here reached appeals to us as most persuasive. The real parties plaintiff in this suit are Spoor and Thompson. Confessedly, Bliss only holds the title for them. Upon the testimony before the court, we may not be able to exactly define the precise interest of each; but it affirmatively appears that the two together are the real owners of the Schneider patent. Placing them, then, in their true position, as we are required to do, viz. as complainants in this suit, with appellant as defendant, we have the anomalous situation of Spoor and Thompson seeking an injunction against appellant for continued infringements committed by Spoor and Thompson. If Spoor and Thompson have any remedy at all, it is not in equity; for their infringement at any time may be stopped by the complainants. If Spoor and Thompson cease using machines, and order no more from appellant, then no further infringement will occur. For past infringements complainants have their remedy at law."

This statement is criticized, because Spoor *and Thompson* are said to be the infringers; it being claimed that Thompson is no party to the infringement. This criticism of the statement of fact seems to be well taken. While Spoor testified that Thompson worked for the Essanay Company, owned by Spoor, and was to be paid for film development by "the machine" at a certain rate per foot, it does not appear that "the machine" referred to was the Bell & Howell machine. From the entire record we think it is more correct to conclude that the development work carried on by Thompson at the Essanay plant was by a machine other than the Bell & Howell machine. But infringement by Spoor, instead of by Spoor and Thompson, does afford justification for a change in the conclusion reached.

[5] Counsel urge that, even though the Schneider patent is owned by Spoor and Thompson as tenants in common, Thompson may enjoin future infringement by Spoor, citing Herring v. Gas Consumers' Ass'n (C. C.) 9 Fed. 556, which supports his position. In that case the court says:

"Can a part owner infringe the common patent and escape all liability? * * * *He has, by virtue of the joint ownership, a right to use the patent; but he has no right, more than a stranger, to infringe the same.* If there is an infringement, the right of recovery is in the party wronged. All the joint owners should ordinarily be parties plaintiff; but, if the wrongdoer is the one who is guilty to the damage of the other joint owner, the latter should not be left remediless. As to such infringement they are strangers."

The reasons thus given for the decision are not at all persuasive. If a tenant in common, by virtue of the joint ownership, "has a right to use the patent," as conceded in this opinion, we are at an utter loss to understand why "he has not the right to infringe" the same. The contrary conclusion is supported by numerous authorities. Among them are several decisions by this court. Walker on Patents (3d Ed.) § 294; Aspinwall Co. v. Gill (C. C.) 32 Fed. 697; Pusey & Jones Co. v. Miller (C. C.) 61 Fed. 407; Blackledge & Weir v. Craig Mfg. Co., 108 Fed. 71, 47 C. C. A. 212; Drake v. Hall, 220 Fed. 905, 136 C. C. A. 471; Central Brass & Stamping Co. v. Stuber, 220 Fed. 909, 136 C. C. A. 475.

While this was but one of the reasons assigned in the opinion in support of the reversal of the order entered in the District Court, and the

reversal might well have rested upon the other reasons there set forth, we embrace the opportunity of correcting the opinion so far as we find it in error, and at the same time dispose of the contention in support of the petition for rehearing.

The petitions for a rehearing are denied.

F. LEWALD & CO. v. BARNES.

(Circuit Court of Appeals, Seventh Circuit. October 7, 1919. Rehearing Denied December 5, 1919.)

No. 2714.

PATENTS ⇐328—FOR CUFF BUTTONS NOT INFRINGED.

The Barney patent, No. 885,135, for separable cuff link buttons, *held* not infringed.

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

Suit in equity by C. Clarence Barnes, trustee, against F. Lewald & Co. Decree for complainant, and defendant appeals. Reversed.

Edward Rector and Walter H. Chamberlin, both of Chicago, Ill., for appellant.

Laurence A. Janney, of Chicago, Ill., for appellee.

Before BAKER, ALSCHULER, and EVANS, Circuit Judges.

ALSCHULER, Circuit Judge. The appeal is from a decree finding infringement of United States patent No. 885,135, 1908, to Barney relating to separable cuff link buttons. Infringement is the sole issue. Figures 1, 2, and 3 of the patent are:

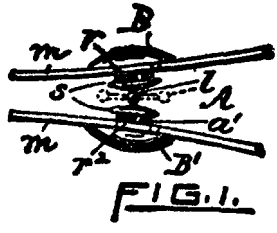

FIG. 1.

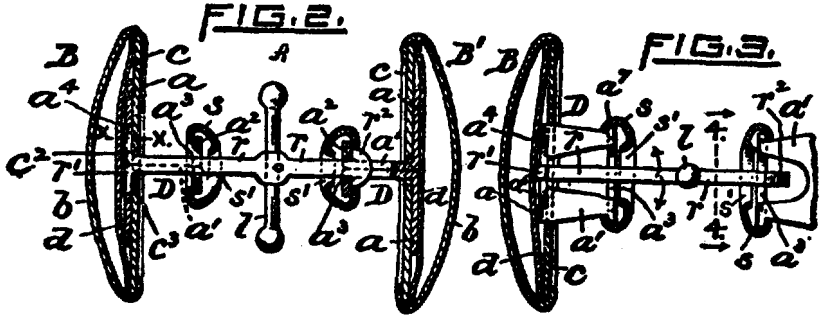

FIG. 2.

FIG. 3.

Fig. 1 shows the button in position, the inner flanges having been passed through the button holes of the cuffs leaving the button faces *B*, *B'* in position, the connecting link flexibly holding the two button members in relatively similar position to accommodate the inclination of the cuff ends *m*, *m*. In Fig. 2 link *r*, *r* is mounted revolubly in the left button member of the figure, its revolution being effected by the small cross-piece *1*, the head *a'* of the free end of the link being inserted through a slot in the other button member, and by means of a quarter turn of the link held by engagement with the inner side of the slot plate, and withdrawable therefrom only by turning the link to bring the head in alignment with the slot. A pressure spring keeps the link from automatically turning, and the revolving of the button members themselves (whereby the link head might become withdrawn and the button members separated) is prevented by the stiffness of the cuff which holds in place between the edges of the button-holes the flat connecting shank between the two flanges of each button member.

Such buttons are useful in that the separate members may be inserted through the buttonholes, and the cuff while on the wrist may be readily fastened by the opposite hand, and unfastened without need of removing one of the button members from the buttonhole, and there is no likelihood when the cuff is not buttoned together, of the separate parts dropping from the cuff.

Concededly the device which the patent describes is useful only in a stiff cuff, with the stiff buttonhole edges of which, as indicated, the device must coact in order to be effective. That this is contemplated by the patent is further manifest from that part of the specification which reads:

"Of course the same result (bringing the head of the link in alignment with the slot so that by revolving the link the head may enter or be withdrawn from the slot) may be attained by simply turning one or the other of the button members *B B'* 90°, but this action is obviously impracticable when they are mounted in the buttonholes of the starched cuff."

Admittedly the device of the patent could not be used for soft cuffs, the buttonholes of which would afford no resistance to the turning of the button members, and their consequent falling apart; and when in about 1910 soft cuffs were coming more in vogue, demand arose for a separable link button for that use. The link of the then commercial Barney button could not be so employed, nor was the special adaptability of the described Barney device to the relative inclination of the two ends of the stiff link cuff a factor in the soft cuff problem, where there was no fixed relative inclination of the cuff ends calling for adjustability or flexibility as between the two button members. Thereupon appellant brought out, and for some years has been making and selling the alleged infringing button designed for soft cuffs and consisting of two parts, each having an outside button head and an inner flange, with a ball produced from the inner flange of one of the parts, adapted to snap into and out of a spring socket in the inner flange of the other button part, the two parts being joined by the ordinary snap joint thus formed, and being attached or separated by manual pressure.

Claim 1 of the patent in suit is as follows:

"As an improved article of manufacture a separable cuff link button, the same comprising a pair of independent button members each provided with a fixed shank terminating in a lateral flange or enlargement adapted to pass through a buttonhole of the cuff and retain said member therein, a swinging coupling member or link mounted on one of the button members and extending longitudinally beyond its flange, and having the free end of said link constructed to engage with the fellow button member for detachably securing them together."

Appellant contends that its button is not within the purview of the Barney conception, and that, even if claim 1 were literally readable upon it, when construed in the light of the prior art and the problem Barney undertook to solve, the claim cannot be held to cover appellant's device. Moreover, appellant insists that in its button there is an entire absence of that element in the claim set forth as "a swinging coupling member or link mounted in one of the button members." It is appellee's contention that this element of the claim is found in appellant's device in the adjustability of the parts by reason of the snap joint not being absolutely rigid, but subject to more or less of movement; that the claim itself does not require the link to swing in the member upon which it is mounted, but that the swinging may take place in the opposite member to which in use it is detachably secured; and that even if, by the terms of the claim, the link swings from the member on which it is mounted, the rigidity of its mounting in appellant's button, and the swinging action in the opposite button member, would be but a reversal of the operation of the parts, whereby no different result is secured, and infringement would not be thereby avoided.

Our study of the record convinces us that Barney was dealing only with a problem of cuff buttons with detachable part, readily conformable to the surface of the stiffly starched link cuff. He had to have such mobility and flexibility of the two parts as would leave them in relatively similar position, not controlling or influencing the shape or inclination of the cuff, but conforming to the cuff surface. This is what Barney described—button members which must have relatively similar adjustability. Of course the old chain or link fastening between the cuff buttons left the buttons to conform themselves to the position of the cuffs, and where the link was rigid to the buttons, the latter were inclined at such angle as would conform approximately to the probable inclination of the cuff. But Barney was trying to accomplish the same result with buttons which might be readily joined or separated as indicated, while the wearer has the cuffs on, and without likelihood when separated of the parts dropping from the cuffs. It is manifest that if, instead of the link swinging in the member in which it is mounted, it had been rigid thereon, Barney's button would have been a failure for use on stiff cuffs, in that whatever flexibility might have been secured through the swinging attachment of the free end of the link to the opposite side, there would be no adjustability of the member to which the link was rigidly attached. If the link were attached rigidly at right angles to one member, and there was mobility only with the opposite member, it is apparent that the rigidly attached button would either

not lie flat against the cuff, or would force that end of the cuff either forward or backward from the other end, so that the ends would not be even.

The scope and law of the invention seem to be well indicated where, referring to the connecting link, the specification describes "a swinging spring pressed rotatable central link or tongue mounted in one of said front heads and extending longitudinally through its shank and back head and being detachably connected in a yielding or flexible manner with the back head of the other button member," thus indicating flexibility and conformability at both ends of the link.

It seems that about 1910 Barney also went to work on the problem presented by the soft cuff, and he then brought out his types E, F, and G, which were offered in evidence, and which some years later came into commercial use; but it is to be noted that while in those types he abandoned the revolubility of the connecting link as described in each of them he retained the element of the connecting link *swinging in the member on which it is mounted.* It does not appear from the evidence that this was necessary for the purpose of producing a button effective for soft cuffs, but whether Barney was or was not aware of this, he still clung to the link which swung on the member on which it was mounted, and as late as 1918 he licensed another model of soft cuff link button which is likewise swingingly mounted on one member, the free end, as in appellant's button being joined to the other member by a snap joint. It does not appear that appellee ever conceived or undertook to make a button wherein the link is rigidly held by the member on which it is mounted.

Buttons composed of separable parts, each having two flanges for inserting in different garments or parts of garments, to be fastened together by the union of the button parts, are old. Newman (patent 227,700, 1880) shows a cuff button in two parts, each having two flanges, one part having a rigidly attached compressable protruding ball to be pressed into a socket in one of the flanges of the other part. True it was not used for so-called link cuffs, but for the ordinary cuffs with overlapping buttonholes; and while the evidence does not show that link cuffs were then in use, all that would be required to adapt it for the link cuff was to put a face on the under side. Indeed even this was not necessary, for the faces need not be the same, being just a matter of choice. Appellant's device is far more nearly an adaptation of Newman than of Barney. Newman's button as shown in his patent would have served link cuffs, not so well as Barney's for the stiff cuffs, but better for soft cuffs.

Buchanan (patent 12,020, 1902) and Marks (712,080, 1902) both show what in principle is very much akin to appellant's button. They are not stated to be cuff buttons, but they show what appear to be two ordinary collar buttons, the head of one constituting a ball or having a rigidly attached ball to be inserted in a socket in the lower flange of the other, whereby one of the parts being fastened into the lower end of a detachable cuff, and the other into the wristband of the shirt, the cuff is readily attachable and detachable by snapping or unsnapping the ball of one of the button parts into or out of the socket in the

other. If such device were inserted in the buttonholes of soft cuffs we would have the same result and the same possibilities as with appellant's button, the matter of shape or ornamentation of the faces not involving invention.

We are satisfied that claim 1 of the patent in suit contemplates as one of its essential elements a link or coupling member which swings in the button member on which it is mounted, and that appellant's device does not embody this element or its equivalent, and it does not therefore infringe.

The decree of the District Court is reversed, with direction to dismiss appellee's bill.

GETTY v. LAYNE et al.

(Circuit Court of Appeals, Fifth Circuit. January 5, 1920. Rehearing Denied February 18, 1920.)

No. 3384.

PATENTS ⊂=328—PATENT FOR WELL MECHANISM VALID, BUT NOT INFRINGED.
The Layne patent, No. 821,653, for well mechanism, *held* valid, but not entitled to the wide range of equivalents of a pioneer patent; also *held* not infringed.

Appeal from the District Court of the United States for the Western District of Louisiana; George W. Jack, Judge.

Suit in equity by Mahlon E. Layne and others against Fred I. Getty. Decree for complainants, and defendant appeals. Reversed.

R. E. Milling, of New Orleans, La., and Francis M. Phelps, of Washington, D. C., for appellant.

Paul Synnestvedt and Harvey L. Lechner, both of Philadelphia, Pa., Jesse R. Stone, of Houston, Tex., J. D. Wilkinson, of Shreveport, La., and Walter P. Armstrong, of Memphis, Tenn., for appellees.

Before WALKER, Circuit Judge, and GRUBB and ERVIN, District Judges:

GRUBB, District Judge. This is an appeal from a decree of the District Court for the Western District of Louisiana in favor of the plaintiffs in the District Court, the appellees in this court, and against the appellant in this court, who was the defendant in the District Court. The effect of the decree was to sustain the validity of letters patent issued to the appellee, Mahlon E. Layne, May 29, 1906, for a well mechanism and numbered 821,653, and also to find that the defendant had infringed the patent by a patented construction of his own. The same patent has been twice heretofore passed on by this court, and its validity twice sustained. El Campo Machine Co. v. Layne, 195 Fed. 83, 115 C. C. A. 115; Van Ness v. Layne et al., 213 Fed. 804, 130 C. C. A. 462. We think the defendant showed no sufficient reason for a departure from our previous decisions sustaining the patent, and that the District Court was correct in determining the question of its validity in favor of the plaintiffs.

The remaining question is that of infringement. The merit in Layne's invention, protected by the patent sued on, was that it provided a pump for deep wells, by avoiding the necessity of having a wide pit at the top of the well, and so was capable of being used in drilled wells, and those drilled narrowly and to a comparatively great depth. Doing away with the wide pit at the top made it necessary that the adjustment and lubrication of the well mechanism be done from the surface, instead of from the bottom of the pit. The problem that confronted Layne was to devise a mechanism that could be placed and kept in position, oiled, and operated from the surface. This required adjustment, lubrication, and protection of the bearings and shaft, after the well mechanism had been lowered into the drilled hole, and without the necessity of the removal of it therefrom. The Crannell patent was intended for use in a wide pit, into which descent was possible, and so Crannell was confronted with no such problem. The limited depth of the pit, in which the Crannell patent was to be used, made it also unnecessary to use a jointed shaft and intermediate bearings. Layne solved his problem by the use of a jointed shaft with intermediate bearings, lubricated from the top to the bottom by gravity, and protected from the water and sand of the well by being inclosed in a casing, which excluded both sand and water from the bearings and shaft. He accomplished its adjustment to vertical positions in the well hole by suspending the shaft, pump and casing from the top of the well, and by a system of wedges holding the well mechanism in position when adjusted. The suspending of the well mechanism from the top also enabled Layne to keep the shaft in alignment through the added stiffness given by the downward thrust of the weight of the pump and shaft. This downward thrust also helped to effect the closure at the lower bearing against the entrance of sand and water. However, the specifications of Layne's patent show that he relied upon stuffing boxes at the top and bottom of the shaft to effect the closure, and to prevent entrance of water and sand, to the detriment of the shaft and bearings.

The twentieth claim of the patent—that sustained in the case of Van Ness v. Layne, supra—covered "the combination of a well casing, a rotary pump therein, and a line shaft for the pump *entirely closed off from the water in the well.*" Validity was given this claim by defining a closed shaft to be one having the three functions of (1) aiding the alignment of the shaft in the well casing; (2) providing for lubrication of the shaft and bearings; and (3) protecting the shaft and bearings from water and sand. The question of adjustment did not enter into the discussion in that case. The closed shaft of the claim was restricted, as above stated, by referring it to the character of inclosed shaft described in the specifications of the patent. It was only by giving the claim this restricted meaning, and limiting it to the description in the specifications, that the claim could be sustained. We must then look to the specifications to determine the character of an inclosed shaft covered by the Layne patent. The shaft there described was a jointed shaft with top, intermediate, and lower bearings, means of adjustment and fixation, means for lubrication, means for alignment in the well,

and means for preventing water and sand from reaching the shaft and bearings. The Layne patent too nearly resembles the Crannell patent to be called a pioneer patent, though it did accomplish a revolution in the well-drilling industry. Its merit was in adapting the Crannell type of pump to a narrow and deep well hole, in a way that has been held by us to exhibit novelty. While the substitution of mere mechanical equivalents for the means adopted by Layne could not avoid infringement of his patent, it is also true that the range of equivalents cannot be enlarged upon the idea that his patent was a pioneer one in the pump art. Its advance over Crannell prevented Crannell from being considered by us an anticipation, and was enough to show novelty, but it stops there. The Layne patent must rest, not upon the idea of closure, which would not be patentable apart from the method by which it was accomplished, but upon the means of its accomplishment, as disclosed by the specifications of his patent. The means which he adopted to accomplish adjustment we are not here concerned with, because the Getty pump has no means of adjustment up and down in the well. It is also true that the Getty pump cannot be held to infringe the means that Layne used to keep his shaft properly aligned, since that was accomplished by suspending the mechanism from the top of the well, while Getty's pump mechanism receives its support by resting on the bottom of the well.

That leaves remaining for consideration the comparison of the respective methods used by Layne and by Getty for lubrication and for closure. Layne's method of lubrication was to put the oil in at the top and to permit it to descend to each of the bearings, and remain stagnant within the shaft casing until ejected from the top after it had become spent by air pressure through an air vent. When it was ejected, it was replaced by clean oil from the top again. On the other hand, the oil was confined at the bottom of the well by use of a packing or stuffing box. Getty adopted a circulatory system of lubrication. By it the oil was also introduced from the top, and descended to the lower bearings by gravity. However at the bottom there was only a partial obstruction to its exit, presented by a long sleeve bearing. Its passage out from the shaft casing was automatic and continuous, so that there was a constant and free flow of lubricant from the top of the line shaft, throughout its length, and out through its bottom. This method was claimed to be necessary to Getty's device, because wear on the upper bearing required a continuous supply of fresh oil for its proper lubrication. These functional differences between the stagnant and circulatory systems of lubrication prevent their being considered as merely mechanical equivalents.

Layne, according to the specifications of his patent, effected his closure at the top and bottom of his shaft by the presence of stuffing boxes, assisted by the effect of a downward thrust bearing and collar. In practice, Layne soon abandoned the use of packing boxes, substituting therefor a long sleeve bearing and retaining the collar. The downward thrust of the weight of the shaft and pump, together with the downward pressure of the column of oil in the shaft casing, accomplished his closure. While the pressure of the column of oil against the out-

ward column of water is now urged by Layne as important in his means of closure, it is true that it is not stressed, as such, in the disclosure of his patent. Principal reliance is there placed on the use of stuffing boxes. Getty's mechanism is free from any such closure devices, either against the flow of oil outward or the flow of water inward, except the long sleeve bearing, without either a collar or the advantage of the downward pressure from the suspended apparatus. Getty relies for closure upon the downward pressure of the oil column balancing the upward pressure of the water column. His mechanism prevents him from availing of packing boxes to effect closure, because they would equally prevent the exit of the oil, which is a necessary feature of his circulatory system. The same reason would prevent his using a thrust bearing with a collar. In addition, the fact that his pump, shaft, and casing are supported on the bottom of the well, and are not suspended from above, deprives him of the downward thrust, due to the weight of the apparatus as a means of closure.

We think Getty has accomplished closure and lubrication by means so functionally different from Layne's disclosure in his patent, that they cannot be said to be mere mechanical equivalents, but rather distinct methods of attaining the same object; the object itself not being patentable. The mere fact that Getty's closure is not complete, or not as complete and effective as that of Layne, is an unimportant fact. The material difference lies in the fact that Layne's patent effects the closure by physical obstructions, such as packing boxes and thrusts bearings, aided incidentally only by the pressure of the oil column, while Getty's partial closure is effected by balancing the pressure of the column of water outside the shaft casing against the pressure of the oil inside the casing, without the use of physical obstruction. The difference is not one without a reason, and adopted merely to avoid infringement. It is made necessary by the different method of support and lubrication used by Getty from that disclosed in Layne's patent. It is true that in the Van Ness Case this court stated that Van Ness used the pressure of the oil column, and did not use packing boxes, to effect closure. Van Ness, however, did suspend his well mechanism from the top of the well, and did use thrust bearings and a collar to help close the bottom of the shaft casing. The mechanism in the El Campo Case, which was held not to infringe Layne's claims numbered 4, 9, and 20, was one that was also supported at the bottom of the well, instead of being suspended from the surface. Referring the closed shaft of Layne to the description in the specifications of his patent, as we must do, we think the differences from Getty's mechanism with respect to means of alignment, lubrication, and closure are so important that Getty's differing means should not be held to be mechanical equivalents, and should not be held to infringe the closed shaft of Layne's patent.

The decree of the District Court is therefore reversed, and the cause remanded to that court for further proceedings in conformity with this opinion; and it is so ordered.

ZIDELL v. DEXTER et al.

(Circuit Court of Appeals, Ninth Circuit. January 5, 1920.)

No. 3389.

1. PATENTS ⇐28—ASSEMBLING OLD ELEMENTS INTO SINGLE DESIGN CONSTITUTES INVENTION.
The fact that the elements of a design patent were old does not establish want of invention in assembling them.

2. PATENTS ⇐328—DESIGN PATENT FOR CHILDREN'S ROMPERS VALID.
The Zidell design patent, No. 52,720, for children's rompers, *held* valid and not infringed.

3. PATENTS ⇐252—DESIGN PATENT NOT INFRINGED BY DISTINGUISHABLE VARIATION OF ELEMENTS.
Where a design invention consists only of bringing together old elements with slight modifications of form, the invention is confined to those modifications, and a person using the same elements with his own variations of form does not infringe, if his design is reasonably distinguishable from the patented design.

4. PATENTS ⇐252—DESIGN PATENT FOR CHILDREN'S ROMPERS NOT INFRINGED.
Design patent for children's rompers *held* not infringed by various garments, each of which had some, but not all, of the elements contained in the patented design.

Appeal from the District Court of the United States for the Southern Division of the Southern District of California; Oscar A. Trippet, Judge.

Patent infringement suit by William I. Zidell against Mrs. Billie Dexter, trading as the Billie Bumps Manufacturing Company, and Arthur Letts, trading as the Broadway Department Store. From that portion of the decree holding that certain garments did not infringe (259 Fed. 582), plaintiff appeals. Affirmed.

Frederick S. Lyon and Leonard S. Lyon, both of Los Angeles, Cal., for appellant.

William R. Litzenberg, of Los Angeles, for appellee Broadway Department Store.

Charles C. Montgomery and Victor R. McLucas, both of Los Angeles, Cal., for appellee Dexter.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

GILBERT, Circuit Judge. The appellant brought suit for infringement of design patent 52,720, issued to the appellant on November 19, 1918, for "children's rompers." The court below held that the patent was valid, and that the defendant Letts had infringed by manufacturing and selling garments of the type described in the proceedings as Exhibit No. 6, but had not infringed in the making and selling of certain other types of garments, known in the record as Exhibits No. 4, No. 5, and No. 8. From that portion of the decree the appellant appeals.

[1] The patent was obtained without specifications or description other than drawings of the design, and it gives to the public no notice that any particular element or group of elements of the design is

predominant. On the face of the design the more prominent distinguishing features would appear to be (1) a square Dutch collar; (2) the ornamentation of collar, wrist bands and knee bands; (3) a belt with large buttons; and (4) the flaring or peg shape of the trousers. The prior art is shown by the Verdi patent, No. 1,255,491, issued October 15, 1917, for a "child's garment," in which is shown a square neck, short sleeves, flaring or peg-shaped skirts, and a belt, all in general resemblance to the appellant's design. Patent No. 47,447, issued to Georgene Averill June 15, 1915, presents a combination of short sleeves, belt, and peg-shaped trousers. Patent 51,674, issued to S. E. Davis January 8, 1918, for "child's one-piece outer garment," exhibits the general features of the appellant's design, with the single exception that the trousers are long and have not the peg shape. An advertisement in a Los Angeles daily paper of May 25, 1917, displays a picture of a one-piece child's garment called "Peggy Jeans," showing a square neck, short sleeves, sleeve cuffs, and belt, and an advertisement in a Los Angeles paper of June 5, 1917, shows a garment called "Klever Kiddie," with Dutch neck, short sleeves, with cuffs, and flaring trousers, with general peg effect. Other advertisements of the year 1917 display similar one-piece rompers with the Dutch neck, short sleeves, sleeve cuffs, belts, and short trousers, the latter full, but not peg-shaped.

It will thus be seen that there is nothing new in any of the features of the appellant's design. He but brought together elements that were old and well known. Single piece child's rompers with belts were old. Square Dutch collars were old. Ornamental stitching was old. Peg-shaped trousers were old. The fact that the elements were old, however, does not prove want of invention in assembling them into a single design, and in view of the fact that the patent was granted, and that the design was favorably accepted by the public, we are not convinced that the court below was in error in sustaining the validity of the patent.

[2-4] In a design invention, which consists only of bringing together old elements with slight modifications of form, the invention consists only in those modifications, and another who uses the same elements with his own variations of form does not infringe, if his design is distinguishable by the ordinary observer from the patented design. This is the conclusion deducible from the leading case of Smith v. Whitman Saddle Co., 148 U. S. 674, 13 Sup. Ct. 768, 37 L. Ed. 606. And in cases where, as here, the elements of the design are all old, and the design is illustrated by drawings only, it has been held that in the absence of specifications the patentee who combines the old elements must be held substantially to the design which he exhibits by his drawing. In Ashley v. Samuel C. Tatum, 186 Fed. 339, 108 C. C. A. 539, it was held that in the absence of a specification calculated to secure to the patentee the predominant feature of his device, with or without ornamentation, the absence of ornamentation as shown in his drawing must be considered an essential element of the design, and it is not infringed by another design which shows such surface ornamentation. In R. E. Dietz Co. v. Burr & Starkweather, 243 Fed. 592,

156 C. C. A. 290, the court said that when a specification is filed with the drawing—

"it must be construed together with the claim and drawing, as is the established rule in respect of other patents. The rules of interpretation are not different from those regulating other patents, and a design claim may (like any other) be restricted to the specific form shown.

And in Ashley v. Weeks-Numan, 220 Fed. 899, 136 C. C. A. 465, the court said:

"The patentee having a patent with written specifications relating to an entirely new form of inkstand, he is entitled, not only to the exact design shown in his drawing of the patent, but also to the protection of the court against the making and marketing of inkstands which contain the dominant features of the design described in the specification."

As already shown, we have no means of knowing which, in the mind of the inventor, was the predominant feature of his design. It seems obvious that one purchaser might be attracted by the shape of the collar, another by the ornamentation stitched on the collar, cuffs, and knee bands, another by the belt with large buttons, and another by the flaring effect of the trousers. The garment known as No. 6 has all of the features of the patented design, excepting that the ornamental stitching is slightly different, and the collar, instead of being made square, is V-shaped. This the court held to be an infringement and the ruling in that respect is not challenged by appeal. Exhibit 4 differs from the patented design in that there is no ornamental stitching on the Dutch collar or cuffs, and no belt with buttons, and it is distinctly different in the shape of the trousers, which, instead of flaring midway, carry side pockets flaring at the top of the trouser legs. Exhibit No. 5 has all the features of the design patent, except that it is not a single piece garment and has no ornamental stitching, and has two front pockets stitched upon the trouser legs. Exhibit 8 is similar to Exhibit 4, except that it has buttons upon the belt.

We do not think that the court below erred in holding that these garments do not infringe. In determining the question of infringement, both the character of the design and the nature of the fabric to which it is applied are to be taken into account. The differences in designs, which under the patent law will avoid infringement, are differences which will attract the attention of the ordinary observer, giving such attention as the purchaser usually gives in buying articles of the kind in question and for the purposes for which they are intended. The evidence shows that at and prior to the conception of this design there were in use and on sale very many similar garments, with variations in design so slight as to leave to the ordinary observer the impression of a very general resemblance, and we must assume that to womankind, who are the purchasers in the main of this class of garment, these various coincident forms of garments were known, and whether such purchasers would be deceived into taking the garments which are alleged to infringe for a garment of the patented design would necessarily depend largely upon that general knowledge. There is no evidence that any purchaser has in fact been so misled.

The decree is affirmed.

A. KIMBALL CO. v. NOESTING PIN TICKET CO.

(Circuit Court of Appeals, Second Circuit. December 16, 1919.)

No. 74.

1. PATENTS ⟸16—ATTRIBUTES OF "INVENTION" STATED.
While patentable "invention" is not a term of legal art, or capable of judicial definition, yet it is a means only, or the embodiment of the inventive idea, and merits the title, even if the want it meets is not apparent until some previous invention, imperfectly satisfying the more universal want, discloses the subordinate and narrower need.

2. PATENTS ⟸328—FOR PIN TICKET DEVICE VALID.
The Thompson patent No. 1,252,862, for an improved pin ticket device to be attached to textile and other articles offered for sale, *held* valid against the contention that it did not disclose invention.

3. PATENTS ⟸17—WHEN MECHANICAL SKILL BECOMES INVENTION STATED.
As a mechanic is one who applies his trade by rule or rote, and only uses what he learned yesterday to do the work of to-day, it may become invention, where a mechanic uses insight or foresight to comprehend a problem, and uses even the learning of yesterday to do new things in a new way.

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

Patent infringement suit by the A. Kimball Company against the Noesting Pin Ticket Company. Decree for plaintiff, and defendant appeals. Affirmed.

Action is upon patent 1,252,862, issued to Eugene W. Thompson January 8, 1918. The subject of invention is a "pin ticket," which means a card or tag intended to bear price marks or other descriptive matter, and affixed to articles offered for sale (usually textile), by means of a piece of wire, so formed as to present a staple whose prongs pass through both card and cloth; but the base of said wire staple is so formed and prolonged (at right angles to the staple points) as to embrace (when bent) the conjoined edges of the pierced cloth and card. The staple ends are then also bent over or back against the rear face of the card.

Of the claims in suit, the sixth defines the invention in most general terms, and is as follows:

"In a pin ticket having a plurality of round-pointed double-shank pins formed of a single piece of wire, the wire between said pins engaging with the ticket to form a support therefor, the shank of said pins passing through the ticket, and the free ends of the wire being bent to engage with both surfaces of the ticket to hold the pins in engagement therewith."

The seventh claim is not sufficiently different to require quotation. The court below found the patent valid and infringed; defendant appeals.

Cyrus N. Anderson, of Philadelphia, Pa., and Walter K. Earle, of New York City, for appellant.

Nathan Heard, of Boston, Mass., and Abr. A. Silberberg, of New York City, for appellee.

Before WARD, ROGERS, and HOUGH, Circuit Judges.

HOUGH, Circuit Judge (after stating the facts as above). Appellant states that the only substantial question here presented is validity; i. e. can invention be found in this "pin ticket"?

We accept the statement, and shall endeavor to answer the query, without bolstering decision by dwelling on the presumption attaching to grant of letters, or the admitted fact that defendant controls and manufactures under another patent, over which priority was awarded Thompson after a protracted interference. Such proceedings assume a belief in validity on the part of both contestants. Roth v. Harris, 168 Fed. 279, 93 C. C. A. 581.

[1] Invention, as we are instructed by the highest court, is not judicially to be defined; i. e., it cannot be determined as to limit of meaning. But many attributes may be marked. Thus patentable invention is a means only; it is the embodiment of the inventive idea (Corrington v. Westinghouse, &c. Co., 178 Fed. 715, 103 C. C. A. 479); and even the smallest invention, if it merits the title, must meet an existing want, yet that want, invoking invention, may never be apparent until some previous invention, imperfectly satisfying the more universal want, discloses the subordinate and narrower need (1 Rob. Pat. 134).

It is this thought that justifies, and indeed compels, study of the prior art, as distinguished from anticipatory patents or uses. To know, not only what the "more universal want" was, but how far and by what means it had been supplied, is a process not seldom resulting in the validation of modest inventions, and the destruction of many of great pretense.

This indicates that "invention" is not a term of legal art, like "common carrier" or "contingent remainder"; nor can applicability be fixed by consulting dictionaries, while reports furnish, not precedents, but only illustrations. What does connect the large word with the perhaps small thing is evidence; and litigations like this become studies of facts, as varying in patent matters as in other human contests.

[2] This record shows that, trivial as the article seems (e. g.) to ourselves, pin tickets have long been a widely used trade adjunct; also that much effort has been expended to produce them cheaply in quantity, yet affixable to a fabric's edge firmly and with ease, without pricking the operator or injuring what is marked.

The "more universal want" has been and still is largely supplied by the "Empire ticket," made under an expired patent (St. John, 340,961). The substantial difference between that ticket and Thompson's device is that the prongs of the latter's staple are formed, not by cutting a wire transversely and making thereby a sharp point, but by doubling the wire back on itself and so producing a smooth, blunt point.

The Bayer reissue, 13,769, shows that making smooth pointed pins by doubling a small wire on itself was known before Thompson; no more is claimed for it. But the tool which rapidly and cheaply makes staple points by cutting wire may leave burrs or roughened edges, which, though usually negligible, cut (e. g.) delicate silk.

Thus the "narrower need" is disclosed, and Thompson is confessedly the first to supply it. Others have tried to; probably Bayer did; but his pin could not hold its ticket firmly, and devices clutching or binding, but not piercing, the fabric, have been put on the market, but without covering the ground.

Here, then, is a want shown to have long existed among intelligent merchants, whose desires are always studied by equally intelligent manufacturers, and the question recurs whether to furnish the means of supplying that want is invention.

[3] It is, of course, urged, and naturally, that no more than a mechanic's skill was needed to take the final step. But a mechanic is one who applies his trade by rule or rote, and only uses what he learned yesterday to do the work of to-day in the same old manner. He may do it excellently, but if he has, not only hindsight, but insight or foresight, first to comprehend the problem and use even the learning of yesterday to do the new thing in a new way, that mechanic has usually earned the inventor's title.

This is what Thompson has done, if the matter be reasoned from the premises of evidence. It is, however, an important evidential element that the trade world to which this little device must appeal, whether of manufacturers or buyers, evidently regards it as important. That word is always relative, and courts and juries should learn its meaning from the evidence, and not their own emotions.

Thus guided by the evidence, we find as matter of fact that the patent discloses invention, and in so doing we arrive at a result not new in this court, and do it in substantially the same way as heretofore. George Frost Co. v. Cohn, 119 Fed. 505, 56 C. C. A. 185; David v. Harris, 206 Fed. 902, 124 C. C. A. 477; Barry v. Harpoon, etc., Co., 209 Fed. 207, 126 C. C. A. 301; Fonseca v. Suarez, 232 Fed. 155, 146 C. C. A. 347.

The decree is affirmed, with costs.

INGLE v. LANDIS TOOL CO. et al.

(District Court, M. D. Pennsylvania. June Term, 1919.)

No. 267a.

1. PATENTS ⊜202(1)—RIGHTS TO PARTLY PERFECTED INVENTION PASSES BY ASSIGNMENT OF ALL PATENTS, ETC.

Assignments, by which a concern transferred a boring machine, together with all patents, drawings, patterns, etc., relating thereto, *held* to convey any rights the assignor had in an unpatented improvement made by one of its employés.

2. PATENTS ⊜93—EMPLOYER ENTITLED TO INVENTION BY EMPLOYÉ.

Where a designer, employed to make improvements in a boring machine, left the results of his work with his employer, and later returned at the request of the employer's assignee to give all necessary assistance in explaining the construction and operation of the machine, etc., *held*, that the employé's rights to the invention passed to his employer under their contract of employment.

3. PATENTS ⊜203—ASSIGNEE'S RIGHTS NOT GREATER THAN THOSE OF PATENTEE.

A patentee's assignee, who was familiar with all the transactions which constituted proof that the patentee had sold his inventive powers to his employers, has no better title to the patent than his assignor.

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

4. BANKRUPTCY ⊂=138(2)—RIGHTS TO INVENTION ACQUIRED BY PARTY CLAIMING UNDER TRUSTEE'S SALE.

Where an employer became bankrupt, and its assets and applications for patents on a boring machine were sold to trustees for creditors, who assigned them to the I. Company, which later sold and assigned them to defendant, and an employé remained in the employment of the employer's successors and completed an improvement prior to the sale to defendant, defendant acquired title to the improvement, whether it was completed prior to bankruptcy or not.

5. PATENTS ⊂=183—RIGHTS TO PARTLY PERFECTED INVENTION GOVERNED BY GENERAL RULES.

The sale of a bankrupt's interest in a partly perfected invention upon which patent had not issued is governed by the general principles relating to bargains and sales, since Rev. St. § 4898 (Comp. St. § 9444), requiring assignments of patents to be in writing, applies only where the patent has issued.

6. PATENTS ⊂=202(1)—ASSIGNEE HOLDS LEGAL TITLE IN TRUST FOR EQUITABLE OWNER.

The assignee of a patentee holds the legal title in trust for the owner of the equitable title.

7. PATENTS ⊂=316—COURT HAS POWER TO REQUIRE ASSIGNMENT OF PATENT IN INFRINGEMENT SUIT TO EQUITABLE OWNER.

Where a defendant set up its equitable title to the patent involved in an infringement suit, the court, having jurisdiction of the parties and subject-matter, may do complete equity between them by dismissing the bill and requiring plaintiff to assign to defendant the legal title to the patent in suit.

In Equity. Patent infringement suit by Arthur H. Ingle against the Landis Tool Company and the Gurney Electric Elevator Company. Bill dismissed, and plaintiff required to assign legal title to patent to the first-named defendant.

Charles H. Howson, of Philadelphia, Pa., Clyde L. Rogers, of Boston, Mass., and James G. Sanderson, of Scranton, Pa., for plaintiff.

E. W. Bradford, of Washington, D. C., and Fred C. Hanyen, of Scranton, Pa., for defendant.

WITMER, District Judge. In this infringement suit, the sole question at issue is one of title or ownership of the improvements in a boring machine, forming the basis of this controversy, and covered by letters patent, on application of William R. Carey, No. 1,244,449.

It appears that the Ingle Machine Company was organized in 1904. Having purchased from Conrad M. Conradson the right to manufacture a horizontal boring machine which he had invented, together with assignments for patents, the company began the building and sale of these machines. The machines were improved through the efforts of the company, and in December, 1913, when it went into bankruptcy, it had pending several applications for patents on improvements, including the application for the basic invention of Conradson. For some time preceding, William R. Carey was in the employ of the company as a designer on the boring machine and other tools, which the company was manufacturing. He was working for the company, and paid as such for his services. In the course of his employment Carey made drawings, consisting of detailed layouts, said to be improvements on the machine, intended to overcome certain defects due to weakness in gearing, approximately as shown in the patent. His work in this particular was about reaching completion, when bankruptcy intervened.

In January, 1914, the assets of the company were sold by order of the bankrupt court to William Gleason, Charles P. Schlegel, and L. P. Willsea, trustees for the creditors. The applications for patents relating to the boring machine were likewise assigned to these trustees on May 29, 1914, and in turn by them assigned to the Ingles Corporation. Carey remained in the employ of the parties during the transfer and completed his undertaking.

On June 4, 1914, Carey having left his drawings in the possession of his employer and found employment elsewhere, the Ingles Corporation sold and assigned to the Landis Tool Company, one of defendants, all of its right, title, and interest in the applications for letters patent pertaining to said boring machine. A final agreement and assignment was made August 13, 1914, in which the Ingles Corporation, as the owner of the Rochester Boring Machine Company, manufacturers of the Rochester boring machine, sold for $10,000 to the Landis Tool Company all the patents, drawings, patterns, special tools, jigs, templets, part lists, advertising matter, and correspondence relating to the manufacture and sale of said boring machine, including the right to use the name under which said boring machines have been manufactured and sold, agreeing to discontinue the manufacture of such machines, as long as the Landis Company chose to carry on the business, and further specifying that, not only the items set forth should be included in the sale and transfer, but "any others which might be classed as belonging to the manufacture of the boring machines and accessories thereto." That the Ingles Corporation sold and intended to transfer to the Landis Company all of its property interest in and to the boring machine, as it was then constructed and in prospect of construction, as well as the business of manufacturing and selling of same, is not doubted. Indeed, there is no one here speaking for the corporation claiming to the contrary.

[1] Though the agreement between the parties is not as full and explicit as it might be, yet it is fully established by the testimony that the Carey improvements and drawings, being an important feature of the machine should pass with the same in the transfer of the property. It was not only so agreed, but, indeed, the drawings and all that was tangible was delivered over by the assignor to the assignee, together with instructions how to avail itself of the alleged advantages and benefits. The conclusion follows that, if the corporation had title to the improvements designed and sketched by Carey, the same were transferred and passed over to the Landis Company.

[2] Whether Carey obtained the right to the monopoly implied in the patent depends upon the character of his employment and the understanding between the parties. Dowse v. Federal Rubber Co. (D. C.) 254 Fed. 308. He was employed as a designer to make the drawings and design certain improvements in detail relating to the construction of the machine, whereby it might be made stronger and capable of doing heavier work in a more satisfactory manner. This is what he accomplished through the aid of others interested in the improvement of the machine. He was paid for what he accomplished, and accomplished what he was paid for—to improve the machine of

his employer, in order that it might have greater value as such, and be more salable as such machine. Though there was no writing to the effect, yet the circumstances attending his employment, the nature of the work he performed, as well as the subsequent conduct of Carey, is convincing that it was not intended that he should retain any personal interest whatever in the result of his efforts in the improvement of the machine.

After bankruptcy intervened, Carey continued his efforts, remaining until shortly before the transfer to the Landis Company. When he changed his employment, he left the result of his undertaking with his employers, drawings and all. After the transfer of the machine, and all pertaining, was fully effected, and delivery of drawings to the Landis Company, Carey, upon the invitation of this company, for a consideration, came from Ohio, where he was then employed, to the company's plant at Waynesboro, Pa., for the purpose of instructing those in charge of the construction of the machine how to make use of and avail themselves of the advantage of his improvements upon it. He remained at the company's plant three or four days, giving every possible assistance regarding the matter of his drawings and their application to the matter to be corrected in the machines then in course of construction and about to be constructed. He was acquainted with the sale and transfer that had taken place, and it could not be otherwise than that he was aware of the full purpose of the Landis Company to push the manufacture and sale of these machines, with the improvements in which he now claims he then had a personal property interest. Without a word of protest, or an inkling of a thought that he was at all interested, he returned home, and later fully and freely wrote the Landis Company concerning further particulars in reference to the matter of his visit and the use of his improvements.

The inference follows that he had no idea then of claiming an interest in what he had accomplished for his former employers, and that, in fact, the product of his labors, as he understood his relations with them, belonged to those who paid him for the very thing accomplished. In this particular there is no doubt that he sold in advance to his employers his inventive powers and all that was accomplished thereby. As was said by Mr. Justice Brewer, in Solomons v. United States, 137 U. S. 346, 11 Sup. Ct. 89, 34 L. Ed. 667:

"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."

[3] Surely Carey's assignee has no better title than he. Ingle, the plaintiff assignee, was acquainted with Carey's employment, and all that was intended thereby to be accomplished, and all that was in fact achieved. He was made acquainted with the sale and transfer of the machine and its belongings from the Ingles Corporation to the Landis Company, as also with the intervening changes in title. He is not a

stranger to what transpired. He was interested in the initial purchase of boring machines, as an officer of the corporation that took his name. He pushed its development, manufacture, and sale prior to the bankruptcy proceeding, and later endeavored to repurchase the same from the Landis Company. His failure to succeed resulted in the letters patent taken out in the name of Carey and assigned to himself. These were intended, and to some extent were used, as a wedge to accomplish his purpose. Though he may have other than fancied grievances, he has no cause to complain of the conduct of the defendants and as to them. If he otherwise possessed the semblance of claim to Carey's invention, he would be estopped from asserting his claim to a monopoly of the improvements claimed by Carey under his letters patent.

[4, 5] But plaintiff argues that, if the Ingles Company had otherwise a right to the assignment of the Carey invention, when bankruptcy overtook Carey's effort, it had not as yet assumed such a stage of development as would impress the same with a property right, or as an asset transferable by the bankruptcy proceedings, and therefore title did not pass out of the Ingles Company.

Whether as an invention it was completed while Carey was in the employ of the Ingles Company, or afterward, while continuing to devote himself to his undertaking in the employ of those who succeeded, by purchase, to the business of the company and the improvement of the machine in question is not important. Surely, at some time, while in the employ of the defendants' predecessor in title, Carey completed his effort, which was at all times, and in all of its stages, the property of his employers, who joined in the transfer to defendant the Landis Company. And whatever may have been its stage of development when bankruptcy intervened is not material, since the property of the bankrupt, the machine and all its belongings, passed in the same manner as any other property acquired. Ager v. Murray, 105 U. S. 128, 26 L. Ed. 942. The sale of the bankrupt's property interest in the improvement, if incomplete or otherwise, and the inchoate right to the exclusive use in the invention, if complete, before patent was granted, is governed by the general principles of the law relating to bargains and sales. Cook v. Sterling Electric Co. (C. C.) 118 Fed. 46; In re Myers-Wolf Mfg. Co., 205 Fed. 289, 123 C. C. A. 441.

There is no provision of law that prevents the assignment of the invention not patented. Such is regarded as other property. The law only takes it out of the ordinary when a patent therefor is granted. Then it is that the statute (section 4898, R. S. U. S. [Comp. St. § 9444]) applies, and requires that the assignment, conveyance, or grant, or whatever interest therein, shall be in writing.

[6] Though the plaintiff, through the inventor, obtained the patent in suit, he holds such legal title in trust for the owner of the equitable title. Dalzell v. Mfg. Co., 149 U. S. 315, 13 Sup. Ct. 886, 37 L. Ed. 749.

[7] The defendant having set up its equitable rights in the answer filed, and prayed for an order requiring the plaintiff to assign the title, which he nominally holds, this court, having jurisdiction of the parties and the subject-matter, will do full and complete equity between them.

It follows that the bill will be dismissed, at the cost of the plaintiff, and in the decree presented an order on the plaintiff may be incorporated, requiring him to assign to the defendant Landis Company the legal title to the patent in suit.

HARVEY HUBBELL, Inc., v. GENERAL ELECTRIC CO. et al.

(District Court, S. D. New York. October 20, 1919.)

No. 265.

1. TRADE-MARKS AND TRADE-NAMES ⟸67—MAKING UNPATENTED PARTS INTERCHANGEABLE NOT UNLAWFUL COMPETITION.
Complainant, a large manufacturer of electrical contact devices, in the absence of protection by patent or trade-mark, *held* not to have acquired an exclusive right in the arbitrarily selected size and shape of the parts of its devices, which precluded other manufacturers from openly adopting such size and shape for the purpose of standardizing and making the parts interchangeable with those of each other and of complainant.

2. TRADE-MARKS AND TRADE-NAMES ⟸93(3)—EVIDENCE INSUFFICIENT TO SHOW UNFAIR COMPETITION.
Allegations of unfair competition, by copying the physical characteristics of complainant's devices, *held* not sustained by the proofs.

In Equity. Suit by Harvey Hubbell, Incorporated, against the General Electric Company and others. Decree for defendants.

W. Clyde Jones, of Chicago, Ill., and Everett N. Curtis and Clifton V. Edwards, both of New York City, for plaintiff.

Frederick P. Fish, Samuel Owen Edmonds, and Hubert Howson, all of New York City, for defendants.

MANTON, Circuit Judge. This bill in equity seeks relief for an alleged invasion of property rights and unfair competition in trade, said to result from the manufacture and sale by some of the defendants named of separable attachment plugs and receptacles. It is claimed that some plugs and receptacles, sold by some of the defendants named, correspond in make and fit with devices produced by the plaintiff.

Two causes of action are alleged in the pleadings and were urged upon the trial:

First. That the plaintiff, by its energy, industry, and expenditure of large sums of money throughout a period of 10 years prior to the filing of the bill, established and built up a system of doing business, constituting a service to its customers, which resulted in good will and business, and the plaintiff now claims that, thus creating a system of service, it has a property right which a court of equity should protect from the invasion of other manufacturers.

Second. That the defendants have copied the distinctive appearances of plaintiff's goods, and have placed them upon the market in such a way and by such devices as are calculated to deceive innocent purchasers, and that by reason thereof they are guilty of unfair trade.

[1] As to the first cause of action, the plaintiff contends that the defendants the General Electric Company and the Bryant Electric Company, and some selling agents named as defendants, have united in a plan of action or scheme to appropriate the Hubbell system, so-called, in violation of the plaintiff's property rights, and that the defendants have entered the market in competition with the plaintiff with a series of devices, plugs, and receptacles, so constructing them as to use the arbitrary dimensions of the interfitting parts, as to interfit and interchange with the plaintiff's devices, thereby interfering with its system and property right, said to be secured to it, with the result that there has been diverted from the plaintiff recurring sales to which it is entitled as a result of the good will and business it has established.

The defendants present the issue by a denial of the existence of such a right as claimed, and further urge that there is no such similarity of construction or of the method of carrying on their business as to warrant the claim of unfair trade. The principal controversy is over the use by the defendant General Electric Company, and the other manufacturers, of parallel contact-making members of the same dimensions and spacing as those characterizing the contact-making members produced by the plaintiff. The defendants admit that they have used the same dimensions and spacing as used by the plaintiff, but contend that this was done in a necessity for and an honest effort to standardize these devices for the benefit of the trade and public, and with no intent to cause any unfair trade to the plaintiff. Concededly, the result is that the defendants' devices are interchangeable with plaintiff's line of devices, such, at least, as employ the parallel form of contact.

The first cause of action alleged presents the question: Has the plaintiff such a property right in a system of service which a court of equity should protect?

The General Electric Company produces a line of devices known in the trade as "G. E. Standard;" the Bryan Electric Company produces a line known as the "Spartan;" and, throughout the trial, comparison as to the shape, form, and manufacture was made between plaintiff's line and the lines of these two defendants. Plaintiff has sold to the public millions of these two-part coacting devices, and its line has found its place in hundreds of thousands of apartment houses, office buildings, and living quarters throughout the country. This was accomplished by plaintiff receiving a fair profit for its receptacles, and, as it says, a larger profit for caps which coact with these receptacles. Thus the plaintiff claims it has sustained great damage to its business.

The evidence in the case shows that separable plugs have been known and were in use prior to 1904. The earliest example of this form was the Weston plug, made under the Weston patent, No. 480,900, granted August 16, 1892. It was on the market for a number of years. The terminals on the plug base appear to be the same as the Hubbell plug No. 5915. The cap, to the binding screws of which the conductor is screwed, is separable from the body, thus enabling the body to be screwed into the socket or receptacle and the circuit completed by inserting

the cap in the body by a straight thrust, thus avoiding twisting the conductor.

Another separable plug, put on the market in 1897 and sold since in substantial quantities, illustrates the terminal charactertistics of the Hubbell plug No. 5915, and the sleeve contacts in the Hubbell early plugs. This, too, had a separable cap with coacting contacts.

The General Electric plugs were of the same construction as the Hubbell No. 5915, except that in the latter the pin and sleeve contacts were replaced by a flat and knife blade contacts; and there is sufficient evidence to justify the claim of the defendant that the separable caps and flat knife blade contacts, arranged in parallel relation and receptacles and sockets adapted therefor, were in common use as early as 1886. Of this the Ft. Wayne sockets, receptacles, and plugs were typical. They were manufactured by the Ft. Wayne Jenney Electric Company. It thus appears that separable parts were united by thrusting the knife blade contacts into the locking contact springs of the receptacle, as is done to-day in the case of both the plaintiff's and defendants' devices. The Ft. Wayne devices were superseded by devices having the terminal styles of the screw ring and bottom plate type. Then followed the novelty plug receptacle, where the contacts were of the pin and sleeve type.

In 1903 came the interchangeable plug receptacles. The Bryant Electric Company brought out one having a flush surface receptacle, as illustrated in their catalogue of 1902, at pages 60, 61. This provided for the fitting of the plugs or caps interchangeably into any of the receptacles of the line.

In 1904 Hubbell brought out his separable or detachable caps, thus permitting the cord to be connected to the body without twisting, and permitting an interchange with a line of receptacles; but at this time there were already out for public use, both the pin and sleeve form and the flat knife blade form. The blades were arranged in both tandem relation as well as parallel relation. At this time, undoubtedly, the favorable form was to provide for the connection to be made by thrusting rather than turning. About this time there came into vogue the more frequent use of the electric fan, heating and cooking devices, hair curlers and irons, as well as other devices where electricity was used.

In 1906 the Benjamin Electric Company brought out a small nonseparable swivel plug, which was customarily used. Plaintiff brought out five different types of contacts. Thus the different types of contacts became more diversified, and there was, therefore, no unit of that line interchangeable with a similar unit of any of the complete lines. The plaintiff has established its line of interchangeability, so far as its caps and sockets and receptacles were concerned. The defendant General Electric Company had established its own line, providing for a mechanical interlocking between the male and female contacts, having the contact dependent upon friction, and with the flat knife blade form, such as is illustrated in the Ft. Wayne plug. The Bryant Electric Company brought its line of surface plug receptacles and its Chapman receptacle.

Hubbell adhered to the pin and sleeve form of contact, and provided pins with necks or depressions to effect the locking engagement with

the female contacts, and concealing its female contacts. Presumably, the insulation of the plug body covered the ends of these contacts, to guard against short circuits. Hubbell produced the knife blade contacts after 1904, and then employed the blade contacts down to the commencement of this suit. It changed its contacts from the turning form to the thrusting form. The plaintiff did this under the protection of its own patents, Nos. 774,250 and 774,251, and also claimed protection under the Weston patent, No. 480,900. It had a license under the latter patent. Thereafter the plaintiff placed upon the market a smaller size and less costly plug designed in several types, and in 1912 it brought out its parallel blade cap No. 5915, which is in issue in this case. This provides parallel arrangement of blades and slots, such as are found in the General Electric plug, "G. E. 062." The cap of Hubbell's No. 5915 is interchangeable with the cap of "G. E. 062" plug, and fits into the body of the latter with serviceable contact.

In 1914 both tandem bladed caps and parallel bladed caps with receptacles with double contacts, so as to coact with caps of either sort, were brought out. There was then provided the four-window construction of receptacle, having two tandem slots and two parallel slots. This was protected by the Burton patent, No. 1,169,613. In October, 1914, plaintiff brought out the "double T" or "T-T" form of receptacle. In 1916 the plaintiff brought out coacting plug caps having blades arranged at right angles. These would coact with T-T slots, as would the Hubbell tandem blade caps.

In 1915 it is estimated that 85 or 90 per cent. of the business was being done by the plaintiff, the General Electric Company, the Bryant Electric Company, and four other concerns, who were licensees of the General Electric Company and the Bryant Electric Company. There were other companies in the field doing the balance of the business. There were from 15 to 20 different types of blades, and from 15 to 30 different types of receptacles. The line of each was not interchangeable with a competing line. The Hubbell Company was producing and disposing of the larger proportion caps and receptacles.

Then it was that the defendants claim there was public demand for standardization. Undoubtedly, it was costly to the public to have non-interchangeable plugs, caps, and receptacles. There was a need for standardization, as is best illustrated by the activities of the International Electric Light Association. The manufacturers, including the plaintiff, entered into a conference, and discussion was had as to the method of standardization. Plaintiff rebelled against standardization, using its type of cap and receptacle with the dimensions as, it says, arbitrarily selected by it for the manufacture of its line. With the plaintiff refusing to standardize, the defendants selected its dimensions and method of contact, and standardized upon the plaintiff's type of blade.

Plaintiff had sold, at this time, approximately 13,000,000 receptacles and plug bases having tandem slots; also approximately 18,000,000 tandem blade caps adapted to coact with those receptacles and bases, and had sold nearly 1,250,000 receptacles and plug bases having parallel slots, and an equal number of parallel blade caps adapted for coaction therewith. In this it was easily the first (in numbers) in putting

in public use a single type of plug or receptacle. Most of the plaintiff's tandem and parallel devices were in actual use in 1915. For this reason, and because the public had so largely invested in caps and plugs of this type, defendants say that they felt the obligation to standardize upon the Hubbell caps; and the defendants contend that they have adopted a noninfringing construction which the public might use interchangeably with plaintiff's, because they employ the same dimensions and spacing of the contact.

There is no question of infringement of patent involved in this issue. As a result, 85 per cent. of the production of the country is now interchangeable. The defendants' caps and plugs are plainly marked, so that any reasonably intelligent purchaser can easily discern the type of plug he purchases. The marks are plain and unmistakable.

Under these facts, I am of the opinion that plaintiff has no exclusive right to manufacture caps and receptacles of these dimensions and spacing of contacts. Its competitors should have the right to make plugs and receptacles with contacts of any size and shape they desire, even if by so doing it will permit of an interchangeability with the Hubbell line. If the plaintiff had popularized some unnecessary and purely nonfunctional features of its productions, these could not be appropriated without its consent. If it had secured a trade-name, such as "Hubbell's," it could not be appropriated, or if it was protected by valid patents it would be entitled to immunity from infringement. These are not the rights which are here sought to be enforced. The plaintiff asserts a common-law property right, and on what it claims to be the best dimensions for the purpose in the spacing of the contacts.

In Marvel Co. v. Pearl et al., 133 Fed. 160, 66 C. C. A. 226, it was said:

"In the absence of protection by patent, no person can monopolize or appropriate to the exclusion of others elements of mechanical construction which are essential to the successful practical operation of a manufacture, or which primarily serve to promote its efficiency for the purpose to which it is devoted. Unfair competition is not established by proof of similarity in form, dimensions, or general appearance alone. Where such similarity consists in constructions common to or characteristic of the articles in question, and especially where it appears to result from an effort to comply with the physical requirements essential to commercial success, and not to be designed to misrepresent the origin of such articles, the doctrine of unfair competition cannot be successfully invoked to abridge the freedom of trade competition. The enforcement of such a claim would permit unfair appropriation, and deny the exercise of the right of fair competition." 133 Fed. 161, 162, 66 C. C. A. 227.

In Meccano v. John Wanamaker, New York, 250 Fed. 450, 452, 162 C. C. A. 520, 522, Judge Ward, speaking for the Circuit Court of Appeals, said, where a somewhat similar claim to that now advanced by the plaintiff was made:

"The complainant cannot obtain a monopoly for all time of perforated plates of the lengths having equidistant holes and intervening spaces which it first used. These are functional features of the units of construction, which any one is at liberty to use. Of course, it cannot claim a monopoly of constructing the particular models or toys which it has made, as, for example, wheelbarrows, bridges, cranes, Ferris wheels, trucks, etc. Assuming that the public associates plates of this description with the complainant as a source, and

that there is likely to be confusion because of similarity of the outfits, it is a question whether it is entitled, within the decision of the Supreme Court in Singer Co. v. June, 163 U. S. 169, 16 Sup. Ct. 1002, 41 L. Ed. 118, to more protection than that outfits made by others should be advertised and sold as the product of the makers, under names and in packages which do not simulate the complainant's. This is true of the outfits which the defendant sells. The name of the complainant's is 'Meccano,' and of those sold by the defendant 'American Model Builder.' They are advertised as made by the American Mechanical Toy Company, and sold in dissimilar packages. So, in the nature of things, the constructing elements and the things constructed being the same, the plates illustrating them and the instructions contained in the manuals furnished with the two outfits must be more or less alike. All that should be required of other makers is to do independent work."

No court has ever gone to the extent of permitting the establishment of a monopoly of proportions or measurements, in the absence of some patent protection. To do so would be practically to engross the particular business. Distinguishing marks may be adopted to denote the origin of production, or some peculiar method of distinguishing goods, and thus secure the benefit of good reputation which it has acquired from such use or practice. The public have the right to make separable plugs, and, from the nature of the requirements, they must have a resemblance in form, dimensions, and appearance. No one should have the exclusive privilege of selecting measurements, even though arbitrarily selected, and thus establish a particular spacing of the contacts to the exclusion of others. To do so would be to stifle competition.

The plaintiff here does not rest upon the adoption of special characteristics of any kind, but of features which pertain to the article made and sold. Nor is this in conflict with the now well-established rule that, if an article has a leading and striking characteristic, which characteristic is designedly given by its maker, and advertised and exploited, and afterward recognized, particularly by purchasers, because of such characteristic, the right to make and use the characteristic can be protected by an action, if an imitation is perpetrated. This rule finds its support in what is referred to in the cases as nonfunctional unfair competition. It presupposes that the appearance of the article, like its descriptive title, has a secondary meaning, and has been associated in the public mind with the first comer as a manufacturer or source, and if a second comer imitates the article exactly, so that the public will believe his goods have come from the first and will buy, in part at least, because of that deception, the court will enjoin the second comer. Crescent Tool Co. v. Kilborn & Bishop Co., 247 Fed. 299, 159 C. C. A. 393. In this case it was said:

"The defendant has as much right to copy the 'nonfunctional' features of the article as any others, so long as they have not become associated with the plaintiff as manufacturer or source. The critical question of fact at the outset always is whether the public is moved in any degree to buy the article because of its source and what are the features by which it distinguishes that source."

The authorities relied upon by the plaintiff are not in conflict with these views.

In International News Co. v. Associated Press, 248 U. S. 231, 39 Sup. Ct. 68, 63 L. Ed. 211, 2 A. L. R. 293, the conceded evidence which caused the court to grant its protection indicated that the de-

fendant's acts amounted to fraud and bribery. The Supreme Court stated that the complainant had a property right in the news which it secured in the conduct of its business, and restrained the defendant from bribing the employés of the complainant to release the news to the defendant. There is no question of fraud, or palming off by the defendants in this issue, nor is there any claim of deception advanced upon this theory of the case.

In the case of Searchlight Gas Co. v. Prest-O-Lite Co., 215 Fed. 692, 131 C. C. A. 626, mainly relied upon by the plaintiff, the complainant had established a system of service in the sale of its Prest-O-Lite tanks with the right of having them refilled; that is, a new tank filled and given in exchange for the old, at the price alone of acetylene gas. The purchase included the right to return the old tank. There the defendant, with what the court found to be fraudulent intent, sold similar tanks and merely removed the paper sticker from over the Prest-O-Lite name, and turned the misused tank back to the plaintiff, thus using the plaintiff's tanks and selling the defendant's gas. The plaintiff there repaired, at its expense, the tank which had been used by the defendant, and by which method defendant secured profits. It was a fraudulent and deceitful practice, and the court enjoined its continuance. The court, by injunction, simply required the defendants to sell their products under their own name, and did not enjoin anything other than the fraud which was perpetrated. The defendant there was permitted to sell, using its own Prest-O-Lite tanks and its gas with proper labels. This was far from granting immunity from competition.

In Fonotipia Co. v. Bradley (C. C.) 171 Fed. 951, the plaintiff had gone to great expense in preparing musical records of the voices of great artists, and from these produced the commercial records which were sold to the public. The defendant simply copied copies of the original records and put them on the market, advertising that they were all duplicates of the original records made by the artists. This was a fraud and deception, and was enjoined.

In the so-called scalper ticket cases (Nashville Ry. Co. v. McConnell [C. C.] 82 Fed. 65; Illinois Central v. Caffrey [C. C.] 128 Fed. 770; Penn. Co. v. Bay, 150 Fed. 770) nontransferable railway tickets were sold. They were sold, and the transferee went before the validating agent, had them validated, and sold the tickets. An injunction was granted against the ticket sellers' continuation of this business method (scalpers). These cases had all the elements of fraud and deceit. The conductors accepted the fraudulently resold tickets, and were deceived in the belief that the passenger, who had a contract as an original vendee, was exercising his right under his contract of carriage. Because they were return tickets, they were sold at a reduced rate, and the railroad company was thus cheated out of the full and regular fare.

In the trading stamp cases (Sperry & Hutchison Co. v. Mechanics' Clothing Co. [C. C.] 128 Fed. 800; Same v. Temple [C. C.] 137 Fed. 992; Same v. Louis Weber, 161 Fed. 219) there was a deliberate interference with a special contract made between the plaintiff and stores which were giving the trading stamps to their customers. The defendants deliberately sought to induce the merchants to break their

contract, and the court held them to be guilty of fraud, saying that by their advertisement they deceived the public. An injunction was granted because there was unfair and fraudulent interference with the contracts and the property protected by the contracts.

The record of the case under consideration discloses no palming off of goods or attempt thereto. Nor does it indicate that by advertising or otherwise did the plaintiff retain any property right in the caps or receptacles when sold. There was nothing in the nature of a mere licensee in the sale. It was an absolute exchange of the commodity for the money received, and the vendee acquired absolute property rights in the articles which he purchased, unrestricted in any way. Nor can I find from the record that the caps or receptacles were sold from their appearance alone. Indeed, the distinguishing features are said to be in the concealed contact slots and nicked edge blades. These are recognized in the trade as the main characteristics of the various devices of the plaintiff, and by such they are recognized and distinguished from competing devices, and therefore a means of identification of plaintiff's production.

I conclude, therefore, that plaintiff has no common-law property right, as it claims to have, and it cannot succeed in its position on this branch of the case.

[2] Unfair competition is alleged as against the defendants in copying the physical characteristics of some ten of Hubbell's devices. They are as follows:

(1) The Hubbell hemispherical cap with knurled edge and base with nickeled sleeve.
(2) Hemispherical brass-covered cap.
(3) Elongated cap.
(4) Cord connector.
(5) Motor plug with cylindrical cap.
(6) Brass-covered chandelier plugs.
(7) Cylindrical lamp receptacle.
(8) Flush receptacles with black centers and brass plate.
(9) The use of the word "Duplex."
(10) The use of the word "Standard."

The caps and receptacles are sold largely to jobbers and men who are familiar with the trade. Each manufacturer has plainly visible his trade-name, so that it is easy for a purchaser to tell which he is buying. Hubbell has a distinctive characteristic, as pointed out, which the trade all know. I have examined carefully the physical exhibits which are involved in each of the above 10 claims, where it is said defendants have copied the devices of the plaintiff. Without dealing with each specifically here, I am satisfied that there is no such palming off or even copying of the physical exhibits as to present an actionable wrong. There is no such copying of lines. The plaintiff, in all its advertisements, made plain the distinguishing characteristics of its plug. I find nothing which would warrant an interference by a court of equity because purchasers have been deceived or plaintiff's rights infringed. Shredded Wheat Co. v. Humphrey Cornell Co., 250 Fed. 960, 163 C. C. A. 210.

For these reasons, a decree will be granted to the defendants.

JOST v. BORDEN STOVE CO.

(District Court, E. D. Pennsylvania. January 2, 1920.)

No. 1909.

1. PATENTS ⟸118—COMPLIANCE WITH STATUTORY REQUIREMENTS NECESSARY.
No one has the right to a patent, without complying with all the conditions set forth in Rev. St. §§ 4886, 4887 (Comp. St. §§ 9430, 9431).

2. PATENTS ⟸282—ACTION FOR INFRINGEMENT BASED ON ISSUANCE OF PATENT.
A patent infringement suit is based, not on the fact that plaintiff may be entitled to a patent, but on the actual issuance of a patent to him.

3. PATENTS ⟸312(3)—GRANT OF PATENT AND INFRINGEMENT AS PRIMA FACIE CASE.
In patent infringement case, evidence of the grant of the patent and of infringement presents a prima facie case, which defendant must overcome to prevent plaintiff securing a decree.

4. PATENTS ⟸310(7)—ATTACK ON VALIDITY OF PATENT MATTER OF DEFENSE IN INFRINGEMENT SUITS.
In patent infringement suits, the grounds specified in Rev. St. § 4920 (Comp. St. § 9466), on which defendant may attack the validity of the patent, are purely matters of defense.

5. PATENTS ⟸310(1)—PLAINTIFF MAY ESTABLISH ONLY PRIMA FACIE CASE OR FORESTALL DEFENSE.
In patent infringement suit, the plaintiff may, if he chooses, confine his case in chief to establishing a prima facie case, or he may forestall the defense by presenting his whole case in chief, but he is not required to negative possible defenses.

6. PATENTS ⟸310(1)—NECESSITY OF PLEADING THAT INVENTIONS HAD NOT BEEN ABANDONED IN INFRINGEMENT SUIT.
In a patent infringement suit, a bill is not defective for failure to allege that the invention had not been abandoned to the public, since this is purely a matter of defense, which the defendant may raise under Rev. St. § 4920 (Comp. St. § 9466).

7. PATENTS ⟸310(9)—DETERMINING ADMINISTRATRIX'S RIGHT TO SUE FOR INFRINGEMENT.
In a patent infringement suit, defendant's contention that title to the patent was not sufficiently alleged to be in plaintiff, who was the inventor's administratrix, raises only the question of a possible variance, and cannot be determined on a motion to dismiss the bill before proofs have been offered.

In Equity. Suit by Estelle C. Jost, administratrix of John Frederick W. Jost, against the Borden Stove Company. On motion to dismiss the bill. Denied.

Mark W. Collet, of Philadelphia, Pa., for plaintiff.
William Steell Jackson, of Philadelphia, Pa., for defendant.

DICKINSON, District Judge. Whenever two things, however essentially different, come (as is often the case) to be the same in results, all thought of difference is likely to be dropped, and the differences ignored.

[1-3] The present motion is based upon such suppression of the thought of a difference between letters patent which have been granted and the right to the patent or its validity. The difference is, of course, obvious. No one has the right to a patent without bringing himself

within all the conditions set forth in R. S. §§ 4886 and 4887 (Comp. St. §§ 9430, 9431). Without the patent he has no property right upon which any one could trespass. Having that property right, he has a cause of action against any one who infringes. In other words, his cause of action depends, not upon whether he is within the provisions of the patent laws, and, in consequence, possessed of the right to a patent, but whether a patent has in fact been granted to him. It is true the right he claims may be open to question, and the validity of his patent to successful attack; yet nevertheless the real condition of things is that without the patent he has nothing, but with it he has all the rights which it grants, until the invalidity of the patent appears. Hence we have the accepted doctrine that evidence of the grant of a patent and of infringement presents a case which, if made out by the evidence, the defendant must overcome, or the plaintiff is entitled to his decree.

[4] The logic of the doctrine that the case of the plaintiff depends upon the patent he holds, and not upon the facts which give him the right to the grant of a patent, is that the issue, which this feature of the case presents, is that of patent or no patent, or, in other words, the production of his patent is conclusive of his patent rights, which are not open to collateral attack.

This would necessarily be the law of the trial of patent cases, as it would be of any other like cases, except for the fact that this law has been changed by statute, and R. S. § 4920 (Comp. St. § 9466), permits the defense to attack the validity of the patent on the grounds set forth. It is perfectly clear, however, that these are purely matters of defense.

[5] The conclusion from the above cannot be resisted that a plaintiff (as to this branch of his case) may confine his pleadings and proofs to the grant of a patent to him. It happens that the facts permitted to be shown in defense are the same facts, and necessarily must be at least some of the same facts, upon which the right of the plaintiff to his patent depends.

This, and the trial conditions next stated, have brought about whatever confusion of thought upon this subject exists. Trials, like all other combats, have their principles of strategy and of tactics. It is the right of a plaintiff to confine, if he chooses, his case in chief to the establishing, as it is called, of a prima facie case. The defendant must then answer it, to which answer the plaintiff may reply. Knowing, however, what the defense will be, he may deem it to be good trial tactics to present his whole case in chief, and undertake the proof, not only of the issue to him of a patent, but also of the facts upon which his right to it ultimately depends, thus forestalling the defense. Viewing the pleadings as the field of strategy, as the trial is of tactics, he may plan the battle on either of the lines suggested in the same way, by setting forth his whole case or only a prima facie case. It is apparent that the ultimate results (if a defense is made) are the same, as the plaintiff must appear, not only to have, but to have a legal right to have, a patent. It is also apparent that the only practical difference produced is in respect to the course of the trial. It does not follow, however,

that because the plaintiff may thus anticipate the defense, by averring and proving facts which it will set up, that he is bound to do so, and the conclusion, before suggested, that he is not required to negative any or all possible defenses, still holds.

[6, 7] Thus the question before us seems to stand upon principle. We have stated it in the abstract. In the concrete, it may be thus presented: The plaintiff has not in her bill, which is the statement of her cause of action, averred, among other things, that this invention had not been "abandoned to the public"; nor has the plaintiff, who sues in a representative character or capacity, averred "in ipsissimis verbis that the title to the patent was in the administratrix of the inventor, who is the plaintiff in this action."

We have chosen these two grounds of the motion to dismiss as typical. The first raises the question of law, which we have discussed, and very squarely raises it, because abandonment is one of the defenses which R. S. § 4920, permits. We do not understand just what the other ground is (not having access to the verbiage of the bill); but, giving to this part of the motion any of the meanings it may have, the result remains that it goes at most to the assertion that there will be a variance. This we cannot determine now, having only the allegata before us, nor until the probata appear.

It remains only to see whether the conclusion reached (that this motion be denied) is in accord with the decided cases by which we are controlled. It is to be observed that many of the later cases discuss the question of pleading presented as affected by the equity rules of 1912 (198 Fed. xix, 115 C. C. A. xix). Indeed, counsel so discuss it. This is, of course, one way of meeting it; but it does not cover the whole ground.

One evident purpose of the equity rules was undoubtedly to simplify pleadings and curtail verbosity, but the necessity of setting forth a cause of action still remains. The fact statements, upon which the cause of action depends, must still be made, although now they are limited to the ultimate facts. Whether the bill in a patent case is restricted to the statement of the grant of a patent, or expanded to include a statement of all the facts which enter into the question of validity, does not of itself indicate compliance or noncompliance with the requirement to make only ultimate fact statements. The real question, in consequence, goes back of the present equity rules. Nor do we see that the cases which rule that a plaintiff may set forth all the ultimate facts upon which his cause of action in the end depends, without the bill being open to the charge of the averments being surplusage, necessarily rule either that he is bound to so set them forth, or that he might not confine himself to the statement of such ultimate facts as establish a prima facie case.

The conclusions reached we think to be in accord with the decided cases, among which are those cited in the respective briefs of counsel. Even these are too numerous to be even listed. In consequence, we limit ourselves to a few of them. Fichtel v. Barthel (C. C.) 173 Fed. 489; American v. Orient (C. C.) 145 Fed. 649; Pittsburgh v. Beler

(D. C.) 222 Fed. 950; McCoy v. Nelson, 121 U. S. 484, 7 Sup. Ct. 1000, 30 L. Ed. 1017; Bayley v. Braunstein (D. C.) 237 Fed. 671; Schaum v. Copley (D. C.) 243 Fed. 924.

The motion to dismiss is denied.

In re LOEN.

(District Court, W. D. Washington, N. D. December 27, 1919.)

No. 5943.

ALIENS ⇐65—ALIEN WHO SURRENDERED DECLARATION OF INTENTION TO EVADE MILITARY SERVICE NOT ENTITLED TO CITIZENSHIP.

Though applicant, who had declared intention to become citizen, surrendered same and made affidavit of willingness to return to Norway, his native country, in support of military exemption claim, was inducted into military service, and before his claim was disposed of the armistice was signed, and he was discharged, *held* that, despite Act June 29, 1906, § 4, as amended by Act May 9, 1918 (Comp. St. 1918, § 4352), and by Act July 19, 1919, providing for admission to citizenship of any person of foreign birth who served in the military or naval forces in the United States and had been honorably discharged, applicant cannot be admitted to citizenship; his conduct showing desire to avoid burdens of citizenship, instead of loyalty to United States.

Naturalization Proceeding. In the matter of the application for citizenship of Knut Sigfred Loen. Application denied with prejudice.

John Speed Smith, Chief Naturalization Examiner, of Seattle, Wash.

NETERER, District Judge. This applicant, at the time of registration for war service was 23 years old. He had declared his intention to become a citizen of the United States. For the purpose of avoiding military service, he surrendered his declaration of intention to the Norwegian consul, to be forwarded to the department at Washington, D. C., and made an affidavit of his willingness to return to his native country, in support of his exemption claim, on the ground of being an alien. His exemption was disallowed by the local board, and he was inducted into the army at Camp Lewis, and before his claim could be acted upon by the departments at Washington, D. C., the armistice was signed. During the time applicant was in the service, he declined to become a citizen, although requested to do so at Camp Lewis. He knew that during the time he was at Camp Lewis special sessions of United States court were held at Camp Lewis for the convenience of soldiers to become citizens, and many thousands were naturalized.

Applicant filed his application for citizenship under Act July 19, 1919, c. 24, § 1. Section 4 of Act June 29, 1906, c. 3592, 34 Stat. 596 (Comp. St. 4352), provides that any alien may be admitted to citizenship who immediately prior to his application "has resided continuously within the United States for five years, and within the state where the court is held one year, and that during the time he has been "a

man of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the same." Section 4, subd. 1, of this act, provides that an alien shall declare on oath before the clerk of any court authorized to naturalize aliens, two years at least prior to his admission, that it is bona fide his intention to become a citizen of the United States, and a willingness to forfeit all allegience and fidelity to foreign sovereignty. This act was amended May 9, 1918 (40 Stat. 542, c. 69 [Comp. St. 1918, § 4352]), by adding the seventh subdivision, by which it is provided:

"Any alien serving in the military or naval service of the United States during the time this country is engaged in the present war may file his petition for naturalization without making the preliminary declaration of intention, and without proof of the required five years' residence within the United States."

On July 19, 1919, this subdivision 7 was amended by providing that—

"Any person of foreign birth who served in the military or naval forces of the United States during the present war, after final examination and acceptance by the said military or naval authorities, and shall have been honorably discharged after such * * * service, shall have the benefits of the seventh subdivision of section 4 of the act of June 29, 1906, * * * as amended, * * * and this provision shall continue for the period of one year after all the American troops are returned to the United States."

The applicant claims that he was honorably discharged, and that this application is timely, and that he should be admitted. The application is within a year, and he bears an honorable discharge.

Is the examination of the court as to the applicant's qualification for citizenship limited to the timeliness of the application, and to the discharge, or is the duty still imposed upon the court to determine whether the applicant comes within the other requirements of the law? The exceptions in favor of an honorably discharged soldier appear to be definitely and clearly pointed out, and limited to proof of residence and declaration of intention, as far as the present inquiry is concerned. All of the requisites except residence and declaration of intention must therefore be met by the applicant, as the only limitation placed upon the court, as far as concerns us here, is with relation to declaration of intention and residence. The applicant never left the training camp. So far as appears, no further disposition was made of his claim for exemption by the departments at Washington.

In the instant case, the applicant had declared his intention to become a citizen, and under oath declared his willingness to renounce all allegiance to foreign sovereignty. By that oath he solemnly swore it to be his bona fide intention to transfer his citizenship and allegiance. This implied willingness and intention to defend the flag, to support the Constitution and laws of the United States; and, when invitation was extended, he declined to do so, thereby repudiating his declared intention, and asserted under oath preference for his native country. He failed to meet the test. Nothing appears to indicate a change of sentiment or feeling of regret.

Citizenship and allegiance to this country are made of sterner stuff. He is not fitted to take the oath of allegiance. Interpretation of the oath of allegiance is more than a mere formula of words. It is the

translation of the alien applicant for citizenship from foreign language, foreign history, foreign ideals, and foreign loyalty, into a living character of our language, of our history, of our life, of our ideals, and loyalty to our flag. It is that intellectual, spiritual, patriotic development of love for the United States, his adopted country, and its Constitution and laws, which moves him in sincerity to dedicate his life to its service, and conscientiously agree to defend it against all enemies and the implanting in his soul of a sincere determination that in the hour of danger or attack upon the Constitution or the flag, to devote to their defense and support unlimited loyal service to the extent of his life, if required. Any person unwilling to pledge his hands, his heart, his life, to the service and preservation of the government of the United States, first and always, is unworthy to be admitted to citizenship.

The proof does not show the applicant's loyalty to our flag and his willingness to defend it. This applicant, when the flag was assaulted by a foreign foe, was unceasing in his efforts to evade military service in a conflict forced upon this country, and did nothing which would indicate that he was attached to the principles of the Constitution of the United States, carrying forward liberty, equality, justice, and humanity. It was not until all danger was past, when the armistice was signed, that he made up his mind to again knock at the door of his country, and ask to be admitted to citizenship.

The application is denied with prejudice, and before he can be admitted to citizenship he will have to serve a probationary period which will justify a court to conclude that he is in truth and in fact attached to the principles of the Constitution and the laws of this country.

TAYLOR & BOURNIQUE CO. v. NATIONAL BANK OF ASHTABULA.

(District Court, N. D. Ohio, E. D. December 27, 1919.)

No. 10201.

1. COURTS ⇐372(7)—COLLECTING BANK'S LIABILITY AS COLLECTOR GOVERNED BY GENERAL LAW, NOT STATE DECISIONS.

On a question of general law, as the liability of a bank accepting for collection commercial paper, the federal courts are not bound by decisions of the state in which the contract was made, or to be performed, but must determine the question of liability by reference to all the authorities.

2. BANKS AND BANKING ⇐171(6)—LIABILITY OF BANK COLLECTING COMMERCIAL PAPER FOR ACTS OF CORRESPONDENT.

A bank receiving commercial paper in one state for collection in another is liable for any neglect of duty occurring in its collection, whether arising from the default of its own officers or employés, or from that of its correspondent, and while this obligation may be modified by contract, a modification will not be inferred from knowledge that the receiving bank must, or intends in due course of business to, forward the paper to another bank for collection.

3. BANKS AND BANKING ⇐175(½)—OWNER OF COMMERCIAL PAPER CANNOT SUE CORRESPONDENT SELECTED BY BANK TO WHICH PAPER WAS DELIVERED FOR COLLECTION.

Where a correspondent selected by a bank with which was deposited commercial paper for collection is negligent, and the owner suffers a loss,

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

the owner cannot in his own name sue the negligent correspondent, but his right of action is against the bank with which he deposited the commercial paper.

At Law. Action by the Taylor & Bournique Company against the National Bank of Ashtabula. On demurrer. Demurrer to petition sustained.

H. E. Starkey, of Jefferson, Ohio, and Charles J. Ford, of Geneva, Ohio, for plaintiff.

Green & Gallup, of Cleveland, Ohio, and Mott G. Spaulding, of Ashtabula, Ohio, for defendant.

WESTENHAVER, District Judge. The defendant demurs to the plaintiff's petition on the ground that a cause of action is not stated. The petition in substance alleges that on the 14th day of March, 1918, plaintiff delivered to the Wisconsin National Bank at Milwaukee, Wis., for collection, four drafts, payable on demand, aggregating $12,533.45, drawn by plaintiff on the Horton Milling Company of Ashtabula, Ohio, payable to the order of the Wisconsin National Bank, with bills of lading attached, for four cars of No. 3 white corn, sold by the plaintiff to the said Horton Milling Company; that the Wisconsin National Bank duly forwarded these drafts to the defendant at Ashtabula, Ohio, for collection; that the defendant carelessly and negligently held them until about May 6, 1918, without making any demand for payment or acceptance, and without making any report or giving any notice of its failure to act; that as a result of this conduct the four cars of corn were permitted to lie on the side tracks of the railroad carrier until the corn had become heated and damaged, and was no longer of the grade and quality originally sold and shipped; and that the Horton Milling Company refused on May 6, 1918, to accept the corn or to pay the drafts. Plaintiff seeks to recover damages based on this negligent conduct of the defendant.

Upon this demurrer plaintiff contends that the law of Wisconsin is to govern, and that this law is what is known as the Massachusetts rule, applicable to the liability of a bank accepting commercial paper for collection. On the other hand, the defendant contends that the case is governed by the law of Ohio, which is the same as that known as the New York rule. No statute of Wisconsin is cited or claimed to be in force creating any special rule different from the general law of commercial paper. The law of Wisconsin invoked by plaintiff results from the decisions of its Supreme Court. See Stacy v. Dane County Bank, 12 Wis. 629; Blakeslee v. Hewett, 76 Wis. 341, 44 N. W. 1105.

The argument before me turns chiefly on whether or not there is any conflict in the decisions of the Surpeme Court of Wisconsin and of Ohio, and, if so, which line of decisions shall be followed—the plaintiff contending that, inasmuch as its contract was made in Wisconsin with the Wisconsin National Bank of Milwaukee, and was to be partly performed there, that the law of that state should control; and the defendant contending that, inasmuch as Ohio was the place

where the contract was to be performed, and the place where defendant's contract, if any, was made, the Ohio law should control.

[1] In my opinion, the true question of law upon which the case turns is not that assumed by counsel. There is, in my opinion, no question involved of conflict in law, and therefore no inquiry need be made as to where the contract was made, or by the law of what state or forum it is to be controlled. The applicable rule is that stated in Swift v. Tyson, 16 Pet. 1, 10 L. Ed. 865; B. & O. Railroad v. Baugh, 149 U. S. 368, 13 Sup. Ct. 914, 37 L. Ed. 772. The rule thereby established is that, when the question is one of general law, and not of purely local law, it is to be determined by reference to all the authorities, and upon due consideration of the principles of general jurisprudence applicable to the subject, and not by reference merely to those of the state in which the cause of action arose.

Swift v. Tyson, supra, involved the question of whether or not one who acquired negotiable paper for a pre-existing debt in due course before maturity and without notice of any defense thereto was to be regarded as a holder for value. The cause of action arose in New York, by the decisions of which one taking a note for a pre-existing debt was not regarded as a holder for value. It was held that this was a question, not of local law, but of general commercial law, and was to be decided upon an examination of all the authorities and due consideration of the principles underlying the general commercial law of the land. The result was that the United States Supreme Court held in that case that one taking negotiable paper for a pre-existing debt was a holder in due course. Mr. Justice Story, delivering the opinion, says that the laws of the state, which were made by the original Judiciary Act the rule of decision in the United States court, mean state laws, strictly local; that is to say, positive statutes of the state and the construction thereof adopted by the local tribunals, and decisions relating to rights or titles to things having a permanent locality, such as the rights and titles to real estate and other matters immovable and intraterritorial in their nature and character.

In B. & O. Railroad v. Baugh, supra, this and all the intervening cases were fully reviewed, and the law reiterated to the same effect. It was therein held that the rule of fellow servancy in negligence cases was not a question of local law, but of general jurisprudence, and that the Ohio vice principal rule would not be followed and applied in the United States courts, even when the injury was sustained and the cause of action arose in Ohio after the pronouncement by its Supreme Court of that rule. It results that, if the United States Supreme Court has declared a rule applicable to the present controversy, it must control, and hence it is immaterial to inquire whether the so-called New York or Massachusetts rule is the true rule, or which has been adopted in Ohio.

[2] Upon this proposition there can be no doubt. See Hoover v. Wise, 91 U. S. 308, 23 L. Ed. 392; Exchange National Bank v. Third National Bank, 112 U. S. 276, 5 Sup. Ct. 141, 28 L. Ed. 722. Neither of these cases has ever been overruled, criticized, or distinguished, and while I do not find that the question involved has ever again been

under consideration by the Supreme Court, I do find that these cases have ever since been uniformly followed by all inferior federal courts. The law, as established by these cases, is that a bank receiving commercial paper in one state for collection in another state from a maker or drawer residing there is liable for any neglect of duty occurring in its collection, whether arising from the default of its own officers or employés, or from that of its correspondent or its agents in another state. This obligation, it is true, may be modified by contract; but a modification of the bank's obligation will not be inferred from knowledge that the receiving bank must, or intends, in due course of business, to forward the same to another bank for collection. The sound reasoning and policy upon which this rule rests is sufficiently stated in Exchange National Bank v. Third National Bank, supra, and in Reeves v. State Bank, 8 Ohio St. 465.

The contrary doctrine is that a bank receiving commercial paper and performing these duties is merely obliged to exercise due care in the selection of competent agents and in the transmission of such paper with proper instructions. The result of this doctrine is that the receiving bank is impliedly authorized to select subagents, who thereby become agents of the owner of the paper, and is not liable for the neglect or default of its subagents. On the other hand, under the correct doctrine as established by the decisions above cited, the receiving bank contracts to make collection, and is, in effect, an independent contractor, which may avail itself of such agencies as are necessary or proper in the performance of its contract, but remains itself liable to the owner for due performance by its agents or representatives thus employed, and they do not become subagents of the owner; nor is the receiving bank exonerated from liability to the owner, no matter what degree of care or diligence it exercises in selecting its agents.

The case of Bank of Washington v. Triplett, 1 Pet. 25, 7 L. Ed. 37, sometimes cited as holding the contrary, is distinguished, on the ground that the bank, upon the facts, was held to have contracted directly with the holder of the bill to collect it, and that the forwarding bank was the holder's agent merely to transmit the bill for collection. This is also the doctrine in Ohio. See Reeves v. State Bank, 8 Ohio St. 466. This case has been followed once, and the law therein stated has been approved twice in later cases. There is nothing to the contrary in Hilsinger v. Trickett, 86 Ohio St. 286, 99 N. E. 305, Ann. Cas. 1913D, 421, as contended on behalf of plaintiff. In this case, Judge Spear, delivering the opinion, says that it is unnecessary to consider the proposition stated in Reeves v. State Bank, supra, because neither the bank taking the paper for collection nor the bank to which it was forwarded was shown to be guilty of any neglect of duty, and, further, no loss to the owner had resulted from the alleged negligence.

[3] Thus far there is no difficulty. The question, however, remains to be considered whether or not the real owner may maintain an action against the bank or agent to which the paper was forwarded by the bank first taking it for collection, as well as against the receiving bank. It is undisputed that the owner may maintain an action against the receiving bank. The apparent difficulty in plaintiff's situation has

impelled me to give the most careful consideration to this question. As a result, I am of the opinion that plaintiff may maintain an action only against the bank with which it made its contract for collection, and not against any other bank to which the receiving bank forwarded it, based on the latter's negligence or breach of duty, as a result of which collection was not made. This conclusion is amply supported by the following authorities: Hoover v. Wise, 91 U. S. 308, 23 L. Ed. 392; Hyde v. First National Bank, 7 Biss. 156, 12 Fed. Cas. 1110, No. 6970; Balcomb v. Old National Bank (C. C. A. 7) 201 Fed. 680, 120 C. C. A. 27; Montgomery County Bank v. Albany City Bank, 7 N. Y. 459; Morris v. First National Bank of Allegheny, 201 Pa. 160, 50 Atl. 1000; note of Editor, 50 Am. St. Rep. 123, 124. This proposition is also explicitly held in Reeves v. State Bank, 8 Ohio St. 466, 483. The dissenting opinion of Judge Sutliff conceded this to be the correct rule when applied to an action based on failure to collect, due to negligence or breach of duty. See, also, 1 Mechem on Agency, § 333; 1 Daniel, Negotiable Instruments, § 344; note, 52 L. R. A. (N. S.) 663. The holding, in brief, of these authorities, is that whenever the doctrine of Exchange National Bank v. Third National Bank, supra, otherwise called the New York rule, is adopted, the owner's right of action for failure to collect, due to negligence, is limited to the bank with which the holder made his contract for collection.

The legal principles upon which these decisions rest are fundamental. The receiving bank, being in effect an independent contractor, has control of the means and agencies necessary and proper to perform its contract. The principal assumes no responsibility for the acts or conduct of the agents selected by an independent contractor. There is no privity of contract between the principal and the agents of the independent contractor. If the principal sustained to them such privity as would permit him to maintain an action against them, then he would become in law responsible for their acts and conduct. They might sue him for compensation, and he might be sued by strangers for their acts. He would be bound by their admissions while acting within the apparent scope of their authority. Notice to them would be notice to him. These principles are too important to be unsettled, out of consideration for the inconvenience which plaintiff may suffer as a result of what must be regarded as erroneous decisions of the Supreme Court of Wisconsin.

This opinion might end here, but, to avoid possible future misunderstanding, a word should be added with reference to those cases which hold that the owner of a negotiable paper may, under some circumstances, maintain an action against a bank to which the paper has been sent by a receiving bank to recover money collected thereon in an action for money had and received. In Reeves v. State Bank, supra, this right was denied. Judge Sutliff dissented, solely on the ground that no privity of contract was necessary to support an action by the real owner for money had and received against one who had no superior right to retain it. Other cases hold that, before remittance to the receiving bank, the latter's agency may be revoked, and that an action for money had and received may be maintained against

the bank to which it is sent, if no advances have been made by the latter thereon. See cases cited, note of editor, 50 Am. St. Rep. 123, 124, and note, 52 L. R. A. (N. S.) 663–665. It is unnecessary, as between this conflict, to determine which line of cases declare the correct rule. It is sufficient to point out that none of them have any application to an action based on negligence, as a result of which collection was not made.

The demurrer will be sustained. An exception may be noted. Leave to amend, if desired, will be given.

STOCKTON v. LEDERER, Internal Revenue Collector (two cases).

(District Court, E. D. Pennsylvania. December 23, 1919.)

Nos. 5628, 5800.

INTERNAL REVENUE ⊜7—ACCUMULATION FOR CHARITABLE PURPOSES NOT SUBJECT TO INCOME TAX.

Income of the estate of a testator in the hands of trustees *held* not subject to tax, under Act Sept. 8, 1916, c. 463, § 2(b) (Comp. St. § 6336b), where by the terms of the will a portion of it, so small as to be exempt from tax, is to be used in payment of an annuity, and the remainder, added to the corpus of the estate at the end of the annuity term, is to be paid over to a charity, which, under section 11a (Comp. St. § 6336k), is exempt from the tax.

At Law. Actions by Alexander D. Stockton, sole surviving trustee under the will of Alexander J. Derbyshire, deceased, against Ephraim Lederer, Collector of Internal Revenue. Judgments for plaintiff.

Prichard, Saul, Bayard & Evans, of Philadelphia, Pa., for plaintiff.

Robert J. Sterrett, Asst. U. S. Atty., and Francis Fisher Kane, U. S. Atty., both of Philadelphia, Pa., for defendant.

DICKINSON, District Judge. As precisely the same questions of fact and of law arise in each of the above cases, we dispose of them in one opinion. The findings of fact and the conclusions of law accompanying this opinion are to be taken as found separately in each case, respectively.

The broad question discussed in this case involves an inquiry into the meaning of the acts of Congress taxing incomes. The particular income is that accruing to an unsettled decedent's estate. The line of thought pointed out to us by counsel for the United States as we grasp the thought and are able to follow the line is, roughly stated, this:

In defining the persons whose incomes are made subject to the tax Congress created a person whose entity may be recognized through the use of the descriptive phrase of decedent's estates. The thought may be readily grasped by calling to mind one of the very numerous situations created out of the fact that some one has died seized and possessed of property, the possession and the legal title to which passes to his representatives and is held by them for an indefinite time. Dur-

ing this time income accrues and is received. The phrase commonly in use to describe this situation is intelligible and sufficiently expressive in itself. It is "income of the estate," as distinguished from the person or persons to whom it ultimately goes. If this income is visually traced as issuing out of the corpus of the estate and flowing into the hands of the legal representatives of the testator or other decedent, and then being distributed in whole or in part after diminution and division, if there be any, to the person or persons to whom it ultimately goes, the distinction between the income of the estate and the income of the beneficiaries under the will or other ultimate recipients is brought to light with satisfactory clearness.

The estate with which we are concerned is that of a testator who had charged his estate with certain annuities, or what were practically the equivalent of annuities, and had given the residue to a charity. More accurately speaking, he had bequeathed and devised his whole estate to his executors qua trustees in trust to invest and keep invested and to pay the annuities, and after the coming of age of one of them and death of the survivor of the others pay over the corpus of the estate, together with the accumulated income, to the charity.

Applying the doctrine which counsel for the United States asks to have applied, as above outlined, a tax has been assessed upon the income as it has accrued to the trustees. In order to complete the statement of facts, although the bearing of these features upon the question before us is not seen, it may be added that application was made to the court, having jurisdiction of the estate, to distribute to the residuary cestui que trustent the balance of the estate after making provision for the assurance of the payment of the annuities and their release. This was upon the practical ground that the ownership of the corpus of the estate and the excess income over and above the payment of the annuities vested in the charity. Distribution was refused by the court. Resort was then had to the practical expedient of the trustee investing the funds of the estate in the form of a loan to the institution representing the charity, upon which loan the charity paid an interest sufficient to take care of the administrative charges and the payment of the annuities. The annuities have all fallen in, except one small one.

The argument of counsel for the United States, concisely and perhaps inadequately stated, is that, the estate being an entity or person having an income within the meaning of the tax laws, this income is taxable as such notwithstanding the fact that it ultimately goes to the charity. The thought upon which the argument is based is supported by the statement that, notwithstanding the fact that the estate is large and the income therefrom many times the sum required to meet the annuities, there is no legal certainty that anything will go to the charity. The income as income belonging to the estate is taxable under the provisions of the taxing statute, and is exempt only so far as it goes to the charity. Therefore, if it does not go to the charity, there is no ground of exemption, and as it cannot now be determined with legal certainty that it will go to the charity, it remains taxable.

There are at least two obstacles in the way of the acceptance of this argument as sound. One is that there are two grounds of exemption from taxation. A part of the income is exempt because of the exemption in favor of charity. The other part is exempt because it is below in amount the taxable limit. The two take in the whole income, and it is difficult to escape the conclusion that if the whole income is exempt, none of it is taxable. The other obstacle is really the same viewed from a different standpoint. It is that this income is not the income of the estate, but of the parties to whom it is given. The legal representatives of the testator are nothing more than the reservoir and conduit pipe through which the income reaches the beneficiaries of the testator's bounty. If that income is cut off, so that it does not arise or is lost in the hands of the trustees, the loss is the loss of the beneficiaries. This is nothing more than the emphatic statement that the income which the United States is proposing to tax is their income. Moreover, it may be stated in addition that the fact theory upon which counsel for the United States base their argument is wholly fanciful and artificial. Practically speaking, there is a surplus of income which goes to charity, so that the whole fabric of the argument is based upon a legal figment, and to recur to the thought already expressed, as no part of the income is taxable if it is the income of the beneficiaries, we do not see how the fact that the charitable beneficiary may not receive its share in any way affects the question.

We have dealt with the case as to its facts on the basis of the corpus of the residuary estate, together with the accumulations of income going under the will to the charity. Of course, if there were here an intestacy as to the whole or any part of the estate an entirely different question would arise, because the income which is claimed to be taxable would not be within the exception to the act. We have viewed the question of intestacy as a closed question for the reason that this will has been construed by the state courts, and the finding made thereon fixes the status of all possible claimants. As a consequence we must perforce accept this finding, inasmuch as a finding by this court that any portion of the estate, either corpus or income, passed to distributees under the intestate laws would be the finding of something which does not exist and which legally cannot possibly come into existence. As a further consequence we have not taken up the subject of intestacy, but accept the ruling made that the decedent did not die intestate as to any part of his estate.

It may be conceded that the income from this estate is within the general taxing clause of the act of Congress because all persons who receive income which ultimately goes to another are required to withhold out of the income a sum equivalent to the normal income tax and render a return thereof, etc. It is to be observed, however, that the income out of which this tax sum is to be withheld is the income of some one who is subject to the tax, and subclause (a) of clause G (38 Stat. 172) provides that income moneys which go to charity and other named institutions of like general character are not within the taxing clause of the act. This statement is made with respect to the provisions of the taxing act of 1913 (Act Oct. 3, 1913, c. 16, 38 Stat.

114) assuming it to include the incomes from unsettled decedent's estates which were included by the act of 1916 (Act Sept. 8, 1916, c. 463, 39 Stat. 756).

The act of 1917 (Act Oct. 3, 1917, c. 63, 40 Stat. 329), so far as we have been able to discover, does not change the situation. The language employed in the act of 1916, which makes clear the inclusion of incomes from decedent's estates as taxable, is open to a construction which would include the income which is derived from the assets of this estate, but section 11 (a) of the same Act (Comp. St. § 6336k), specifically provides that income which belongs to a charitable institution shall not be subject to the tax. The part of the income which goes to the sole remaining annuitant is not taxable because of the provision which is in every one of the acts declaring incomes up to a certain amount not to be taxable under the act.

We are therefore of opinion that no part of the income from this estate is subject to the tax, and that the plaintiff is entitled to recover judgment for the sum set forth in the pleadings. We understand there is no controversy over the amount for which judgment should be rendered, and the plaintiff may enter formal judgment for the sum demanded in each case.

We accompany this opinion with findings of fact and conclusions of law, in accordance with the requests submitted by plaintiff, as follows:

Findings of Fact.

The facts are found as requested in requests of plaintiff 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, and 15.

Conclusions of Law.

We find and state conclusions of law in accordance with the requests of the plaintiff, as follows:

Requests 16, 17, 18, and 19 are found as requested.

The conclusion with respect to request 20 is that judgment may be entered in each of the cases before us for such sum as counsel may agree to be the correct sum in each case. We retain jurisdiction of the causes to find and determine the amounts for which judgment may be entered, in the event that counsel fail to so agree.

Defendant's requests for conclusions of law are answered as follows:

Requests 1, 2, 3, and 4 are denied.

Requests for findings of fact are answered as follows:

1. Finding 1 is made as requested, in the respect that the income referred to is income derived from the assets of the estate of the decedent pending its administration and final distribution. The income and corpus of this estate is distributable in accordance with the will of the testator, Alexander J. Derbyshire.

2. So far as finding 2 is of a question of fact, it is found that the law of the distribution of this estate was declared by the Supreme Court of the state of Pennsylvania in Biddle's Appeal, 99 Pa. 525, to be that the corpus of the estate was not distributable in the lifetime of the annuitants.

3. So far as finding 3 is one of fact, it is that the law of this case is that the trust referred to remains an active trust during the life of the annuitants, in so far as that the corpus of the estate is not distributable until after the death of the last annuitant.

DETROIT, M. & T. S. L. RY. v. CITY OF MONROE et al.
(District Court, E. D. Michigan, S. D. December 22, 1919.)
No. 300.

1. COURTS ⟸508(1)—FEDERAL COURT HAS NO JURISDICTION TO ENJOIN SUIT IN STATE COURT, WHERE NOT IN AID OF ITS OWN JURISDICTION.
Under Rev. St. § 720, now Judicial Code, § 265 (Comp. St. § 1242), a federal court cannot enjoin prosecution of a suit in a state court, where not in aid of its own jurisdiction previously acquired, but to enable it to assume jurisdiction of the controversy then pending in the state court, because a federal question is incidentally involved therein.

2. COURTS ⟸489(9)—STATE COURT HAS IN SOME INSTANCES JURISDICTION OF QUESTIONS UNDER INTERSTATE COMMERCE ACT.
State courts are not without jurisdiction in every case involving rights or questions under the Interstate Commerce Act.

In Equity. Suit by the Detroit, Monroe & Toledo Short Line Railway against the City of Monroe and others. On motion to dismiss bill. Granted.

See, also, 257 Fed. 783.

Bernard F. Weadock, of Detroit, Mich., for plaintiff.
J. C. Lehr, of Monroe, Mich., for defendants.

TUTTLE, District Judge. This is a motion to dismiss the bill of complaint herein on the grounds of alleged lack of equity appearing on the face of the bill, and of alleged lack of jurisdiction by this court to grant the relief prayed in the bill.

The controversy out of which this suit arose has already been before this court recently on a bill filed by the city of Monroe, Mich., hereinafter called the City, one of the present defendants, in one of the state courts of Michigan, against the present plaintiff, hereinafter called the Railway, to restrain the latter from an alleged violation of a certain franchise contract between said City and said Railway, in charging rates of fare between said City and the city of Detroit, Mich., higher than the rates prescribed by the provisions of said franchise contract. This previous suit was removed by the Railway, defendant therein, to this court on the ground that the increase in rates complained of was based upon and justified by an order of the Interstate Commerce Commission, and that therefore such suit was one arising under the Constitution and laws of the United States and removable to the federal court. Afterwards said suit was remanded by this court to the state court from which it had been removed, for the reason that it appeared that the bill therein was not based upon any rights arising under the federal laws, and did not so directly involve a federal question as to make that suit a removable one. It was the opinion of this court that the

substance and essence of that bill was the complaint that the Railway was violating the franchise mentioned and that the allegations therein to the effect that the aforesaid order of the Interstate Commerce Commission was void, as relating to wholly intrastate rates, were made by the City merely to negative an anticipated defense by the Railway, and was only incidental to the real purpose of the suit. It was therefore held that the suit did not arise under the Constitution or laws of the United States, within the meaning of the statute providing for the removal of such suits. City of Monroe v. Detroit, Monroe & Toledo Short Line Ry., 257 Fed. 782.

After that suit had been thus remanded to the state court, the Railway filed the present bill in this court against the city, its mayor, and its city attorney, seeking to restrain them from further prosecution of said suit. In its bill herein plaintiff Railway alleges that before the removal of the previous suit the state court had issued a temporary injunction restraining said plaintiff from collecting the rate of fare fixed in the order of the Interstate Commerce Commission, referred to, and requiring plaintiff to collect only such rate of fare as was provided in the franchise mentioned; that said plaintiff has not complied with said injunction as it is advised by counsel that such injunction is invalid because the court by which it was issued was without jurisdiction in the premises; that thereafter plaintiff moved the said state court to dissolve such injunction, and dismiss the bill filed in that suit, upon the ground, among others, that sole jurisdiction to enjoin, set aside, annul, or suspend any order of the Interstate Commerce Commission was conferred upon the United States District Court for the district in which the carrier was a resident, which motion was denied; that thereupon said suit was removed to and remanded by this court as hereinbefore stated; that subsequently the City and its officials named as defendants herein instituted proceedings in the suit in the state court to cause this plaintiff to be punished for contempt of that court in failing to observe its said injunction, and that an order to show cause why this plaintiff and its officers should not be punished for such alleged contempt has been issued, and hearing thereon set in said proceedings; that the defendants herein intend by force and violence to remove from the cars of this plaintiff the crews thereof while said cars are in operation, and to cite said crews for contempt of that court in failing to collect and charge the rates of fare fixed by the aforesaid franchise, despite the fact, as alleged by plaintiff, that said crews are now collecting the lawful rates of fare fixed in the aforesaid order of the Interstate Commerce Commission; that such action will result in disabling plaintiff from performing its public duty as an interstate carrier, and will cause great financial loss to it and untold inconvenience to its patrons; that plaintiff is forbidden by law to charge discriminatory rates, and that if it should charge and collect the rates of fare fixed in the franchise, rather than that fixed in said order, it would be guilty of a discrimination in favor of said City and its inhabitants as against the other patrons of its line, and be subject to the penalties provided in the federal statutes, and that a compliance with said injunction would render plaintiff liable to criminal prosecution for each

day that it neglected to collect the rates of fare established in said order, and would result in a multiplicity of suits against it and its officers and agents; that said defendants have not applied to the proper tribunals established to test the validity of said order, or to set it aside, but are relying solely upon the aforesaid suit to harass and annoy plaintiff and prevent it from complying with the order of the Interstate Commerce Commission; that said state court is without jurisdiction in the premises, sole and exclusive jurisdiction therein being conferred by the federal statutes on the federal courts, and that the prosecution of said suit will deprive plaintiff of its property without due process of law, in contravention of the provision of the Fourteenth Amendment to the Constitution of the United States.

Plaintiff prays for a temporary and also a permanent injunction, restraining the said City and its said officials from further prosecuting the suit in the state court, and from taking any further steps to cite plaintiff, its officers, agents, or crews for alleged contempt of court in complying with the said order of the Interstate Commerce Commission, and from attempting to enforce the terms of the aforesaid franchise (called by the plaintiff in its bill an ordinance) relative to the rates of fare named therein, and from causing any forfeiture of the rights of plaintiff thereunder by reason of the increase in said rates complained of. As already stated, defendants have moved the court to dismiss this bill for want of jurisdiction and for lack of equity.

[1] Proceeding first to consider the question of jurisdiction, it is apparent that the whole object of this bill is to secure an injunction restraining the proceedings in the state court referred to. Section 720, United States Revised Statutes, being section 265 of the Judicial Code (Comp. St. § 1242), provides as follows:

"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."

This court, therefore, is asked to do exactly what Congress has expressly provided that it should not do. While it is true that the prohibition of this statute does not extend to cases in which it is necessary that a federal court should grant an injunction to protect its own jurisdiction, previously acquired for other purposes than that of enjoining proceedings in a state court, yet it seems clear that this is not such a case. Before the filing of this bill this court had already divested itself of all jurisdiction over the subject-matter of this controversy and no proceedings of any kind were then pending here in relation to any of the matters involved in the present suit. It is not, therefore, necessary that any injunction should be issued as prayed in this bill for the purpose of restraining interference with the jurisdiction of this court. This is not, of course, a case where an injunction is authorized by any law relating to proceedings in bankruptcy. Nor is it sought to restrain the enforcement of a state law alleged to be in contravention of the United States Constitution. The prohibition, therefore, of the statute is applicable. Haines v. Carpenter, 91 U. S. 254, 23 L. Ed. 345; Dial v. Reynolds, 96 U. S. 340, 24 L. Ed. 644; St.

Louis, Iron Mountain & Southern Ry. Co. v. McKnight, 244 U. S. 368, 37 Sup. Ct. 611, 61 L. Ed. 1200.

The mere fact that in the suit in the state court thus sought to be restrained a federal question is incidentally involved does not authorize a federal court to enjoin the prosecution of such suit, although such federal question, if directly involved, would be within the exclusive jurisdiction of the federal court. Western Union Telegraph Co. v. Louisville & Nashville R. R. Co., 218 Fed. 628, 134 C. C. A. 386 (C. C. A. 7); Carl Laemmle Music Co. v. Stern, 219 Fed. 534, 135 C. C. A. 284 (C. C. A. 2).

Nor does the fear that plaintiff may be subjected to frequent prosecutions in the suit in the state court entitle it to an injunction here, in the absence of a showing that this court has the necessary jurisdiction to grant equitable relief within the general powers of a court of equity having proper jurisdiction. Fitts v. McGhee, 172 U. S. 516, 19 Sup. Ct. 269, 43 L. Ed. 535; Indiana Mfg. Co. v. Koehne, 188 U. S. 681, 23 Sup. Ct. 452, 47 L. Ed. 651.

It is urgently insisted by the plaintiff that the suit in the state court is one to enjoin, set aside, annul, or suspend an order of the Interstate Commerce Commission, and that therefore such suit is within the exclusive jurisdiction of a federal court. Section 208, Judicial Code (Comp. St. § 997). This contention has already been, in effect, overruled by this court in its opinion already cited. City of Monroe v. Detroit, Monroe & Toledo Short Line Railway, supra.

[2] Nor are the state courts without jurisdiction in every case involving rights or questions under the Interstate Commerce Act. Pennsylvania Railroad Co. v. Puritan Coal Mining Co., 237 U. S. 121, 35 Sup. Ct. 484, 59 L. Ed. 867; Pennsylvania Railroad Co. v. Sonman Shaft Coal Co., 242 U. S. 120, 37 Sup. Ct. 46, 61 L. Ed. 188; Pennsylvania Railroad Co. v. Stineman Coal Mining Co., 242 U. S. 298, 37 Sup. Ct. 118, 61 L. Ed. 316.

Plaintiff is not without proper remedy in the premises. It will have an opportunity to present, in the state court itself, the contention that such court lacks jurisdiction to entertain the suit pending there or to grant the relief prayed therein, and, if necessary, that contention and defense may, in due course, be submitted, on writ of error, to the United States Supreme Court. Robb v. Connolly, 111 U. S. 624, 4 Sup. Ct. 544, 28 L. Ed. 542; Fitts v. McGhee, supra; Indiana Mfg. Co. v. Koehne, supra; Prentis v. Atlantic Coast Line Co., 211 U. S. 210, 29 Sup. Ct. 67, 53 L. Ed. 150; Dalton Adding Machine Co. v. State Corporation Commission, 236 U. S. 699, 35 Sup. Ct. 480, 59 L. Ed. 797.

For the reasons stated, the motion to dismiss the bill must be granted, and an order entered in conformity with the terms of this opinion.

HUNAU v. NORTHERN REGION SUPPLY CORPORATION.

(District Court, S. D. New York. January 3, 1920.)

1. CORPORATIONS ⊂=642(4½)—FOREIGN COMPANY SUBJECT TO PROCESS WHERE AGENT HAS AUTHORITY TO CONCLUDE BARGAINS GENERALLY.

A foreign trading corporation, which sends an agent to New York, authorized to conclude bargains generally, is subject to local process in personam.

2. CORPORATIONS ⊂=642(6)—FOREIGN COMPANY NOT SUBJECT TO PROCESS IN PERSON UNLESS DOING SOME CONTINUOUS OR PERMANENT BUSINESS.

A foreign corporation is not subject to local process in personam in respect of each single transaction which it may authorize within the domestic jurisdiction, unless it does some "continuous" or "permanent" business within that jurisdiction.

At Law. Action by Adolph Hunau against the Northern Region Supply Corporation. On motion by defendant to quash service of original writ in personam. Motion denied.

The defendant is a foreign corporation organized under the laws of the "government of the Northern Region" of Russia, whatever that may be. It is in fact a co-operative buying and selling company, whose business is to buy American and English products, raw and made up, and to export all kinds of Russian produce in return. On May 20, 1919, the plaintiff, a citizen of New York, served one of the defendant's directors, Danichewsky, in New York, with a summons issued out of the state court, and attached a bank deposit of the defendant in a local bank. The moving papers described the plaintiff's claim as arising upon a contract to pay the plaintiff for services rendered in New York to one Konechko, an agent of the defendant, sent here upon the company's business. The defendant, appearing specially, removed the suit and got the attachment vacated. It then moved, still appearing specially, to quash the service on the ground that it was doing no business here. The matter was referred to a master, and is now argued upon exceptions to his report.

The master found the defendant to have done business under the following evidence:

The corporation, being organized in September, 1918, wrote a letter to a New York bank in October of that year, stating the kinds of goods it would like to buy, and requesting assistance and proper introduction for its representatives about to be sent, among whom was one Konechko. He was stated to have no authority to buy, but to be only a "specialist" in selecting goods. The bank was itself to give the orders of purchase, and the defendant would wire a transfer of the necessary funds. To effect this arrangement the defendant transmitted $47,000 to the bank.

Konechko arrived in New York in December, 1918, and began at once examining goods, and setting on foot negotiations with various sellers. These he continued until April 15, 1919, when Danichewsky, a director, arrived, who himself continued the business till May 20th, when the summons was served. It was to help Konechko in his dealings that he employed the plaintiff, according to the latter's story.

The bank apparently at once told the defendant that the suggested arrangement was not satisfactory to it, for on January 4, 1919, shortly after Konechko had arrived, the defendant in reply advised the bank that Konechko was authorized to buy goods and that his orders should be honored by them. On January 26, 1919, the defendant asked Konechko to postpone buying till the director, Danichewsky, should arrive, owing to the difficulties of receiving any goods at Murmansk during the winter season. This cable was not transmitted to the bank by either the defendant or Konechko. Before Danichewsky's arrival, Konechko had, however, concluded a contract with a local

company by which the defendant might purchase $200,000 worth of goods, and under that contract he had used up all or nearly all the deposit, $47,000, in actual purchases. Another large contract of purchase had been nearly concluded, and negotiations were opened with others. In all these the plaintiff helped him. These contracts appear to have been not for specific purchases, but apparently authorized the defendant to purchase goods as its agents might afterwards select. Danichewsky, on his arrival, canceled the existing contract, refused to complete that which was nearly concluded, and repudiated the supposed contract with the plaintiff.

The master thought that the defendant was "doing business" in New York generally and continuously, and that in any event, in respect of those matters out of which the cause of action arose, the defendant was subject to jurisdiction, regardless of any general business. He relied upon Premo Specialty Co. v. Jersey Cream Co., 200 Fed. 352, 118 C. C. A. 458, 43 L. R. A. (N. S.) 1015 (C. C. A. 9th Circ.), and Reilly v. Phil. & R. Ry. Co. (D. C.) 109 Fed. 349.

Philip A. Carroll, of New York City, for the motion.
Alphonse G. Koelble, of New York City, opposed.

LEARNED HAND, District Judge (after stating the facts as above). [1] It appears to be still the federal law (People's Tobacco Co. v. American Tobacco Co., 246 U. S. 79, 38 Sup. Ct. 233, 62 L. Ed. 587, Ann. Cas. 1918C, 537), despite International Harvester Co. v. Kentucky, 234 U. S. 579, 34 Sup. Ct. 944, 58 L. Ed. 1479, that the mere solicitation of business, by agents sent into a state without authority to conclude bargains, does not constitute "doing business" within its borders. Such was, of course, the ruling in Green v. C., B. & Q. Ry. Co., 205 U. S. 530, 27 Sup. Ct. 595, 51 L. Ed. 916, and International Harvester v. Kentucky, supra, must be deemed to rest upon the fact that the local agents had authority to receive negotiable paper in payment of orders which they had not the power to close. On the other hand, in New York, the last ruling of the Court of Appeals definitely held that a "continuous" and "permanent" business within the state, which consisted only of soliciting orders, was "doing business." Tauza v. Susquehanna Coal Co., 220 N. Y. 259, 115 N. E. 915. A searching analysis of the whole subject would have been necessary if the case at bar raised that question. The theory upon which rests the right to sue a foreign corporation is in flux, and much may depend in the end upon what view becomes dominant.

In this case, however, it appears to me that the master is right under any rule, because Konechko had power to buy from January 4, 1919, on a power which he exercised in one instance, and was in course of executing in others, when Danichewsky intervened. The defendant's only business was to buy and sell goods between Russia and England and America, and when it sent a duly authorized agent, with power to buy them in New York, and he began what was designed to be a continuous business—at least so it must be assumed—I cannot well see what other business it could have done. The cable of January 26, 1919, did indeed direct Konechko to postpone any purchases till Danichewsky arrived; but I do not read it as curtailing his powers meanwhile, nor did Danichewsky question his intermediate purchase. It was based upon the difficulty of receiving goods at Murmansk, due to lack of berthing facilities, and was rather a direction of the manner in which he should exercise those powers. It is in this aspect signifi-

cant that it was never communicated to the local bank, as the cable of January 4, 1919, had been. I conclude that the defendant had begun a "continuous" and "permanent" business here. Danichewsky certainly had full powers after he arrived in April, nor does it appear that, at least until he left in May, the business of the defendant was intended to cease. At least, the project appears to have remained open on May 20, 1919.

[2] I do not mean to suggest, however, that the service will stand upon the second ground suggested by the learned master. I know of no authoritative decision that a corporation submits itself to local jurisdiction as to any single transaction performed in a foreign state. If so, it would be suable upon all local causes of action, regardless of any other business. Such, indeed, appears to have been the notion in Premo Specialty Co. v. Jersey Cream Co., 200 Fed. 352, 118 C. C. A. 458, 43 L. R. A. (N. S.) 1015, and was in 33 Harv. L. R. 10, attributed to my decision in Smolik v. Phil. & R. Ry. Co. (D. C.) 222 Fed. 148, though I was, at least consciously, quite innocent of any such purpose. I do not, however, understand this to be the law at all. How far a corporation is immanent in every authorized act of its agents anywhere, and what will be the eventual basis of its subjection to foreign process, it is not necessary to consider; but it is clear that at present some general activities are necessary. The last expression of the Supreme Court (Flexner v. Farson, 248 U. S. 289, 293, 39 Sup. Ct. 97, 63 L. Ed. 250) gives little encouragement to the "realists"; but it must be owned that no consistent theory can at present reconcile all the cases, certainly not all the opinions. At any rate, this case ought not to be the excuse for a general essay.

The motion is denied.

COMPANIA MINERA Y COMPRADORA DE METALES MEXICANO, S. A., v. AMERICAN METAL CO., Limited, et al.

(District Court, W. D. Texas, El Paso Division. January 15, 1920.)

No. 671.

1. COURTS ⊜359—JOINDER OF CAUSES AND PARTIES DEFENDANT, AS AFFECTING RIGHT TO REMOVAL, TESTED BY LOCAL STATE LAWS.
   In determining whether an action was properly removed from a state court, the question whether the causes of action and parties defendant are properly joined will be determined according to the local state law.
2. ACTION ⊜50(5)—JOINDER OF CAUSES OF ACTION PROPER.
   A petition seeking damages for an alleged breach of contract from one defendant, and also alleging that such defendant acted as agent of a second defendant in making the contract, and seeking recovery against such second defendant in case it was the principal, *held* to properly join causes of action and parties defendant under local Texas laws.
3. REMOVAL OF CAUSES ⊜1—STATUTORY NATURE OF RIGHT.
   The right of removal from state to federal courts is purely statutory.
4. REMOVAL OF CAUSES ⊜48—SEPARABLE CONTROVERSY TO WHICH AN ALIEN IS A PARTY NOT REMOVABLE.
   A separable controversy to which an alien is a party cannot be removed from a state to federal court, irrespective of whether the alien is a plaintiff or defendant.

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5. REMOVAL OF CAUSES ⊂=29—SUIT INVOLVING ALIENS IS NOT "SUIT BETWEEN CITIZENS OF DIFFERENT STATES."

Where an alien plaintiff sued an alien defendant and a citizen defendant, the suit is not one between citizens of different states, within Judicial Code, § 24 (Comp. St. § 991), conferring original jurisdiction on federal District Courts in such cases.

[Ed. Note.—For other definitions, see Words and Phrases, Controversy between Citizens of Different States.]

6. COURTS ⊂=321—WHERE ONE OR MORE PARTIES ARE ALIENS, EACH PLAINTIFF MUST BE CAPABLE OF SUING EACH DEFENDANT TO GIVE FEDERAL COURT JURISDICTION.

Under Judicial Code, § 24 (Comp. St. § 991), conferring original jurisdiction on federal District Courts in certain suits between citizens of a state and foreign states, each plaintiff must be capable of suing each defendant in the federal courts, and, if the defendant is an alien, and one of the plaintiffs is also an alien, a federal court has no jurisdiction, although other plaintiffs are citizens of the state.

7. REMOVAL OF CAUSES ⊂=11—SUIT IN WHICH PLAINTIFF AND ONE OF DEFENDANTS ARE ALIENS NOT REMOVABLE.

A federal District Court has not original jurisdiction over a suit brought by an alien plaintiff against an alien defendant and a citizen defendant, and such a suit, therefore, cannot be removed from a state court to the federal court.

8. REMOVAL OF CAUSES ⊂=82—FAILURE OF ALIEN DEFENDANT TO JOIN IN PETITION FOR REMOVAL.

In suit by an alien plaintiff against an alien defendant and a citizen defendant, the failure of the alien defendant to join in the citizen defendant's petition for removal would necessitate remanding the case to the state court, even if it were otherwise removable, since a citizen defendant's right to remove a separable controversy does not exist in suits involving alien parties.

Suit by the Compania Minera y Compradora de Metales Mexicano, S. A., against the American Metal Company and the Compania de Minerales y Metales, S. A., was removed from a state court by the first-named defendant. Motion to remand granted.

Jones, Jones, Hardie & Grambling, of El Paso, Tex., for plaintiff.

Turney, Burges, Culwell, Holliday & Pollard, of El Paso, Tex., for defendant American Metal Co., Limited.

Joseph B. Cotton, of New York City, and Turney, Burges, Culwell, Holliday & Pollard, of El Paso, Tex., for defendant Compania de Minerales y Metales, S. A.

SMITH, District Judge. This case was removed here from a state court, and a motion to remand is now presented.

The plaintiff Compania Minera y Compradora de Metales Mexicano, S. A., a corporation organized under the laws of the republic of Mexico, brought this suit in the district court of the Forty-First judicial district of Texas, at El Paso, and upon the first count of its petition seeks to recover of the defendant Compania de Minerales y Metales, S. A., damages for an alleged breach of contract theretofore made and entered into by and between them. By the second count of its petition plaintiff makes the American Metal Company, Limited, a corporation incorporated under the laws of the state of New York,

a party defendant, and alleges that said Compania de Minerales y Metales, S. A., in making said contract with plaintiff and in breaching same, was acting as the duly authorized agent of said American Metal Company, but says it makes such allegation only in event it should be determined that Compania de Minerales y Metales, S. A., in making said contract, was not acting for itself, but as the agent of American Metal Company, Limited, and only in the latter event does the plaintiff pray judgment against the last-named company.

Petition and bond for removal were seasonably filed by the American Metal Company, Limited, one of the defendants, but in these the other defendant, Compania de Minerales y Metales, S. A., did not join. The petition for removal is based upon the following grounds: (1) That this is a suit in which there is a controversy between citizens of different states, and that the defendants are nonresidents of the state of Texas. (2) That there is a separable controversy herein, wholly between the plaintiff and the petitioner for removal, which can be fully determined as between them. (3) That the matter in controversy is between citizens of a state and foreign states, citizens, or subjects.

[1, 2] Looking to the local laws of Texas as the proper test (Cincinnati, New Orleans & Texas & Pacific Ry. Co. v. Bohon, 200 U. S. 221, 26 Sup. Ct. 166, 50 L. Ed. 448, 4 Ann. Cas. 1152), the causes of action set up by plaintiff and the parties defendant are properly joined (New State Land Co. v. Wilson et al. [Tex. Civ. App.] 150 S. W. 253). Therefore the case with which we are here dealing is one in which there is only one plaintiff, an alien corporation, and only two defendants, one of which is an alien corporation, and the other a citizen corporation. The removal petitioner, the American Metal Company, Limited, contends that this is a case of which this court has original jurisdiction, and therefore is removable here under the following provisions of the statutes:

"The District Courts shall have original jurisdiction as follows: * * * Of all suits of a civil nature, at common law or in equity, * * * where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of three thousand dollars, and * * * (b) is between citizens of different states, or (c) is between citizens of a state and foreign states, citizens, or subjects." Section 24, Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1087 [Comp. St. § 991])

—and that provision of section 28 of the Judicial Code (Comp. St. § 1010) which reads as follows:

"Any other suit of a civil nature, at law or in equity, of which the District Courts of the United States are given original jurisdiction by this title, and which are now pending or which may hereafter be brought, in any state court, may be removed into the district court of the United States for the proper district by the defendant or defendants therein, being nonresidents of that state. And when in any suit mentioned in this section there shall be a controversy which is wholly between citizens of different states, and which can be fully determined as between them, then either one or more of the defendants actually interested in such controversy may remove said suit into the District Court of the United States for the proper district."

[3] The right of removal is purely statutory. No case can be removed from a state to the federal court, unless it clearly comes within some provision of the removal statute. Great Northern Ry. Co. v.

Alexander, 246 U. S. 276, 38 Sup. Ct. 237, 62 L. Ed. 713; Kentucky v. Powers, 201 U. S. 1, 26 Sup. Ct. 387, 50 L. Ed. 633, 5 Ann. Cas. 692; Phœnix Ins. Co. v. Pechner 95 U. S. 183, 24 L. Ed. 427. Therefore, in order to dispose of the motion to remand, it is necessary to determine whether or not this case comes within any of the provisions of the statutes above quoted, and, if it does not, the motion should be granted.

[4] The contention that there is in this suit a separable controversy between the plaintiff and the defendant petitioning for removal, which would authorize the case to be removed to this court, cannot be sustained, because, if there is a separable controversy, which I do not decide, it is not "wholly between citizens of different states," as is required by the separable controversy provision of the statute. The plaintiff, one of the parties to the controversy, being an alien, excludes the case from that provision. A separable controversy to which an alien is a party cannot be removed, whether the alien is a plaintiff or defendant. Deakin v. Lea, Fed. Cas. No. 3695; Creagh v. Equitable Life Assurance Society (C. C.) 88 Fed. 1; Merchants' Cotton Press Co. v. Insurance Co. of North America, 151 U. S. 368, 14 Sup. Ct. 367, 38 L. Ed. 195; King v. Cornell, 106 U. S. 395, 1 Sup. Ct. 312, 27 L. Ed. 60; Woodrum v. Clay (C. C.) 33 Fed. 897; Insurance Co. v. Insurance Co. (C. C.) 50 Fed. 243; Tracy v. Morel (C. C.) 88 Fed. 801.

[5] Now, eliminating the separable controversy question entirely, as I must, and considering the case as a whole, it must be also held that this is not a suit "between citizens of different states," and hence not within the jurisdiction of this court by virtue of that provision of the statute.

[6, 7] This brings us to a consideration of the third and last question presented, and that is whether or not the case is removable, because falling within that provision of the statute which gives the United States District Courts jurisdiction of suits when the required amount is in controversy and is "between citizens of a state and foreign states, citizens and subjects."

It has been held that, where a citizen of a state sues a citizen of another state and an alien, the case is within federal jurisdiction, and may be removed from a state court upon the joint petition of both defendants. Baker v. Pinkham (D. C.) 211 Fed. 728; Roberts v. Pac. & A. Ry. & Nav. Co., 121 Fed. 785, 58 C. C. A. 61; Carson v. Hyatt, 118 U. S. 279, 6 Sup. Ct. 1050, 30 L. Ed. 167. These decisions were correctly based upon the obvious reason that the defendants should be accorded the right to unite in a petition to remove a case, where they could have removed severally, if sued alone. But it has also been held that the federal courts have no jurisdiction of a case in which both the plaintiff and the defendant are aliens. Montalet v. Murray, 4 Cranch, 46, 2 L. Ed. 545; Mossman v. Higginson, 4 Dall. 12, 1 L. Ed. 720; Cunard S. S. Co. v. Smith, 255 Fed. 846, —— C. C. A. ——; Pooley v. Luco (C. C.) 72 Fed. 561. Neither of these rulings is applicable to the instant case. If these defendants had been sued separately, one of the suits would have embraced an alien plaintiff and a citizen

defendant, and the other would have been between an alien plaintiff and an alien defendant. The former case, conceding the inapplicability of the doctrine announced in the case of In re Wisner, 203 U. S. 449, 27 Sup. Ct. 150, 51 L. Ed. 264, which I do not find it necessary to decide, would be removable, and the latter would not be removable.

It is well settled that, where there are several plaintiffs and defendants, each plaintiff must be capable of suing each defendant in the federal courts. Strawbridge v. Curtiss, 3 Cranch, 267, 2 L. Ed. 435; New Orleans v. Winter, 1 Wheat. 91, 4 L. Ed. 44; Coal Co. v. Blatchford, 11 Wall. 172, 20 L. Ed. 179; Cuebas Y Arredondo v. Cuebas Y Arredondo, 223 U. S. 376, 32 Sup. Ct. 277, 56 L. Ed. 476; Hooe v. Jamieson, 166 U. S. 395, 17 Sup. Ct. 596, 41 L. Ed. 1049; Peninsular Iron Co. v. Stone, 121 U. S. 631, 7 Sup. Ct. 1010, 30 L. Ed. 1020. If the defendant is an alien and one of the plaintiffs is also an alien, though the others are citizens of a state, the federal court has no jurisdiction. Black's Dillon on Removal of Causes, § 84, citing Sawyer v. Switzerland Marine Ins. Co., 14 Blatchf. 451, Fed. Cas. No. 12408.

Tested by this rule, it is clear that, as the plaintiff and one of the defendants are aliens, this court has not original jurisdiction of this case, and same cannot be brought here from the state court by removal proceedings.

[8] It is also worthy of note that the alien defendant does not join in the petition for removal, and therefore, if this were a removable case, it would have to be remanded for that reason. C., R. I. & P. Ry. Co. v. Martin, 178 U. S. 245, 20 Sup. Ct. 854, 44 L. Ed. 1055; Stone v. South Carolina, 117 U. S. 430, 6 Sup. Ct. 799, 29 L. Ed. 962; Fletcher v. Hamlet, 116 U. S. 408, 6 Sup. Ct. 426, 29 L. Ed. 679. To permit the citizen defendant to remove this case upon his petition alone would be to hold that he had the right to remove under the "separable controversy" provision of the statute—a right which, as we have already seen, is not accorded to defendants in suits between "a citizen of a state and foreign states, citizens or subjects."

Counsel for the defendant petitioning for removal contends that the alien defendant may be disregarded in considering this motion to remand, and in support of such contention cites the case of Iowa Lillooet Gold Mining Co. v. Bliss et al. (C. C.) 144 Fed. 446. I do not consider that case in point. Bliss in that case was held to be neither a proper nor a necessary party, and was therefore misjoined. In this case, the alien defendant, as we have seen, was a proper party, against which the plaintiff sets up a cause of action properly joined and necessary to afford full relief to the plaintiff.

The motion to remand is granted.

UNITED STATES v. PHILADELPHIA, B. & W. R. CO.

(District Court, E. D. Pennsylvania. January 2, 1920.)

No. 5246.

1. INTERNAL REVENUE ⟸9—STOCK DIVIDENDS NOT SUBJECT TO CORPORATION EXCISE TAX.
   Under the Corporation Excise Tax Act of August 5, 1909, a corporation stockholder is not taxable on stock dividends received.
2. INTERNAL REVENUE ⟸9—CORPORATION EXCISE TAX ACT INAPPLICABLE TO EARNINGS IN PREVIOUS YEARS.
   Under the Corporation Excise Tax Act of August 5, 1909, earnings made before 1909 cannot be considered income received during that year, merely because the corporation then distributed them in dividends.
3. INTERNAL REVENUE ⟸9—CORPORATION EXCISE TAX PROPER ON DIVIDENDS FROM EARNINGS IN PREVIOUS YEARS.
   Under the Corporation Excise Tax Act of August 5, 1909, a corporation holding stock in another concern is liable on dividends declared by such concern in 1910, although such dividends represented in part earnings made before January 1, 1909.
4. INTERNAL REVENUE ⟸7, 9—"EXCISE TAX" AND "INCOME TAX" DEFINED.
   An "excise tax" is an indirect charge for the privilege of following an occupation or trade, or carrying on a business; while an "income tax" is a direct tax imposed upon income, and is as directly imposed as is a tax on land.
   [Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Excise.]
5. CONSTITUTIONAL LAW ⟸70(3)—LEGISLATIVE MEASURE OF EXCISE TAX CONCLUSIVE.
   Though Congress, in levying an excise tax, should restrict the measure of the tax to income derived from the occupation or business with respect to which the tax is levied, yet the measure fixed is conclusive on the courts.

At Law. Action by the United States against the Philadelphia, Baltimore & Washington Railroad Company. On rule for judgment for want of a sufficient affidavit of defense. Leave to enter a specified judgment for plaintiff.

Robert J. Sterrett, Asst. U. S. Atty., and Francis Fisher Kane, U. S. Atty., both of Philadelphia, Pa.

John Hampton Barnes, of Philadelphia, Pa., for defendant.

DICKINSON, District Judge. This case comes before us with the effect of a case stated; the facts being stipulated and to be treated as if incorporated in an affidavit of defense. The facts are as follows:

(1) The Delaware Railroad is a corporation, whose activities are limited to what is necessary to the continuance of its corporate existence. In consequence, under the doctrine of the Minehill Case, it is not liable to the payment of an excise tax, and did not pay one.

(2) The defendant corporation is the operating company, and operates the railroad of the Delaware Company through the part ownership of the stock of the latter company and an operating arrangement satisfactory to the two companies and their stockholders.

(3) On February 21, 1910, the Delaware Company declared, and on February 28th of the same year paid, dividends, of which the defendant corporation received a large part.

(4) The dividends received were as follows:

Special cash dividend of 5 per cent	$ 83,223.75
Extra cash dividend of 20 per cent	332,895.00
Stock dividend of 70 per cent	1,165,132.50
Total	$1,581,251.25

(5) The source of these cash dividends was earnings of the Delaware road divided as follows:

Before January 1, 1909	$334,889.29
Since January 1, 1909	81,229.46
	$416,118.75

(6) There may be added to this statement, although not the statement of a fact, that Act Cong. Aug. 5, 1909, c. 6, 36 Stat. 112, by section 38 subjects every corporation to the payment of a special excise tax, equivalent to 1 per centum, upon "the entire net income * * * received by it from all sources during such year," etc.

(7) That counsel agree that the questions presented for decision are whether the defendant is liable for the tax upon or rather measured by

(a) The stock dividend of	$1,165,132.50
(b) The part of the cash dividends represented by the earnings after January 1, 1909	81,229.46
(c) The part of the same represented by earnings before January 1, 1909	334,889.29

[1] (a) With respect to question (a), we understand it to be admitted that no tax is payable because of the stock dividend under the rulings in Towne v. Eisner, 245 U. S. 418, 38 Sup. Ct. 158, 62 L. Ed. 372, L. R. A. 1918D, 254, and Peabody v. Eisner, 247 U. S. 349, 38 Sup. Ct. 546, 62 L. Ed. 1152. In consequence no discussion is called for. It may be stated, in explanation, that this cause was ripe for hearing when the later cases were pending in the Supreme Court, and the present case was held awaiting the rulings to be made.

[2] (b) and (c) With respect to questions (b) and (c), it may be premised that if we were dealing with the case of a corporation which received earnings in one year, which it made the subject of the payment of dividends to its stockholders in another year, we would regard it as clear upon principle and authority that such earnings were no part of the income of the corporation during the latter year, merely because a dividend was declared in that year. If, therefore, the Delaware Company were not within the doctrine of the Minehill Case, 228 U. S. 295, 33 Sup. Ct. 420, 57 L. Ed. 842, and was subject to the 1909 tax, there could be no finding that the earnings before 1909 was income received during that year, nor during the year 1910 merely because then distributed in dividends. Southern Pacific v. Lowe, 247 U. S. 330, 38 Sup. Ct. 540, 62 L. Ed. 1142.

[3] It does not follow, however, that a dividend declared in 1910,

although necessarily out of earnings received at an earlier date, would not be part of the 1910 income of a stockholder of that company. On the contrary, we think it clear that it would be such. The Southern Pacific Case is not in conflict with this conclusion, although it is true it was there held that the dividend received by the stockholder was referred back to the time the earnings came to the Central Pacific corporation, because the ruling made was based upon the peculiar relations of the two companies, which were in fact such that they were held to be one and the same, and the question was in consequence ruled as if it had been one of the liability of the Central Company.

If, therefore, it were a fact in this case that the Delaware road was but another name for the defendant, or merely the hand by which the defendant received these moneys before 1909, they would not be held to be 1910 income, merely because there was a bookkeeping transfer at that time, but would be held to be the income of the years before 1909, when the moneys in fact came to the defendant. There is, however, no such fact in this case, but, on the other hand, the defendant is in this case merely as a stockholder of the Delaware road.

The case of Lynch v. Hornby, 247 U. S. 339, 38 Sup. Ct. 543, 62 L. Ed. 1149, is distinguished by counsel for the defendant. Whether properly so or not we do not stop to inquire, because, as we view it, the real doctrine of Southern Pacific v. Lowe sustains the proposition that dividends received by a stockholder are part of his income during the year in which they come to him. Counsel for defendant seems to read the latter case as ruling that the dividends there would not have been held taxable as income of the year in which received, except for the fact of the peculiar relations of the two companies. We read the ruling as precisely the reverse of this, and that the dividends would have been held taxable, except for this peculiar state of facts.

We confess to a feeling of being staggered by such a difference with capable and careful counsel with whom we would at any time hesitate to differ, and as we have not otherwise been able to reconcile the difference, we have sought to find it in the thought of the stockholder being a corporation. There is, of course, a fundamental difference between an income tax and an excise tax, both with respect to what is taxed and the source of the power to tax.

[4] We are concerned wholly with an excise tax. Whether it is a scientifically accurate concept of it or not, the concept of it as a charge for the privilege of following an occupation or trade, or carrying on a business, gives us a fairly good working idea of what it is. It is, in consequence, an indirect tax, and has no reference to earnings or income, except that the sum of such earnings or income may (as anything else may) be made the measure of the tax. An income tax, on the contrary, is a direct tax imposed upon the thing called income, and is as directly imposed as is a tax on land.

[5] If, therefore, an argument were being addressed to a legislator, it might be well urged that in framing an excise tax the measure should be limited to the yield, profits, or earnings of the occupation or business with respect to which the tax is imposed, and the measure should not be enlarged by the income which the taxpayer derived from other

sources wholly disconnected with the occupation or business "with respect to the carrying on or doing which" he is made subject to the tax. If, however, the legislator rejected the argument (as the exception in the act of 1909 proves was done), and applied the larger measure, the courts would be powerless to make the correction, even if it were assumed to be demanded by the justice of the case. In point of fact there would be little merit in the argument as applied to the facts of this case, because these dividends are as much earnings as any other part of what the defendant receives.

Without a further prolongation of the discussion, we are of opinion that the excise tax imposed by the act of 1909 and measured by both these cash dividends is payable by the defendant. As the amount of the judgment to be entered is a matter of calculation, and in order that it may have a definite date, no judgment is now entered, but counsel has leave to enter the judgment indicated in this opinion to be the proper one.

UNITED STATES v. SMITH.

(District Court, D. Indiana, at Indianapolis. January 3, 1920.)

No. 1358.

1. POST OFFICE ⊂=27—DEFENDANT, PRESENTING AFFIDAVITS OF OWNERSHIP OF NEWSPAPER, CANNOT URGE THAT THEY WERE NOT AFFIDAVITS, IN PROSECUTION FOR THEIR FALSITY.
   Where defendant, pursuant to Act Aug. 24, 1912, § 2 (Comp. St. § 7313), presented affidavits taken before a notary as to the ownership of a newspaper, defendant cannot, in a prosecution for their falsity under Criminal Code, § 28 (Comp. St. § 10192), urge that, because taken before a notary, they were not affidavits within the act.

2. POST OFFICE ⊂=27—MAKING OF AFFIDAVIT CONTAINING FALSE STATEMENTS NOT ALTERATION, FORGERY, OR COUNTERFEITING OF SAME.
   The making of an affidavit containing false statements, though the same was delivered to the postal authorities to show the ownership of a newspaper, as required by Act Cong. Aug. 24, 1912, § 2 (Comp. St. § 7313), does not fall within Criminal Code, § 28 (Comp. St. § 10192), denouncing the offense of falsely making, altering, or counterfeiting affidavits, etc.; the affidavit being in fact genuine.

Delavan Smith was indicted for violation of Criminal Code, § 28, for making a false affidavit as to the ownership of a newspaper. On demurrer to the indictment. Demurrer sustained.

L. Ert Slack, U. S. Atty., of Indianapolis, Ind.

Ferdinand Winter and Miller, Dailey & Thompson, all of Indianapolis, Ind., for defendant.

ANDERSON, District Judge. An act of Congress passed August 24, 1912 (37 Stat. 553, c. 389 [Comp. St. § 7313]), provides:

"That it shall be the duty of the editor, publisher, business manager, or owner of every newspaper, magazine, periodical, or other publication to file with the Postmaster General and the postmaster at the office at which said publication is entered, not later than the first day of April and the first day

of October of each year, * * * a sworn statement setting forth the names and post office addresses of the editor and managing editor, publisher, business managers, and owners. * * *" Section 2.

This statute further provides:

"Any such publication shall be denied the privileges of the mail if it shall fail to comply with the provisions of this paragraph within ten days after notice by registered letter of such failure."

Section 28 of the Criminal Code (Act March 4, 1909, c. 321, 35 Stat. 1094 [Comp. St. § 10192]) provides as follows:

"Whoever shall falsely make, alter, forge, or counterfeit, or cause or procure to be falsely made, altered, forged, or counterfeited, or willingly aid, or assist in the false making, altering, forging, or counterfeiting, any bond, bid, proposal, contract, guarantee, security, official bond, public record, affidavit, or other writing for the purpose of defrauding the United States; or shall utter or publish as true, or cause to be uttered or published as true, or have in his possession with the intent to utter or publish as true, any such false, forged, altered, or counterfeited bond, bid, proposal, contract, guarantee, security, official bond, public record, affidavit or other writing for the purpose of defrauding the United States, knowing the same to be false, forged, altered, or counterfeited; or shall transmit to, or present at, or cause or procure to be transmitted to, or presented at, the office of any officer of the United States, any such false, forged, altered, or counterfeited bond, bid, proposal, contract, guarantee, security, official bond, public record, affidavit, or other writing, knowing the same to be false, forged, altered, or counterfeited for the purpose of defrauding the United States, shall be fined not more than one thousand dollars, or imprisoned not more than ten years, or both."

On October 21, 1919, the defendant was indicted by the grand jury for the violation of the various clauses of this section. The indictment is in 20 counts, and these various counts are based upon four affidavits, dated, respectively, October 1, 1912, April 1, 1918, September 30, 1918, and March 31, 1919.

These affidavits are not charged in any count of the indictment to be forged or counterfeited, in the technical sense of the term. They are charged to be genuine as to their execution, but false as respects one of the material statements in them; that is, as to the ownership of the newspaper. Each count is based upon one of these affidavits, and each of them is averred to have been sworn to before a notary public.

Two objections are made to the indictment and to each count of it. One of the objections made is that—

"A notary public is not an officer authorized by any statute of the United States to administer an oath in reference to the matters to which said affidavit relates."

[1] It is earnestly contended that, this being so, the affidavit is not an affidavit, as alleged in the indictment, and that this defect appears upon the face of the indictment. If the defendant, as alleged in the indictment, presented these affidavits to the postmaster in Indianapolis as affidavits, he cannot now be heard to say that they are not affidavits.

In Ingraham v. United States, 155 U. S. 434, 15 Sup. Ct. 148, 39 L. Ed. 213, the Supreme Court had before it this question. Ingra-

ham was indicted for presenting to the Third Auditor of the Treasury an affidavit in support of a fraudulent scheme against the government, and upon his trial the objection was made that the affidavit, which had been sworn to before a justice of the peace, was not admissible in evidence without proof that the justice had been duly commissioned and qualified as a justice of the peace. The Supreme Court said, on page 437 of 155 U. S. (15 Sup. Ct. 149, 39 L. Ed. 213):

"Even if Remington [the justice of the peace] had not been properly commissioned, or had not qualified, so as to entitle him, in law, to discharge the functions of a justice of the peace, the paper presented by the defendant to the Third Auditor of the Treasury for the purpose of obtaining the payment or approval of his claim, being in the form of an affidavit, must, for all the purposes of this prosecution, be taken to be an affidavit. If he knew that the statement in that paper, described in the indictment, was fraudulent or fictitious, he was not the less guilty * * * because of the fact, if such was the fact, that Remington had not been duly commissioned as a justice of the peace, and was not, for that reason, entitled to administer the oath certified by him. * * * He is estopped to deny that the document or writing so used was not what it purports to be, namely, an affidavit."

The several counts of the indictment are therefore not bad upon this ground.

[2] It is, however, insisted by the defendant that the different paragraphs or clauses of section 28 apply only to forged instruments, and not to instruments which are genuine as to execution, but false as to the facts contained in them. The Supreme Court has not passed upon this section 28, so far as the researches of counsel have disclosed; but section 29 (Comp. St. § 10193), which reads as follows:

"Whoever shall falsely make, alter, forge, or counterfeit, or cause or procure to be falsely made, altered, forged, or counterfeited, or willingly aid, or assist in the false making, altering, forging, or counterfeiting, any deed, power of attorney, order, certificate, receipt, contract, or other writing, for the purpose of obtaining or receiving or of enabling any other person, either directly or indirectly, to obtain or receive from the United States, or any of their officers or agents, any sum of money; or whoever shall utter or publish as true, or cause to be uttered or published as true, any such false, forged, altered, or counterfeited deed, power of attorney, order, certificate, receipt, contract, or other writing, with intent to defraud the United States, knowing the same to be false, altered, forged, or counterfeited; or whoever shall transmit to, or present at, or cause or procure to be transmitted to, or presented at, any office or officer of the Government of the United States, any deed, power of attorney, order, certificate, receipt, contract, or other writing, in support of, or in relation to, any account or claim, with intent to defraud the United States, knowing the same to be false, altered, forged, or counterfeited, shall be fined not more than one thousand dollars and imprisoned not more than ten years"

—has been before the Supreme Court twice.

In United States v. Staats, 8 How. 41, 12 L. Ed. 979, the Supreme Court construed the last clause or paragraph of section 29. The indictment in that case was based upon an affidavit, genuine in fact, but containing what was alleged to be a false and untrue statement. One of the questions before the court was whether the acts charged in the indictment constituted an offense within the last

clause of this section 29. The court said, on page 46 of 8 How. (12 L. Ed. 979):

"The court are of opinion that the offense charged in the indictment comes within the statute. The only doubt that can be raised is whether the writing transmitted or presented to the commissioner in support of the claim for a pension should not, within the meaning of the statute, be an instrument forged, or counterfeited, in the technical sense of the term, and not one genuine as to the execution, but false as it respects the facts embodied in it.

"The instruments referred to in the first part of the section, the false making or forging of which, with the intent stated, is made an offense, probably are forged instruments in a strict technical sense; and there is force, therefore, in the argument that the subsequent clause, making the transmission or presentation of deeds or other writings to an officer of the government a similar offense, had reference to the same description of instruments."

But the court held, because of the language of the last clause of the section, "any deed, power of attorney," etc., that it embraced the instrument counted upon in the indictment.

In United States v. Davis, 231 U. S. 183, 34 Sup. Ct. 112, 58 L. Ed. 177, the Supreme Court again had the same question before it; that is to say, whether the third paragraph of section 29 included only documents which were forged or counterfeited, and therefore excluded all other documents, no matter how fraudulent they might be. The court said:

"Coming to the text of the third paragraph, we think it is at once apparent that its provisions are so comprehensive as to prevent us from holding that they include only documents which are forged or counterfeited, and hence exclude all other documents, however fraudulent they may be. The all embracing words, 'any deed, power of attorney, order, certificate, receipt, or other writing in support of or in relation to any account or claim with intent to defraud the United States, knowing the same to be false, altered, forged, or counterfeited,' leave room for no other conclusion. The context of the section reinforces this view, since the contrast between the narrow scope of the first two paragraphs and the enlarged grasp of the third shows the legislative intent, after fully providing in the first two paragraphs for forged and counterfeited documents, instruments, etc., to reach by the provisions of the third paragraph, any and all fraudulent documents, whether forged or not forged, and thus efficiently to deter from committing the wrong which it was the purpose of the section to prohibit."

The court then refers to the case of United States v. Staats and says:

"The court [in that case] fully analyzed the statute, and while conceding that other clauses of the act dealt with forged instruments in a technical sense, concluded that the case [under the third clause] was within both the letter and the spirit of the act."

When the court in the Davis Case based its construction of the statute upon the "narrow scope" of the first two paragraphs and the "enlarged grasp" of the third, it, in effect, decided that the first two paragraphs should have the narrow scope contended for; that is, they embraced only forged or counterfeited instruments in a technical sense.

Section 28 has no such "all-embracing words" in any of its paragraphs, such as are found and expressly relied upon by the Supreme Court in its construction of section 29. The second and third para-

graphs of section 28 each uses the words "any such false, forged," etc. It therefore follows that, so far as section 28 is concerned, it only embraces forged or counterfeited instruments in the technical sense, and does not include instruments which are genuine, but which contain statements which are not true in fact. This construction as to the meaning of the words "falsely make, forge or counterfeit" is strengthened by the fact that the sections of the statute, making it a crime to forge or counterfeit the coins or paper money of the United States, use these exact words, as, for example, section 163 (Comp. St. § 10333):

"Whoever shall falsely make, forge, or counterfeit, or cause or procure to be falsely made, forged, or counterfeited"

—and section 164 (Comp. St. § 10334):

"Whoever shall falsely make, forge, or counterfeit, or cause or procure to be falsely made, forged, or counterfeited."

It follows that no count of the indictment states an offense under section 28, and the demurrer should be and is accordingly sustained.

EASTERN TRANSP. CO. v. EAST CAROLINA LUMBER CO. (PHILADELPHIA & READING COAL & IRON CO., Garnishee).

(District Court, E. D. Pennsylvania. January 8, 1920.)

No. 23.

1. SHIPPING ⊂=39—OBLIGATION OF SHIPOWNER UNDER CHARTER PARTY TO FURNISH BARGES.
   The obligation of one who had agreed by a charter party to supply barges for 18 voyages for a stipulated hire could be met only by performance, or by something which excused performance in whole or in part.
2. SHIPPING ⊂=52—BARGE OWNER, ON DEFAULT OF CHARTERER, HAS CHOICE OF REMEDIES.
   Where shipper, who had chartered barges for 18 successive voyages, failed to perform by paying the freight and demurrage as stipulated, the owner may declare the breach and refuse further performance, recovering any sum already due, together with damages for breach, or disregard the breach and elect to continue performance.
3. SHIPPING ⊂=52—OWNER OF BARGES, ON BREACH MAY SUE FOR BREACH OF CHARTER.
   Where the owner elected to continue performance, notwithstanding the default of the charterer, who had chartered barges for 18 successive voyages, such election carries with it the right to demand and bring an action in affirmance of the contract for each installment for freight and demurrage as it becomes due.
4. SHIPPING ⊂=52—SHIPOWNER'S ELECTION TO DECLARE OR WAIVE IS FINAL.
   Where a shipper, who had chartered barges for 18 successive voyages, defaulted in payment of freight and demurrage, the owner's election to declare the breach, or to waive it, is final, except in case of a right of an election in successive breaches.
5. SHIPPING ⊂=52—SHIPOWNER CANNOT DECLARE BREACH OF CHARTER AFTER HE HAD WAIVED SAME.
   Where an owner, who had chartered barges for 18 successive voyages, did not elect to declare the breach on the shipper's default in payment of

freight and demurrage, the owner, having waived the default, cannot, after his own subsequent default, declare a breach and recover therefor.

6. SHIPPING ⟸51—REQUEST OF SHIPPER FOR EARLIER DELIVERY OF VESSEL THAN CHARTER PARTY PROVIDED NO DEFENSE FOR FAILURE TO FURNISH VESSELS AT TIME PROVIDED.

Where the owner, who agreed to furnish barges for 18 successive voyages, for some time delivered them according to the charter party, and then defaulted, it is no defense to defaults that the shipper asked for barges faster than the contract schedule, and then failed to load them and promptly pay demurrage and freight.

7. SHIPPING ⟸51—INABILITY TO PROCURE TUGS NO DEFENSE TO FAILURE TO FURNISH BARGES AS PROVIDED.

Where an owner chartered barges for 18 successive voyages, and the charter party did not make any exceptions to the owner's inability to get tugs, the owner's inability to get tugs will not excuse failure to deliver barges according to the charter party.

8. CONTRACTS ⟸316(4)—TIME OF ELECTION TO DECLARE BREACH ON DEFAULT OR TO WAIVE IT.

Where one party to a contract defaults, the innocent party has a right of election, which occurs at each succeeding default, but the election cannot be deferred until after the contract is at an end and the rights of the parties have become otherwise fixed.

9. SHIPPING ⟸37—WILLINGNESS TO CONTRACT NOT EQUIVALENT TO ENTERING INTO CHARTER PARTY.

A statement by an owner of barges that in effect that it was willing to enter into a charter party embodying the contract suggested by the shipper, but that it would not agree until the contract was put into form, is not equivalent to a contract, and cannot be made basis of an action.

In Admiralty. Libel by the Eastern Transportation Company against the East Carolina Lumber Company, and with the Philadelphia & Reading Coal & Iron Company as garnishee. Sur trial hearing on libel, answer, and proofs. Libel dismissed, as well as cross-libel filed by respondent.

Willard M. Harris, of Philadelphia, Pa., for libelant.

Wm. Clarke Mason, of Philadelphia, Pa., for respondents.

DICKINSON, District Judge. The propositions by which this case is ruled are broadly stated these:

[1] 1. The obligation assumed by libelant under the charter party was to supply barges for 18 voyages, and its right was to receive the freight earned and demurrage due when payable.

2. This obligation could be met only by performance or something which excused performance in whole or part.

[2] 3. If the shipper failed on his part to perform, by paying freight and demurrage as stipulated, the libelant had one of two rights: One was to declare the breach and refuse further performance by declaring the contract off, recovering what was due, including damages for the breach of the contract; the other was to disregard the breach, elect to continue performance notwithstanding the default, and recover, when the contract was performed, all to which it was entitled.

[3] 4. This latter right would carry with it as its corollary the right to demand and bring an action in affirmance of the contract for each installment of freight and demurrage as it became due and payable.

[4] 5. The two rights mentioned are, however, alternative rights, and, although either might be exercised by the libelant at its election, the election, when made, was final (except that the right of election recurred at each succeeding breach), and the election to keep the contract in force kept alive all the obligations of both parties thereunder.

[5] 6. The libelant, having waived defaults in the payment of freights and elected to keep the contract in force, had no right after its own subsequent default, and after the time of performance was past, to declare a breach and recover on the contract, which had not been performed.

The parties to this action have, by their sins of commission and omission, or at least the confusion in their dealings with each other, created so many difficulties with which their proctors must cope, and have cast upon the trial court such an unnecessarily heavy burden of work, that they have forfeited all claims to consideration, and deserve to be left where, at the close, they found themselves to be. In the first place, they left open to dispute whether they had made one contract or two. In the second place, neither had, or at least neither acted upon, any clear concept of what contract it claimed to have. In the third place, although this is doubtless a consequence of the others, each was seeking to secure all the rights which could possibly flow to it out of the contractual dealings between them, without paying the slightest attention to the obligations upon which those rights depended. Neither even seems to have known or regarded as of any importance with whom it had a contract.

The thread by which we may find our way out of the labyrinth which the parties have builded is found, if there is any, in the thought that the two lumber companies made one or more contracts, and then sought to perform by following the requirements of another contract, which the respondent Turner had made with the garnishee. The result was that each was complaining of defaults of the other, based, not upon the charter party between them, but based upon the Turner contract. The same explanation, in another form, is that the libelant was looking to the first contract, and the respondent to what has been called the second contract of July 23d.

Proctor for respondent and the cross-libelant has cut the gordian knot of his difficulties by averring the existence of a second contract, and taking his stand upon it. In consequence, all he claims depends upon the finding of such second contract. Proctor for libelant and the cross-respondent has been able to find no such short and straight road out of his difficulties. He has made it entirely clear that the libelant seeks to recover the freight claimed to have been earned by two barges and demurrage due to seven others.

The basis of his claim of right, or his cause of action, is, however, by no means of like clearness. The best he has been able to do, as it is perhaps the best which could be done, is to take his stand upon the broad ground that the libelant had a contract which, if performed, or which, so far as performed, gave it the right to what is claimed, and that full performance was excused by respondent's breach, which, when

declared, gave libelant the right, of which it availed iself, to call off the contract and recover for what it had done thereunder.

The proposition of law involved in this statement of the position of the libelant is in itself clear enough and is sound. The difficulty is in applying it to the fact situation which this case presents. A statement of the facts in anything like detail would expand this opinion, already overlong, to an impossible length. The proctor for the libelant, with an industry and care for which he is to be commended, has grouped some of them for us in his brief. This statement we have found very helpful. Notwithstanding his efforts, however, to keep the statement within limits, by confining it to the most salient facts, he has required nearly 60 pages for the discussion. This gives a foretaste of what an inquiry into all of the matters in controversy would involve. To meet the task as best we may, we will confine this opinion, so far as possible, to a statement of the main facts upon which the rulings made depend, and discuss the evidentiary facts, along with the findings of fact, which will be filed herewith.

We feel grateful, also, to the proctor for respondent, who has, as before stated, rested his defense, so far as it is affirmative, and his cross-libel wholly, upon the existence of the second contract, which he asks us to find.

One of the many difficulties which an adequate discussion of the merits of this case presents is that there are so few, if any, facts which may be called undisputed. The contract, even of the parties, is in dispute. It is not in dispute however, that the lumber companies executed the charter party, which bears date July 10, 1915. Nor is its meaning in dispute.

The libelant was to have ready for loading at the James City wharves, Newbern, N. C., 18 barges, one on each of named dates. These dates covered the period from August to March, both inclusive, and called for two barges a month, one on the 1st and the other on the middle day of the month, except during the months of October and November, when a third barge was to report on the 26th of each month. These arrivals were to be "on or about the date named, weather conditions permitting." The freight was made payable on delivery of cargo. As will appear by the findings of fact, in which the movements of each barge are followed, the libelant had a barge to report for loading always on time, and usually ahead of time, until November 26, 1915. This statement includes 9 barges out of the 18. There was a barge due on that date, and another on December 1st following. The next barges to arrive reported December 6th and 10th. No other barges reported until February 14, 1916, although there were 4 barges due on the intermediate dates and one on that date. The next contract arrival dates were March 1st and 16th (the latter being the closing date of the contract), but no barges reported until March 20th and April 20th. The freight on neither of the two last barges was paid. The libelant supplied no more barges.

It is to be observed that it supplied 9 barges in accordance with its contract; then 2 barges, each of which was 11 days behind schedule; then no barges for four trips; then one barge, which was 2 months

late, or on time, according to which date you refer it, and then two barges, which were 20 and 36 days, or 80 and 86 days, late, according as you refer them to the nearest or the unfilled arrival dates. It will be further noted that neither of the two last-named barges was supplied within the contract time, and that 5 of the barges were never supplied.

[6] The libelant, in consequence, is confronted with these questions: (1) How can it recover on a contract to furnish 18 barges, after it has refused to perform? (2) How could it excuse nonperformance by declaring a breach of the contract, when it was itself in default, and after the time limit of the contract had expired?

The only answer counsel for libelant puts forth is that the respondent nagged and harassed the libelant, by asking for barges faster than the contract schedule, and then not loading them, and by not paying promptly either demurrage or freight, and that libelant was hampered in having its barges on time by its inability to get tugs to tow them.

However real its troubles and difficulties may have in fact been, and they were real enough, we see in them no legal excuse for nonperformance. The first excuse is either unjustified or a dangerous one to make. The charter party called for a schedule which, until November 26th, was more than met. The answer of libelant to complaints made during this time was ready at hand. It was more than living up to its contract. Complaints after that date were not only justified, but respondent might well have called off the contract.

The respondent has set up a second contract to furnish one additional barge per month. This second contract the libelant denies. If the complaints of the respondent were because of nonperformance of this second contract (and the fact is it was in no respect performed), the libelant recognized the existence of this contract by attempting to perform or to excuse nonperformance.

[7] The second excuse, however well grounded in fact, and it is very strongly supported, affords no excuse in law. The libelant contracted to supply barges at stated times. Bad weather might prevent performance, and it contracted itself out of liability in the event of default so caused. If it was unwilling to assume the duty of towage, or providing it, such a stipulation should have been inserted, or it should have protected itself through a tug contract. The courts cannot protect it against the consequences of contracting to do more than it was able to perform.

[8] The real situation was this: The complaints of the respondent before November 26th were unjustified, except on the basis of a second contract. There were repeated defaults in the payment of freights. The libelant had just cause to declare a default, but it could not waive this default and hold to the contract, and at the same time use these waived defaults as an excuse for its own subsequent defaults, or for nonperformance of its contract.

The conclusions reached are that the libelant has shown no cause of action, because it has admittedly not performed in full, nor has it shown a right to recover for part performance, through excusing full performance by declaring a breach because of the default of the other

party to the contract; no breach having been declared until the libelant was itself in default, and the time of performance by it was past. It may be that this places the libelant in the position of being the victim of its own indulgence to the respondent. If it had declared a breach at any time upon failure of the shipper to pay freights, it could have relieved itself of all further obligations under its contract. The respondent would then have been at liberty to secure barges elsewhere. It had the right to hold to its contract, and thus keep in force the obligation of the shipper to take the barges. The keeping of the contract in force meant, however, the continuance of its own obligation to perform.

A contract, even after one party is in default, is either on or off, and although the innocent party has the right of election, and although the right recurs at each succeeding default, it is a right which must be exercised during the life of the contract, and the election cannot be deferred until after the contract is at an end, and the rights of the parties have become otherwise fixed.

[9] The conclusion that the libel must be dismissed makes it unnecessary to discuss any of the other questions which arise, except those arising under the cross-libel. This is founded upon the proposition that the letter of July 23, 1915, is contractual. Our finding, as stated, is that it is not. Willingness of the parties to contract is not enough. The letter of libelant is in effect that it was willing to enter into a charter party embodying the contract suggested by the respondent, but that it would not so agree unless and until the contract was put in that form. As already twice stated, the claim of the cross-libel is based on the second contract and falls with it. The real situation with respect to the charter party contract is that neither of these parties has a claim against the other, because neither has performed.

An order may be prepared, dismissing both the libel and cross-libel, each party to pay their own costs, and neither party to pay costs to the other, the record costs to be paid by the one by whom incurred. To give definite date to the order none is now made, but either party has leave to submit the form of one to be entered.

UNITED STATES v. APPLE et al.

(District Court, D. Kansas, Third Division. October 7, 1919.)

No. 110–N.

1. INDIANS ⟸27(1)—UNITED STATES MAY MAINTAIN SUIT TO PREVENT INDIANS FROM BEING DESPOILED OF ROYALTIES UNDER LEASE APPROVED BY GOVERNMENT REPRESENTATIVES.

Where it was alleged that ignorant Quapaw Indians, who had with authority of the representatives of the government leased oil lands, were being despoiled of the royalties through the fraud and machinations of defendants, the government not only has the right, but also it is its duty, to maintain suit to protect the Indian lessors, for they were still in a state of tutelage and wards of the United States.

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

2. INDIANS ⟸27(6)—BILL BY UNITED STATES AGAINST DEFENDANTS, WHO WERE DESPOILING INDIAN LESSEES OF ROYALTIES, HELD TO STATE A CAUSE OF ACTION.

A bill alleging that defendants, one of whom held power of attorney from Indian lessees, still in the state of tutelage, had conspired and were defrauding the lessees of the profits from oil leases made with consent of the representatives of the government, *held* to state a cause of action.

In Equity. Suit by the United States against Walter T. Apple and others. On separate motions of several defendants to dismiss. Motions denied.

Fred Robertson, of Kansas City, Kan., J. A. Tellier, of Little Rock, Ark., and Joseph W. Howell, of Washington, D. C., for plaintiff.

Edward E. Sapp, S. C. Westcott, and E. B. Morgan, all of Galena, Kan., A. M. Keene, of Ft. Scott, Kan., E. S. Bessey and G. W. Earnshaw, both of Joplin, Mo., Al F. Williams and G. W. Staton, both of Columbus, Kan., Garland Biffle, of Baxter Springs, Kan., Fred A. Walker, of Columbus, Kan., and P. E. Bradley, of Joplin, Mo., for defendants.

POLLOCK, District Judge. The facts alleged in the petition filed herein, in so far as necessary to decision of separate motions of certain defendants to dismiss, may be briefly stated as follows:

Benjamin and See-sah Quapaw, full-blooded, ignorant Quapaw Indians, through allotment and inheritance, being the owners of three tracts of land in Ottawa county, Okl., described in the petition, in due form of law made certain mining leases covering the same, reserving as rental certain royalties in the minerals to be produced therefrom. The mining operations conducted by the lessors under said mining leases on said properties proved to be very successful, to the extent between the 13th day of March, 1915, and the 31st day of December, 1917, the cash royalties paid to the Indian lessees under and by virtue of said mining leases amounted to as much as $178,000. It is charged in the bill said Indian lessees, being ignorant of business affairs and unlearned, were induced to and did make to a Quapaw Indian relative, defendant herein, Charles Goodeagle, a certain power of attorney, set forth in the pleadings, purporting to empower him as attorney in fact to collect the royalties of lessees arising from said mining operations, to deposit the same from time to time to the credit of lessees in the Baxter National Bank, of Baxter Springs, defendant herein, and, further, to check out from said bank and expend said royalty moneys for the use and benefit of the Indian lessees, however, in a certain and definite manner stated in said power of attorney only, and none other; that said power of attorney, after its making, was lodged with and retained by said bank for the purpose it might at all times be fully informed and know the contents of said instrument, and before payment of any check drawn on said account, if the same was authorized by the power conferred on said attorney in fact, Charles Goodeagle. Thereafter said attorney in fact, and said national bank, and its officers, in violation of the trust reposed in them by the Indian lessees, by virtue of the terms of said power of attorney, and conspiring together and

with the other defendants named in the bill, and for the purpose of wronging and defrauding said Indian lessees out of their vast sums of royalties so accruing, and for the purpose of converting said royalty moneys to the use and benefit of defendants, from time to time, in violation of the terms of said power of attorney, and of the trust reposed in them, the bank and the attorney in fact caused said royalty moneys to be checked out of said bank and expended in the purchase and improvement of many tracts of land purchased from the different defendants named in the bill, and, further, said attorney in fact, in violation of his trust, but conspiring with other defendants named herein, seeking to wrong and defraud said Indian lessees of the property and property rights, did make, or cause to be made, in the name of said lessees, promissory notes and other contracts, obligating or attempting to bind said lessees to the payment of large sums of money to certain other defendants named in the bill, all as particularly described and pleaded in the many paragraphs of the voluminous petition, as a result and by reason of all of which conspiracies and fraudulent acts on the part of defendants, said lessees have been despoiled and defrauded out of their vast property rights in more than $200,000. Wherefore the government, acting for said Indian lessees, prays the decree of this court canceling and annulling said fraudulent transactions and contracts, that it may have an accounting with each and all of the defendants named herein so procuring any part of said royalty moneys, and, on said accounting being taken and stated, a decree for the same may enter in favor of plaintiff, to the use and benefit of the lessees in any case wherein said royalty funds can be traced in property now held by defendants, or any of them; that the same may be decreed a trust fund, and a lien on the property thereby purchased, said lien foreclosed, and the property ordered sold in satisfaction of said trust lien; that defendant holders of said promissory notes, and other contract obligations made by or in the name of said lessees now in the possession of defendants, be ordered to turn same into court, and a decree entered canceling and annulling the same, and for other and general relief.

To this petition so charging defendants have appeared. Some have fully answered thereto; some others have filed separate motions to dismiss the case. Said motions, principally, are based on the ground the government has no interest in or right of suit to correct the wrongs of the Indian lessees of which complaint is made in the petition. Said motions stand briefed, argued, and submitted for decision.

[1] In support of the motions to dismiss it is urged by defendants the tracts of land out of which the royalty moneys arose are the absolute property, in fee simple, of their Quapaw Indian owners; hence, it is contended, as a necessary sequence the royalties paid from mining operations conducted thereon are the absolute and unconditioned property of the Indian owners, from all of which it is said to result said Quapaw Indian owners in their own persons and right, and not the government, must sue to correct the alleged wrongs complained of in the petition. On the contrary, the government contends and urges the Indian lessees were both in fact and law incompetent to make a valid

mining lease of said properties without the approval of the accredited representative of the government, and, further, were not alone incompetent in fact and law to make said power of attorney authorizing Charles Goodeagle to collect and expend said royalties money, when made, but over and above all such contentions, at all times said Quapaw Indian lessees were the wards of the government, and their property and property rights were, by reason of the national policy of the government towards such wards, under the protecting and fostering care which the sovereign, as the guardian of the persons and estates of its wards, owes to right such wrongs as are done them while this relation continues to exist, which exists and will continue to exist until the law-making power of the government shall terminate the same.

Without at this time attempting to determine precisely what title and right the Indian lessees have in the lands from which the mining royalties accrue, or the question of the power of said Indian owners to make mining leases on said properties without the consent and approval of the representatives of the government, or other contracts with relation thereto, or royalties accruing from mining operations conducted thereon, yet I am of the opinion the government may bring and maintain this suit in its capacity as guardian or protector of the estates of its Indian wards, the lessees, and, further, under the charges made in the bill in this case, it was its duty to so do, for, although it may in the end appear the power of attorney under which Charles Goodeagle acted in collecting the royalties and depositing the same in bank be held to have been a valid instrument of writing, yet it cannot be held the estate of wards of the government may be despoiled and dissipated, as charged in this bill, through fraud, collusion, and combination to accomplish such purpose, with the knowledge and consent of the bank and its officers in which the moneys were deposited, and the other alleged conspirators, to their use and benefit, all as alleged by plaintiff. I think this proposition is fully settled and established in the following adjudicated cases controlling or persuasive here:

In United States v. Rickert, 188 U. S. 432, 23 Sup. Ct. 478, 47 L. Ed. 532, Mr. Justice Harlan, delivering the opinion of the court, says:

"Some observations may be made that are applicable to the whole case. It is said that the state has conferred upon these Indians the right of suffrage and other rights that ordinarily belong only to citizens, and that they ought, therefore, to share the burdens of government like other people who enjoy such rights. These are considerations to be addressed to Congress. It is for the legislative branch of the government to say when these Indians shall cease to be dependent and assume the responsibilities attaching to citizenship."

In United States v. Noble, 237 U. S. 74, 35 Sup. Ct. 532, 59 L. Ed. 844, Mr. Justice Hughes, delivering the opinion of the court, says:

"The Quapaws are still under national tutelage. The government maintains an agency, and, pursuant to the treaty of May 13, 1833 (7 Stat. 424), an annual appropriation is made for education and other assistance (37 Stat. 530). In 1893 the Quapaw National Council made provisions for allotments in severalty, which were to be subject to the action of Congress, and in the act of ratification of 1895 Congress imposed the restriction upon alienation which has been quoted. The guardianship of the United States continues, notwithstanding the citizenship conferred upon the allottees. United States v. Celestine,

215 U. S. 278, 291 [30 Sup. Ct. 93, 54 L. Ed. 195]; Tiger v. Western Investment Co., 221 U. S. 286, 315, 316 [31 Sup. Ct. 578, 55 L. Ed. 738]; Hallowell v. United States, 221 U. S. 317, 324 [31 Sup. Ct. 587, 55 L. Ed. 750]; United States v. Sandoval, 231 U. S. 28, 48 [34 Sup. Ct. 1, 58 L. Ed. 107]."

In United States v. Nice, 241 U. S. 591, 36 Sup. Ct. 696, 60 L. Ed. 1192, Mr. Justice Van Devanter, delivering the opinion for the court, says:

"It was said in United States v. Kagama, 118 U. S. 375, 383 [6 Sup. Ct. 1109, 30 L. Ed. 228]: 'These Indian tribes are the wards of the nation. They are communities dependent on the United States. * * * From their very weakness and helplessness, so largely due to the course of dealing of the federal government with them and the treaties in which it has been promised, there arises the duty of protection, and with it the power.' What was said in these cases has been repeated and applied in many others"—citing United States v. 43 Gallons of Whiskey, 93 U. S. 188, 23 L. Ed. 846; Dick v. United States, 208 U. S. 340, 28 Sup. Ct. 399, 52 L. Ed. 520; United States v. Sutton, 215 U. S. 291, 30 Sup. Ct. 116, 54 L. Ed. 200; Ex parte Webb, 225 U. S. 663, 32 Sup. Ct. 769, 56 L. Ed. 1248; United States v. Wright, 229 U. S. 226, 33 Sup. Ct. 630, 57 L. Ed. 1160; United States v. Sandoval, 231 U. S. 28, 34 Sup. Ct. 1, 58 L. Ed. 107; United States v. Pelican, 232 U. S. 442, 34 Sup. Ct. 396, 58 L. Ed. 676; Perrin v. United States, 232 U. S. 478, 34 Sup. Ct. 387, 58 L. Ed. 691; Johnson v. Gearlds, 234 U. S. 422, 34 Sup. Ct. 794, 58 L. Ed. 1383; Joplin Mercantile Co. v. United States, 236 U. S. 531, 545, 35 Sup. Ct. 291, 59 L. Ed. 705.

"Of course, when the Indians are prepared to exercise the privileges and bear the burdens of one sui juris, the tribal relation may be dissolved and the national guardianship brought to an end, but it rests with Congress to determine when and how this shall be done, and whether the emancipation shall at first be complete or only partial. Citizenship is not incompatible with tribal existence or continued guardianship, and so may be conferred without completely emancipating the Indians or placing them beyond the reach of congressional regulations adopted for their protection,"—citing United States v. Holliday, 3 Wall. 407, 18 L. Ed. 182; Cherokee Nation v. Hitchcock, 187 U. S. 294, 308, 23 Sup. Ct. 115, 47 L. Ed. 183; United States v. Rickert, 188 U. S. 432, 445, 23 Sup. Ct. 478, 47 L. Ed. 532; United States v. Celestine, 215 U. S. 278, 30 Sup. Ct. 93, 54 L. Ed. 195; Tiger v. Western Investment Co., 221 U. S. 286, 311–316, 31 Sup. Ct. 578, 55 L. Ed. 738; Hallowell v. United States, 221 U. S. 317, 324, 31 Sup. Ct. 587, 55 L. Ed. 750; Eells v. Ross, 64 Fed. 417, 12 C. C. A. 205; Farrell v. United States, 110 Fed. 942, 49 C. C. A. 183; Mulligan v. United States, 120 Fed. 98, 56 C. C. A. 50.

It follows, regardless of the fact whether the Quapaw Indian lessees, Benjamin and See-sah Quapaw, were or were not incompetent to make a valid mining lease on their lands, as that term is employed in the act of Congress of June 7, 1897 (30 Stat. 72, c. 3), and, further, regardless of the validity or invalidity of the power of attorney by said lessees made to Charles Goodeagle, yet, as the petition alleges, through the many conspiracies entered into between said attorney in fact and his codefendants in violation of the trust by the lessees reposed in their attorney, all with the knowledge of the defendant bank and its officers, the lessees were despoiled and defrauded of their property for the use and benefit of the conspirators, the government is interested, and is under the obligation and owes the duty to its Indian wards to bring and maintain this suit and to right the wrongs done by calling defendants to account. Brader v. James, 246 U. S. 88, 38 Sup. Ct. 285, 62 L. Ed. 591; United States v. Boylan (D. C.) 256 Fed. 468.

[2] Other objections to the petition are found stated in the motions to dismiss, such as the misjoinder of controversies, the nonjoinder of indispensable parties, want of equity, etc. These matters, however, I do not find urged with any insistence on the briefs and arguments of solicitors for the respective parties. If, as has been held, the plaintiff has legal capacity to maintain this suit, sufficient facts are found set forth in the bill to call for the interposition of a court of equity.

It follows, finding no ground to sustain the several motions to dismiss, they are denied. It is ordered moving parties are ruled to answer the bill within 20 days from the date of this memorandum.

It is so ordered.

UNITED STATES v. BLOCK.

(District Court, D. Indiana, at Indianapolis. January 10, 1920.)

No. 691.

1. CRIMINAL LAW ⊂=166—COURT-MARTIAL ACQUITTAL IS BAR TO CIVIL PROSECUTION.

Defendant registered on the 5th day of June, 1917, and thereafter failed to answer his questionnaire and fled to escape military duty. He was tried by a court-martial for desertion and convicted, but the conviction was set aside by the reviewing authorities, and he was ordered restored to duty. *Held*, that this proceeding before the court-martial constituted a bar to a prosecution in the District Court for failing to answer his questionnaire.

2. CRIMINAL LAW ⊂=163—FORMER JEOPARDY DEFENSE APPLICABLE TO MISDEMEANORS.

The principle that a man shall not be placed in jeopardy twice for the same offense applies to misdemeanors, as well as graver crimes.

William H. Block was indicted for failure to make return on a selective draft questionnaire. Demurrer to plea of former acquittal overruled.

L. Ert Slack, U. S. Atty., of Indianapolis, Ind.
Edward Maher, of Chicago, Ill., for defendant.

ANDERSON, District Judge. On November 4, 1918, the defendant was indicted by the grand jury for failing and neglecting to fill out, swear to, and return his questionnaire to Local Board No. 2 in the city of Indianapolis. In substance, the indictment alleges that on the 5th day of June, 1917, the defendant was a male person between the ages of 21 and 30 years; that on said 5th day of June, 1917, the defendant was duly and legally registered under the act of Congress entitled "An act to authorize the President to increase temporarily the military establishment of the United States," approved May 18, 1917, and in accordance with the regulations prescribed by the President under said act; that the defendant was, on the 27th day of December, 1917, under the jurisdiction of Local Board No. 2 in the city of Indianapolis, Ind., which said local board was then and there formed, constituted and operating under said act of Congress and the Selective Service Regulations prescribed thereunder by the President

on November 8, 1917, and then and there had jurisdiction, by virtue of said regulations, over all registrants who had been registered in said precinct; that on said 27th day of December the said local board mailed to said defendant the questionnaire of said defendant at his last known address, which said questionnaire the said defendant was required to fill out, swear to, and return to said local board, in accordance with said act and said regulations, on or before the 5th day of January, 1918; that on the said 27th day of December the said local board posted in its office the proper notices prescribed in said regulations, containing the order number of said defendant, notifying him that his questionnaire had on that day been mailed to him by the said board, and that he was required by law and by said regulations to execute and return to said board his said questionnaire within seven days from said 27th day of December; that the said defendant did not, within said seven days, and did not before the 5th day of January, 1918, fill out, swear to and return his questionnaire to said board; that on the 5th day of January, 1918, the defendant unlawfully and willfully failed, and did at all times, from the 5th day of January, 1918, until the day of the indictment unlawfully and willfully fail and neglect to perform such duty and to fill out, swear to, and return his said questionnaire to said local board.

The defendant was duly arrested and brought into court to answer said indictment, whereupon, before his arraignment, the district attorney, upon request of the Department of Justice at Washington, asked that the defendant be turned over and delivered to the military authorities of the United States at Ft. Benjamin Harrison, Ind., to be dealt with in accordance with military law, and it was so ordered by the court. The defendant was duly turned over to the military authorities, and he now files his plea of former acquittal, setting forth the order for his court-martial; that the court-martial met on January 15, 1919, at 10 o'clock a. m., for the trial of the defendant; that the defendant was then and there arraigned upon the charge of violating the Fifty-Eighth Article of War, with the specification, "In that Private William H. Block, Jr., Order No. 1742, Serial No. 2337, unassigned, having been duly drafted into the military service at Indianapolis, Indiana, on March 28, 1918, did, on or about March 28, 1918, willfully desert the service of the United States, and did remain absent in desertion until he was apprehended at Roseburgh, Oregon, on or about October 13, 1918;" to which the defendant pleaded to the specification, "Not guilty;" to the charge, "Not guilty." The plea then avers that the paragraphs of the Manual for Courts-Martial that set out the gist of the offense were read to the court-martial by the Judge Advocate, as follows:

"Section 130. Registrants failing to return their questionnaires or to report for physical examination to be reported to police authority."

Then follows the procedure under this section.

"Section 131. Report to the adjutant general of the state in cases of registrants who fail to return their questionnaires, or who fail to report for physical examination, and who cannot be located."

Then the procedure under such section is set out.

"Section 133. Adjutant general to order delinquents to report; and notice to registrant."

Then follows the procedure under such section; and

"Section 140. Persons inducted into military service who fail to report for military duty, or who fail to entrain, or who absent themselves from entrainment.

"1. A registrant who, after the time set for his induction into military service (sections 133, 159g), and with intent to evade such service;

"(a) Fails to report for military duty under induction orders, whether issued by the adjutant general of the state (form 1014, p. 234), or by a local board (form 1028, p. 250); or who

"(b) Fails to entrain for a mobilization camp pursuant to orders; or who

"(c) Absents himself from his party en route to a mobilization camp, or otherwise refuses or neglects to proceed to the camp as ordered

—is a deserter, and subject to punishment by court-martial."

The plea then sets forth the evidence which was introduced against the defendant before the court-martial, showing that he registered on June 5, 1917, and the procedure thereafter with reference to mailing to him his questionnaire, and his failure to answer the same, and the posting of the notice as required by the Selective Service Regulations, and evidence that notice was given to the defendant to report to the adjutant general.

The plea further shows that the defendant denied that he had received said questionnaire or such notice, and avers that he was absent on private business and that prior to the time that he left on such private business no such questionnaire was in existence; that by reason of his failure to respond to the notice of the adjutant general, as thereinbefore set forth, and under the Selective Service Regulations and the act of Congress (Comp. St. 1918, §§ 2044a–2044k), he became and was automatically inducted into the service of the United States as a soldier, as set forth in the charge and specification thereinbefore in his plea set out; that divers witnesses were sworn; that proceedings were had from day to day before said court-martial; that evidence was read, oral evidence was heard, and Selective Service Regulations were read; that 28 witnesses testified orally; that there was introduced in evidence exhibits, Selective Service Regulations, the registration card of the defendant, forms 1012, 1002, 1010, 1013, 1014, 1018, and report of police, also a blank form of questionnaire, all as required by Selective Service Regulations, and a report of the Medical Board; that arguments were heard, and said court-martial found against the defendant and sentenced him "to be dishonorably discharged from the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for fifteen (15) years"; that the matter was taken before the reviewing authority, and the following order was made:

"The sentence is disapproved. Private Block will be released from confinement and restored to duty."

—and that said last order remains in full force and effect, and cannot be annulled or set aside in any manner by the military authorities.

The plea further alleges:

"That the offense of failing to file the questionnaire was included in the said charge of 'desertion,' and that he, having been acquitted of the charge of desertion, is thereby, as a matter of law, acquitted of the charge of failing to file a questionnaire, being an essential ingredient of the charge of desertion, and is a lesser offense included in the charge of desertion."

[1, 2] The plea of the defendant is based upon the theory that he has been once placed in jeopardy and acquitted of the offense charged against him in the indictment. The Selective Service Law provides, in section 6, for the punishment of a registrant failing or neglecting to answer his questionnaire. The section, so far as it is applicable to this case, reads as follows:

"* * * Or who, in any manner, shall fail or neglect fully to perform any duty required of him in the execution of this act, shall, if not subject to military law, be guilty of a misdemeanor and upon conviction in the District Court of the United States having jurisdiction thereof, be punished by imprisonment for not more than one year or, if subject to military law, shall be tried by court-martial and suffer such punishment as a court-martial may direct."

The Supreme Court of the United States in Grafton v. United States, 206 U. S. 333, 27 Sup. Ct. 749, 51 L. Ed. 1084, 11 Ann. Cas. 640, held that a soldier in the army, having been acquitted of the crime of homicide, alleged to have been committed by him in the Philippine Islands, by a military court-martial of competent jurisdiction proceeding under authority of the United States, cannot be subsequently tried for the same offense in a civil court exercising authority in that territory. In the course of its opinion the court said (206 U. S. on page 345, 27 Sup. Ct. 751, 51 L. Ed. 1084, 11 Ann. Cas. 640):

"We assume as indisputable, on principle and authority, that before a person can be said to have been put in jeopardy of life or limb the court in which he was acquitted or convicted must have had jurisdiction to try him for the offense charged. It is alike indisputable that if a court-martial has jurisdiction to try an officer or soldier for a crime, its judgment will be accorded the finality and conclusiveness as to the issues involved which attend the judgments of a civil court in a case of which it may legally take cognizance."

Grafton having been acquitted of the crime of homicide by a court-martial, and having thereafter been convicted in the civil courts, the Supreme Court reversed the case and ordered that the complaint of the United States against Grafton be dismissed, and that he be discharged. This principle, that a man shall not be placed in jeopardy twice for the same offense, applies to misdemeanors as well as to graver crimes. Ex parte Lange, 85 U. S. (8 Wall.) 163, 21 L. Ed. 872.

In that part of section 6 of the Selective Service Law above quoted, Congress provided that whoever violated such section, "if not subject to military law," should be guilty of a misdemeanor, and upon conviction in the District Court of the United States having jurisdiction thereof, be punished by imprisonment for not more than one year, and provided further, in the alternative, that "if subject to military law" he should be tried by court-martial and suffer such punishment as a court-martial may direct, thus recognizing the legal principle that a

man may not be subjected to trial or punishment twice for the same offense.

This is not the case of a plea setting up the former conviction or acquittal of the defendant in a court of another sovereignty. It is well settled that an acquittal or conviction in a state court is not a good defense in this court; but the rule is different where both courts derive their powers from the same sovereignty. In this case the court-martial and the District Court of the United States sitting in this district both derive their powers from the government of the United States.

The plea sets forth a good defense of former acquittal, and the demurrer should be overruled; and it is so ordered.

In re LOONEY.

(District Court, W. D. Texas, El Paso Division. January 9, 1920.)

No. 268.

1. BANKRUPTCY ⊂=225—REPRESENTATIVE OF "CREDITOR" NOT AN ATTORNEY CANNOT EXAMINE WITNESSES BEFORE REFEREE.

The word "creditor," as used in General Orders in Bankruptcy No. 4 (89 Fed. iv, 32 C. C. A. viii), does not include the agent, attorney in fact, or proxy of a creditor, and under such order and No. 22 (89 Fed. x, 32 C. C. A. xxv), a creditor cannot appoint a representative, who is not an attorney and counselor at law, to examine witnesses before a referee.

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

2. BANKRUPTCY ⊂=225—EXAMINATION OF WITNESSES BEFORE REFEREE BY "PARTY."

The term "party," as used in General Order in Bankruptcy No. 22 (89 Fed. x, 32 C. C. A. xxv), providing that the examination of witnesses before the referee may be conducted by the party in person, means the owner of the claim, and seems meant to exclude agents, attorneys in fact, and proxies.

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

In the matter of Denia Labrucia Looney, bankrupt. On review of order of referee. Affirmed.

Dyer, Croom & Jones, of El Paso, Tex. (Gowan Jones, of El Paso, Tex., of counsel), for bankrupt.

Brown & Whitaker, of Murfreesboro, Tenn. (Volney M. Brown, of El Paso, Tex., of counsel), for T. E. Blanchard.

SMITH, District Judge. This is a certificate for the review of an order of H. R. Gamble, one of the referees in bankruptcy of this court, denying the right of T. E. Blanchard to examine the bankrupt at the first meeting of his creditors. Said Blanchard was the secretary of the Tri-State Association of Credit Men, and at said meeting filed the claims of 24 creditors, in each of which he was named as attorney in fact for the owner thereof, and in connection with each presented as his authority to act a power of attorney as follows:

"Said claimant hereby constitutes and appoints T. E. Blanchard, or his substitute indorsed hereon, its attorney in fact to join with other creditors and proceed in bankruptcy against the above-named debtor, under the provisions of the act entitled 'An act to establish a uniform system of bankruptcy throughout the United States,' approved July 1, 1898, and the amendments thereto, and to execute in the name of the undersigned, any usual or necessary petition or paper in that behalf, and to represent the claimant at all meetings of creditors herein, with authority to vote for trustee, also to accept any composition proposed by said bankrupt in satisfaction of ——— debts, and upon all other propositions submitted to the creditors, and to receive dividends and all notices in said cause."

Said Blanchard was not an attorney at law. The referee held that Blanchard was not entitled to examine the bankrupt for the reasons, first, that he was not authorized to do so by his powers of attorney; and, second, that he was forbidden to do so by General Order No. 4 of the Supreme Court (89 Fed. iv, 32 C. C. A. viii).

I am of opinion that the ruling of the referee was correct, and that the reasons given therefor were sound. The power of attorney which was presented authorized the said Blanchard to execute in the name of the owner of the claim any usual or necessary petition or paper in the bankruptcy proceeding, and to represent the claimant at all meetings of creditors, with authority to vote for trustee, and also with authority to accept any composition proposed by the bankrupt, and to act upon all other propositions submitted to the creditors, and to receive dividends and all notices. The powers which said Blanchard was authorized by this power of attorney to exercise in representing the claimant at all the meetings of creditors was limited to voting for trustee, accepting composition, and to acting upon any other proposition that might be submitted to the creditors, and to receiving dividends and notices. The power of attorney did not authorize him to examine witnesses at the meeting of creditors, or to perform any of the duties connected with any of the proceedings of a judicial nature; but, had it done so, I do not think it would have been valid in law.

Counsel for said Blanchard contend that he was authorized to act in the examination of witnesses by General Order No. 4, which provides that:

"Proceedings in bankruptcy may be conducted by the bankrupt in person in his own behalf, or by a petitioning or opposing creditor; but a creditor will only be allowed to manage before the court his individual interest. Every party may appear and conduct the proceedings by attorney, who shall be an attorney or counselor authorized to practice in the Circuit Court or District Court."

The argument of counsel is that, as paragraph 9 of section 1 of the Bankruptcy Act (Comp. St. § 9585) defines a creditor to include "any one who owns a demand or a claim provable in bankruptcy, and may include his duly authorized agent, attorney, or proxy," the word "creditor" in General Order No. 4 should be so defined, and that one who holds power of attorney from the owner of a claim is himself a creditor, and by the terms of General Order No. 4 would be authorized to conduct all of the proceedings in bankruptcy.

Considering the context of this General Order, it appears to me that the word "creditor," therein used, should be construed in its ordinary

and restricted sense, and not given the statutory definition, since the creditor, in conducting the proceedings, is confined to his "individual interest," and an agent, proxy, or attorney in fact has no "individual interest." I am further confirmed in this view by the fact that this General Order further requires that, if a creditor be represented by an attorney, such representative "shall be an attorney or counselor authorized to practice in the Circuit Court or District Court." There is no possible reason why the Supreme Court should have prescribed this qualification of an attorney, if it was the intention in the previous part of the order to give the creditor the right to appoint any person, without qualifications, to conduct the proceedings.

In General Order No. 22 the Supreme Court (89 Fed. x, 32 C. C. A. xxv) deals more specifically with this question. It provides that:

"The examination of witnesses before the referee may be conducted by the party in person or by his counsel or attorney, and the witnesses shall be subject to examination and cross-examination, which shall be had in conformity with the mode now adopted in courts of law."

[1, 2] It will be noted that this order designates the party, instead of the creditor, as being authorized to examine the witnesses, and says that the party so doing shall act in person, which are words of restriction. The term "party" evidently means the owner of the claim, for it is only the owner of the claim who can be a party to the bankruptcy proceedings, and it would seem that the intention was to exclude agents, attorneys in fact, and proxies. "Counselor or attorney" evidently means counselor or attorney at law. That the examination "shall be had in conformity with the mode now adopted in courts of law" would seem to evidence an intention to authorize only an attorney learned and experienced in the law, and qualified to conduct the examination in conformity with the rules of the courts of law when the party himself does not do it "in person."

I would not be understood as saying that a creditor may not be represented by proxy to a limited extent in the conduct of the bankruptcy proceedings, but I believe such representation should be, and is, confined to those proceedings which in their nature are not judicial, in the sense that they do not require in their conduct expert knowledge of court procedure and practice, such as voting at meetings of creditors, selecting trustees, accepting composition, dividends, etc. This idea is prominent in Form No. 20 (89 Fed. xxxvii, 32 C. C. A. lxi), "General Letter of Attorney in Fact when Creditor is Not Represented by Attorney at Law," prescribed by the Supreme Court, when considered in connection with General Orders Nos. 4 and 22. And I may also add, as worthy of note, that as these General Orders and said Form No. 20 deal with the question as to the manner in which creditors may be represented in the conduct of bankruptcy proceedings and the examination of witnesses before the referee, it can hardly be presumed that the word "creditor," as therein used, was intended to include any other than the owner of the provable debt. The word "creditor" does not always, when used, include "agent, attorney in fact, or proxy," as is plainly evident from paragraph 5, General Order No. XXI (89 Fed. x, 32 C. C. A. xxiii), and

doubtless from numerous provisions of the Bankruptcy Act. By reference to paragraph 9, section 1, of the Bankruptcy Act, it will be noted that the word "creditor" may include a duly authorized agent, attorney, or proxy, only when consistent with the context of the provisions of the act in which it is used, and, as already stated, to say that the word "creditor," as used in General Orders Nos. 4 and 22, includes the agent, attorney, or proxy of the creditor, would not be consistent with the context of those General Orders. A referee is a judicial officer, and in holding the bankruptcy courts exercises judicial authority. Mueller v. Nugent, 184 U. S. 1, 22 Sup. Ct. 269, 46 L. Ed. 405; White v. Schloerb, 178 U. S. 542, 20 Sup. Ct. 1007, 44 L. Ed. 1183; In re Covington (D. C.) 110 Fed. 143; In re Eagles (D. C.) 99 Fed. 695; In re McGill, 106 Fed. 57, 45 C. C. A. 218; paragraph 7, § 1, Bankruptcy Act.

In all the courts of the United States the parties may plead and manage their own cases personally or by an attorney and counselor at law. R. St. U. S. § 747 (Comp. St. § 1249). By clear implication this statute excludes from the courts all other agents, attorneys in fact, and proxies, than attorneys and counselors at law, and it is the universal practice to exclude them. To admit the unlearned nonprofessional in the courts, for the purpose of conducting their proceedings in the trial of cases for others, would soon inevitably break down all the rules of practice which have been so long in use and are so essential to the administration of justice, and I think General Orders Nos. 4 and 22 were designed and promulgated by the Supreme Court to prevent this very thing.

Therefore, answering the question certified by the referee for review, I hold that said order of the referee be affirmed.

THE CATALUNA.
THE ARAGON.

(District Court, S. D. New York. March 26, 1918.)

1. SHIPPING ⊂=175—CHARTERER BREACHED CONTRACT BY FAILURE TO PROCURE CLEARANCE, ETC., AFTER LOADING.

   Where charter party allowed 12 lay days for loading and unloading, and provided for payment of demurrage in event of additional delay, the charterer, which failed to obtain clearance for the vessel after it was loaded, etc., must be deemed to have breached its contract, and is liable in personam for damages to the owner of the vessel, which, after a long delay, unloaded the cargo at the charterer's risk.

2. SHIPPING ⊂=152—FREIGHT PAID IN ADVANCE MAY BE RECOVERED BACK WHERE CARGO IS NOT DELIVERED.

   The American doctrine is that freight paid in advance can be recovered back if the ship fails to deliver cargo at destination, unless there is a special stipulation that freight shall not be repaid.

3. SHIPPING ⊂=49(5)—CARGO UNLOADED FOR CHARTERER'S FAILURE TO OBTAIN CLEARANCE NOT SUBJECT TO OWNER'S CLAIMS FOR CHARTERER'S BREACH OF CONTRACT.

   Where the charterer of a vessel failed to obtain clearance, and the owner finally unloaded the cargo, *held* that, while the charterer was

liable in personam for breach of the charter party, which fixed the time for loading, etc., yet under the American doctrine, that freight paid in advance may be recovered back if cargo is not delivered, the owner had no lien on the cargo unloaded, notwithstanding charter party provided for payment of freight in advance, for no freight in the proper acceptance of the term was earned.

In Admiralty. Libel by the Compania Trasmediterranea, as owner of the steamship Cataluna against 6,387 barrels of petroleum and the Societe Espagnole d'Achate & d'Affretements, together with a libel by the Compania Trasmediterranea, as owner of the steamship Aragon, against 7,072 barrels of petroleum and the Societe Espagnole, etc. On exceptions to libels. Exceptions overruled as to libels in personam, and sustained as to libels in rem.

Kirlin, Woolsey & Hickox, of New York City (John M. Woolsey, of New York City, of counsel), for exceptions.

Burlingham, Veeder, Masten & Fearey, of New York City (Roscoe H. Hupper, of New York City, of counsel), opposed.

MAYER, District Judge. Exceptions have been filed to libels brought by the owner of two Spanish steamships against their respective cargoes of petroleum and the charterer. The libel on behalf of the Aragon is brought to recover (1) freight, (2) demurrage, and (3) extra expenses, aggregating $174,864; and the libel on behalf of the Cataluna is brought to recover (1) freight, (2) demurrage, and (3) expenses of lighters, etc., aggregating $156,644. The charters on which the libels are founded are in the same terms, and the libels themselves are similar in form. It will suffice, therefore, for both cases, to refer to the Cataluna libel.

[1] The Cataluna was chartered at Barcelona, Spain, to proceed to New York and load a complete cargo of crude petroleum in barrels to be provided by respondent, and with said cargo to proceed to certain Spanish ports. The charter party provided with regard to freight and demurrage as follows:

"(4) Twelve lay days are conceded for the loading and unloading, commencing to count these from the moment of the steamer's arrival at the port, whether the pier is ready or not, in spite of the custom of the port, always that the ship is ready to receive or discharge its cargo. If the pier indicated by the charterers cannot be used immediately, these days will begin to be counted immediately on receiving written notice that the steamer has arrived in port.

"(5) For every day's delay occasioned through fault of the charterers, or their agents, the charterers will have to pay 5,000 (five thousand) pesetas per day, payable in Barcelona."

"(8) The charterers must pay the total sum of the freight in Barcelona on receipt of telegraphic advice that the cargo has been loaded and the B/L's signed. The freight to be 60 (sixty) pesetas per barrel shipped and further amount of delay, should there have been any in New York."

It is alleged that under the charter party it was the duty of respondent to furnish the Cataluna with a lawful cargo, and that respondent was bound to secure all such licenses and permits as should be required in respect of the cargo, and to furnish all such papers and documents

concerning cargo as should be necessary to enable the Cataluna to clear and sail from the port of New York with her cargo.

The Cataluna arrived at the port of New York on or about August 27, 1917, was duly tendered to respondent, and in due course began loading her cargo of 6,387 barrels of crude petroleum, which loading was completed September 17, 1917; lay days allowed under the charter parties having expired on September 12, 1917. When the loading was completed, the Cataluna was ready to proceed on her voyage from New York with the petroleum cargo, and libelant demanded from respondent that bills of lading be presented for signature, and that respondent should secure and present such other papers and documents as were necessary to enable the Cataluna to clear, including an export license for the cargo. Respondent wholly failed and neglected to present bills of lading, and did not provide the necessary export license and such other papers as were requisite to enable the vessel to clear, and by reason thereof the Cataluna was prevented from proceeding on her voyage, and was detained at New York from September 12, 1917, to December 5, 1917. On the latter date libelant caused the cargo of crude petroleum to be discharged from the Cataluna onto lighters, there to be held at the risk and expense of respondent. The libel then alleges that by reason of the foregoing matters libelant became entitled to collect from respondent the freight provided by the charter party to be paid and demurrage money, and further charges and expenses for lighters, etc. The libelant asked that process in rem issue against the 6,387 barrels of crude petroleum, and that process in personam, with clause of foreign attachment, issue against respondent.

From the foregoing it is plain that there was a breach of the charter party. The Cataluna was not called upon to lie idle indefinitely, and the fact that freight and demurrage were to be paid for at Barcelona does not transmute a breach into something else, nor prevent libelant from recovering because by respondent's conduct libelant was prevented from transporting the freight. It must be remembered that the charter was a voyage charter, and, so far as appears from the face of the libel, libelant was always ready to perform its agreement; but respondent, in failing to obtain the necessary clearance papers and detaining the vessel for an unreasonable time, breached its contract. I am of opinion, therefore, that the libel, so far as it sets forth an action in personam, is good, and that the exceptions in that respect must be overruled.

[2, 3] The libel in personam proceeds in effect, upon the theory of damages for breach of the charter party; but, while the libel is good in personam, it fails in rem. The American doctrine is that freight paid in advance can be recovered back in the event that the ship fails to deliver the cargo at destination, unless there is a special stipulation that the freight shall not be repaid. Nat. Steam Nav. Co., Ltd., of Greece v. International Paper Co., 241 Fed. 861, 154 C. C. A. 563, expresses the views of our Circuit Court of Appeals, and that opinion clearly points out the difference between the law of England and our law upon the subject of prepaid freight and reference is made to well known leading cases.

Where freight is not prepaid, there can be no doubt that there cannot be a maritime lien, unless the freight is earned; that is to say, transported. Where freight is prepaid, but not transported, it seems to me the same principle must apply, although perhaps there is no case which clearly and directly disposes of the point. Freight under our law is a payment for the delivery of goods to destination, and whether prepaid or not is earned only by such delivery in the absence of some special arrangement to the contrary. No transportation having taken place, and no freight having been earned, there is no foundation for a maritime lien, and thus for an action in rem. As demurrage is extended freight, there is no action in rem for demurrage. The exceptions, so far as they are directed to the action in rem, are sustained.

Settle order on notice.

NEW YORK LIFE INS. CO. v. ANDERSON, Internal Revenue Collector.

(District Court, S. D. New York. February 11, 1919.)

1. INTERNAL REVENUE ⟸9—DIVIDENDS PAID BY INSURANCE COMPANY TO POLICY HOLDERS OR CREDITED ON PREMIUMS MUST BE EXCLUDED IN COMPUTING THE COMPANY'S INCOME.

Dividends or surplus, which life insurance companies are required by Insurance Law N. Y. § 83, either to pay policy holders in cash or to credit upon premiums due from them, must be excluded in determining the income of the company for the purposes of taxation.

2. INTERNAL REVENUE ⟸9—DEPRECIATION IN MARKET VALUE OF SECURITIES NOT ALLOWED AS DEDUCTION WHERE NOT REALIZED BY SALE.

In computing the income of an insurance company for assessment under Act Aug. 5, 1909, c. 6, § 38, par. 2, which allowed all losses actually sustained within the year and not compensated by insurance, together with reasonable allowance of depreciation of property, to be deducted, depreciation of securities taken at market value during the year cannot be deducted, where the depreciation was not realized by sale of depreciated securities.

At Law. Action by the New York Life Insurance Company against Charles W. Anderson, Internal Revenue Collector. Verdict directed for plaintiff.

Judgment reversed, 263 Fed. 527, — C. C. A. —.

See, also, 257 Fed. 576.

James H. McIntosh, of New York City, for plaintiff.

Francis G. Caffey, U. S. Atty., of New York City, for defendant.

LEARNED HAND, District Judge. [1] In Conn. Mut. Ins. Co. v. Eaton (D. C.) 218 Fed. 206, affirmed 223 Fed. 1022, 138 C. C. A. 663, which is authoritative upon me, the resolution of the insurer under which the dividends were paid provided that dividends were payable upon all policies in force at the beginning of the ensuing year. The resolution gave the right to the dividend upon payment "or nonpayment when due" of the succeeding premiums. One of the insured's options was to receive the dividend in cash. As I understand the facts, therefore, the debt was absolute upon all policies which had been kept

in force during the year in which the dividend was earned. If so, I see no difference between that case and a policy issued under section 83 of the New York Insurance Law (Consol. Laws, c. 28). It can make no difference that the dividend is a debt made absolute by statute instead of by contract. Therefore that case appears to me to be on all fours with the case at bar. In Mut. Ins. Co. v. Herold (D. C.) 198 Fed. 199, affirmed 201 Fed. 918, 120 C. C. A. 256, the facts are not clear, and this may not have been the situation.

Moreover, in principle I think there is no distinction, even if the debt be not absolute. Assume, if one please, that the payment of the dividend in Conn. Mut. Ins. Co. v. Eaton, supra, was conditional upon the insured's payment of the next succeeding premium; even so, when he elected to pay that premium, the dividend became an absolute debt, payable in cash. In such cases as the insured had so elected, as he did in all cases there under consideration, his further election to accept, not cash, but credit upon his premium, discharged an absolute debt quite as much as a similar election under section 83 of the New York Insurance Law. Perhaps the discharge of such a debt ought to have been considered equivalent to the receipt of an equal sum of money —i. e., as income; but the law is fixed otherwise, and unless there be some distinction I must follow it.

So it seems to me that, as respects all policies on which the insured have elected to pay the balance of their premiums during the year for which the tax is levied, the credit of the dividends was as much a payment where the New York law did not apply, as where it does. I hold, therefore, both on the facts of Conn. Mut. Ins. Co. v. Eaton, supra, and upon principle, that the plaintiff is right as to this item, and it may have a verdict as to so much.

[2] The remaining point is as to the depreciation of securities taken at market value during the year. It is quite apparent that, if this depreciation be accepted as a deduction, and no appreciation be added, the insurer may slowly over a series of years credit itself with possibly the whole value of its securities and without any corresponding offset. This is obviously an unreasonable result, which could not have been intended. The question is whether the depreciation falls within the deductions covered by paragraph 2 of section 38 of the act of 1909 (36 Stat. 112, c. 6). Of the deductions so allowed the only one appropriate is:

"All losses actually sustained within the year, and not compensated by insurance or otherwise, including a reasonable allowance for depreciation of property if any."

This clause of the statute undoubtedly goes to a "depreciation" which has not yet been realized by sale of the depreciated property; so much one must allow. If the securities had been sold, I need not say that the loss would not have been a proper item of allowance. The clause is not intended to cover that situation. The question is whether it should be limited to the loss in actual use value, due to wear and tear, reflected in a fall in money value. It seems to me quite clear that it should be so limited. The fluctuations in the market value of a com-

mercial security, as in the case of a stock of goods, are constant from month to month. No one regards them as a final depreciation in value from which the property will not recover. It may or may not; but, if there has been no certain deterioration in those elements which contribute to the beneficial use of the property, and which prevent it from ever commanding the same opinion of its value as before, the loss has not, I think, been "actually sustained." When consumable goods are in part worn out, they can never recover their earlier condition. It is true that their value may recover, owing to the increased value of all their class, new and used; but the proportion between the value of new and used goods of that kind is presumptively unchanged. The loss has then been "actually sustained," in the sense that it cannot be recouped. This is what I think the language means. It refers to such goods as by reason of their physical deterioration are permanently impaired in use, from which impairment there was no chance of recovery.

Such an interpretation, moreover, accords with common business understanding. A manufacturer charges his profits with the loss to his machinery and buildings, due to wear and tear, recognizing that the necessity of the upkeep of his capital will in the end inevitably require some such allowance. A merchant, on the other hand does not ordinarily include the variations in the market values of his stock in counting his profits. They may shortly be restored to their value, and the time to charge his profit with them is when they are sold, and the gain or loss finally ascertained.

Cases like Stratton's Independence v. Howbert, 231 U. S. 399, 34 Sup. Ct. 136, 58 L. Ed. 285, and those which follow it, or Doyle v. Mitchell Bros. Co., 247 U. S. 179, 38 Sup. Ct. 467, 62 L. Ed. 1054, and those which follow it as well, are quite different. The question was how the gross income was to be estimated, particularly what allowance should be made for the original value of the raw material, which had been worked up and sold as a finished product. Hays v. Gauley Mountain Coal Co., 247 U. S. 189, 38 Sup. Ct. 470, 62 L. Ed. 1061, was a case where securities were actually sold, and the question was also one of gross income. It did not determine what was to be considered the proper deduction for depreciation not realized by conversion into cash. Nor do any of the cases cited in the lower courts seem to me to be in point. While the case appears, therefore, to be one of first impression, I do not hesitate to hold that the defendant is right upon this item.

The plaintiff will take no interest upon the first item of $694.52 in the agreed statement. A verdict will be directed for the amount found in accordance with the foregoing.

THE TAMAHA.
THE F. B. DALZELL.
THE FLORENCE.

(District Court, E. D. New York. December 5, 1919.)

1. WHARVES ⟸21—TUG NOT NEGLIGENT IN STRETCHING HAWSER ACROSS OPEN SLIP.

Where a tug, under orders, drew a vessel out of a dry dock, stretched a hawser from the vessel across an open slip to a pier, suggested to the vessel's officer that a lantern be placed at the steamer's stern after dark, and then left, *held*, that the tug was not negligent in either stretching the line or in failing to remain to watch it.

2. WHARVES ⟸21—STEAMER PRIMARILY AND PIER ALSO LIABLE FOR INJURIES SUSTAINED WHEN TUG RAN INTO HAWSER ACROSS OPEN SLIP.

Where a hawser, stretched from a vessel at a dry dock across an open slip to a pier, caused injury to libelant, engineer on a tug which endeavored to enter the slip after dark, *held*, that the steamer was primarily responsible, but that the dry dock company, which was apparently aware of the condition and knew that the slip was frequently used by other vessels, was also liable.

3. WHARVES ⟸21—EVIDENCE INSUFFICIENT TO SHOW INJURY TO LIBELANT WHEN HIS TUG RAN INTO A HAWSER.

The testimony of an engineer on a tug that he had been knocked down by something and injured when the tug ran against a hawser stretched from a steamer across an open slip to a pier *held* insufficient to establish that any injuries were received in the manner claimed, in view of fact that persons inspecting the engine room immediately after the accident found no indications that the room had been affected by the accident, and when the condition claimed as injury might have resulted from disease.

In Admiralty. Libel by Walter A. Gully against the steamship Tamaha; the F. B. Dalzell, James Shewan & Sons, Incorporated, and the tug Florence, impleaded. Libel dismissed.

Harry E. Shirk, of Brooklyn, N. Y., for libelant.

Kirlin, Woolsey & Hickox and L. De Grove Potter, all of New York City, for the Tamaha.

Carter & Carter and P. S. Carter, all of New York City, for the F. B. Dalzell.

Foley & Martin and J. A. Martin, all of New York City, for James Shewan & Sons, Inc.

CHATFIELD, District Judge. The libelant was an engineer upon the tug Florence, which attempted to enter a slip adjoining the pier used to hold the shop and offices of the Shewan Dry Dock Company upon the evening of July 6, 1916. In so doing the tug struck a 7-inch hawser which had been stretched from the stern of the steamer Tamaha across the slip to the pier upon the south. No lantern had been placed on this hawser, or at the stern of the ship, to indicate danger. The pilothouse of the tug, its smokestack, and the steampipe leading to the whistle were sheered off just above the roof of the main deckhouse. The captain of the tug was in the pilothouse, but was saved from serious injury by the framework of the wheel, which was crushed down

over him. The libelant was thrown to the floor in his engineroom, and testifies that he was struck upon the left side of the head, or upon the left ear, by some object which knocked him down.

Surveyors who examined the boat immediately after the accident found absolutely nothing broken or misplaced inside of the engineroom, except that the bell wires were pulled loose and a strip of molding pulled out of place where these wires were torn out.

The hawser in question had been placed across the slip after the steamer had been drawn out of the dry dock in order to allow another vessel of the same line to be put in the dry dock for immediate repairs. The Tamaha was placed at the end of the Shewan pier, but angling across, so that her bow was held by lines to some structure inside of Shewan's yard. Her stern thus projected partly into the slip in question, and the Dalzell tug stretched the hawser, at the direction of some one either on the Shewan pier or on the ship, and with the approval of the ship's officers. The captain of the tug called the attention of the Tamaha's officer to the line, and indicated that a lantern should be placed at the stern of the steamer; but his suggestion was not accepted by this officer.

[1] The Dalzell tug left before dark, and I see no negligence in either stretching the line or in failing to remain to watch the line, so far as the Dalzell tug was concerned. The negligence consisted in the maintenance of this line across an open slip in the dark without some light to indicate its presence. Responsibility for that must rest upon the vessel, unless that responsibility was shared or assumed by the owners of the dry dock. The petition should therefore be dismissed by which the F. P. Dalzell was brought into the case.

[2] As between the Tamaha and the Shewan Company, the Tamaha was primarily responsible for the conditions. The Shewan Company was apparently aware of these conditions, and knew that the hawser was blocking the adjoining slip. They also knew that this slip was frequently used by vessels which would not know of the presence of the hawser. The steamship, therefore, and the Shewan Company, must be held at fault for the situation which existed and the carelessness which resulted in the injuries upon the Florence.

[3] But another issue in this case has been raised by the claimant and respondent with respect to the injuries alleged by the libelant to have been received on this occasion. The libelant suffered the loss of his left leg some 35 years ago, when he was a small boy. He complains of pains at times in his shoulder, which his own doctors could trace to no injury, unless it be from the strain or discomfort of using a crutch under his left arm. He complains of trouble in hearing, and an examination by various doctors has disclosed that his hearing is somewhat impaired.

Examination in open court showed that his ability to hear was affected in great degree by his idea of what the doctors were doing in the way of a test. The libelant seemed to be attempting honestly to report his perceptions and sensations during these tests; but it was apparent that he said he did not hear certain sounds of which he must have

been in some way conscious, and which were much louder and more easily distinguishable than the voice, which he quickly responded to, at the same distance.

His loss of hearing is much less than he believes it to be, even if he has not intentionally misled the doctors during the examinations.

The libelant has failed to furnish a preponderance of credible testimony indicating that he received any injury at the time, from which the deafness has resulted, or that the deafness is the result of any blow received at the time of collision with the hawser.

The captain of the vessel testifies that the libelant complained of no injury and was around the boat within a few moments. The libelant testifies that it was some half an hour before he was able to get out around the deck, and during this time he pulled most of the fire under the boiler.

The captain of the boat seems to have been in a better position to estimate what was going on, as he retained command and control of his boat and was observing the whereabouts and condition of his crew. While the libelant may be excused for not appreciating the situation and the length of time during which steam was escaping from the open steam pipe outside of the engine house, while he was endeavoring to pull his fires and to shut off any steam that might be escaping, nevertheless his condition was not such that it is persuasive evidence of his having received any severe blow upon the head. The hawser which came in contact with the tug was not broken. The eardrums of the libelant were not ruptured, and the testimony leads the court to believe that his impaired hearing is the result of some other internal trouble, which manifested itself either after this accident, or which was first noticed and observed when the libelant's attention was called to what might have happened from the accident, and that he thereby attributed to the accident in question effects with which it had nothing to do as a cause.

The libel will be dismissed, but without costs.

Ex parte CHAN WY SHEUNG.

(District Court, N. D. California, S. D. November 20, 1919.)

No. 16672.

ALIENS ⊂=32(8)—EVIDENCE INSUFFICIENT TO SUSTAIN ORDER EXCLUDING CHINESE.

Where a Chinese applicant's father had been admitted as a native-born citizen, and applicant's two brothers were subsequently admitted as sons of a native-born citizen, *held*, that a declaration, claimed to have been made by applicant's father in Canada, giving China as the father's birthplace and an instrument by applicant's grandfather, stating that he arrived in the United States subsequent to the date applicant's father had claimed to have been born in this country, were insufficient to authorize the department in overturning its previous decisions and excluding the applicant.

Habeas corpus proceedings by Chan Wy Sheung. Demurrer to petition overruled, and writ issued.

Joseph P. Fallon, of San Francisco, Cal., for petitioner.

Annette Abbott Adams, U. S. Atty., and Benjamin F. Geis, Asst. U. S. Atty., Both of San Francisco, Cal., for respondent.

RUDKIN, District Judge. The facts in this case are substantially as follows:

Chan Young, the father of the present applicant, was admitted to the United States in December, 1899, as a native-born citizen, after a full hearing before the proper department. The testimony introduced on that hearing, consisting of the testimony of the then applicant, his father, and at least one other witness familiar with the time and place of the applicant's birth, showed without contradiction that the applicant was born at 751 Sacramento street, San Francisco, state of California, in the year 1875. In the year 1909 or 1910 Chan Way Bon, a son of Chan Young, was admitted as the son of a native-born citizen, and in 1917 Chan Way Ging, another son, was likewise admitted as the son of a native-born citizen. It is conceded by the government that the present applicant is a brother of the two last-named Chinese, and a son of Chan Young, who, as already stated, was formally admitted to the United States as a native-born citizen 20 years ago. Chan Young died in San Francisco in 1912, having resided continuously in the United States from the time of his admission up to the time of his death. The grandfather is likewise dead. The denial of the admission in this case was based upon the fact that the father of the applicant under the name of Chun Wan Mong on the 2d of June, 1899, filed a statement and declaration for registration at Victoria, British Columbia, stating that he was born at Ding Boy, Sun Woy district, China, and that he was then of the age of 25 years. There was likewise offered in evidence at the present hearing a certified copy of an application for a certificate of residence, made by Chin Wong, the grandfather of the applicant, on the 10th day of April, 1894, stating, among other things, that the applicant arrived in the United States in May, 1876.

Based upon these two certificates or statements, it is argued by the government that the father of the applicant was not a citizen of the United States, and that the statement of the grandfather that he arrived in the United States in 1876 precludes the idea that his son was born here in 1875. There are grave doubts in my mind whether either of these statements or certificates are competent or admissible as against the applicant. There is also a grave doubt in my mind as to whether the declaration made at Victoria was actually made by the father of the applicant. There is no testimony in the record tending to identify him as the person who made the declaration, and while the declaration shows that the applicant arrived at Victoria by the steamship Umatilla, there is other testimony tending to show that he in fact arrived by the steamer Walla Walla. But, in any event, it occurs to me that the department should be bound in this matter by its own prior adjudications, made at a time when the witnesses who had knowledge of the facts were living, and able and competent to testify, and that it would be a gross injustice to exclude the applicant now, after the death of his father and his grandfather, when it is utterly impossible to explain or contradict the ex parte statements offered in evidence against him.

As to the declaration of the grandfather, it was not in evidence before the department, and perhaps should not be considered; but in any event, it seems to me, entirely too much importance is attached to the matter of dates. As showing the ease with which dates may be confused or misstated, I need only refer to the record in this case, to show that it is stated in the brief of counsel for the government and the memorandum prepared for the Secretary that the application of the grandfather was dated April 13, 1894, whereas the certified copy shows that it was dated April 10. Furthermore, the testimony given by the grandfather in 1899 showed that he had been a resident of the United States for 30 years, which would carry him back to the '60's, and away beyond the birth of the applicant. I am fully aware of the limited power of the courts in matters of this kind, and of the force and effect that must be given to the findings of the department; but I am of the opinion that the question here presented is one of law rather than of fact, and I cannot sanction the injustice that would result from excluding the applicant from the country at this late day under the circumstances disclosed by this record. The decisions of the department, after a full hearing, should be given some effect, and should not be overturned or set aside in subsequent cases upon any such pretext or for any such reason as is here assigned.

The demurrer is therefore overruled, and the writ of habeas corpus will issue as prayed, returnable November 22, 1919, at 10 o'clock a. m.

UNITED STATES v. BENOWITZ.

(District Court, S. D. New York. October 20, 1919.)

INTERNAL REVENUE ⟸25—PERSONS AUTHORIZED TO ADMINISTER OATH TO INCOME TAX RETURN.

Under Income Tax Act Feb. 24, 1919, § 223 (Comp. St. Ann. Supp. 1919, § 6336¼kk), and the regulations made thereunder, requiring income returns to be made under oath, such oath may be taken before any person authorized by the local law to administer oaths.

Criminal prosecution by the United States against Hyman Benowitz for perjury under Criminal Code, § 125 (Comp. St. § 10295). On demurrer to indictment. Overruled.

Francis G. Caffey, U. S. Atty., and Benjamin P. De Witt, Asst. U. S. Atty., both of New York City.

Abraham Levy and Mark Eisner, both of New York City, for defendant.

LEARNED HAND, District Judge. It must be conceded that since United States v. Curtis, 107 U. S. 671, 2 Sup. Ct. 501, 27 L. Ed. 534, and United States v. Hall, 131 U. S. 50, 9 Sup. Ct. 663, 33 L. Ed. 97, the crime charged in the first count must stand or fall solely upon whether section 406 of the regulations under the income tax law authorized commissioners of deeds to take oaths to income tax returns (United States v. Morehead, 243 U. S. 608, 37 Sup. Ct. 458, 61 L. Ed. 926), or perhaps whether under Mr. Justice Story's dictum in United States v. Bailey, 9 Pet. 238, 253, 257, 9 L. Ed. 113, the oath was taken before such an official "in conformity with the practice and usage of the Treasury Department."

Section 406 begins by the bare statement that all returns must be verified on oath, in that respect merely repealing the statute. Yet it very clearly intended—though it must be confessed, it is very blindly worded—to cover the whole matter, because it at once proceeds to particulars, providing that soldiers and sailors may take oaths before any one generally authorized to administer oaths to soldiers and sailors and that persons abroad may go to consular officers. It is, of course, absurd to suppose that the section taken as a whole meant to say that only such officers might administer oaths. If so, no one need, or indeed could, verify his return unless it were soldiers and sailors and persons abroad. This would repeal the statute in substance; indeed, such a regulation would be illegal.

Finally, the section concludes with a provision for the certification of oaths taken by "a foreign notary or other official having no seal." This, of course, directly implies that foreign notaries may take such oaths, and that there are also officials so authorized who have no seals other than they. It is perfectly apparent from this language that those who drafted the section must have supposed that the first sentence authorized some officers to take oaths, for the last sentence from which the question was taken would be without any conceivable meaning

if they did not, just as the second and third sentences, while logically possible, would be absurd and indeed invalid in law. If so, the only question is as to what officers the draftsmen of the section must have meant.

Much the most rational, and, so far as I can see, the only possible, interpretation is that they meant to include all such as were authorized by the local law to take oaths in their several districts. If I do not so interpret the language, I must suppose that the regulation which was meant to put the statute into effect illegally defeated it by applying it in a whimsically capricious way. I interpret the regulation, therefore, as intended to allow a commissioner of deeds, among other officials to take such an oath. It becames unnecessary, therefore, to consider the effect of Justice Story's dictum in United States v. Bailey, supra.

The second count is concededly good, if the first is.

Demurrer overruled.

HOGAN et ux. v. BUJA.

(District Court, E. D. Louisiana, New Orleans Division. January 13, 1920.)

No. 16018.

1. ADMIRALTY ⊂⊃2—UNDER SAVING CLAUSE, INJURED SERVANT MAY PROCEED IN ADMIRALTY, AT COMMON LAW, OR UNDER WORKMEN'S COMPENSATION ACT.

Under Judicial Code, § 24, par. 3 (Comp. St. § 991), saving to suitors in admiralty their rights at common law and under Workmen's Compensation Acts, a person injured by a tort cognizable in admiralty may proceed in admiralty, at common law, or under the provisions of a workmen's compensation act.

2. MASTER AND SERVANT ⊂⊃401—PLEADING IN ADMIRALTY PAYMENT OF WORKMEN'S COMPENSATION.

Under Judicial Code, § 24, par. 3 (Comp. St. § 991), saving to admiralty claimants rights to workmen's compensation, an exception of no cause of action to a libel for personal injuries will not be sustained, where the libel fails to show that a workmen's compensation award had been received; but, if an award has been received, that fact may be set up in defense, for admiralty courts will not permit two recoveries for the same tort.

In Admiralty. Libel by Mr. and Mrs. John Hogan, for the use and benefit of their minor son, Alvin Joseph Coffey, against Albert J. Buja. Exceptions to libel overruled, and respondents allowed 10 days to file an answer.

Daniel Wendling, of New Orleans, La., for libelants.

Gordon Boswell, of New Orleans, La., for respondent.

FOSTER, District Judge. This is a libel in personam, brought on behalf of a minor for personal injuries. It appears from the allegations of the libel that the said minor was employed as a longshoreman by the respondent, who is a stevedore, and the injuries occurred on board the steamship Nondrallie, while lying in the Mississippi river at New Orleans.

An exception of no cause of action has been filed. It is contended on behalf of respondent that the amendment to paragraph 3, section

24, of the Judicial Code adopted October 6, 1917 (Comp. St. § 991), "saving * * * to claimants the rights and remedies under the workmen's compensation law of any state," deprives the admiralty courts of jurisdiction in any state where a workmen's compensation law is in force and effect. It does not appear from the libel that any settlement has been made under the compensation laws of Louisiana (Act 20 of 1914 and amendments); but, as it is conceded in argument, that fact may be considered in determining this exception.

As paragraph 3 of section 24, Judicial Code, was originally enacted, it granted admiralty and maritime jurisdiction to District Courts of the United States, "saving to suitors in all cases the right of a common-law remedy where the common law is competent to give it," and it is well settled that the state courts had jurisdiction of a suit not in rem to recover damages for an admiralty tort, and the injured party might elect whether to sue at common law or in admiralty.

[1] I can see no difference with regard to the workmen's compensation laws, and therefore the person injured, in a case of tort cognizable in admiralty, may elect whether to proceed in admiralty, at common law or under the provisions of the workmen's compensation law, where it exists.

[2] If a settlement has been made in this case in such a manner as to exclude any further recovery, that fact may be set up in defense, as courts of admiralty administer the broadest equity, and would not permit two recoveries for the same tort. That is a question to be decided on the merits. If the facts set up in the answer in this case warrant it, a trial may be had on that issue, separate from the other questions involved in the case.

The exception will be overruled; respondent to have 10 days in which to file an answer.

UNITED STATES ex rel. BERGER v. UHL, Acting Commissioner of Immigration.

(District Court, S. D. New York. December 8, 1919.)

HABEAS CORPUS ⊂=54—APPLICATION BY ALIEN INSUFFICIENT AS TO GROUNDS FOR DETENTION.

An application by an alien, held in custody by the immigration authorities, to obtain release on habeas corpus, will be dismissed, where it did not set forth the ground on which he was held by the immigration authorities, or the record of the deportation proceedings, but averred merely on information and belief, without stating any grounds, that applicant believed he was held in custody because he arrived in 1913.

Habeas Corpus. Application by the United States, on the relation of Fred Harold Berger, for writ of habeas corpus against Byron H. Uhl, as Acting Commissioner of Immigration at the port of New York. Application denied.

Chas. Recht, of New York City, for petitioner.

Francis Caffey, U. S. Dist. Atty., of New York City, for defendant.

MAYER, District Judge. This is an application for a writ of habeas corpus. It is impossible to ascertain from the petition what facts, if any, are alleged as the ground upon which it is claimed that the detention is illegal. The petitioner alleges that—

"The cause or pretense of the imprisonment or restraint of the said relator, to the best of the knowledge and belief of your relator, is that he arrived in the United States in the year 1913."

It is impossible to believe that officials of the government detained petitioner merely because he arrived in the United States in 1913. The sources of the knowledge and belief upon which such an extraordinary allegation is based are not stated.

The petitioner then relates some experiences beginning with his arrest in California, but carefully avoids setting forth any fact upon which any present wrongful detention can be predicated. He states, in effect, that he has been confined in various jails and immigration stations since 1917, and discloses his wishes as follows:

"Your petitioner feels that there is no evidence upon which to base said deportation, but your petitioner will not raise any question as to this, for your petitioner feels that, if the government or the people of the United States do not desire his presence here, he is willing to return to his native country, formerly Baltic Russia, but now the independent republic of Esthonia and Latvia.

"Your petitioner feels, however, that he has suffered great injury by two years of close confinement in various jails and immigration stations, in violation of promises made to petitioner that he would be immediately deported."

The practice of applying for writs of habeas corpus upon loose general allegations, which fail to show on the face of the petition that a petitioner is wrongfully detained, should be discontinued. From time to time cases may arise where deportation is imminent, and where the person detained or his attorney may not have time to have access to the records, and thus to draw a satisfactory petition. In such in-

stances, justice may require the issuance of a writ to prevent premature deportation from making the question moot. But such is not this case, where so far as appears from the petition the petitioner has waited for two years, and is now willing to be deported, but desires to be set at large until he is accommodated.

Petitioner or his counsel will have no difficulty in examining the records upon which his deportation is based, and, if he applies again for a writ, he will attach to his petition the record, or a copy thereof (which will be furnished without expense), or, in lieu thereof, his statements must be made on knowledge, or, if on information and belief, he must set forth the grounds of his information and belief.

Application denied.

Ex parte YOUNG TOY.

(District Court, N. D. California, First Division. September 16, 1919.)

No. 16515.

ALIENS ⊂=32(8)—EVIDENCE INSUFFICIENT TO SUSTAIN EXCLUSION OF CHINESE.

In habeas corpus proceedings by a Chinese seeking admission as the son of a resident merchant, evidence that the father was principally engaged in delivering liquors and cigars sold by the firm of which he was a member, *held* not to destroy the father's mercantile status, since the manual labor of delivering articles was a necessary part of the business.

Habeas corpus proceedings by Young Toy. Demurrer to petition for writ overruled, and writ issued.

George A. McGowan, of San Francisco, Cal., for petitioner.

Annette Abbott Adams, U. S. Atty., and Ben F. Geis, Asst. U. S. Atty., both of San Francisco, Cal., for respondent.

DOOLING, District Judge. Petitioner, a native of China, seeks admission into this country as the son of a resident merchant. The relationship is conceded, but the mercantile status of the father is denied. The testimony shows that the father is a member of a firm dealing in liquors, but that he spends much of his time in delivering goods to customers of the establishment. It is also claimed that the firm has not sufficient capital, or goods to justify the number of active members claimed. It may be said in passing that about six months before the date of the exclusion of the present applicant one of his brothers was admitted into the country, and at that time the father's status as a merchant was recognized. Establishments dealing in liquor, with prohibition in sight, naturally would not want a large stock of goods on hand, and that phase of the case was not the determining factor in the department's conclusion that the father was not a merchant within the meaning of the law. The decision of the commissioner contains the following language:

"Admitting the alleged father's claim that he has $500 invested in the business, the work performed by him is that of a laborer, requiring no skill or training, and would not seem to bring him within the definition of a 'mer-

chant' as one who is engaged in buying and selling merchandise at a fixed place of business, and performing no manual labor other than that necessary in the conduct of his business as a merchant."

Here we have the real reason for the determination that the applicant's father is not a merchant as defined. But the firm of which the father is a member has a fixed place of business and is there engaged in buying and selling liquors and cigars. The delivery of goods sold by a modern mercantile establishment is just as much an essential part of the business as is the sale itself, and a member of the firm who makes the delivery is not performing manual labor not necessary in the conduct of his business as a merchant. It is not all manual labor which disqualifies, but only such manual labor as is not necessary in the conduct of the business as a merchant. I can see no difference between the wrapping up of the goods in the store, and the delivery of them to the purchaser's home. Each involves manual labor, but each is necessary to conduct of the business.

The demurrer will therefore be overruled, and the writ will issue, returnable September 20, 1919, at 10 o'clock a. m.

SANDERSON v. BISHOP et al.

(Circuit Court, W. D. Arkansas, Texarkana Division. January 7, 1909.)

1. VENDOR AND PURCHASER ⊂⊃18(½)—NEGOTIATIONS AFTER EXPIRATION OF OPTION HELD NOT TO CREATE CONTRACT.
   Where a written option to purchase land had expired without renewal, further negotiations between the parties on the basis of the option contract, and acts which were conditional on completion of the sale, *held* not to create a contract enforceable in equity by the vendor.
2. SPECIFIC PERFORMANCE ⊂⊃17—CONTRACT HELD NOT ENFORCEABLE BY THIRD PERSON.
   A contract made by a third person with one holding an option to purchase land, by which he agreed to join in the purchase and pay a stated sum for a half interest in the land, *held* not enforceable in equity by the vendor.

In Equity. Suit by H. G. Sanderson against George W. Bishop, Jr., and Jacob L. Neff. Decree for defendants.

W. H. Arnold and M. E. Sanderson, both of Texarkana, Ark., for complainant.

L. A. Byrne, for defendant Bishop.

Henry Moore, Jr., of Texarkana, Ark., for defendant Neff.

ROGERS, District Judge. A careful examination of the record in this case discloses the following state of facts:

The complainant, on January 2, 1908, gave the defendant Bishop an option for the lands in controversy, and during that month Bishop paid complainant $1,000 therefor. The option was in writing and re-

cited the price of the lands at $25,000 cash, on certain conditions therein stated. The option was to expire on March 1, 1908, and provided that, when Bishop elected to take the land and pay $1,000, complainant was, within 10 days thereafter, to furnish an abstract showing a good and sufficient title, under the laws of Arkansas, and to execute deed therefor. It also provided that, if the purchase was made the $1,000 already paid was to go as part of the purchase price. If the title should not turn out to be good, the $1,000 was to be returned to Bishop, and if it turned out to be good, and Bishop refused to purchase the land under the terms of the option, then Bishop was to forfeit the $1,000 to the complainant. Meantime, however, on January 14, 1908, the option by written contract was changed, so that the terms of payment were as follows, to wit: $8,500 cash, less the $1,000 paid that day, and $16,500 due January 1, 1909—and, thus modified, the option was to stand until the 1st of March, 1908. The abstract furnished by complainant thereafter was not perfected, so as to show good title, and on the 1st of March the option expired by its terms. After March 1, 1908, no other option terms of sale were ever offered by the complainant, but Bishop and complainant's attorney and agent continued to negotiate, dicker, and jockey with each other, in an effort to close the deal on the terms stated in the expired option.

Meantime, and while the option was in force, Bishop had interested his codefendant, Neff, in the option, and induced him to agree to buy a half interest in the lands for $17,500. That agreement was in writing, and was dated January 31, 1908, To accomplish this he induced complainant's attorney to give him a bogus option, substantially the same as the one he already had, except the price was stated at $35,000, instead of $25,000, as recited in the option of January 2, 1908, and the bogus option was antedated, so as to make it appear that it was executed on January 14th, the same day Bishop had paid the $1,000 on the option. He also induced the complainant's agent for the sale of the land to wire him the purchase price was $35,000. It is not left in doubt by the evidence that Bishop intended to use this bogus option and telegram to promote the sale to Neff on the basis of $35,000; whereas he already had an option to purchase the place at $25,000. Nor is there any doubt that complainant's attorney and agent both knew what Bishop wanted with the bogus option and telegram. Bishop denied having shown the bogus option to Neff until Neff had agreed to pay $17,500, being one-half purchase price of the land, $500 of which he paid in cash, and of the remaining $17,000 agreed to pay $8,750 on or about March 1, 1908. Bishop admits that he promised, before or at the time Neff paid him the $500, to show him the option contract which contained the terms of the proposed purchase. This he never did, but instead showed him the bogus option contract.

Neff testifies Roberts did show him the bogus contract before he agreed to buy, and solicited him to buy on the same terms he (Bishop) had bought from complainant. Whatever may be the truth on this point, it is certain that Bishop had represented to Neff that the option price was $35,000, and confirmed it by the bogus contract, in which

price was recited as $35,000. It is also true that Neff never saw the option contract of January 2, 1908, or knew of its existence or its terms, until after this suit was brought. After the option expired, on March 1, 1908, all the negotiations had, between complainant, his agent, and attorney, on the one side, and Bishop and his attorney, on the other side, proceeded on the basis of the option contract of January 2, 1908, so far as terms of payment was concerned. As soon as Bishop made his agreement with Neff, Bishop's attorney, Byrne, seems to have practically dropped out of sight, and Bishop relied on Neff's attorney, whose duties related solely to passing on the title. The attorney suggested many defects to complainant, and his agent and attorney endeavored to comply, and make the corrections, but never to the satisfaction of Neff's attorney, who also represented Bishop as to the title.

It finally came to this: That Bishop was willing to close the deal, but Neff was not satisfied with the title. Bishop, to use his own language, could not "swing the deal" without Neff's aid; he could not get Neff's aid until Neff's attorney was satisfied as to the title; complainant could not satisfy Neff's attorney as to the title, and hence Bishop would not close the deal, mainly because, presumably, he could not raise the cash payment. Bishop's willingness to close the deal is easily explained, because, under the arrangement into which Neff had been inveigled if the deal went through he (Bishop) had only to pay, in addition to the $500 he had already paid, $7,000 (and that not due until January 1, 1909), and become half owner of a plantation which cost $25,000, while Neff would be out $17,500 for a half ownership in the same plantation. Naturally Bishop could afford to take chances on titles, which Neff could not. While the matter stood in this shape, the parties wrangling over the title, the overflow came, and the place was greatly damaged, and the crop lost. Immediately all negotiations ceased, and the suit followed.

[1, 2] It is clear that Neff was never bound to complainant in any respect, and had no contract with him; his contract was with Bishop, and was conditional. The conditions were never performed, and Neff was not bound to Bishop. No cross-bill would, therefore, lie in this case on the state of facts disclosed; and hence the application to file it is denied. Neff not being under any contractual obligations to complainant, as to him the original bill would not lie. Bishop having failed on account of defects in the title to close the option before it expired, and the option never having been renewed between him and complainant, none existed when the overflow came and the negotiations ceased; but it may be said, if the option had been in existence and complainant had furnished an abstract showing a perfect title, so that Bishop became obligated to buy the land, by the very terms of the option contract of January 2, 1908 (and there never was any other), if Bishop refused to close the option no penalty resulted, except the loss of his $1,000 which had been paid upon the option.

Much is said and some reliance seems to be placed on the fact that Bishop had complainant make a deed to himself and Neff, and that complainant's brother had entered into a written contract, and had

executed a note for $4,000 to pay the rent of the plantation for the year 1908; the note being made payable to Bishop and Neff. Those matters are unimportant. No doubt Bishop wanted to use the rent note and contract as an additional lever to influence Neff to buy, and he wanted the deed ready, so that, if Neff did buy, he could close the deal without delay, and thereby avoid any further risk of Neff's discovering that he had been beaten out of $10,000 in the deal with Bishop; but these circumstances were all taken conditionally, and the parties could not have understood otherwise, and their actions throughout were upon that theory. They were taken while the option was pending, and if the option fell they fell with it necessarily; otherwise, Bishop and Neff would be getting the rent on land they did not own, and had not even agreed to purchase. It is unprofitable to pursue that branch of the case any further.

The principles of law governing options are stated by the Eighth Circuit Court of Appeals in the case of James et al. v. Darby, 100 Fed. 224, 40 C. C. A. 341, and are as applicable to the case at bar as that case.

The bill will be dismissed as to both defendants, and the attachment discharged, at the costs of complainant.

ADAMS EXPRESS CO. v. LANSBURGH & BRO.

(Court of Appeals of District of Columbia. Submitted November 4, 1919. Decided January 5, 1920.)

No. 3263.

MASTER AND SERVANT ⟸305—HELPER MOVING AUTOMOBILE TRUCK CONTRARY TO INSTRUCTIONS ENGAGED IN SCOPE OF EMPLOYMENT.

A helper on defendant's automobile truck, standing near plaintiff's place of business during the driver's temporary absence, *held* engaged in the scope of his employment when he moved the truck at a third party's request, so as to render defendant liable for the negligent knocking over of a lamp post, which broke plaintiff's window, although defendant had explicitly instructed the helper not to drive the truck.

Appeal from the Supreme Court of the District of Columbia.

Action by Lansburgh & Bro., a corporation, to the use of the Home Plate Glass Insurance Company, against the Adams Express Company. Judgment for plaintiff, and defendant appeals. Affirmed.

M. W. King and L. Koenigsberger, both of Washington, D. C. (Eugene Young and Morris Simon, both of Washington, D. C., on the brief), for appellant.

W. H. Holloway, of Washington, D. C., for appellee.

ROBB, Associate Justice. Appeal from a judgment in the Supreme Court of the District for the plaintiff, appellee here, for damages resulting from the breaking of a plate glass window by the negligence of an employé of the defendant, appellant here, in operating defendant's automobile.

The case was tried by the court without a jury upon an agreed statement of facts to the following effect: An electric automobile truck, belonging to and in use by the defendant company in the conduct of its express business, was standing at the curb about 120 feet from plaintiff's place of business in this city. The driver of the truck had temporarily left it "to make certain deliveries." Prior to leaving he had removed the starting key and placed it under the front seat of the truck. During the absence of the driver a third person requested the "helper" to move the truck, that the person in question might gain entrance to a point opposite plaintiff's place of business, which he knew to be the next stopping place on the route. When that place was reached, a lamp post was knocked over and against plaintiff's plate glass window, through the negligent handling of the truck. At the time of the accident the helper was in the employ of the defendant company, and wore a cap with "Adams Express Company" on it, "but had been expressly forbidden to drive or operate machines of said express company." These instructions were given him personally, numerous signs and notices were posted at defendant's warehouse to the same effect, and the rule books furnished all employés forbade the driving or operating of machines by helpers. This helper had not previously served on this particular route, but had served as helper with other drivers on trucks owned and operated by the defendant company. Just what were the duties of a helper does not appear.

The question for determination is whether, under the admitted facts, it may be said that the act of the helper was within the general scope of his employment. In Axman v. Washington Gaslight Co., 38 App. D. C. 150, the decisions upon this question were quite carefully reviewed, and the conclusion reached that the true test in measuring the principal's responsibility is whether the act of the agent was done in the prosecution of the business either impliedly or expressly intrusted to the agent by the principal. Public policy requires that the principal be held liable for what his agent does or omits doing in conducting the business of the principal, for the principal has voluntarily substituted for his personal management and supervision that of the agent. It would be difficult, if not impossible, precisely to define the meaning of "scope of employment," for the character of the employment and the nature of the wrongful act in the given case must be considered. It has been held that expressions equivalent to "scope of employment" are: "Line of duty," Isaacs v. Third Ave. R. Co., 47 N. Y. 122, 7 Am. Rep. 418; "in the employer's service," Adams v. Cost, 62 Md. 264, 50 Am. Rep. 211, and Slater v. Advance Thresher Co., 97 Minn. 305, 107 N. W. 133, 5 L. R. A. (N. S.) 598; "course of service," Ephland v. Mo. Pac. R. Co., 137 Mo. 187, 37 S. W. 820, 38 S. W. 926, 35 L. R. A. 107, 59 Am. St. Rep. 498; "transaction of the employer's business," Cobb v. Simon, 119 Wis. 597, 97 N. W. 276, 100 Am. St. Rep. 909; "furtherance of the employer's interests," Paulton v. Keith, 23 R. I. 164, 49 Atl. 635, 54 L. R. A. 670, 91 Am. St. Rep. 624, and Smith v. Causey, 28 Ala. 655, 65 Am. Dec. 372; "protection of employer's property," West Jersey R. Co. v. Welsh, 62 N. J. Law, 655, 42 Atl. 736, 72 Am. St. Rep. 659. And there is substantial unanimity of opinion that the principal may be held accountable for the wrongful act of the agent within the scope of his employment, although forbidden by the principal. Axman v. Washington Gaslight Co., 38 App. D. C. 150; Palmer v. St. Albans, 60 Vt. 427, 13 Atl. 569, 6 Am. St. Rep. 125; McCann v. Consolidated Traction Co., 59 N. J. Law, 481, 36 Atl. 888, 38 L. R. A. 236; Consolidated Ice Mach. Co. v. Keifer, 134 Ill. 481, 25 N. E. 799, 10 L. R. A. 696, 23 Am. St. Rep. 688; Engel v. Smith, 82 Mich. 1, 46 N. W. 21, 21 Am. St. Rep. 549; McClung v. Dearborne, 134 Pa. 396, 19 Atl. 698, 8 L. R. A. 204, 19 Am. St. Rep. 708; Moses v. Mathews, 95 Neb. 672, 146 N. W. 920, Ann. Cas. 1915A, 698. In Duggins v. Watson, 15 Ark. 118, 60 Am. Dec. 560, the court pertinently observed that, if disobedience of instructions by an agent will exonerate the principal, the rule of respondeat superior, designed for the protection of innocent third persons, virtually will be abrogated.

A helper, according to the Century Dictionary, is:

"One who helps, aids or assists; specifically, one who is employed as assistant to another in doing some kind of work."

It results, therefore, that the helper in the present instance was the assistant of the driver in delivering and collecting packages for the defendant. The truck was a necessary instrument in carrying out that purpose, and it is a reasonable inference that, when the driver left the truck to make a delivery, the helper was left in charge. At the moment he was the sole representative of the defendant, and, when he under-

took to drive the truck to the next stopping place, he certainly was furthering the business of the principal in the particular work in which he was engaged as helper. He represented the principal and no one else. True, his specific instructions did not contemplate such an act; but it is equally true that the act was within the general scope of his employment. Defendant attaches importance to the fact that the key was removed by the driver and placed under the seat of the truck. It is quite apparent, however, that this precaution was taken against strangers, and not against the helper, who had knowledge of what had been done, as evidenced by his act in removing the key. Indeed, this circumstance is not at all helpful to the defendant, for, had the driver really intended to prevent the operation of the truck by his helper, he would have put the key in his pocket, instead of leaving it within easy reach of the helper. If the policy of the defendant company be not to permit helpers in any circumstances to drive its trucks, it should employ helpers who will obey instructions. Certainly the public ought not to suffer the consequences of disobedience, where, as here, the helper or assistant is acting within the general scope of his employment and in direct furtherance of the business of the principal.

The judgment is affirmed, with costs.

Affirmed.

PASSAIC NAT. BANK et al. v. COMMERCIAL NAT. BANK et al.

(Court of Appeals of District of Columbia. Submitted October 13, 1919. Decided November 3, 1919.)

No. 3241.

CANCELLATION OF INSTRUMENTS ⊂=15—ADEQUATE REMEDY AT LAW FOR MISREPRESENTATIONS TO PURCHASERS OF SECURITIES.

In view of Judicial Code, § 267 (Comp. St. § 1244), prohibiting equitable suits where legal remedy is adequate, a suit in equity to rescind the purchase of securities and recover the consideration paid cannot be maintained against defendants, who were not the vendors, but were alleged to have made false representations regarding the value of the securities, since a damage action at law would afford adequate remedy for any false representations made by them, and they could not respond to a decree of rescission.

Appeal from the Supreme Court of the District of Columbia.

Bill by the Passaic National Bank, the Rutherford National Bank, the Savings Investment & Trust Company, and others against the Commercial National Bank, Tucker K. Sands, and others. From a decree dismissing the bill as to the named defendants, plaintiffs appeal. Affirmed.

C. F. Carusi and Hayden Johnson, both of Washington, D. C., for appellants.

Thos. C. Bradley, W. H. Ellis, C. B. Ellis, and A. H. Ferguson, all of Washington, D. C., for appellees.

VAN ORSDEL, Associate Justice. Appellants, plaintiffs below, filed a bill in equity in the Supreme Court of the District of Columbia,

seeking a rescission of the purchase of certain securities, amounting to $95,000 and a money decree for the amount invested therein, with interest and costs. The facts, as alleged in the bill, are substantially as follows:

In 1910 a firm known as F. Mertens' Sons were the owners of a large amount of mountain lands in the state of Maryland, from which timber had been cut. This firm conceived the idea of converting the land into a vast orchard scheme. To this end it was subdivided into 10-acre tracts. The United States Trust Company, of Washington, was selected as trustee to hold title to the property and to act as the agency through which payments were to be made by purchasers of these orchard tracts. Under his contract, the purchaser agreed to pay a stated cash payment, usually 10 per cent. of the purchase price, with notes maturing from month to month for the balance, payable to the trust company as trustee, and when the purchase price had been paid in full, usually in 5 years, the purchaser was to receive a conveyance from the trust company for a commercial orchard. In other words, the promoters agreed to plant the land in fruit trees, cultivate the same, and, according to the prospectus, turn over to the purchaser a bearing orchard at the time of the passing of title.

Large numbers of persons purchased these 10-acre tracts at prices averaging about $2,000, in some instances paying as high as $2,500. The deferred purchase-money notes were indorsed by the trust company without recourse, and turned over to Mertens' Sons, who redelivered large numbers of them to the trust company as collateral security for sums of money advanced to the firm from time to time.

In July, 1914, the United States Trust Company went into the hands of a receiver, and defendant Tucker K. Sands was appointed receiver. The defendant Continental Trust Company was then substituted as trustee, and took over the trust from the United States Trust Company, paying $145,000, the amount of the indebtedness due from Mertens' Sons, receiving the collateral in the form of thousands of tract-purchase deferred payment notes, took over the title to the real estate, and proceeded to execute the trust in substantially the same terms as it had been carried on by the United States Trust Company. With the receivership and the transfer of the affairs to the Continental Trust Company, defendants Bates Warren and Charles W. Warden, who had been prominently connected with the affairs of the United States Trust Company, became officers and directors of the Continental Trust Company.

In the early part of 1916, the indebtedness of F. Mertens' Sons to the Continental Trust Company was about $250,000, and it was also largely indebted to the defendant Commercial National Bank. By this time the sale of orchard tracts had almost ceased, and Mertens' Sons had become hopelessly insolvent. They had borrowed large sums of money from many banks and trust companies throughout the country, largely based upon the commercial paper which had been indorsed over to them by the United States Trust Company, and later by its successor as trustee, the Continental Trust Company. In March, 1916, the Continental Trust Company, acting through Bates Warren, its vice

president; the Commercial National Bank, acting through Tucker K. Sands, its vice president, and the firm of F. Mertens' Sons, acting through Frederick Mertens, one of its members, conceived a plan, the object of which was the reduction of the indebtedness of Mertens' Sons to the two defendant banks, as well as the averting of the financial crisis in the affairs of Mertens' Sons, which would result in the destruction of the collateral represented by the tract purchasers' notes. The plan conceived was to raise $1,000,000 on securities on 398 tracts of land, worth not more than $27,400. The 398 tracts were conveyed to the Continental Trust Company by Frederick Mertens and John Mitchell, Jr., who was a partner with Mertens in the apple orchard project. The deeds on their faces purported to convey 500 tracts. The 102 tracts additional attempted to be conveyed were not owned by either Frederick Mertens or John Mitchell, Jr., nor have they ever had any interest in said tracts.

In carrying out this scheme, on the 11th of March, 1916, the Green Ridge Valley Orchards Company was incorporated, with a capital stock of $500,000, divided into shares of the par value of $100 each, by Bates Warren, vice president of the Continental Trust Company, Tucker K. Sands, vice president of the Commercial National Bank, Frederick Mertens, Otto G. Raymond, and Gardner L. Boothe. At a meeting of the incorporators held on March 16, 1916, at 10 o'clock a. m., in Alexandria, Va., a proposition was submitted on behalf of Frederick Mertens and John Mitchell, Jr., as follows:

"To sell to the said company, to enable it to carry out the objects for which it was incorporated, the said 500 orchard tracts for $500,000 of the fully paid and nonassessable stock of this corporation and for a note of this company for the sum of $500,000, payable on demand."

The minutes of the meeting further stated:

"Whereas, the incorporators believe the aforementioned offer to be a reasonable one, and the price for said property to be fair and reasonable: Now, therefore, be it resolved that the directors of this company be, and they are hereby, authorized to acquire from the said Frederick Mertens and John Mitchell, Jr., or their assigns, at a price not in excess of that mentioned, the aforesaid 500 orchard tracts."

On the same day, at 5:30 p. m., the directors of the Green Valley Orchards Company held a meeting in the Commercial National Bank Building, Washington, D. C., and accepted the proposition of Mertens and Mitchell by a resolution which recited that each tract contained approximately 10 acres and each tract was about one-half planted in apple trees in good condition.

Pursuant to the prearranged plan, the Continental Trust Company conveyed the 500 tracts of land to the Green Ridge Valley Orchards Company, by deed in which the trust company covenanted that the property was unincumbered. Upon 398 of the tracts conveyed, however, there existed prior mortgages and liens, and the title to the remaining 102 tracts was not owned by Mertens and Mitchell. None of the property conveyed, except about 150 tracts, was under cultivation and planted with apple trees.

It is further averred that on the 17th day of March, the day following the meetings at Alexandria and the Commercial National Bank, another meeting of the stockholders was held at the principal office in Alexandria, Va., and the following resolution adopted:

"Be it resolved, that the Green Ridge Valley Orchards Company, Incorporated, shall issue in the manner provided by law $500,000 of first-mortgage coupon bonds, bearing date on the 20th day of March, 1916, to be payable on or before five years after date, with interest thereon at the rate of 6 per cent. per annum, payable semiannually, said bonds to be secured by mortgage or deed of trust on all the property of the Green Ridge Valley Orchards Company, Incorporated, said mortgage or deed of trust to be substantially in the form submitted and read at this meeting."

Immediately following this meeting, John Mitchell, Jr., proceeded to New York and attempted to interest plaintiffs McBee, Jones & Co. in an effort to market the bonds. He was informed by McBee, Jones & Co. that conditions were unfavorable for the marketing of bonds of that character, but were favorable to the marketing of short-term notes well collateraled. Accordingly, on April 18, 1916, the stockholders, who were, in fact, the directors, of the Green Ridge Valley Orchards Company, held a meeting at the office of the corporation, and adopted the following resolution:

"Whereas, it is deemed for the best interests of the company that the company issue and sell its collateral trust notes for the aggregate principal amount of $100,000, due in four, six, eight, and twelve months, and that said notes be secured by a pledge of $120,000, face amount, of the company's first mortgage 6 per cent. five-year gold bonds in a form of collateral trust agreement to be executed between this company and the Empire Trust Company."

In accordance with this resolution, the directors and officers of the company were authorized to and did issue $100,000 collateral trust gold notes of the company, indorsed by Mertens' Sons, pledging as collateral security therefor $120,000 face amount of the mortgage bonds under an agreement between the Green Ridge Company and the Empire Trust Company.

About October 1, 1916, Mertens' Sons being financially embarrassed, organized a corporation known as F. Mertens' Sons Corporation, of which the president was defendant Bates Warren and the treasurer was Charles W. Warden, both vice presidents of the Continental Trust Company. To this corporation Mertens' Sons undertook to convey all their property in trust for their creditors. Shortly thereafter an involuntary petition for bankruptcy was filed against Mertens' Sons, and they were adjudged bankrupt, and the deed of conveyance to the F. Mertens' Sons Corporation was adjudged in the United States District Court for the District of Maryland to be null and void, on the ground that at the time of its execution F. Mertens' Sons were insolvent.

On May 17, 1916, McBee, Jones & Co. telegraphed to F. Mertens' Sons as follows:

"Have Continental Trust and Commercial National wire us to-day what they regard as safe sale value for orchard tracts securing bonds Green Ridge Valley Orchards Co."

To which, on the same day, the Continental Trust Company answered by telegraph as follows:

"Replying to your inquiry respecting value of individual orchard tracts planted to growing apple trees on Green Ridge Valley Orchards and securing their five year six per cent. bonds, we think eighteen hundred to two thousand dollars a conservative valuation. The tracts are being well cared for and growing in value."

On the same day a letter was sent from the Commercial National Bank, signed by Tucker K. Sands, cashier, as follows:

"Answering your inquiry as to my opinion of the sale value of orchard tracts owned by Green Ridge Orchards Company and covered by bonds, I should estimate that the valuation of $2,000 for each 10-acre tract would be a fair valuation. I understand that previous sales of the tracts was at $2,500."

Upon receipt of this information, McBee, Jones & Co. sold and delivered in various amounts to the plaintiffs in this action $95,000 of the face value of the short time notes. Out of the proceeds of sales of said notes, $33,750 were remitted for the account of the Continental Trust Company, $9,000 to the Continental Trust Company for the account of Mertens' Sons, and, at the request of Mertens' Sons, $45,000 of the unsold notes were exchanged for $45,000 worth of the bonds of the Midland Railway Company, which bonds were forwarded to the Continental Trust Company for the account of Mertens' Sons, and were held by the Continental Trust Company and the Commercial National Bank as security for loans made by them to Mertens' Sons. It is alleged at length in the bill that the Continental Trust Company and the Commercial National Bank knew, or were chargeable in law with knowledge, of these various transactions.

Mertens' Sons, on the 28th day of March, 1917, were adjudged bankrupt, and the estates of the firm and the individual members thereof are being administered by a trustee in bankruptcy. It is alleged that from the best information obtainable the bankrupts' estates will pay to the creditors a dividend of not exceeding 5 per cent. on their claims. In June, 1917, by the voluntary action of the stockholders, officers, and directors, the Green Ridge Valley Orchards Company was adjudged a bankrupt, and its only asset consists of the 398 tracts of land, of a value of $27,400, incumbered by the mortgage given to the Continental Trust Company as trustee, to secure the issue of the $500,000 in bonds, which are held, with the exception of the $120,000 face value on deposit with the Empire Trust Company, as collateral security by creditors of Mertens' Sons for various obligations to them.

In the bill it is prayed:

"That the contract of sale and purchase of the gold notes in the bill mentioned be rescinded, for the reasons in the bill set forth, and that the plaintiffs, upon the return to the defendants of the notes held by the plaintiffs, recover of the defendants the money and securities parted with to the defendants in the proportion in which the plaintiffs respectively are entitled, together with interest and costs, and for such other and further relief as may be equitable and just."

The defendant Tucker K. Sands moved to dismiss the bill of complaint on the ground, among others:

"That the bill does not state such a case as entitles the plaintiffs to any relief against this defendant, because they have a plain, adequate, and complete remedy at law."

The defendant Commercial National Bank also moved to dismiss the bill on the ground that—

"Said bill of complaint is bad in substance, and does not contain allegations of fact such as would, if true, entitle the plaintiffs, as against this defendant, to relief in this court."

On hearing, the motion to dismiss as to these defendants was sustained, from which decree the case comes here on appeal.

The court below dismissed the bill as to defendants Sands and the Commercial National Bank on the ground that plaintiffs, as against these defendants, have a plain, adequate, and complete remedy at law. The Judicial Code of the United States (section 267 [Comp. St. § 1244]) provides that—

"Suits in equity shall not be sustained in any court of the United States in any case where a plain, adequate, and complete remedy may be had at law."

The case here attempted to be made against these defendants is based upon the alleged false representations of defendant Sands in his communication of May 17, 1916, to the brokers, McBee, Jones & Co., as to the value of the orchard tracts. As the result of these representations, plaintiffs were induced among other things, to exchange the $45,000 of railroad bonds for a portion of the notes. By the averments of the bill, a portion of the railroad bonds was turned over to the Commercial National Bank as security for an indebtedness of Mertens' Sons to the bank. The only ground for equitable jurisdiction is found in the prayer for rescission. It is clear that only the vendor, the Green Ridge Company, the maker of the notes, and Mertens' Sons, the indorsers, through whom they came into the hands of the brokers for sale, could be compelled by equitable process to rescind. Defendants Sands and the Commercial Bank are not vendors nor indorsers of the notes.

The rule as to equitable jurisdiction in cases of this sort is clearly stated by Judge Lurton in Hindman v. First National Bank of Louisville, 112 Fed. 931, 50 C. C. A. 623, 57 L. R. A. 108, as follows:

"One who has been induced by false representations to buy property has open to him no less than three remedies. He may rescind and sue at law for the consideration, he may bring an equitable suit for rescission and obtain full relief, or he may retain what he has received and bring his action for fraud and deceit. The first two kinds of relief lie, as is most evident, only against the vendor. The third will lie against either the vendor or any third person through whose false representations, directly made, the plaintiff has sustained damages."

Defendants, not being parties to the contract resulting in the sale of the notes, clearly are not in position to respond to a decree requiring rescission, and Mertens' Sons and the Green Ridge Valley Orchards Company, the only persons against whom the action for rescission would lie, are not made parties defendant. If they were before the

court, and rescission could be had, defendant Commercial National Bank, if liable, a point not here decided, could be retained as a defendant to respond to the extent of turning over the railroad bonds as prayed for in the bill, as one of the results to be obtained from rescission. It is clear that the inability of the plaintiffs to obtain rescission through lack of proper parties defendant, deprives plaintiffs of any means of requiring the bank to respond by turning over the bonds. Hence, so far as defendants Sands and the Commercial National Bank are concerned, the only liability left would be that growing out of the alleged false representations as to the value of the orchard tracts, which, it is averred, induced plaintiffs to invest in the notes. For this there is an adequate remedy at law by an action sounding in tort for damages for deceit.

The decree is affirmed, with costs.

Affirmed.

KANSAS CITY SOUTHERN RY. CO. v. MARTIN.

(Circuit Court of Appeals, Fifth Circuit. January 6, 1920.)

No. 3450.

1. COMMERCE ⊜27(8)—RAILWAY EMPLOYÉ UNLOADING BRIDGE TIMBERS EMPLOYED IN "INTERSTATE COMMERCE."

A railroad employé, engaged, when injured, in work on the ground unloading timbers to be used by him and others in the reconstruction or repair of a bridge, constituting part of a railroad in use as an instrumentality of interstate commerce, *held* employed in "interstate commerce" within Employers' Liability Acts of April 22, 1908, and April 5, 1910 (Comp. St. §§ 1010, 8657–8665).

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

2. RELEASE ⊜58(3)—VALIDITY QUESTION FOR JURY.

In an action by a servant for personal injury, where defendant pleaded a release in bar, the issue made by a reply, alleging that plaintiff was induced to execute the release by fraudulent representations of defendant's agent, and that on learning their falsity he returned the check received, *held* properly submitted to the jury with the other issues.

3. MASTER AND SERVANT ⊜216(5)—RISK OF INJURY FROM NEGLIGENCE OF COEMPLOYÉ OF INTERSTATE CARRIER NOT ASSUMED.

An interstate carrier's employé, injured by ties falling from a flat car, caused by the negligence of a coemployé, *held* not to have assumed the risk.

In Error to the District Court of the United States for the Eastern District of Texas; George W. Jack, Judge.

Action at law by M. Martin against the Kansas City Southern Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

John J. King and W. L. Estes, both of Texarkana, Tex., for plaintiff in error.

J. Q. Mahaffey, of Texarkana, Tex., and S. P. Jones, of Marshall, Tex. (Mahaffey, Keeney & Dalby, of Texarkana, Tex., on the brief), for defendant in error.

Before WALKER, Circuit Judge, and FOSTER and GRUBB, District Judges.

WALKER, Circuit Judge. The defendant in error (who will be referred to as the plaintiff), a citizen of the state of Texas, brought this suit under the federal Employers' Liability Act (35 Stat. 65; 36 Stat. 291 [Comp. St. §§ 1010, 8657–8665]), in the District Court for the Eastern District of Texas against the plaintiff in error (which will be referred to as the defendant), a Missouri corporation, having its principal place of business in Kansas City, in that state. The question of the court's jurisdiction of the suit, which was brought in a district not that of the residence of either the plaintiff or the defendant, was duly raised; the ground on which the jurisdiction was denied being that the plaintiff was not engaged in interstate commerce when he received the injury complained of.

[1] The plaintiff was a member of a bridge gang employed in maintaining and repairing bridges constituting part of lines of railway in use by the defendant in interstate commerce. When he was injured, he, as a member of such gang, was assisting in unloading timbers and cross-ties from a car at a point near a bridge on the defendant's line of railway over the Calcasieu river, near Lake Charles, La.; the purpose being to use the timbers and ties so placed in the reconstruction or repair of that bridge as soon as the required material could be assembled, without causing an interruption of the use of the bridge in interstate commerce. It is settled that the repair of bridges or other structures constituting part of a railway in use as an instrumentality of interstate commerce is so closely related to such commerce as to be in legal contemplation a part of it, that a railway employé engaged in such work is to be regarded as engaged in interstate commerce, and that preparatory steps taken with the purpose of furthering the actual work of repair or reconstruction constitute a part of such commerce within the meaning of the act. Pederson v. Delaware, Lackawanna & Western R. R. Co., 229 U. S. 146, 33 Sup. Ct. 648, 57 L. Ed. 1125, Ann. Cas. 1914C, 153; Southern Railway Co. v. Puckett, 244 U. S. 571, 37 Sup. Ct. 703, 61 L. Ed. 1321, Ann. Cas. 1918B, 69; Louisville & Nashville R. R. Co., v. Parker, 242 U. S. 13, 37 Sup. Ct. 4, 61 L. Ed. 119; Philadelphia, Baltimore & Washington R. R. Co. v. Smith, 250 U. S. 101, 39 Sup. Ct. 396, 63 L. Ed. —.

The work in which the plaintiff was engaged when he was hurt was not more remote from the actual making of the repairs being prepared for than the work which was held to be a part of interstate commerce in the cases of Pederson v. Delaware, Lackawanna & Western R. R. Co., supra, and Philadelphia, Baltimore & Washington R. R. Co. v. Smith, supra. We are of opinion that the doing of that work is to be considered as a part of what was required to effect the repair of the bridge near which it was being done, and that the plaintiff in taking part in that work was engaged in interstate commerce. Unloading the ties at a place near enough to the bridge for them to be conveniently available for the use to which they were destined was a part of the task of getting the bridge repaired. That task was not merely anticipated, but had been entered upon when plaintiff was hurt.

[2] The defendant set up in bar of the action a written release, alleged to have been executed by the plaintiff for a valuable consideration. The plaintiff replied to the effect that he was induced to execute the release by described fraudulent representations made to him by the defendant's agent, and that plaintiff, promptly after ascertaining the falsity of such representations, returned the check given to him when the release was executed. The court overruled a request of the defendant, made at the opening of the trial, that the issue so raised be heard and determined, on the equity side of the court, prior to the trial of the other issues involved; and the court, over the defendant's objection, submitted that issue to the jury with the other issues so submitted.

There is a conflict of decisions on the question whether such an issue, raised as it was in the instant case, is one at law and triable by a

jury. The view prevailing in some courts is that the issue is not one at law, unless the fraud charged touches the execution of the questioned instrument, so as to be provable under a plea or replication of non est factum. In the case of Union Pacific Railway Co. v. Harris, 158 U. S. 326, 15 Sup. Ct. 843, 39 L. Ed. 1003, such an issue was treated as one triable by a jury in an action at law. That was a suit for personal injuries, in which a release was pleaded as a bar to the action. The plaintiff replied that the release was obtained through misrepresentations and fraud, and that the plaintiff, while he was ill, signed the release in ignorance of its contents. The court held that there was no error in the instructions given in submitting those issues to the jury, and affirmed the judgment rendered for the plaintiff. Though fraud other than that touching the execution of the release was set up in the pleading attacking its validity, it was decided that there was no error in the action of the court in submitting to the jury the issues raised.

Upon a full consideration it was decided by the Circuit Court of Appeals for the Sixth Circuit, in the case of Wagner v. National Life Ins. Co., 90 Fed. 395, 33 C. C. A. 121, Circuit Judge Taft delivering the opinion, that it is proper in a suit at law for the plaintiff to meet a plea of release by a replication that the release was obtained by fraud, whether the fraud touches the execution, or consists in misrepresentation as to material facts inducing execution. Another well-considered case to the same effect is American Sign Co. v. Electro Lens Sign Co. (D. C.) 211 Fed. 196. What the plaintiff does, when he makes such a reply to a plea setting up a release, amounts to his saying that, because of the fraudulent misrepresentations alleged, the defendant is without right to maintain the defense based upon the release set up. A contract so procured is no more binding at law than in equity. It is competent for a court of law to decide that a transaction vitiated by fraud is not effective to confer the asserted right based upon it. Buzard v. Houston, 119 U. S. 347, 7 Sup. Ct. 249, 30 L. Ed. 451; Equitable Life Assur. Soc. v. Brown, 213 U. S. 25, 29 Sup. Ct. 404, 53 L. Ed. 682.

The sustaining of a replication such as the one in question does not require the giving of any equitable remedy or the application of any peculiarly equitable doctrine. The result is to sustain, on a ground cognizable in a court of law, a denial of the defendant's asserted right to maintain a defense based upon an instrument which is unenforceable because the plaintiff was led into making it by fraudulent misrepresentations. There seems to be no necessity of resorting to a court of equity to prevent the enforcement, by action or by defense, of an unsealed instrument procured by fraud. The cancellation and surrender of such an instrument are not necessary to prevent it being availed of by a party claiming under it. We are of opinion that reason and authority support the conclusion that the issue raised by the reply to the plea setting up the release was properly submitted to the jury.

It is insisted that there was no evidence to support a finding that the release was procured by fraud. The evidence without dispute showed that the plaintiff was seriously injured. While he was still in the hospital undergoing treatment, he was approached by W. C.

Rochelle, the defendant's claim agent, on the subject of a settlement of the claim based upon the injury. There were considerable negotiations; the plaintiff demanding the payment of more than was offered, claiming that he was permanently disabled, "that he was knocked out, that his bridge building was over," and Rochelle insisting that plaintiff would ultimately make a complete recovery and be able to do the same work he was doing before. While matters were in this situation the plaintiff consented to be examined by three physicians, named and employed by Rochelle. The examinations were made; the physicians reporting to Rochelle, not to the plaintiff. There was evidence tending to prove that thereafter the plaintiff was influenced to make the settlement evidenced by the release by statements made by Rochelle to him to the effect that the doctors who had examined him said that his injuries were not permanent, and that he would be able to go to work again in a very short time.

There was evidence tending to prove that the plaintiff was permanently disabled, and that at the time Rochelle made the statements attributed to him he had received from one of the examining physicians a written report, which not only did not show that that physician considered the injuries not permanent, but plainly indicated that he considered them very serious; there being no suggestion in that report of the likelihood of the plaintiff's recovery. In view of the existence of that report, the withholding of it from the plaintiff, and Rochelle's knowledge of its contents, the statements attributed to the latter well could be regarded as fraudulent representations, capable of being effective in inducing the plaintiff to consent to the settlement evidenced by the release, which he promptly repudiated upon being informed by another physician, on the day the release was signed, that he had been deceived as to the seriousness of his injuries. Without regard to other evidence adduced, that which has been referred to justified the submission to the jury of the issue raised as to the validity of the release.

[3] There is no merit in the contention that the evidence without dispute showed that the injury to the plaintiff was due to a risk which he assumed, and was not attributable to negligence of a coemployé. There was evidence tending to prove that, while plaintiff was standing near a car where he was required to be to help in unloading ties therefrom, he was struck by one or more ties, which fell from the car in consequence of another employé stepping on ties on the car after the removal, preparatory to unloading, of the stakes or standards which held them in the position in which they were placed when loaded on the car. There was evidence to support the conclusion that the ties were so placed that they would not have fallen after the removal of the supports, if they had not been caused to do so by a man on the car stepping on them. The plaintiff did not assume the risk due to the negligence of a coemployé in causing the fall of the ties, where the plaintiff was endangered thereby.

The conclusion is that the record does not show that any reversible error was committed.

The judgment is affirmed.

THE NORTHLAND. THE STIMSON. INGALLS v. BODDEN.

(Circuit Court of Appeals, Fourth Circuit. November 14, 1919.)

No. 1750.

1. COLLISION ⊂⊃56—BETWEEN SCHOONER AND OVERTAKING STEAMSHIP, FAULT OF STEAMSHIP.
A collision at sea on a clear night, between a schooner making 2½ or 3 knots and an overtaking steamship, *held* due solely to fault of steamship, on evidence that schooner kept her course and speed, and on seeing steamship 8 or 10 miles behind showed a bright white light astern, which should have been seen for at least 2 miles, but that she was not seen until within half a mile, and the steamship then kept her course and speed until collision.

2. COLLISION ⊂⊃56—DEFENSE OF INEVITABLE ACCIDENT NOT SUSTAINED.
Breaking of the steering gear of an overtaking steamship shortly before collision with a schooner *held* not to sustain the defense of inevitable accident, where it was through negligence that the steamship failed to see the schooner in time to safely avoid collision.

Appeal from the District Court of the United States for the Eastern District of Virginia, at Norfolk; Edmund Waddill, Judge.

Suit for collision by W. A. Bodden, master of the schooner Stimson, against the steamship Northland; L. C. Ingalls, master, claimant. Decree for libelant, and claimant appeals. Affirmed.

For opinion below, see 257 F. 762.

This is an appeal from a decree of the District Court of the United States for the Eastern District of Virginia, holding the steamship Northland solely in fault for a collision between that vessel and the schooner Stimson, which occurred about 13 miles southeast of Hog Island Light, off the coast of Virginia, at about 4 o'clock on the morning of October 14, 1918. The schooner was a four-masted schooner, of the gross tonnage of 693 tons, 185 feet long, 39.5 feet beam, 13.8 feet deep, and was bound from New York to Norfolk, light. The Northland was a steamer of the burden of 3,282 tons gross, 304.4 feet long, 47.2 feet beam, 19.8 feet deep, and engaged in the coastwise freight and passenger business on the route between New York and Norfolk.

It is conceded that the weather at the time of the collision was good, the wind being light from the southwest, the sea smooth, and the night being clear and starlight. The schooner, for some time prior to the collision, had been on a starboard tack, heading about south by east, making from 2½ to 3 knots an hour, with her four lower sails and four jibs set, and her regulation running lights properly placed and brightly burning. An experienced master was at the wheel, a sailor was on the forecastle deck of the schooner forward, keeping an efficient lookout, and two other sailors of experience were on the deck of the vessel; one of them having previously been at the wheel until he had been sent forward by the master to assist in tacking the ship. These men, together with the regular master and mate of the schooner, have testified in the case, and the others of the crew of nine of the schooner offered for cross-examination.

It appears that the Northland was proceeding on a course southwest, three-quarters south, making between 16 and 17 miles an hour, and was being navigated by her first officer in the pilot house, with a man at the wheel in the pilot house, and a lookout on the forward deck. It appears that the navigators of the schooner, some time before the collision, observed the white light of an approaching vessel several miles distant, off their port quarter, and when the steamer was about 2 miles away, and about eight minutes before the collision, her green light was observed still abaft on the port beam of the schooner, whereupon a white light was shown from the schooner's stern to the approaching steam vessel, this white light

being the regular anchor light of the vessel, a regulation light whose visibility is proved greater than 2 miles, and which was displayed off the port quarter of the schooner in such a position that the navigators of the steamer should have immediately observed it; that the schooner continued her course and speed unchanged, and the steamer overhauled her rapidly, seemingly regardless entirely of the presence of the schooner, and making no effort to avoid her; two or three minutes after the white light was shown, one of the crew of the schooner displayed an electric torchlight on the deck of the schooner forward of amidships in such position also to be entirely visible to the navigators of the approaching steamer; notwithstanding the lights thus displayed on the part of the schooner, the steamer Northland continued on with her course and speed apparently unchanged, coming into violent collision with the schooner a few minutes after this second light was displayed from her deck, striking her on her port bow about 30 feet aft of her stem, cutting several feet into her, and causing her most serious damage.

The lookout of the steamer did not testify; the man at the wheel gave his deposition, but stated that he did not see the schooner, nor did he know that there was a vessel in the vicinity, until he struck; the only witness testifying really as to the facts of the collision from the steamer being the first officer, who admits that he did not see any of the schooner's lights until she was about half a mile away, when he saw the white light when it was reported to him by the lookout, and immediately thereafter saw the red light, excusing himself from any fault for the collision by attributing it to a breakdown of the steering gear of the Northland.

The libel was filed in the lower court on October 14, 1918, and on October 28, 1918, the depositions of Capt. Marshal, acting master and navigating officer of the schooner, the lookout, wheelsman, engineer, and the mate were taken in Norfolk. It appears that the depositions of the first officer, the quartermaster, the second assistant engineer, the carpenter, and the master of the Northland were taken in New York on February 11, 1919.

It is insisted by appellee that these witnesses, at least the greater number of them, should have testified; but, on the other hand, it is insisted by counsel for the appellant that most of all the witnesses who did not testify had retired, and therefore could not have known as to the facts connected with the accident. However, none of them testified as to the facts of the collision, save the first officer and the quartermaster. These were the only witnesses examined on behalf of the Northland out of a crew of about 50 all told. Several other witnesses gave their evidence by deposition and before the court as to the construction of the steering gear of the Northland.

Henry H. Little, of Norfolk, Va. (Henry M. Hewitt, of New York City, and Walter H. Taylor, of Norfolk, Va., on the brief), for appellant.

Floyd Hughes, of Norfolk, Va. (Hughes, Vandeventer & Eggleston, of Norfolk, Va., on the brief), for appellee.

Before PRITCHARD, KNAPP, and WOODS, Circuit Judges.

PRITCHARD, Circuit Judge (after stating the facts as above). [1] The law in regard to this case is well established, but the facts are controverted, and in order to reach a correct conclusion it is necessary to ascertain, if possible, what actually occurred at the time of the collision. It appears that four witnesses testified on behalf of the schooner as to the material facts, while only one witness was produced who gave affirmative testimony on behalf of the Northland as to the main facts. It is true her quartermaster was a witness, but he only testified as to the accident to the steering gear. It appears that he had no report from the lookout, and saw no lights from the schooner.

He further testified that he did not see the schooner nor know of her close proximity until the collision.

MacDonald, first officer, the only witness who testified on behalf of the Northland as to the main facts, among other things, said:

"The obscuration of the atmosphere, whatever it might have been, in no way interfered with my observation of that light. I should say that the obscuration of the atmosphere would permit me to see the riding light of a vessel, or the colored lights of a vessel which I was approaching, for two miles that morning; there was just a light vapor on the water. I think I could have seen an anchor light about two miles, that is about all it is supposed to show. I don't think there was anything in the atmosphere that prevented me from seeing the lights of the Stimson when she was at least two miles off, if those lights had been properly displayed, either a white or a red light. As a matter of fact I did not see them until they were half a mile off."

This witness admits that he did not see the schooner until she was a half mile away. The fact that he did not see the schooner at a greater distance than a half mile shows that the steamer was at fault in this respect. It is true that he contradicts in many respects the witnesses for the schooner; but in weighing his evidence it should be borne in mind that he, above all other witnesses, was most interested, being in charge of the navigation of the steamship. But when we consider what he says in connection with the evidence for the schooner we are of the opinion that it should not prevail against the evidence of the latter; there being four witnesses introduced in the schooner's behalf. The evidence for the schooner is corroborated, in respect to the weather and physical facts about the collision, by Capt. Bodden and the mate of the schooner. The failure of MacDonald to observe the white light and the red light of the schooner until they were a half mile distant furnishes, we think, the principal reason why the accident occurred.

The learned judge who tried this case made a very clear and concise finding as to the relative position of the vessels at and just before the collision. He also states very clearly the contention of the respective parties, as follows:

"The schooner's case, briefly, is that while on the starboard tack, in the vicinity in question, and proceeding at about 2½ knots an hour, she observed the masthead light of the steamship some 8 to 10 miles away, bearing aft of her port beam, and subsequently, and when more than 2 miles away, she saw the steamship's green light; that at the time the schooner was provided with a skilled and competent crew, in charge of an experienced master, all at their proper stations, and efficiently performing their respective duties, with her running lights properly set and brightly burning; that upon observing the steamship's white light, and partly in the position of an overtaken vessel, she at once caused her regulation riding light for approaching vessels to be put out, placing the same in the most conspicuous position on the companionway of the after cabin, which was the best position in which it could be placed, and was in full view of the approaching steamship, and should have been seen 6 to 8 miles away; that in addition, as the steamship continued to approach, the schooner caused an electric light to be waved, and its light flashed upon her sails, to further attract the attention of the approaching steamship, and she kept her course and speed; that, notwithstanding the plain obligation imposed upon the Northland, the burdened vessel to avoid collision as well as the risk thereof, with the overtaken vessel, the schooner, she continued to approach her at a rapid rate of speed, claimed

to be 17 miles an hour, and ran into and collided with the Stimson, striking her about 30 feet aft of her stem on the port bow, seriously cutting into and crushing through the schooner from her rail down below to her water line, causing great damage, for the recovery of which this libel was filed.

"The schooner further charges that the steamship was without a lookout properly stationed; that she was in charge of incompetent and unskillful navigators; that she failed to keep out of the way of the schooner, or to shape her course so as to avoid crossing ahead of her and pass under her stern; that she failed to slacken her speed, stop, and reverse, and proceeded at a too rapid rate of speed; and that she, being the overtaking vessel, should not have collided with the schooner at all, but have avoided her by a wide margin.

"The respondent in the main, admits the circumstances of the two vessels approaching and coming together, as above stated, but contends: (1) That the collision was the result of inevitable accident, in that, when it was too late to avoid the consequences thereof, the connecting shaft of the steering gear broke and parted, through a latent defect, causing the injury. (2) That the Stimson was in command of an incompetent navigator, without a proper lookout, and that she omitted to exhibit her white or stern light in sufficient time to enable the navigators of the steamship to make proper maneuver to avoid the collision."

It is insisted by counsel for the appellee that in this suit, inasmuch as there was conflicting evidence, the decree of the lower court will not be reversed or disturbed, unless it is clearly shown that the court was in error. They cite in support thereof the following cases: The Richard F. Young, 246 Fed. 682, 158 C. C. A. 638; Baker-Whiteley Coal Co. v. Neptune Navigation Co., 120 Fed. 247, 56 C. C. A. 83; The Anaces, 106 Fed. 742, 45 C. C. A. 596. We think the rule as contended for by appellee is so well established that it is useless for us to enter into a further discussion of this phase of the question. The evidence is conflicting, but we think, when considered as a whole, the learned judge who heard the case in the court below was amply warranted in finding as he did.

[2] It is contended by counsel for the appellant that the collision was the result of an inevitable accident, in that when it was too late to avoid the consequences thereof the connecting shaft of the steering gear broke and parted through a latent defect causing the injury. This would be a good defense, if the facts of this case were such as to bring it within the rule. In the case of The Fullerton, 211 Fed. 833, 128 C. C. A. 359, the Circuit Court of Appeals for the Ninth Circuit, in discussing this question, said:

"The court below held that the collision was the result of inevitable accident. In collision cases the accident is said to be inevitable when it is not possible to prevent it by the exercise of due care, caution, and nautical skill. The term is usually applied to collisions caused by a vis major, or by the intervention of other vessels, or floating ice, or a severe snowstorm, or the disablement of the steering gear. In the Mabey and Cooper, 14 Wall. 204, 215 (20 L. Ed. 881), the court said: 'Inevitable accident, as applied to a case of this description, must be understood to mean a collision which occurs when both parties have endeavored, by every means in their power, with due care and caution, and a proper display of nautical skill, to prevent the occurrence of the accident, and where the proofs show that it occurred in spite of everything that nautical skill, care, and precaution could do to keep the vessels from coming together.' The Fullerton being without fault, the question arises whether the officers in charge of the Transit endeavored by every means in their power, with due care and caution, and a proper display of nautical skill, to prevent the collision."

The evidence as to when and how the steering gear was broken is far from satisfactory. The schooner was the favored vessel. Therefore it was the duty of the steamer to exercise such care as was necessary to avoid a collision with her. Not having by proper lookout observed the schooner when at least 2 miles away, the speed the steamer was making resulted in its coming in such close proximity to the schooner that it was well-nigh impossible to avoid hitting her, which places the steamer in the wrong. Therefore, if the steering gear really broke at the time as contended by appellant, it did not present a case of inevitable accident. There is evidence tending to show that they did not discover the break until after the accident, and in this connection it is significant that they displayed no signals to indicate this trouble for more than two hours after the collision.

It also appears that the steamer approached the sailing vessel at least twice after the collision, and made other maneuvers which would indicate that the steering gear was not disturbed in the way and at the time counsel for appellant contend. It is true they produced in court what purported to be the broken rod of the steering gear; but this only proves that the rod was broken, but throws no light upon the question as to the time it was broken, or of the circumstances under which the breakage occurred.

It further appears that the schooner was sailing on a starboard tack, with four lower sails and four jibs set, and was making only 2½ or 3 knots per hour, and that the wind was light from the southwest, and that the night was clear, with no haze or fog, and that her lights were properly set and burning. It also appears that the navigation of the schooner was in charge of an experienced master, and an efficient lookout properly stationed, who discharged their duties. There were two other men on deck, who had assisted in tacking the ship shortly before the lights of the steamer were observed. The schooner's speed was only about one-fifth of that of the approaching steamship, and we fail to see how the schooner could have committed any fault contributing to the collision. However, it appears from the record that she discharged her obligations as to course and speed. Indeed, there is no evidence that any fault in this respect was committed. MacDonald, among other things, said:

"I don't think there was any fault with the schooner from the time I saw the red light, or anything she could do to avoid the collision. I attribute the collision entirely to our failing to keep out of the way of the schooner by reason of our steering gear breaking down."

This sets at rest the question as to the conduct of the schooner. Taking it all in all, we think the evidence is such as to establish the fact that those in charge of the navigation of the steamer were negligent, and that such negligence was the cause of the collision, and for this reason we think that the defense of the steamer of unavoidable accident, even if their contention as to when and how the steering gear was broken be true, should not be entertained.

Therefore we are clearly of the opinion that the conclusions of the court below were correct. Such being the case, it necessarily follows that the decree of the District Court should be affirmed.

Affirmed.

W. G. COYLE & CO., Inc., v. NORTH AMERICA STEAMSHIP CORPORATION, Limited, et al.

THE YARMOUTH.

(Circuit Court of Appeals, Fifth Circuit. January 3, 1920.)

No. 3408.

1. MARITIME LIENS ⊂=29—FURNISHING COAL TO FOREIGN VESSEL UNDER CHARTER GAVE RIGHT TO LIEN.

Libelant, who furnished coal in New Orleans to a foreign steamship under charter made in New York, and new in the port, on an order given at the request of a business associate of the charterer, who was absent, but pursuant to a requisition of the chief engineer, and which coal was received and receipted for by the master, *held* entitled to a lien under Act June 23, 1910, c. 373, §§ 1–3 (Comp. St. §§ 7783–7785), where it did not appear that libelant could by the exercise of reasonable diligence have ascertained that by the terms of the charter the charterer was to furnish coal.

2. MARITIME LIENS ⊂=30—FURNISHER OF SUPPLIES NOT CHARGED WITH NOTICE OF CHARTER.

The mere fact that one furnishing coal to a vessel is informed that she is under charter is not enough to charge him with notice of the terms of the charter party.

3. MARITIME LIENS ⊂=29—LIEN FOR SUPPLIES FURNISHED TO FOREIGN VESSEL PURSUANT TO REQUISITION OF CHIEF ENGINEER.

An order for coal delivered to a foreign steamship, pursuant to a requisition of the chief engineer, an appointee of the owner, where the coal is received by the master and engineer and receipted for by the former, is to be regarded as given by the ship's master within Act June 23, 1910, c. 373, § 2 (Comp. St. § 7784), although a business associate of the charterer co-operated in procuring the giving of the order.

4. MARITIME LIENS ⊂=65—PRESUMPTION OF AUTHORITY OF MASTER TO PROCURE SUPPLIES NOT OVERCOME BY SHOWING MADE.

The statutory presumption that a master has authority from the owner to procure supplies or other necessaries for his vessel, under Act June 23, 1910, c. 373, § 2 (Comp. St. § 7784), is not rebutted or destroyed by showing merely that the furnisher was informed that the vessel was under charter.

Appeal from the District Court of the United States for the Eastern District of Louisiana; Rufus E. Foster, Judge.

Suit in admiralty by W. G. Coyle & Co., Incorporated, against the steamship Yarmouth; the North America Steamship Corporation, Limited, claimant. Decree for respondent, and libelant appeals. Reversed.

Gustave Lemle, Selim B. Lemle, and Arthur A. Moreno, all of New Orleans, La. (A. A. Moreno and Lemle & Lemle, all of New Orleans, La., on the brief), for appellant.

Abraham Goldberg, H. Generes Dufour, and Alfred C. Kammer, all of New Orleans, La. (Farrar, Goldberg & Dufour, of New Orleans, La., on the brief), for appellees.

Before WALKER, Circuit Judge, and GRUBB and ERVIN, District Judges.

WALKER, Circuit Judge. [1] This is an appeal from a decree dismissing a libel against the Yarmouth, a Canadian steamship, for

amounts claimed to be due for coal furnished and towage services rendered by the libelant to that ship while it was in the port of New Orleans in July, 1917. The ship was released on a claim interposed by its owner, the appellee, a corporation of Nova Scotia. The libelant (appellant here) was engaged in the coal business in New Orleans. Among its customers was the Cuyamel Fruit Company, which operated a number of steamers, to which the libelant furnished coal at prices previously agreed on. It furnished coal to the Yarmouth under the following circumstances: Herbert S. Hiller, who was traffic manager of the Cuyamel Fruit Company, was of good repute and was well known to the appellant, after getting from the latter quotations of prices of coal, ordered it to deliver to the Yarmouth 265 tons of Alabama steam coal at the price quoted. The order was complied with by delivering the coal to the Yarmouth; its master and engineer having knowledge of such delivery, the former giving a receipt for the coal. A like order, given about a month before, had been complied with in the same way. On his direct examination as a witness for the libelant, Mr. Hiller testified to the effect that the coal was ordered and delivered as above stated, and that he ascertained the price and gave the order at the request of G. B. Warden, who was associated in business with F. R. Betancourt, the charterer of the Yarmouth. The following is a part of the report of the cross-examination of that witness:

"Q. Did Mr. Betancourt tell you to order coal for the steamship Yarmouth? A. Mr. Betancourt was out of town. Mr. Warden left it entirely with me to order the coal for the ship.

"Q. When you ordered this coal from W. G. Coyle & Co., were any questions asked you as to whether or not the ship was under charter? A. I believe it was asked who was operating the steamship. It was a new steamer here in town, and they asked me some information about the boat, which I told them; that is what information I gave them.

"Q. What information did you give them? A. I told them that the boat was chartered under the charter to F. R. Betancourt.

"Q. They asked no further questions? A. Well, they just merely asked—they asked me if these people had an office. I remember they asked me those particulars.

"Q. You say that the steamship Yarmouth was under charter for two months. Do you know what months? A. I think it was under charter for two months; that is my understanding. I had nothing to do with the charter of the ship, nor did I see any records of the ship; but I do know that they told me the ship was under charter, and the managing owner of the ship admitted that the boat was under charter.

"Q. But what I am trying to get you to answer is whether or not this particular coal which you claim to have ordered was ordered during the time you know the ship to have been chartered to Betancourt and Warden? A. To the best of my knowledge and belief, the boat was under charter at that time.

"Q. You testify that this coal was used for fuel of the steamship Yarmouth. How do you know that? A. From a statement—

"Q. You do not know that of your own knowledge; you have no actual knowledge of it? A. No; I was not on the ship.

"Q. When you ordered this coal, did you order any particular kind of coal? A. No; the usual custom is to order sufficient coal, according to the requisition of the chief engineer of the boat.

"Q. And you were the one that agreed as to the price of the coal? A. Yes, sir.

"Q. Do you know how much was delivered under your first order? A. I kept no records of the delivery.

"Q. Do you know how much was delivered under the second order? A. It was 265 tons.

"Q. Did you keep a record of that delivery? A. No, sir.

"Q. Then how do you know it? A. I know it by the report from the captain and invoices.

"Q. But not of your own knowledge? A. Not of my own knowledge.

"Q. When was your first order given for the coal? Was it during the existence of this same charter? A. Yes, sir.

"Q. Do you remember how much was delivered then? A. I do not remember. I might say that, as far as the deliveries were concerned, I do not believe that, in the operation of any boat, the man that purchases the coal knows how much goes on the ship actually, because we never see the coal go in the ship, and we only go by the records received from the chief engineers.

"Q. The first coal was bought or ordered from W. G. Coyle & Co. under the same conditions and circumstances as the second coal, was it not? A. The same; yes, sir.

"Q. Did you have anything else to do with Betancourt, or Warden, or F. R. Betancourt, in ordering these supplies? I mean by that, did you have anything to do with other officers, the payment of bills, or anything like that? A. Not a thing."

Following the delivery of the coal and the rendition of towage services, the libelant made out a bill therefor against "S. S. Yarmouth and Owners," which it sent to Mr. Hiller. Mr. Hiller referred the collector to Betancourt & Co., who had an office in New Orleans, as he had done in the case of a similar bill for the coal delivered to the Yarmouth about a month before. Betancourt & Co. paid the first bill, but did not pay the second one. Evidence adduced showed that at the time of the transactions in question the Yarmouth was being operated under a charter party made in New York on the 4th day of June, 1917, by the owner, the appellee, to Fiacro R. Betancourt. By that instrument the owner hired the ship for the period of two months from the 5th day of June, 1917, "with full complement of officers, seamen, engineers, and firemen for a vessel of her tonnage." It contained the following provisions:

"That the owner shall provide and pay for all provisions, wages of captain, officers, marine insurance, firemen and crew; shall pay for the hull insurance of the vessel; also for all cabin, deck, engine room, and other necessary stores, and keep the steamer in a thoroughly efficient state in hull, machinery, and equipment for and during the service.

"(2) That the charterer shall provide and pay for all the coal, port charges, pilotages, agencies, commissions, consular charges (except those pertaining to the captain, officers, or crew), and all other usual expenses, except those aforestated; but when the vessel puts into a port for causes for which the steamer is responsible, then all such charges shall be paid by the owner."

So far as was disclosed, at the time of the transactions in question, the libelant was without information as to the Yarmouth and how it was being operated, except as shown by the above set out part of the testimony of the witness Hiller.

[1] So far as the claim against the ship for the price of the coal furnished is concerned, the decree appealed from is sought to be sustained on the ground that evidence adduced was such as to support a finding that the libelant was informed that the ship was operated by a charterer, and by the exercise of reasonable diligence could have ascertained that, because of the terms of the charter party, the person order-

ing the coal was without authority to bind the vessel therefor. The provision in the charter party requiring the charterer to provide and pay for coal would, under the proviso contained in section 3 of the "Act relating to liens on vessels for repairs, supplies or other necessaries" (36 Stat. 604, c. 373 [Comp. St. § 7785]), prevent that act from having the effect of giving a lien on the ship for coal furnished on the order of the charterer, if the furnisher knew, or by the exercise of reasonable diligence could have ascertained, the terms of the charter party. The Kate, 164 U. S. 458, 17 Sup. Ct. 135, 41 L. Ed. 512; The Valencia, 165 U. S. 264, 17 Sup. Ct. 323, 41 L. Ed. 710.

There are material differences between the facts of each of the two cases just referred to and those of the instant case. Each of those decisions was rendered in responding to questions certified to the Supreme Court by a Circuit Court of Appeals. In the first-cited case the following facts were disclosed:

"On the order of a steamship company, which had an agent and office in New York City, the libelant, which had a place of business in the same city, furnished and delivered coal to vessels at that place, which were operated by the steamship company, under charters requiring the charterer to pay for coal furnished to the vessels.

"The owners of each chartered vessel, as the libelant knew, had an agent for the business of the vessel at New York City. The libelant knew or could easily have known what vessels belonged to the steamship company and what vessels were operated by the latter under time charters. It is true that its agents did not examine the charter parties, nor make any inquiry as to their provisions; but from what they had always heard about such instruments they believed and assumed, or took it for granted, that they contained conditions requiring the charterers, at their own expense, to provide and pay for all coals needed by the vessel. It was under these circumstances that the libelant furnished each vessel, operated by the steamship company, with coal as ordered by that company, charging the company and the vessel therefor, without making any distinction in the mode of keeping its accounts between the vessels owned by the steamship company and those operated by it under time charter parties. Specifications of lien were filed in the proper office against each vessel to which coal was delivered.

"None of the coal furnished to the chartered vessels was ordered by the master of the vessel, nor were any of the bills therefor submitted to him for approval. They were submitted only to the steamship company. Nor did the agents of the chartered vessels know that coal was supplied by the libelant on the credit of the vessel, or that any specifications of lien were filed under the local statute."

It was on the above-indicated state of facts that the court decided that the furnisher of the coal was chargeable with knowledge of the charterer's lack of authority to bind the vessel for the price of the coal furnished. The opinion in that case contained the following:

"If the libelant in this case had furnished the coal upon the order of the master, and without knowledge or notice that the vessel was operated under a charter party, or if coal had been furnished upon the order of the charterer as well as upon the credit of the vessel, under circumstances which did not charge libelant with knowledge of the terms of the charter party, but charged it only with knowledge of the fact that the vessel was being operated under a charter party, a different question would be presented."

The just-quoted statement makes it plain that that decision furnishes no support for the proposition that, without regard to other attending circumstances, the single fact that the furnisher of supplies to a vessel

is informed that it is under charter to the party on whose order the supplies are furnished charges such furnisher with notice of the terms of the charter party.

The Valencia, supra, also was a case of furnishing coal to a vessel at New York, not by the order or procurement of the master but on the order of a steamship company which had an office in that city, at which the furnisher did business with the steamship company, and the former could easily have ascertained the ownership of the vessel and the relation of the steamship company to the owners. Upon the facts certified, the court concluded that the libelant by reasonable diligence could have ascertained that the steamship company did not own the vessel, but used it under a charter party providing that the charterer should pay for all coal needed. In each of the cases cited there was a finding supported by facts disclosed, that the libelant, who had notice of the fact that the party giving the order was the charterer, would have learned of the terms of the charter party, if he had made use of sources of information shown to be accessible to him. The propriety of a decision that one is chargeable with notice of a fact actually unknown to him is dependent upon the circumstances under which he was put on inquiry.

The libelant in the instant case, on an order given by a well and favorably known official of a ship-operating company with which the libelant had business relations, furnished coal to a foreign vessel at New Orleans, that vessel being "a new steamer" there, about which no information was imparted to the libelant, other than that it was under charter to F. R. Betancourt, who, so far as appears, was a total stranger to the libelant, and was not in New Orleans when the coal was ordered and furnished. It was not disclosed that a charter party or a copy of it was in New Orleans, or that any one then at or near that place then knew what the terms of that instrument were. Evidently Mr. Hiller did not know what were the terms of the charter party. It was not shown that the libelant by reasonable diligence could have ascertained that the charter party to Betancourt provided that he should pay for all coal needed. One who is put on inquiry by a fact or circumstance coming to his notice is not properly chargeable with knowledge of another fact actually unknown to him, in the absence of a showing that the existence of such unknown fact would have been disclosed if the suggested inquiry had been made with due diligence. In the absence of a showing that one, before acting in a situation presented, had reasonably available means of learning of the existence of a fact actually unknown to him, he is not to be held to have been bound to know that fact, though he was put on inquiry.

[2] The mere fact that one knows or is informed that a ship is under charter is not enough to charge him with notice of the terms of the charter party. The George Dumois, 68 Fed. 926, 15 C. C. A. 675. In the case just cited the claim was for coal furnished to a ship in a foreign port on an order given by one known to be the charterer of it. The coal was received by the master and officers of the ship, was a necessary supply to the ship, without which the voyage could not have been prosecuted, and was used by the ship in prosecuting the voy-

age. That case arose and was decided before the enactment of the above-mentioned act of June 23, 1910, relating to liens on vessels for repairs, etc. It was held that under the law as it then existed a lien on the ship resulted from the furnishing of supplies under the circumstances stated, unless it was shown that the furnisher relied on the credit of the owner or charterer, not of the ship, and that, though the furnisher knew that the order for the coal was given by the charterer, he was not bound to know the terms of the charter party, which in fact included a provision requiring the charterer to pay for such supplies. If there had been no change in the law, that decision would be an authority supporting a ruling in the instant case that the furnishing of coal by the libelant was under such circumstances as to have the effect of creating a lien on the ship.

[3] While the evidence showed that Mr. Hiller, in giving the order for the coal, did so at the request of a business associate of the charterer, it also showed that when he gave the order he was apprised of the amount of coal needed by a requisition of the ship's engineer, an appointee of the owner, and that the master and the engineer acquiesced in the delivery of the coal to the ship; the former giving a receipt for it. An order so given is to be regarded as given by the ship's master, though a business associate of the charterer co-operated in procuring the giving of it. The Philadelphia, 75 Fed. 684, 21 C. C. A. 501; Norwegian Steamship Co. v. Washington, 57 Fed. 224, 6 C. C. A. 313; In re Alaska Fishing & Development Co. (D. C.) 167 Fed. 875.

The necessity, existing under the law as it formerly was, of alleging and proving that necessary supplies furnished on such an order as the one shown in the instant case were furnished on the credit of the vessel, is dispensed with by the provision of the above referred to act of June 23, 1910, that designated persons, including a ship's master, "shall be presumed to have authority from the owner or owners to procure repairs, supplies, and other necessaries for the vessel." This provision is qualified by the following one contained in section 3 of the act:

"But nothing in this act shall be construed to confer a lien when the furnisher knew, or by the exercise of reasonable diligence could have ascertained, that because of the terms of the charter party, agreement for the sale of the vessel, or for any other reason, the person ordering the repairs, supplies, or other necessaries was without authority to bind the vessel therefor."

Language used in the last-quoted provision, "nothing in this act shall be construed to *confer* a lien," etc., is some indication of the absence of an intention to deprive a furnisher of a lien on a ship for necessary supplies furnished to it under such circumstances that he would have had a lien under the previously existing law, unaffected by any lien statute. It is questionable whether the same meaning properly can be attributed to the proviso that it would have had if, instead of the last-quoted language, it had used some such language as the following:

"But the furnisher shall not have a lien if he knew, or by the exercise of reasonable diligence," etc.

If the transaction now in question had occurred before the enactment of the act mentioned, as it was a furnishing on the order of the

master of necessary supplies to a ship in a foreign port, there would have been a lien on the ship, unless it had been shown that the supplies were not furnished on its credit, or that the libelant knew, or by the exercise of reasonable diligence could have ascertained, that the master was without authority to bind the vessel therefor, and the circumstance that the libelant knew that the ship was under charter would not have been enough to rebut the presumption that the supplies were obtained on its credit, though the charterer participated in the ordering of them, and the charter party required the charterer to pay for them. The George Dumois, supra. As the libelant would have had a lien if the statute had not been enacted, there is some ground for saying that language used in the statute stands in the way of its being given the effect of preventing a lien in the libelant's favor attaching.

But, assuming that the statute has the effect of preventing the furnishing of necessary supplies to a vessel in a foreign port giving a lien on it, if a lien would not have resulted if the transaction had been in the vessel's home port, it is plain that an effect of the statute is to either create or recognize a presumption of the validity of such an order as the one on which the libelant furnished the coal, and that proof of the giving of that order and of compliance with it by delivering the coal to the ship with its master's acquiescence was prima facie sufficient to entitle the libelant to the lien claimed, and put upon the claimant the burden of proving that the master was without authority to bind the vessel, and that the libelant knew, or by the exercise of reasonable diligence could have known, of such lack of authority. The Yankee, 233 Fed. 919, 147 C. C. A. 593.

[4] Nothing in the act indicates that the presumption of authority in a vessel's master to procure necessaries for it could be rebutted or destroyed by showing that the furnisher knew or was informed that the vessel was under charter. To rebut or overcome the presumption of the master's authority to bind the vessel, it must be shown that the furnisher knew, or by the exercise of reasonable diligence could have ascertained, that the terms of a charter party, or something else, deprived the master of authority to bind the vessel for necessaries furnished to it. The burden was on the appellee, the claimant, to prove that the libelant knew, or by the exercise of reasonable diligence could have ascertained, that the charter party required the charterer to pay for coal needed. There was an absence of evidence tending to prove that the libelant either knew, or from any accessible source of information could have learned, that the charter party contained a provision having that effect. There was no evidence tending to prove that either the charter party or any one having knowledge of its terms was within reach of the libelant. It was not shown where the charterer was, except that he was not in New Orleans. To say that the libelant could have learned of the terms of the charter party by applying to the charterer's business associate, who was instrumental in procuring the giving of the order for the coal, would be a guess or surmise unsupported by evidence. We conclude that the order for the coal was given under such circumstances that it is to be treated as having been given by the master, and that

no evidence adduced rebutted or destroyed the statutory presumption that the master had authority to bind the vessel for the coal furnished on that order. It follows that the libelant was entitled to a lien for the price of the coal.

The evidence showed that the towage services in question were required in getting the coal ordered loaded on the vessel, and in effecting a needed movement of the vessel, and that they were rendered at the request or with the acquiescence of the master. The rendition of those services well may be regarded as necessary to enable the vessel to proceed on her voyage, or, at any rate, that they were such as facilitated its use as an instrument of navigation. We think such services were "necessaries," within the meaning of that word as used in the abovementioned act of June 30, 1910, and that they were rendered under such circumstances as to give rise to a lien on the vessel for the price or reasonable value thereof.

The decree appealed from is reversed, and the cause is remanded, with instructions to enter a decree for the libelant for the amount claimed in the libel and costs.

Reversed.

In re DRESSLER PRODUCING CORPORATION.

Petition and Appeal of DALTON et al.

(Circuit Court of Appeals, Second Circuit. December 10, 1919.)

No. 61.

1. BANKRUPTCY ⊂⊃65—PREFERENCE OF CORPORATION DIRECTORS FOR BANKRUPTCY RATHER THAN STATE COURT FOR WINDING UP CORPORATION NOT FRAUD.
A petition, verified by the directors of a corporation, alleging its inability to pay its debts in full, and its willingness to be adjudged a bankrupt, cannot be said to be fraudulent, because the directors prefer that forum rather than a state court, where a stockholder has commenced suit for dissolution, and is sufficient to give the bankruptcy court jurisdiction.

2. BANKRUPTCY ⊂⊃61—ADMISSION AS ACT OF BANKRUPTCY RENDERS SOLVENCY IMMATERIAL.
Where the act of bankruptcy is a written admission, as provided by Bankruptcy Act, § 3a (5), Comp. St. § 9587, the question of solvency is immaterial.

3. CORPORATIONS ⊂⊃559(3)—MAY EXERCISE POWERS AFTER APPOINTMENT OF RECEIVER.
Appointment of a temporary receiver for a corporation does not deprive it of the right to exercise its corporate powers, except as to matters specially confided to the receiver by the court.

4. BANKRUPTCY ⊂⊃20(1)—SUPERSEDING OF SUIT IN STATE COURT.
State court proceedings are superseded by filing of a petition in bankruptcy, to make more effective the bankruptcy proceedings.

5. BANKRUPTCY ⊂⊃20(1)—PROCEEDINGS BY CORPORATION STOCKHOLDERS NOT BARRED BY SUIT FOR DISSOLUTION IN STATE COURT.
The institution by a stockholder of a corporation of a suit for dissolution in a state court does not deprive other stockholders of the right to institute proceedings in bankruptcy.

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6. BANKRUPTCY ⊂=439—ORDER DENYING MOTION TO DISMISS REVIEWED BY REVISION.

An order of a court of bankruptcy, denying a motion to dismiss a petition, is reviewable by petition to revise.

Petition to Revise and Appeal from Order of the District Court of the United States for the Southern District of New York.

In the matter of the Dressler Producing Corporation, bankrupt. Marie Dressler Dalton and James H. Dalton petition to revise and appeal from an order of the District Court. Affirmed.

Whitman, Ottinger & Ransom, of New York City (Nathan Ottinger, of New York City, of counsel), for appellants.

Barker, Donahue, Anderson & Wylie, of New York City (Louis J. Wolff, of New York City, of counsel), for bankrupt.

Before ROGERS, HOUGH, and MANTON, Circuit Judges.

MANTON, Circuit Judge. [1] The appellants, Marie Dressler Dalton, a stockholder of one-half the capital stock of the bankrupt and also a creditor thereof, and her husband, creditor, on February 1, 1919, began a proceeding in the state court for a dissolution of the bankrupt corporation. The ground upon which the application was based was that there was a hopeless diversion of views of the stockholders of equal interest and a desire to prevent waste of the corporate property. No allusion is made to the insolvency of the company but it was asserted that, if the company continued with such divided ownership of stock and management, insolvency might result. The petition in the state court was made returnable on February 24, 1919. On February 19, 1919, this petition in bankruptcy was filed. It is instituted by the stockholders whose interests appear to be adverse to the appellants. On the same day an order to show cause, returnable on February 21st, was issued in the proceedings, asking for a stay of the state court proceedings. On February 26th the appellants obtained an order to show cause, returnable March 3d, for leave to intervene and set aside the bankruptcy proceedings. The District Judge, in the order now under review, permitted the appellants to file an answer "raising the issue of fraud with respect to the admission in writing of the inability of the bankrupt to pay its debts and its expression of willingness to be adjudicated a bankrupt." The order stays the proceedings in the state court for dissolution, and denied the application of the appellants to dismiss the proceedings in bankruptcy.

It is not disputed but that a petition in bankruptcy was filed with a view to the liquidation of the affairs of the bankrupt corporation within the jurisdiction of the United States District Court rather than the Supreme Court of the state. It is asserted that the corporation is solvent, but it does appear by the schedules in bankruptcy that it owed $22,809.97 as against cash assets of $5,865.86, and motion picture films with an uncertain value. The assets are said to be "undeterminable." At the time of the filing of the petition in bankruptcy, the corporation was not in a position or condition to continue business, and the desire to wind up its affairs was not only necessary, but seemed to be the

wish of all the parties concerned. One faction attempted it in the state court; the other faction with frankness of statement, says it chose the federal court, because it deemed that court "better adapted to preserve the rights of all parties." We are of the opinion that it was unnecessary to justify a choice, for the petitioners in bankruptcy have the unchallengeable right to proceed by filing this petition. The institution of the proceedings in the state court is not a bar to maintenance of this petition in bankruptcy. Insolvency need not be alleged or shown to successfully maintain a petition in bankruptcy, if the corporation is unable to meet its obligations as they mature and arise, and this appears to be the fact here. There are many allegations and denials of fraud on both sides, but through it all there seems to be the common wish to liquidate the affairs of the bankrupt.

The appellants contend that a fraud is being committed or consummated by this petition in the federal court, and that this is sufficient ground for a dismissal of the petition. In support of this contention we are referred to Zeitinger v. Dry Goods Co., 244 Fed. 719, 157 C. C. A. 167. In that case a fraud was established by a decree of a state court after a trial which lasted for four weeks. A director was ousted by the state court for waste and mismanagement, and a receiver was appointed to enforce the decree, and the directors were held liable for a considerable sum of money. At the time the petition in bankruptcy was filed, the affairs of the corporation had been taken from the directors by a final decree of the state court, and the losses of the corporation were decreed to be due and owing from its stockholders and assessed against them. The court refused to take jurisdiction of the petition in bankruptcy, which was authorized by the same board of directors, and thus permit the instrumentality of the Bankruptcy Law to further their fraudulent purposes.

In the case at bar the directors can at least be said to be holding office as de facto officers. They, under oath, say that the corporation is unable to pay its debts in full, and ask the protection of the bankruptcy court. This is sufficient to require the bankruptcy court to take jurisdiction. Under these circumstances, it cannot be said to be a fraud to proceed in winding up the affairs of the corporation by bankruptcy proceedings, rather than through the medium of the state law in granting a dissolution of the corporation. A choice of a forum, under the circumstances disclosed by the affidavits in the record, in itself, is not a fraud, and would not warrant the District Judge in refusing jurisdiction.

[2] Where the act of bankruptcy is a written admission, as the statute provides (section 3a [5] Comp. St. § 9587), the question of solvency is immaterial. Matter of Cohn, 227 Fed. 843, 142 C. C. A. 367; West Co. v. Lea, 174 U. S. 590, 19 Sup. Ct. 836, 43 L. Ed. 1098. In re Moench & Sons Co., 130 Fed. 685, 66 C. C. A. 37, this court held that the fact that the property of the corporation was in the possession of receivers appointed in the state court did not affect the jurisdiction of the court of bankruptcy to adjudicate such corporation a bankrupt. It was further held that an admission in writing of inability to pay its debts, and its willingness to be adjudicated a bankrupt on

that ground, prevented a creditor from proving the solvency as a defense. The court said:

"It would also seem to be reasonable to hold that the power to make the admission in writing could be exercised by the same officers who have the power to make a general assignment, and, in the absence of statute or by-law regulating the subject, such power resides in the directors. * * * It is no doubt true that by committing either the fourth or fifth acts of bankruptcy, when three creditors stand ready at once to take advantage of it by filing a petition, the corporation achieves the object which the act forbids it to secure by its own voluntary petition, but its doing so is not such a 'fraud upon the act' as to prevent the application of the plain language of the act to the facts presented."

[3] Even where a temporary receiver is appointed for a corporation the corporation still has the right to exercise its corporate powers, except as to the matters specially confided to the receiver by the court. Sigua Iron Co. v. Brown, 171 N. Y. 488, 64 N. E. 194.

[4] It is the desire of the law that the state court proceedings be superseded upon the filing of a petition in bankruptcy, and this to make more effective the bankruptcy proceedings. Cresson Coal Co. v. Stauffer, 148 Fed. 981, 78 C. C. A. 609; Morehouse v. Giant Powder Co., 206 Fed. 24, 124 C. C. A. 158; In re Salmon (D. C.) 143 Fed. 395.

[5] A solvent corporation, as a person, may have its property distributed among its creditors in the manner provided by the Bankruptcy Act (Comp. St. §§ 9585–9656). Hanover Nat. Bank v. Moyses, 186 U. S. 181, 22 Sup. Ct. 857, 46 L. Ed. 1113. The claim of the appellants, that at the time the directors admitted that the company was insolvent, and unable to meet its obligations as they matured and arose, they were without authority to so act, and that, therefore, such a consent is of no value in the bankruptcy proceedings, is without force, and is not a reason why the motion to dismiss the petition should be granted. If there is a question whether a fraud has been perpetrated, and the authority of the board of directors to sign the consent, which was filed in the voluntary proceedings in bankruptcy, is questioned, it is left open for trial by the order sought to be revised.

We are of the opinion that the action of the board of directors here was justified upon the affidavits presented, and that the District Judge correctly disposed of the question presented in the court below. Matter of United Grocery Co. (D. C.) 239 Fed. 1016; Matter of Cohn (D. C.) 220 Fed. 956.

[6] The petitioner seeks to have this cause reviewed both by a petition to revise and by an appeal. Evidently they have been doubtful as to their remedy. We have considered the cause as coming to us pursuant to a petition to revise, rather than an appeal. Summary proceedings are reviewable only by a petition to revise. In re Goldstein, 216 Fed. 887, 133 C. C. A. 91; Gibbons v. Goldsmith, 222 Fed. 826, 138 C. C. A. 252. Where the court of bankruptcy has erroneously retained jurisdiction to adjudicate the rights of an adverse claimant itself, the action may be reviewed by a petition to revise. Mueller v. Nugent, 184 U. S. 1, 22 Sup. Ct. 269, 46 L. Ed. 405; Shea v. Lewis,

206 Fed. 877, 124 C. C. A. 537; In re Gill, 190 Fed. 726, 111 C. C. A. 454; In re Vanoscope Co., 233 Fed. 54, 147 C. C. A. 123.

There is a clear distinction between "controversies arising in bankruptcy proceedings" and "bankruptcy proceedings." Bankruptcy proceedings, broadly speaking, cover questions between the alleged bankrupt and include the matters of administration generally, such as appointments of receivers and trustees, allowance of claims, and matters to be disposed of summarily. All of these matters occur in the settlement of the estate. In re Friend, 134 Fed. 778, 67 C. C. A. 500. The determining factor or the important consideration for ascertaining to which class the particular application belongs is to determine the object and character of the proceedings sought to be reviewed. If it is a controversy arising in bankruptcy proceedings, the Circuit Courts of Appeals exercise their jurisdiction as in other cases, under section 24a (Comp. St. § 9608). If the controversy pertains to proceedings in bankruptcy relative to the adjudication and the subsequent steps in bankruptcy, it is one which may be revised in matters of law upon notice and a petition by the aggrieved party.

The distinction was marked in Moody v. Century Savings Bank, 239 U. S. 374, 36 Sup. Ct. 111, 60 L. Ed. 336, where the court said:

"Whether the Circuit Court of Appeals rightly sustained its jurisdiction turns upon whether this is one of those 'controversies arising in bankruptcy proceedings' over which the Circuit Courts of Appeals are invested, by section 24a of the Bankruptcy Act, with the same appellate jurisdiction that they possess in other cases under Judicial Code, § 128 [Comp. St. § 1120], or is a mere step in bankruptcy proceedings the appellate review of which is regulated by other provisions of the Bankruptcy Act. If it is a controversy arising in bankruptcy proceedings, the jurisdiction of that court was properly invoked, as is also that of this court. We entertain no doubt that it is such a controversy. It has every attribute of a suit in equity for the marshaling of assets, the sale of the incumbered property, and the application of the proceeds to the liens in the order and mode ultimately fixed by the decree. True, it was begun by the trustees and not by an adverse claimant; but this is immaterial, for the mortgagees, who claimed adversely to the trustees, not only appeared in response to notice of the trustees' petition, but asserted their mortgage liens and sought to have them enforced against the proceeds of the property conformably to the contentions before stated. This was the equivalent of an affirmative intervention, and, when taken in connection with the trustees' petition, brought into the bankruptcy proceedings a controversy which was quite apart from the ordinary steps in such proceedings and well within the letter and spirit of section 24a."

Petitions to revise bring up questions of law only; appeals, both of law and of fact. Elliott v. Toeppner, 187 U. S. 327, 23 Sup. Ct. 133, 47 L. Ed. 200. A petition to revise calls up any order or judgment and judicial action in bankruptcy proceedings; appeals, final judgments only. Duryea Power Co. v. Sternbergh, 218 U. S. 299, 31 Sup. Ct. 25, 54 L. Ed. 1047.

If the question arises in an independent suit to determine the claim necessary for the settlement of the estate, or if it arise in one of the cases specified in section 25a (Comp. St. § 9609), review may be had by appeal; but if the question pertains to and arises in a bankruptcy proceeding, and does not fall within either of the cases specified in section 25a, review may be had by petition to revise in matter of law.

Under section 24a, a controversy arising between a trustee and a third party in respect to property either in the possession of the trustee or a third party, the review in the Circuit Court of Appeals is had on appeal and in the same manner as any other case; but in case of such controversy the revisory power is not available. On the review, the judgment in independent suits to recover assets, or to determine controversies arising relative to the bankrupt estate, the remedy is by appeal.

We are of the opinion that the remedy of the aggrieved party here was by a petition to revise.

The determination below is affirmed.

UNITED STATES v. VOGEL.

(Circuit Court of Appeals, Second Circuit. December 10, 1919.)

No. 29.

ALIENS ⊂=68—POWER OF COURT TO GRANT AMENDMENT OF NATURALIZATION PETITION.

Where an alien in his declaration of intention, and later in his petition for naturalization, erroneously stated the sovereignty to which he owed allegiance, which allegiance, as required by statute, he "particularly" renounced, the court is without power on hearing of his petition, by an order nunc pro tunc, to allow amendment of the declaration and petition, to date back to the time of their filing.

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

Petition by Albert Vogel for naturalization. From an order granting naturalization, and dismissing its petition for cancellation of certificate, the United States appeals. Reversed.

Francis G. Caffey, U. S. Atty., of New York City (Julian Hartridge, of New York City, of counsel), for the United States.

Frank Case Hayden, of New York City, for appellee.

Before ROGERS, HOUGH, and MANTON, Circuit Judges.

MANTON, Circuit Judge. Appellee, at the time his application for citizenship was filed, was a resident of the Southern district of New York. He was born in Benningen, Germany, in 1885. He came to this country from France in 1906. On August 27, 1914, he subscribed and swore to a declaration of intention to become a citizen, and on April 23, 1917, he subscribed and filed a petition for naturalization. Each of these papers recited that he was born in Benningen, Germany, in 1885, and in them he made the usual oath renouncing allegiance to any foreign sovereign, particularly the emperor of Germany. On August 7, 1917, he subscribed and swore to an oath of allegiance, renouncing his foreign allegiance, to wit, to the emperor of Germany. On March 26, 1918, he appeared in open court before the District Judge to complete his naturalization. The District Judge took testimony, and

the appellee testified that he was a French citizen. An order was granted nunc pro tunc striking out the words "William II, emperor of Germany," and substituting the words "French Republic," and a decree was entered admitting the appellee to citizenship. The government has appealed from the order amending the oath of allegiance and granting naturalization to the appellee, and asks that the certificate be canceled.

The District Judge filed an opinion in which he recognized the conflict of authorities of the various District Courts as to the power of a District Judge to amend, nunc pro tunc, a declaration of intention to become a citizen, at any time during the proceedings. He reached this conclusion, taking the view that, because the statute requires, with respect to both the declaration of intention and the petition for naturalization, that the applicant renounce, not only his particular sovereignty, but that of every other sovereignty as well, the purpose of particularizing as to his own sovereignty is merely one of identification, and that the general renunciation is sufficient to include that sovereignty. The court was of the opinion that the new loyalty was adequately evidenced by the oath of allegiance as supplemented by the general renunciation.

The requirements to become a citizen of the United States are contained in section 3 of the act of June 25, 1910 (Comp. St. § 4352), as follows:

"First. He shall declare on oath before the clerk of any court authorized by this act to naturalize aliens, or his authorized deputy, in the district in which such alien resides, two years at least prior to his admission, and after he has reached the age of eighteen years, that it is bona fide his intention to become a citizen of the United States, and to renounce forever all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty, and particularly, by name, to the prince, potentate, state, or sovereignty of which the alien may be at the time a citizen or subject. * * *

"Second. Not less than two years nor more than seven years after he has made such declaration of intention he shall make and file, in duplicate, a petition in writing, signed by the applicant in his own hand writing and duly verified, in which petition such applicant shall state his full name, his place of residence (by street and number, if possible), his occupation, and, if possible, the date and place of hs birth. * * *

"The petition shall set forth that * * * it is his intention to become a citizen of the United States and to renounce absolutely and forever all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty, particularly by name to the prince, potentate, state, or sovereignty of which he at the time of filing of his petition may be a citizen or subject. * * *

"At the time of filing his petition there shall be filed with the clerk of the court a certificate from the Department of Commerce and Labor, if the petitioner arrives in the United States after the passage of this act, stating the date, place, and manner of his arrival in the United States, and the declaration of intention of such petitioner, which certificate and declaration shall be attached to and made a part of said petition.

"Third. He shall, before he is admitted to citizenship, declare on oath in open court that he will support the Constitution of the United States, and that he absolutely and entirely renounces and abjures all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty, and particularly by name to the prince, potentate, state, or sovereignty of which he was before a citizen or subject. * * *"

The United States District Courts have jurisdiction to naturalize by virtue of section 3 of the act of June 29, 1906 (34 Stat. 596 [Comp.

St. § 4351]). This section provides the procedure and the limitations thereof. Section 2171 of the Revised Statutes provides that no alien who is a native, citizen, or subject or the denizen of any country, state, or sovereignty with which the United States is at war at the time of his application, shall be then admitted to become a citizen of the United States. At the time of this application the United States was at war with the German Empire.

The district judge found that appellee was the son of a parent who was of Alsace-Lorraine at the time that territory was a part of France. His father served in the French army in the Franco-Prussian war, and he returned to France afterwards to reside in Paris. He and his wife were both French citizens. The appellee was born in Germany while his mother was there on a visit, after Benningen became German territory. The appellee mistakenly renounced allegiance to Germany, when he should have renounced allegiance to France. This was due to mistaken information given the applicant as to the proper sovereignty. The question, therefore, is presented whether the court had the power to admit to citizenship, in view of the erroneous renunciation in the declaration of intention and petition for naturalization in the specification of the particular sovereignty to which allegiance had been previously owing, and to do this by granting an order nunc pro tunc.

In the District Courts, there has been a division of view as to such power in the court. The following authorities have held that no such power exists in the court: In re Lewkowicz, 169 Fed. 927; In re Stack, 200 Fed. 330; Ex parte Lange, 197 Fed. 769; In re Friedl, 202 Fed. 300. On the other hand, it has been held that such power existed in the federal court. U. S. v. Viaropulos, 221 Fed. 485; U. S. v. Orend, 221 Fed. 777; In re Denny, 240 Fed. 845.

In U. S. v. Ginsberg, 243 U. S. 472, 37 Sup. Ct. 422, 61 L. Ed. 853, four questions were certified to that court which dealt with the regularity of naturalizing citizens. But two of the four questions were answered. The first of the questions answered was:

"Is the final hearing of a petition for naturalization, had in open court as required by section 9 of the act of June 29, 1906, c. 3592 [Comp. St. § 4368], if after the petition is first presented in open court the hearing thereof is passed to and finally held in the chambers of the judge adjoining the courtroom, on a subsequent day and at an earlier hour than that to which the court has been regularly adjourned?"

And the second:

"(4) May a certificate of citizenship be set aside and canceled, in an independent suit brought under section 15 of the act of June 29, 1906, c. 3592 [Comp. St. § 4374], on the ground that it was illegally procured, if the uncontradicted evidence at the hearing of the petition showed indisputably that the petitioner was not qualified by residence for citizenship, and that the court or judge who heard the petition and ordered the certificate misapplied the law and the facts?"

The court held that a hearing in the judge's chambers adjoining the courtroom did not satisfy the requirements of the act and that the certificate of citizenship granted by the court could be annulled in an independent suit by the United States. The court said:

"An alien who seeks political rights as a member of this nation can rightfully obtain them only upon terms and conditions specified by Congress.

Courts are without authority to sanction changes or modifications; their duty is rigidly to enforce the legislative will in respect of a matter so vital to the public welfare. * * * The whole statute indicates a studied purpose to prevent well-known abuses by means of publicity throughout the entire proceedings. Its plain language repels the idea that any part of a final hearing may take place in chambers, whether adjoining the courtroom or elsewhere.

"No alien has the slightest right to naturalization unless all statutory requirements are complied with, and every certificate of citizenship must be treated as granted upon condition that the government may challenge it as provided in section 15 and demand its cancellation unless issued in accordance with such requirements. If procured when prescribed qualifications have no existence in fact it is illegally procured; a manifest mistake by the judge cannot supply these nor render their existence nonessential."

When the act of June 29, 1906 (34 Stat. 596), was enacted "as a uniform rule of naturalization," Congress dictated in particularity as to what the declaration of intention should consist of, and required the applicant to particularize as to the sovereignty from whence he came and which he was renouncing. The system is statutory, and the only province of the courts is to ascertain the will of Congress and execute it accordingly. Citizenship can only be obtained by complying with the terms as prescribed by Congress. The act itself provides the terms to an explicit degree when "an alien may be admitted to become a citizen in the manner and not otherwise." Citizenship may not be obtained by an alien in any other manner. Every material obligation, as imposed by statute, constitutes a part of the manner as contemplated by Congress in the act. The act provides that an alien shall renounce "particularly by name to the prince, potentate, state, or sovereignty of which he was before a citizen or subject" at the appropriate time in each instrument. It is not within the power of courts, in our opinion, to vary this rule and permit the applicant at a later time to recognize his mistake and ask to change it, for to do so would be permitting the applicant to declare his intention of renunciation at a time other than when making his application.

When making his declaration and signing his petition and filing the same is the time he must announce his renunciation as a citizen or subject of the particular government. It was the intent of Congress to have such renunciation of the particular foreign sovereignty made contemporaneously with the execution and filing of each of the necessary instruments, and the court is without power later to permit a change to date back by granting an order nunc pro tunc.

For the court to do so, we think, is reading into the statute a permission which is tantamount to a trespass upon the executive domain, nor can the court say which steps must be complied with and which may be omitted in compliance, and which may be corrected if error creep in. To permit such power in the court would frustrate the whole act; it would place the power of the court above the terms of the act. To permit of a substantive amendment would, in but a step further, permit naturalization to become effective without amending an insufficient declaration. This the courts cannot and should not do. We think the court below was without the power to grant the order nunc pro tunc, and erred in admitting the appellee to citizenship.

Decree reversed.

HAMMERSCHLAG MFG. CO., Inc., v. IMPORTERS' & TRADERS' NAT. BANK.

(Circuit Court of Appeals, Second Circuit. December 10, 1919.)

No. 46.

1. BANKS AND BANKING ⟸148(3)—DUTY OF DEPOSITOR TO VERIFY BANK STATEMENT.

A depositor, who sends his passbook to be written up and receives it back with his paid checks as vouchers, is under obligation to the bank to examine and verify the passbook and vouchers, and to report to the bank any errors disclosed.

2. BANKS AND BANKING ⟸148(1)—NO LIABILITY FOR PAYMENT OF RAISED CHECKS, WHERE ALTERATIONS NOT DISCOVERABLE BY REASONABLE CARE AND DEPOSITOR LATE IN MAKING CLAIM.

A bank expressly authorized in writing to pay checks to a depositor's bookkeeper, and which so paid checks duly signed by the depositor, but which, after signing, had been raised by the bookkeeper, *held* not liable for the overpayments, where the checks were entirely written by the bookkeeper, and the alterations were not discoverable by reasonable care, and where depositor's passbook was written up and returned with canceled checks each month, and no claim was made by depositor until more than a year after the raising of the checks commenced.

3. TRIAL ⟸141—DIRECTION OF VERDICT PROPER WHERE EVIDENCE IS UNDISPUTED.

A directed verdict is proper, where the evidence is undisputed and free from conflict.

4. BANKS AND BANKING ⟸148(4)—LIABILITY FOR PAYMENT OF RAISED CHECKS AFFECTED BY LACHES OF DEPOSITOR IN NOTIFYING.

Where a depositor's passbook was written up and returned with canceled checks each month, with a notice stamped thereon requesting its examination, and stating that the bank disclaimed responsibility for any error unless notified within 30 days, the bank *held* not liable for payment of raised checks, which it could not have discovered by reasonable care, and of which it was not notified for nine months.

Manton, Circuit Judge, dissenting.

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

Action by the Hammerschlag Manufacturing Company, Incorporated, against the Importers' & Traders' National Bank. Judgment for defendant, and plaintiff brings error. Affirmed.

The plaintiff is a corporation organized and existing under the laws of the state of New Jersey and has its principal office in the town of Garfield, in that state. The defendant is organized and existing under the laws of the United States, and is a resident and citizen of the state of New York, and has its principal office and place of business in the Southern district of New York. At the times hereinafter mentioned the plaintiff was a depositor in the bank owned and conducted by defendant.

The plaintiff, between August 1, 1913, and October 21, 1914, inclusive, deposited with defendant $659,815.40; and on August 1, 1913, the defendant was indebted to plaintiff in the sum of $21,036.84 upon an account for money deposited with it. Between the dates mentioned the defendant paid to the plaintiff upon its order the amount of $675,702.24. The plaintiff demands in this action the difference between the amounts which defendant received and the amounts paid out to it or on its order, to wit, the sum of $5,150. It appears that checks payable to "Bearer a/c Exchange" were presented to defendant by the plaintiff's accredited representative and were paid by it, which

had been raised by the said accredited representative. It also appears that the increase to which these checks had been raised equaled the balance for which the plaintiff sues.

At the conclusion of the plaintiff's case defendant moved to dismiss the complaint and for the direction of a verdict, upon the ground that plaintiff failed to show liability on the part of the defendant bank, and that from plaintiff's own evidence it appeared the defendant bank was free from any liability or fault respecting the raised checks. The motions were granted and a verdict was returned under the court's instructions in favor of defendant.

Louis S. Posner, of New York City, for plaintiff in error.
Henry W. Baird, of New York City, for defendant in error.

Before ROGERS, HOUGH, and MANTON, Circuit Judges.

ROGERS, Circuit Judge (after stating the facts as above). The question which this case presents relates to the right of a bank which has paid raised checks to escape liability for repayment of the amounts so paid by establishing the negligence of the depositor in not examining the passbook and vouchers returned to him by the bank, and in not reporting to the bank without unreasonable delay the errors discovered or which might have been discovered.

In the present case there was no forgery of signatures. It is admitted that the signatures were all genuine. The forgeries consisted in raising the amounts for which the checks were originally drawn, and the alterations were all made by the plaintiff's confidential bookkeeper. He had exclusive charge of the preparation of the checks for signatures, and exclusive charge of the presentation of the checks for signatures. After the signatures were affixed, the bookkeeper would raise the amount of the check and present it to the bank for payment. The alteration of checks by him began in August, 1913, and in June of that year the plaintiff had written the following letter and given it to the bookkeeper, William H. Hooper, who presented it to the paying teller of the bank:

"New York, June 6, 1913.

"Importers' & Traders' National Bank, Broadway and Murray Street, City—Gentlemen: Please accept this letter as authority for payment to our Mr. W. H. Hooper of checks presented by him, drawn to the order of bearer—signature below.

"Respectfully yours, [Signed] Hammerschlag Mfg. Co.,
"J. D. Goldberg, Vice President.

"Dic. J. D. G/K.
"[Signed] William H. Hooper."

Each one of the altered checks was altered by Hooper, presented by him, and to him the money on all of them was paid. The amount of the check as originally drawn was erased by an ink eradicator preparation, and as the raised amount was in the handwriting of the one party who wrote the original check there was nothing in the appearance of the check to challenge attention. The protectograph was not used, with a possible exception of one or two of the checks, until after the alteration in amount was made. No book containing checks and stubs was used. The checks were drawn on voucher forms, which were padded, and the amounts were entered in the book as the book of original entry.

[1] A depositor who sends his passbook to be written up, and receives it back with his paid checks as vouchers, is under an obligation to the bank to examine and verify his passbook and vouchers, and report to the bank the errors disclosed.

In Weisser's Administrators v. Denison, 10 N. Y. 68, 61 Am. Dec. 731 (1854), the court declared that a depositor owes the bank no duty which requires him to examine his passbook or vouchers with a view to the detection of forgeries. It also declared that where checks forged by the confidential clerk of the depositor were paid by the bank, charged to the depositor in his bank book, the book balanced and with the forged vouchers, among others, returned to the clerk, who examined them and reported them correct, and the principal did not discover the forgeries until months afterwards, when he immediately informed the bank, the bank could not retain the amount of the forged checks. The more recent authorities in New York, soon to be considered, lay down a quite different doctrine.

In Leather Manufacturers' Bank v. Morgan, 117 U. S. 96, 6 Sup. Ct. 657, 29 L. Ed. 811 (1886), the rule is laid down that the depositor is bound personally or by an authorized agent and with due diligence to examine the passbook and vouchers, and to report to the bank without unreasonable delay any errors that may be discovered; and if he fails to do so, and the bank is misled to its prejudice, he cannot afterwards dispute the correctness of the balance shown by the passbook. It is also held that, if the duty of examination is delegated by the depositor to the clerk guilty of the forgeries, he does not so discharge his duty to the bank as to relieve himself from loss.

In Critten v. Chemical National Bank, 171 N. Y. 219, 63 N. E. 969, 57 L. R. A. 529 (1902), the rule is laid down that a bank depositor owes to the bank the duty of exercising reasonable care to verify returned vouchers by the record kept by him of the checks he has issued, for the purpose of detecting forgeries or alterations; and in that case the court held a bank depositor chargeable with the knowledge of the fraudulent alteration of checks possessed by his clerk to whom he intrusted the examination of the vouchers, and with his negligence or failure in the verification of the accounts, although the clerk happened to be the one who made the alterations, where the comparison of the checks with the stubs in the check book would have disclosed such alterations to an innocent party previously unaware of the forgeries.

In Morgan v. United States Mortgage & Trust Co., 208 N. Y. 218, 101 N. E. 871, L. R. A. 1915D, 741, Ann. Cas. 1914D, 462 (1913), a trusted clerk in the employ of the trustees of an estate, and who was their immediate agent in dealing with the bank, forged 28 checks, aggregating a large sum, which the bank paid. Checks drawn on the account of the estate were signed by a rubber stamp imprinting the words "estate of David P. Morgan," and were authenticated by the actual signature of one of the trustees. The clerk who made the deposits filled out the body of the checks, obtained from the bank the passbook and vouchers and check list whenever the account was

balanced, and employed in his forgeries the simulated signature of the trustee Morgan. An action was brought to recover the amount paid by the bank on the forged checks. The court held that there could be no recovery; the rule being that a bank is permitted to escape liability for repayment of amounts paid out on forged checks, if it establishes that the depositor has been guilty of negligence which contributed to such payments and that it has been free from any negligence. The negligence which the bank relied upon was the negligence of the trustees in not examining their passbook and list of vouchers, and thus discovering within a reasonable time what they were being charged with. The depositors were in the habit of making an examination, but the examination was incomplete and ineffective. The court declared that if they had examined the check list and passbook, and compared them with their own books, they would have discovered at once the payment and debit to their account of checks which they had not drawn, and the forgeries would have been uncovered. The trustees had relied for verification merely on a comparison of vouchers, without any effort to verify them by comparison with the check list or passbook.

In Myers v. Southwestern National Bank, 193 Pa. 1, 44 Atl. 280, 74 Am. St. Rep. 672 (1899), the court recognized the duty of the depositor to verify the settlements of his bank book, and held that he could not recover from the bank the loss which he sustained by not doing so. In that case the depositor intrusted to the confidential clerk, who committed the forgeries, the duty of verifying the passbook, and the court held the depositor clearly responsible for the acts and omissions of his clerk in the course of the duties with which he was intrusted.

So in First National Bank of Birmingham v. Allen, 100 Ala. 476, 14 South. 335, 27 L. R. A. 426, 46 Am. St. Rep. 80 (1893), it is held to be the duty of the depositor, who has his passbook written up by the bank and receives it back with his paid checks as vouchers, to examine the passbook and vouchers either personally or by an authorized agent, and report to the bank without unreasonable delay any errors that may be discovered in them. The court also held that, if the depositor has the examination made by an agent who happens to have been the one guilty of the forgeries, the depositor will be chargeable with the knowledge of the agent. And see Dana v. National Bank, 132 Mass. 156; De Fariet v. Bank of America, 23 La. Ann. 310, 8 Am. Rep. 597.

[2] In the instant case the bank deposit book was balanced each month. After it was balanced it was returned with the vouchers and the check list; and on each occasion when the passbook was returned there was stamped in red ink on it the following notice:

"The bank requests and expects that the dealers will carefully examine their passbooks and vouchers each time when returned to them, and that they will at once notify the bank of any error in the account or balances, and especially to any objection on their part, for any reason, to any voucher returned being charged against them. The bank disclaims responsibility for any error in the accounts as rendered, unless informed of it within 30 days after the return by it of the passbook and the surrender of the vouchers."

No one in the plaintiff's company examined the returned checks, but the bookkeeper who forged them. This appears from the following excerpt from his testimony:

"Q. But, I mean, was there anybody in the business that went over these returned checks? A. Myself.

"Q. That checking up, as it were, of the checks returned from the bank, was done by you? A. Yes, sir.

"Q. And by no one else in the concern? A. Not in the company.

"Q. Is that correct? A. Yes, sir. * * *

"Q. So that, at the expense of repetition, I will ask you whether I am correct in understanding that the sole examination made of the passbook and the returned checks during this period, outside of whatever the outside accountant did, was made by you? A. Yes, sir."

The outside accountant, as the record shows, made a monthly examination. He checked up the vouchers returned by the bank, and checked them up against the bank list. Then he took the checks and checked them up against the general exhibit, which contained a record of the number of the check, the date, the payee, and the amount, and compared the amount with the entry in the general exhibit. He took the deposits as listed by the bank, and compared them with the deposits listed in the general exhibit; and he took the balance as shown in the general exhibit and the outstanding checks that did not come through, and found there was an agreement with the balance as shown by the bank. Although he knew there was a daily cash receipts book, he admitted that he did not look at it; and he admitted that, if he had compared it with the general exhibit book, the discrepancies would have been immediately disclosed. He was asked by the court whether there would have been any trouble about it, and answered:

"No; it would be very plain and obvious that there was a defalcation or embezzlement."

Inasmuch as the examination which it was the duty of the plaintiff to make involved, not simply the authenticity of the signatures to checks, but the amount of the checks, as to whether they had been raised or not, that duty could not be performed with ordinary care by looking at the entries in a secondary book and leaving unopened the book of original entries. Such a method of examination left the door wide open for such forgeries as was practiced in this case, and the negligence of the accountant is clearly attributable to the plaintiff; the law being that, when a duty is cast upon any person, that person may not absolve himself of his duty by delegating the duty to some other person to perform. In this case the duty clearly was not adequately performed. When the plaintiff sent its passbook to defendant to be balanced, it in effect demanded to be informed as to the condition of its account, and, when the balanced passbook and the vouchers were returned, the silence of the plaintiff respecting the returned vouchers and the entries in the passbook amounted to an admission on its part as to their correctness.

The rigid responsibility imposed on banks must be maintained. It is equally important, however, that depositors who make negligent examinations of the accounts rendered to them by their banks should

themselves sustain the losses which result from their own and not the bank's carelessness, and which would have been prevented if they themselves had exercised reasonable care. The plaintiff seeks in this case to hold the bank responsible for the payment of checks raised by its own employé, who was authorized by it to prepare the checks and to obtain the money on them, and over whose conduct no reasonable supervision was exercised.

The failure, however, of a bank depositor adequately to examine his passbook and vouchers, and to give the bank prompt notice of any errors he may discover, is no defense to the depositor's right to recover the money so paid from the bank, if the bank's officers, before paying the checks, could have detected the forgeries, if they had exercised reasonable care. This principle was declared by the Supreme Court in Leather Manufacturers' Bank v. Morgan, supra, where it was said:

"Of course, if the defendant's officers, before paying the altered checks, could by proper care and skill have detected the forgeries, then it cannot receive a credit for the amount of those checks, even if the depositor omitted all examination of his account."

And this court so understood the decision and applied it in New York Produce Exchange Bank v. Houston, 169 Fed. 785, 95 C. C. A. 251 (1909), as did the Circuit Court of Appeals in the Sixth Circuit in First National Bank v. Fourth National Bank, 56 Fed. 967, 971, 6 C. C. A. 183 (1893). This being the law, we are brought to inquire whether in the instant case the defendant bank, if it had exercised reasonable care in examining the checks, could have detected the forgeries. If in the exercise of such care it might have detected them, it must answer to the plaintiff for its failure to do so. The proof is that the alterations in the checks were so cleverly done that even the man who made them could not himself detect them. The court asked him whether it was fair to say that the alterations were so successfully accomplished that he who made them was unable to determine them by examining the checks. The reply was, "I believe invariably so." Then the court again asked, "You believe it [detection] could not be made?" And the witness answered, "Yes, sir." Then followed this:

"The Court: In other words, what you mean to say is that so far as you, the author of this change, was concerned, the change was so completely effective that even you could not see that there was a change; is that true?
"The Witness: Yes, sir."

In making the alterations the same ink was employed that was used in writing the original amounts. At the time of the trial there were two or three checks in which there was shown to be a difference in the appearance of the ink. The appearance of ink changes in time, and there is absolutely no evidence whatever as to the condition of the ink on the checks at the time they were presented to the bank, or that there was anything about them to put the bank upon inquiry. In the case of one or two of the checks, it was possible that the protectograph mark had been changed. The practice was to have checks signed first, then altered, and then protectographed. Asked as to the

check upon which possibly the protectograph mark was changed, the witness answered:

"I would say that the check appears to have been changed; but it would be a very difficult problem to determine that it has really been changed."

And the following excerpt from the testimony of the accountant employed by the plaintiff to make the audits is important upon this phase of the subject:

"Q. Was there anything in the course of your work that directed your attention as queer about any of those checks? A. No.
"Q. You thought they were all right? A. Certainly."

In view of the testimony as to the appearance of the checks which had been altered, and in view of the letter of June 6, 1913, written by defendant to the bank, and left with the paying teller, and which elsewhere appears, it is very evident that it is impossible to say that there was a lack of reasonable care in the failure of defendant to detect the alterations in the checks.

This brings us to inquire whether the question of the negligence of the defendant in paying the checks, or of the plaintiff in examining the passbook and vouchers, after their return by the bank, should have been submitted to the jury.

[3] It is the province of a jury to determine facts, and of a court to declare the law. But a judge may direct a verdict, where there is a failure of evidence, or where the evidence is contrary to all reasonable probabilities, or where it is uncontroverted; and a directed verdict is proper, when it is plain that a contrary verdict cannot be permitted to stand. The rule is stated correctly in 23 Am. & Eng. Encyc. of Law (2d Ed.) 551, where it is said that—

"When the facts are admitted, or are undisputed, or where the evidence is not conflicting, there is no question which need be submitted as a question of fact, and the court may withdraw the case from the jury and itself decide all questions which are involved as questions of law; e. g., the question of negligence is often a mixed question of law and fact, but when the direct fact or facts in issue are ascertained by undisputed evidence, and such fact or facts are decisive of the case, a question of law is raised and the court should decide it without submitting any question to the jury."

Again at page 558 it is said that—

"If the evidence is free from conflict, or the facts are undisputed, or conclusively proved, so that there is no reasonable chance for drawing different conclusions from them, the court may and must withdraw the whole case from the jury, or the particular fact or facts in issue as to which there is no conflict in the evidence."

These propositions are established by a long line of decisions, which are cited, and which need not be repeated here.

The evidence in the case at bar is undisputed and free from conflict. Counsel for plaintiff admits this in his brief where he says:

"We feel convinced, and respectfully urge upon this court, that no question of fact exists in this case with relation to complainant's conduct in the examination of the returned vouchers, and that from the uncontradicted testimony it must be held that it discharged its whole duty to the bank."

We agree that no question of fact arises, either as to the plaintiff's or the defendant's conduct. The testimony is uncontradicted alike as to the conduct of each. The defendant called no witnesses, and such evidence as is in the record comes from the plaintiff's own witnesses, and they stand uncontradicted. The facts being undisputed, there was no question of fact for the jury to determine.

This case is in principle not unlike Morgan v. United States Mortgage & Trust Co., supra. It was claimed in that case that the question of the negligence of the bank should have been submitted to the jury. But the court declared that, after an examination of all of the evidence, it was not thought that there was any which would have justified the jury in deciding that the respondent was negligent; and the court came to the same conclusion as respects the negligence of the depositors. After calling attention to what steps the depositors took, and failed to take, to verify the accounts rendered by the bank, Judge Hiscock, who wrote for the New York Court of Appeals, said:

"The only question is whether a jury would have been permitted to say that they were free from negligence, when they closed their eyes or turned them away from these certain means of detection of their own agent's wrongdoing, which were furnished to them for that very purpose by the bank. I do not think it would have been permitted to so determine."

And in Critton v. Chemical National Bank, supra, the Court of Appeals disposed of the question of negligence as a matter of law upon the undisputed evidence.

The plaintiff, however, notwithstanding the admission, already quoted, that there is no question of fact, still strongly relies upon Leather Manufacturers' Bank v. Morgan, supra, in which the Supreme Court held that the question of the depositor's negligence in examining his returned passbook and vouchers was a question for the jury; but that case seems to us distinguishable from the case at bar. The facts in the instant case are undisputed and beyond controversy, while in the Morgan Case they appear to have been otherwise. In the latter case the court in its opinion speaks of the evidence as—

"tending to show—we do not say beyond controversy—that Cooper failed to exercise that degree of care, which under all the circumstances, it was his duty to do."

And again the opinion says:

"There was also evidence tending to prove—we do not say conclusively—that the depositor gave practically no attention to the account rendered by the bank, except to that one rendered March 2, 1881"

—which led to the discovery of the forgeries. And then the court goes on to say that if the case had been submitted to the jury, and they had found such negligence upon the part of the depositor as precluded him from disputing the correctness of the account rendered, "the verdict could not have been set aside as wholly unsupported by the evidence." And again it says:

"As there is, under the evidence, fair ground for controversy as to whether the officers of the bank exercised due caution before paying the altered checks, and whether the depositor omitted, to the injury of the bank, to do what or-

dinary care and prudence required of him, it was not proper to withdraw the case from the jury."

Upon the undisputed evidence in the case at bar this court can see no ground for controversy. The bank as a matter of law, upon the undisputed facts, was not guilty of negligence, and the depositor was.

[4] In conclusion, we come to consider whether the plaintiff in error was entitled to a verdict upon the three forged checks, aggregating $400, paid prior to the first bank balancing. In New York it has been held that a bank is not relieved from liability for raised checks, which it had paid before the account was balanced, by the failure of the depositor subsequently to discover the alterations, unless thereby the bank has lost an opportunity to obtain restitution. Critton v. Chemical National Bank, supra; Weisser's Administrators v. Denison, supra.

It would seem sufficient to say that, whatever the rule may be under other circumstances, it certainly is inapplicable to the facts under consideration. The plaintiff must have known the rule of the bank, stamped upon its passbook each time it was balanced, in which it was stated that—

"The bank disclaims responsibility for any error in the accounts as rendered, unless informed of it within 30 days after the return by it of the passbook and the surrender of the vouchers."

In continuing to do business with the bank with knowledge of this rule, the plaintiff consented to be bound by it, and is estopped to claim that the bank is liable to it upon the three checks paid prior to the first balancing of the passbook. Those checks were paid in August, 1913, and the passbook was balanced at the end of that month. Notice of the forgeries was not given to the bank until May, 1914. Under the circumstances of this case, it is unnecessary to inquire whether the doctrine held in New York as to the right of the depositor to hold the bank for payments of forged checks paid prior to the first balancing of the passbook is or is not recognized in the federal courts.

Judgment affirmed.

MANTON, Circuit Judge (dissenting). The defendant in error had money of the plaintiff in error on deposit. It was subject to checking in withdrawals. The relation existing between the bank and depositor was that of debtor and creditor, and the bank can justify the payment on the depositor's account only on actual direction of the depositor. Critton v. Chemical Bank, 171 N. Y. 218, 63 N. E. 969, 57 L. R. A. 529. In the case under consideration, payment was made without actual direction of the depositor, because of forgeries. The bank can only escape liability by affirmatively establishing (1) negligence of the depositor directly relating to and facilitating the forgeries; (2) omission of the depositor to use ordinary care in the examination of return vouchers to the prejudice of the bank, thus estopping the depositor in making claim; and (3) by the bank establishing that it was guilty of no negligence in paying the forged checks. Leather Mfrs.' Bank v. Morgan, 117 U. S. 96, 6 Sup. Ct. 657, 29 L. Ed. 811; N. Y.

Produce Exchange Bank v. Houston, 169 Fed. 785, 95 C. C. A. 251; Morgan v. U. S. Mortgage & Trust Co., 208 N. Y. 218, 101 N. E. 871, L. R. A. 1915D, 741, Ann. Cas. 1914D, 462.

Unless the case be a plain one, whether each or any of these defenses has been established was a question of fact for the jury, and not one of law for the court. When the fraudulent alteration of the checks was proved, the liability of the bank for the amount was made out, and it was incumbent upon the defendant in error to establish affirmatively negligence on the part of the plaintiff in error to relieve it from the consequences of its fault or misfortune in paying on forged orders. Critton v. Chemical Nat. Bank, 171 N. Y. 224, 63 N. E. 969, 57 L. R. A. 529.

The question of negligence cannot arise unless the depositor has, in drawing his check, left blanks unfilled, or by some affirmative act of negligence facilitated the commission of the fraud by those into whose hands checks may come. Crawford v. West Side Bank, 100 N. Y. 50, 2 N. E. 881, 53 Am. Rep. 152. While it is true that the drawer of a check may be liable when he draws the instrument in such an incomplete state as to facilitate or invite fraudulent alterations, he is not bound, under the law, to so prepare the check that nobody else can successfully tamper with it. Belnap v. National Bank of Mass., 100 Mass. 380, 97 Am. Dec. 105.

Reading the prevailing opinion leads me to the conclusion that the court has decided the questions of fact which are presented by this evidence as questions of law, rather than permitting the submission of such questions of fact to the jury. The evidence is disputed, and the inferences to be drawn therefrom are in dispute. Reasonable minds might differ as to the conclusions to be drawn legitimately from such evidence, and such are typical questions for a jury's solution. The leading authorities, which are binding upon us, and which are considered in the prevailing opinion, illustrate the necessity for us to pronounce that a jury question is presented by the evidence here. The forgeries here were committed by an employé of the plaintiff in error who occupied the position of head bookkeeper and trusted executive. The forgeries in each instance consisted in the raising of the amounts of checks drawn by the plaintiff in error to "Bearer, Account Exchange," after the checks had been drawn and were completed and duly signed. The checks were prepared by Hooper in his own handwriting, and thereafter signed by an officer of the plaintiff in error, and were presented to the bank by Hooper. After the signature, he committed the alterations resulting in the forgeries. The alteration of the check was made by the use of Collins' ink eradicator. Some of the checks were stamped by a protectograph. In these instances, the stamp of the protectograph was obliterated by restamping. This alteration was plain and quite visible to the naked eye. This was also true of the change in the color of ink used.

The checks were drawn on voucher form and were numbered consecutively. It was not the practice of the officers of the company to examine the books; but this was left to its bookkeepers, including

Hooper. He devised a system of keeping the accounts in the books of the plaintiff in error which covered up his forgeries and thefts. At the end of each month the returned vouchers, with the bank's statement, were checked up and reconciled by Hooper, and also by an auditing accountant employed by the plaintiff in error. Because of this ingenious scheme of Hooper, they were found correct by the auditing accountant and were not detected. In issuing the checks to "Bearer, Account Exchange," a method was pursued by which the officers of the company reimbursed plaintiff in error for petty cash taken as needed in the management of the business. The plaintiff in error's method of bookkeeping and method of checking up the accounts cannot be said to be antiquated, much less a negligent method. Hooper was shrewd and clever enough to deceive his colaborers in the plaintiff in error's employ, including the auditing accountant. But there was sufficient indication to a prudent paying teller at a bank to put him on notice of the alterations made by the protectograph stamp, if, indeed, the alteration in the figures should not have been discovered. This is not the case as should be disposed of by the court as a question of law.

In Critten v. Chemical Nat. Bank, 171 N. Y. 224, 63 N. E. 971, 57 L. R. A. 529, Judge Cullen said:

"In the present case the fraudulent alteration of the checks was not merely in the perforation of the additional figure, but in the obliteration of the written name of the payee and the substitution therefor of the word 'Cash.' Against this latter change of the instrument the plaintiffs could not have been expected to guard, and without that alteration it would have no way profited the criminal to raise the amount. Apart, however, from that consideration, the question was clearly one of fact, to be determined largely by an inspection of the checks themselves."

The bank cannot be excused from its negligence upon the theory that there was neglect by the depositor in examining the returned vouchers. If the bank's officers, before paying the altered checks, could, by proper care and skill, have detected the forgeries, then it cannot receive a credit for the amount of those checks, even if the depositor omitted all examination of his account. Leather Manufacturers' Bank v. Morgan, 117 U. S. 96, 6 Sup. Ct. 657, 29 L. Ed. 811. This doctrine enunciated in Leather Manufacturers' Bank v. Morgan et al., supra, was accepted by this court in New York Exchange Bank v. Houston, 169 Fed. 785, 95 C. C. A. 251, and was so interpreted by the Sixth Circuit in the First National Bank v. Fourth National Bank, 56 Fed. 967, 6 C. C. A. 183. In the New York state court, the general rule is that a bank may pay and charge to its depositor only such sums as are duly authorized by the latter, and, of course, a forged check is not authority for such payment. The bank may escape liability for the repayment of amounts paid out on forged checks, by establishing that the depositor has been guilty of negligence which contributed to such payment and that it has been free from any negligence. Morgan v. U. S. Mortgage & Trust Co., 208 N. Y. 222, 101 N. E. 871, L. R. A. 1915D, 741, Ann. Cas. 1914D, 462. But as Judge Harlan said, in Leather Mfrs.' Bank v. Morgan, supra:

Where there is "fair ground for controversy as to whether the officers of the bank exercised due caution before paying the altered checks, * * * it was not proper to withdraw the question from the jury."

Of course, the depositor owed a duty of some examination and verification of its account with the bank when the passbook and vouchers were returned. In this they guarded against a continuation of subsequent forgeries and thefts; but such examination means the exercise of ordinary care, either personally or by some authorized agent. The bank cannot justly complain, after such examination, if forgeries were not discovered by such examiner until it was too late to retrieve. Leather Mfrs.' Bank v. Morgan, supra; Frank v. Chemical Nat. Bank, 84 N. Y. 209, 38 Am. Rep. 501.

When, having obtained from the bank a list of vouchers and balanced passbook, which were intended to give and did give them a correct basis for comparison and verification, the plaintiff in error, by its agents, made an examination and reconciled the accounts, the care with which such examination is made, and whether it was ordinary prudent vigilance, is a question for the jury. Morgan v. U. S. Mortgage & Trust Co., supra. The following language was quoted with approval in Leather Mfrs.' Bank v. Morgan, supra:

"The alleged duty, at most, only requires the depositor to use ordinary care; and if this is exercised, whether by himself or his agents, the bank cannot justly complain, although the forgeries are not discovered until it is too late to retrieve its position or make reclamation from the forger."

In National Bank v. Tacoma Mill Co., 182 Fed. 1, 104 C. C. A. 441 (C. C. A. 9th Dist.), there was an examination of the bank's balance. The deposit slips and checks upon such examination did not reveal the forgeries. Accounts were reconciled, as in the case at bar, and there the court approved a direction of the verdict fastening liability on the bank, saying:

"If those statements tally with the deposit slips made up by the depositor and the checks drawn against the bank, and if the balances agree one with the other, the depositor is not obliged to look further, nor to bear in mind some irregularity that may appear elsewhere in his general books, although a searching inquiry might lead to a discovery of the fraud. The present case is illustrative of the principle. The mill company was unable to ascertain what had happened, until it sent out to its customers for statements of their accounts and called in experts to determine the condition of its books. It was then discovered that the Mandan Mercantile Company credit was given on April 5th, which gave a clue to the line of inquiry, and led to a discovery of the fact that that item did not appear in the bank deposit, as it should have done; and it was found that, if the items in the mill company's cash account had been checked with the deposit account, it would have shown that this item had not been deposited, although it is probable the cash had been drawn from the bank, in this particular instance, and put in the cash drawer of the mill company. The inquiry which the defendant would have had the plaintiff pursue to discover the fraud is collateral to an examination of the passbook and the record of checks drawn against the bank account, and it does not seem to us that the plaintiff was guilty of such negligence in relation thereto as that the question should have been submitted to the jury."

In both the leading authorities considered and approved by the prevailing opinion (Leather Mfrs.' Bank v. Morgan, 117 U. S. 96, 6 Sup. Ct. 657, 29 L. Ed. 811; Critten v. Chemical Bank, 171 N. Y. 219, 63

N. E. 969, 57 L. R. A. 529), the courts held the question of negligence of the bank and depositor in each case should be submitted to the jury. Even though the depositor in the present case could be said to be estopped because of negligent conduct or method of examination of the returned vouchers, this does not exempt the bank from liability for such forged checks as were paid before the depositor had an opportunity to examine the returned vouchers, and the plaintiff in error should prevail at least as to these sums.

In my opinion, upon this record, we should not decide as a question of law whether the plaintiff in error or defendant in error was negligent. Plainly they are questions of fact for the jury. The judgment should be reversed.

TRANSCONTINENTAL PETROLEUM CO. v. INTEROCEAN OIL CO.

(Circuit Court of Appeals, Eighth Circuit. December 12, 1919. Rehearing Denied February 21, 1920.)

No. 5339.

1. CONTRACTS ⟸10(4)—MUTUALITY OF CONTRACT FOR SALE TO EXTENT OF BUYER'S REQUIREMENTS.
   A contract for the sale and purchase of a commodity, where the quantity to be delivered or received is measured by the output or requirements of an established plant or business during a limited time, does not lack mutuality.
2. CONTRACTS ⟸10(4)—MUTUALITY OF CONTRACT FOR SALE OF OIL LIMITED TO SELLER'S PRODUCTION.
   A contract, by a corporation operating some 20 oil wells, to sell a stated quantity of crude oil, to be delivered during two years, *held* not invalid, for lack of mutuality, because of a provision limiting its obligation to deliver to the production of its wells then owned or afterwards acquired during the term.
3. SALES ⟸71(4)—MUTUALITY OF PROVISIONS OF CONTRACT FOR SALE OF OIL.
   A provision of a contract for sale and purchase of crude oil, to be delivered through a stated time, that seller should not be bound to deliver beyond the production of its own wells, also limits purchaser's obligation to receive to such production.
4. WITNESSES ⟸287(1)—MAY EXPLAIN TESTIMONY ON CROSS-EXAMINATION.
   Where the superintendent of the export department of a large Mexican oil company, having wells from which the oil was piped and transported to his headquarters at the coast, where it was stored in tanks for shipment, testified that during the term of a contract his company did not load, deal in, or buy any oil other than from its own wells, the striking out of his testimony as hearsay, because of his statement on cross-examination that he was not at the wells during the time, and the refusal to permit him to explain that, while not stationed at the wells, he visited them, that he had charge of all transportation lines, and the men operating them, and of the books and records, showing the source of the oil handled, *held* error.
5. EVIDENCE ⟸317(1)—WITNESSES ⟸268(2)—OFFICER OF CORPORATION MAY TESTIFY AS TO ITS BUSINESS; CROSS-EXAMINATION AS TO SOURCE OF KNOWLEDGE.
   That the knowledge of an officer of a large corporation as to facts connected with its business is gained largely from others, and from records in the course of the business, does not render his testimony as to such

facts incompetent as hearsay, and while cross-examination as to his source of knowledge is proper, and may affect the weight of his testimony, that question is for the jury.

6. EVIDENCE ⟸158(27)—DAMAGES FROM BREACH OF CONTRACT MAY BE SHOWN BY PAROL.

On the question of damages resulting from breach by defendant of a contract to purchase crude oil, oral testimony as to other sales at the place during the time of default *held* not incompetent, as secondary, because the sales and purchases, as between the parties thereto, may have been evidenced by written contracts.

7. PRINCIPAL AND SURETY ⟸6—LIABILITY OF PARTY FOR DEFAULT OF ASSIGNEE; "GUARANTY."

A defendant, which contracted to purchase from plaintiff a large quantity of crude oil, to be delivered in future, *held* directly and primarily liable for breach of the contract by its assignee, notwithstanding a provision of the contract that in case of assignment defendant should "remain as simple guarantor for its fulfillment," for the term "guaranty," while strictly importing secondary liability, is often used in a broader sense to signify suretyship in general.

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

In Error to the District Court of the United States for the District of South Dakota; James D. Elliott, Judge.

Action at law by the Transcontinental Petroleum Company against the Interocean Oil Company. Judgment for defendant, and plaintiff brings error. Reversed and remanded for new trial.

Philip W. Russell, of New York City (Horner, Martens & Goldsmith, of Pierre, S. D., and Wing & Russell, of New York City, on the brief), for plaintiff in error.

A. K. Gardner, of Huron, S. D. (Colby & Brown, of New York City, on the brief), for defendant in error.

Before HOOK and STONE, Circuit Judges, and AMIDON, District Judge.

HOOK, Circuit Judge. This was an action by the Transcontinental Petroleum Company of the Republic of Mexico against the Interocean Oil Company of South Dakota for breach of a written contract of sale and purchase of crude oil produced in the Panuco oil fields, near Tampico, Mexico. The plaintiff was the seller, and defendant the purchaser. The breach claimed was in the failure of the latter and its assignee to take a large part of the quantity of oil contracted for. At the conclusion of plaintiff's evidence the trial court directed a verdict for the defendant and judgment followed accordingly.

[1, 2] At the threshold of the case is defendant's contention that the contract is void for want of mutuality of obligation. This involves a construction of the first three paragraphs of the contract. By the first paragraph plaintiff agreed to sell and deliver to defendant 1,200,000 barrels of Mexican crude petroleum oil upon terms and conditions specified, "provided, however, that deliveries in said quantity or in any quantity are limited to the actual production of the oil wells owned by the vendor and the production of other wells which may be from time

to time controlled by the vendor." The second paragraph provides for deliveries by plaintiff at the rate of not less than 50,000 barrels per month from January 1, 1914, to December 31, 1915, in cargo lots into defendant's vessels of stated capacities, failure of the latter to take the specified quantity in any month to be made up the next. The defendant was given the right to require plaintiff, by notice, to commence the monthly deliveries before January 1, 1914. By the third paragraph defendant agreed "to take said oil as above provided, and pay for the same at the rate" specified.

The argument of defendant is that the proviso of the first paragraph limiting plaintiff's undertaking to the production of wells owned or controlled by it made it entirely optional with plaintiff to deliver any oil at all. There is no merit in the argument. In effect, the contract bound the plaintiff to deliver the entire output of its wells, up to the quantities specified. No such personal choice or option was given to withhold or refuse deliveries of oil produced by its wells as is sometimes held to destroy the requisite mutuality of contract obligations. The limitation is a physical one, of a kind common in business affairs. When the quantity of a commodity to be delivered or received under a contract of sale rests in the uncontrolled will or desire of one of the parties, mutuality is lacking. It is otherwise when the quantity is measured by the output or requirements of an established plant or business during a limited time. Cold Blast Transp. Co. v. Kansas City Bolt & Nut Co., 52 C. C. A. 25, 114 Fed. 77, 57 L. R. A. 696. This latter rule is an adjustment of legal principles to necessary and reasonable business usages. It appears plaintiff owned and controlled about 20 oil wells in the Panuco field, with extensive structural equipment, and though the life of any particular well might not be forecast with certainty, it is idle to say plaintiff did not have an established plant, the actual product of which it could bind itself to sell and deliver in whole or in part during the time limited. The plaintiff could not, without violating its contract, have capped its wells or choked their production to escape deliveries. In that respect a correlative duty on its part would be implied.

[3] The plaintiff contended at the trial that the proviso above discussed was for its sole benefit, and therefore it was not required to prove as part of its case that it was able and willing to make the deliveries of oil produced by its wells. The court properly ruled otherwise. In effect the plaintiff's contention was that its right to make deliveries was not limited to the product of its wells, but that defendant's right to require deliveries was so limited. If that were the contract, it would be unilateral. In most of the cases cited for the contention, the provisions held to be for the benefit of one, but not both, of the parties, related to incidental matters, not, as here, going to the very root of the contract and vital to its mutuality.

Plaintiff introduced evidence tending to show the following: Defendant gave notice under the contract advancing the beginning of the two-year delivery period to November, 1913. For the first five months defendant sent vessels, and received and paid for an aggregate amount of oil less by 78,256.09 barrels than the minimum quantity it

was required to take in that time. It refused to receive or pay for any oil thereafter. In April, 1914, it assigned the contract to one Von Reitzenstein under a clause that it might do so "and remain as simple guarantor for its fulfillment by its assignees." The assignee failed to take or pay for any oil. James Dickson, a witness for plaintiff, with 23 years' experience in the oil business in Mexico, testified that he had been superintendent of plaintiff's export department ever since its plant was built in 1911, and had under him in 1913 and 1914 about 200 employés, including assistant superintendents and foremen. He described the extensive plant of the plaintiff in the Panuco oil field and at the station where vessels were loaded. He said that during the contract period, 1913–1915, and before and since that time, the plaintiff possessed and controlled about 20 flowing oil wells in the Panuco field. Panuco is about 64 miles up the river from Tampico. The office of the witness was at Las Matillas, about 3 miles from Tampico. The oil flowed from the wells through pipes into flow tanks, thence by pipe lines about 2 miles into loading tanks at the river. It was then run into barges and taken down the river to Las Matillas, where it was pumped into storage tanks of several hundred thousand barrels capacity. He gave the dimensions, number, and capacities of the different instrumentalities and the quantities of oil on hand available for delivery at different times under the contract. He testified that the plaintiff did not load, deal in, or buy any other oil than that from its wells above mentioned.

[4] Without going into further details, it may be said that, except for what will be mentioned presently, the testimony of this witness was that the output of plaintiff's wells, the transportation and storage capacity of its plant, and the quantities on hand available for deliveries to defendant were much in excess of the requirements of the contract. During the cross-examination this occurred:

"Q. Now, you had not been up to Panuco for a number of years prior to 1914, had you? A. No, sir.

"Q. You had not been in 1912, had you? A. 1911 and 1912.

"Q. Since that time you had been down at Las Matillas? A. Yes, sir."

At the close of the cross-examination, and before the redirect examination, the court ruled that, because the witness had not been at the oil field since 1912, his testimony as to the source of the oil stored at Las Matillas was hearsay, and on motion of defendant it was struck out. Plaintiff's request that it be allowed to examine the witness further on that subject was denied. Later a request that the witness be permitted to explain his statement that he had not been up at Panuco since 1912 was likewise denied, as was also a formal offer to show by him that he meant that he had not been employed there since that year, but had originally constructed the pipe lines from the wells to the loading tanks at the river, and had been at the oil field a number of times during the contract period down to November, 1915, that no new pipe lines had been built; that as superintendent of plaintiff's export department he also had official charge of the conveyance of the oil by barge from the loading tanks at Panuco to Las Matillas, of the men engaged in that work, and of the plaintiff's books and records

concerning it. These rulings of the court left the plaintiff without proof of a vital part of its case. It had no other available witness upon that subject.

[5] Much of what officials of large enterprises know of their operations is necessarily learned "in the course of business" and from associates and employés, through conferences, conversations, letters, reports, records, and the like. It is upon such information that the business is directed and carried on. Considered narrowly and technically it might be regarded as proceeding in considerable measure from hearsay; but absolute, first-hand, personal knowledge is not as a rule practicable and is not required as an invariable rule of evidence. As Lord Ellenborough said, "the rules of evidence must expand according to the exigencies of society." Pritt v. Fairclough, 3 Campbell, 306. Cross-examination into the scope of the jurisdiction and duties of the officials and the sources and extent of their information may affect the weight of their testimony, which is for the jury. If plaintiff's president had not died, but had testified, as Mr. Dickson did, that his company did not "load, deal in, or buy" oil not of its own production, there would have been little, if any, question as to the admissibility of his testimony, even though it appeared that he had not been at the wells, 60-odd miles away. And we do not think it should have been ruled as a matter of law that like testimony by the superintendent of the export department was inadmissible. He testified to the fact positively, and no legal inference or presumption arises from the title of his office that he did not possess the requisite information. For aught that appears, the oil coming under his jurisdiction may have been about all that was produced by his company; his duties may have required constant and full information as to its origin and quantity—what was on hand from month to month, and what could be reasonably counted on in the future from the known source or sources of supply. One in charge of the export department of a Mexican oil company may have been bound to know such things as fully and definitely as the highest official. We also think that the statement of the witness, on cross-examination, that he was not at the oil wells after 1912, might well have been intended as meaning that he was not officially stationed there. That is not an unusual form of expression in like circumstances. When attention was drawn to the distinction on redirect examination, the witness should have been allowed fully to explain. Redirect examinations are primarily for such purposes.

[6] As bearing upon its loss and damage, the plaintiff offered testimony of other sales and purchases of oil in that neighborhood during the period of defendant's default. The trial court excluded it as not the best evidence, because it appeared the transactions were conducted by written correspondence or according to written contracts. But the sales, purchases, and prices were not required to be in writing. That they were so was casual or fortuitous as to others than the parties to those particular transactions. Oral evidence of the prices received and paid was not proof of the contents of writings, within the rule on that subject. Even if the writings had been introduced, there would still have been testimony that the transactions indicated were

consummated. The money might have passed by check or draft, but it would hardly be contended that those instruments must be produced. The existence of written evidence of a fact does not always exclude parol proof of it. Keene v. Meade, 3 Pet. 1, 7, 7 L. Ed. 581. For example, the mere fact of title to personal property may be shown orally, although there is a writing evidencing the sale. Dixon-Pocahontas Fuel Co. v. Grain Co., 71 W. Va. 715, 77 S. E. 362, Ann. Cas. 1914C, 115.

[7] Finally, as to defendant's liability for the default of its assignee: The contract says that upon its assignment defendant should remain as a simple guarantor. Strictly speaking the liability of a guarantor is for the debt or obligation of a third person, is secondary and collateral, and its enforcement depends upon compliance with certain conditions. The liability of a surety is original, primary, and direct. Hall v. Weaver (C. C.) 34 Fed. 104, 106. But the term "guaranty" is often used in a broader and more comprehensive sense. It is employed, also, to signify suretyship in general. See Saint v. Wheeler & Wilson Mfg. Co., 95 Ala. 362, 10 South. 539, 36 Am. St. Rep. 210. The customary incidents of a strict guaranty are lacking here. The principal obligation was primarily defendant's, not that of a third person; and while defendant had an unrestricted right to assign, the very act of assignment carried with it its assurance to plaintiff of fulfillment by its assignee. Except for the assignment by the defendant, the obligation to take and pay for the oil was its own, and under the circumstances its guaranty should be liberally, not technically, construed. We think it remained directly and severally liable for the default of its assignee. Neither a prior action against him nor his presence here is essential.

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

FONTANA v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. December 8, 1919.)

No. 5295.

1. INDICTMENT AND INFORMATION ⊂=176—VARIANCE OF PROOF AS TO TIME OF OFFENSE NOT MATERIAL, WHERE WITHIN LIMITATION PERIOD.
   The averment in an indictment that defendant made statements violating the Espionage Act on a specified day was a mere formal jurisdictional allegation, which permitted the government to show that such statements were made at any time before the indictment was filed within the statute of limitations and after passage of the Espionage Act.
2. CONSTITUTIONAL LAW ⊂=265—INDICTMENT, TO CONSTITUTE DUE PROCESS OF LAW, MUST DISTINCTLY AND SPECIFICALLY CHARGE OFFENSE.
   In order to constitute due process of law, an indictment must not only inform accused that there is a charge against him, but must be sufficiently distinct and specific to advise him what he has to meet and to give him a fair and reasonable opportunity to prepare his defense.
3. CRIMINAL LAW ⊂=308—INDICTMENT AND INFORMATION ⊂=55—TESTING ON PRESUMPTION THAT ACCUSED HAS NO KNOWLEDGE OF FACTS CHARGED.
   A person indicted for a serious offense is presumably innocent, and the

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

sufficiency of an indictment must be tested upon the presumption that he is innocent, and has no knowledge of the facts charged against him.

4. INDICTMENT AND INFORMATION ⊂⊃71—REQUIREMENTS AS TO DEFINITENESS STATED.

An indictment must set forth the facts so distinctly as to advise accused of the charge, and give him a fair opportunity to prepare his defense, so particularly that a conviction or acquittal would bar another prosecution for the same offense, and so clearly that the court may determine whether the facts stated support a conviction.

5. WAR ⊂⊃4—INDICTMENT UNDER ESPIONAGE ACT HELD INSUFFICIENT.

An indictment charging that nine statements of accused uttered in a certain town violated the Espionage Act, but not identifying the occasions upon which the statements were made, *held* insufficient, because not specifically advising accused of the charge he would be required to meet, and not sufficiently definite to be pleaded in bar of a subsequent prosecution.

6. CRIMINAL LAW ⊂⊃295—BAR TO SUBSEQUENT PROSECUTION DEPENDS ON INDICTMENT, AND NOT EVIDENCE ADDUCED ON FORMER TRIAL.

Whether a conviction or acquittal is a bar to a subsequent prosecution must be determined from the indictment and judgment at the former trial, and the evidence on such trial cannot be considered, because not a part of the judgment.

7. WAR ⊂⊃4—INDICTMENT UNDER ESPIONAGE ACT INSUFFICIENT.

An indictment charging that accused made nine statements violating the Espionage Act, but not specifying the circumstances under which they were made, *held* insufficient, where, if made in a public address advocating the results alleged in the indictment in the presence of members of the military or naval forces of the United States, or of those eligible to become such members, or, if circulated among such men, they might be calculated to produce such results, but if uttered in private conversations, or in discussion with or in the presence of loyal men of ordinary intelligence, in the absence of other circumstances to indicate the evil intents alleged, they would be susceptible to the inference that they were made with the intents charged.

8. INDICTMENT AND INFORMATION ⊂⊃63—CONCLUSIONS REGARDING INTENT TO VIOLATE LAW NOT SUFFICIENT.

When language does not constitute a crime, if uttered under some circumstances, but does, if uttered under others, it is not enough for an indictment to charge that the language was used with intent to violate the law, since that would be a mere conclusion of the pleader.

9. WAR ⊂⊃4—EVIDENCE INSUFFICIENT TO SUSTAIN ESPIONAGE ACT CONVICTION.

In prosecution for violating the Espionage Act, evidence that accused's utterances after passage of the act constituted only a sentence or two in a sermon and statements to persons soliciting Red Cross subscriptions in accused's house, etc., *held* insufficient to sustain a conviction.

In Error to the District Court of the United States for the District of North Dakota; Charles F. Amidon, Judge.

J. Fontana was convicted of violating the Espionage Act, and he brings error. Reversed and remanded, with directions to discharge defendant.

John Knauf, of Jamestown, N. D. (B. W. Shaw, of Mandan, N. D., on the brief), for plaintiff in error.

M. A. Hildreth, U. S. Atty., of Fargo, N. D. (John Carmody, Asst. U. S. Atty., of Fargo, N. D., on the brief), for the United States.

Before SANBORN, CARLAND, and STONE, Circuit Judges.

SANBORN, Circuit Judge. The defendant below was convicted of three violations of section 3 of the Espionage Act of June 15, 1917 (40 Stat. p. 217, c. 30 [Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 10212c]), and sentenced to three years in the penitentiary under an indictment containing three counts which charged that by saying the same words on or about December 19, 1917, he

(1) Willfully made and conveyed false reports with the intent to interfere with the operation and success of the military and naval forces of the United States and to promote the success of its enemies, to the injury of the United States;

(2) Willfully caused and attempted to cause insubordination, disloyalty, and refusal of duty in the military and naval forces of the United States, to its injury; and

(3) Willfully obstructed the recruiting and enlistment service of the United States, to the injury thereof.

The defendant demurred to the indictment, and the demurrer was overruled. At the close of the evidence he moved for a directed verdict, on the ground that there was no substantial evidence to sustain a verdict against him, and this motion was denied, and he made a motion in arrest of judgment, and that motion was denied. These rulings are assigned as error.

Counsel for the defendant insist that the indictment was insufficient, because it did not set forth the facts which the pleader claimed constituted the violations charged so distinctly as to advise him of the charges he had to meet and to give him a fair opportunity to prepare his defense, nor so particularly as to enable him to avail himself of a conviction or acquittal in defense of another prosecution for the same offense.

The indictment charged that the three offenses were committed on or about December 19, 1917, at New Salem, a town in North Dakota, during the war between the United States and the Imperial German government, with the respective intents denounced by the statute, by falsely stating:

(1) That President Wilson was a man who, after securing his election on the slogan "kept us out of war," turned squarely around and by the use of his high office of President whipped the members of Congress into line by threats of exposure of this one and that one, and in this way secured the authority to enter the war with Germany;

(2) That he felt proud of the noble fight the Germans were making in the war;

(3) That the sinking of the Lusitania was justified, and that there was no reason whatever for the United States taking up arms against Germany;

(4) That he frequently prayed for the success of the armies of Germany over the armies of the United States;

(5) And stated to his congregation and to divers persons, whose true names are to the grand jurors unknown, false and injudicious statements as aforesaid;

(6) That he did not want to subscribe for Liberty Loan Bonds, because it would tend to encourage the administration;

(7) That the President was using the same methods of threats to force every bank within the United States to subscribe to Liberty Loan Bonds;

(8) That the purchase of Liberty Loan Bonds would give the country more money to fight Germany and thus prolong the war;

(9) That he desired the success of the enemies of the United States.

[1] The averment in the indictment that the defendant made these statements on or about December 19, 1917, was a mere formal jurisdictional allegation, which permitted the introduction of evidence of any of them at any time before the indictment was filed within the statute of limitations, and there was nothing but that formal statement and the allegation that the statements were made at New Salem to indicate at what time, under what circumstances, on what occasions, to whom, in whose presence, or by what persons the government would attempt to prove that the defendant had made any of these statements, nothing to indicate to him whether he was to be tried for making all of them at one time, on one occasion, or for making some of them at one time to one person, and others at other times and on other occasions to other persons.

[2, 3] The basic principle of English and American jurisprudence is that no man shall be deprived of life, liberty, or property without due process of law; and notice of the charge or claim against him, not only sufficient to inform him that there is a charge or claim, but so distinct and specific as clearly to advise him what he has to meet, and to give him a fair and reasonable opportunity to prepare his defense, is an indispensable element of that process. When one is indicted for a serious offense, the presumption is that he is innocent thereof, and consequently that he is ignorant of the facts on which the pleader founds his charges, and it is a fundamental rule that the sufficiency of an indictment must be tested on the presumption that the defendant is innocent of it and has no knowledge of the facts charged against him in the pleading. Miller v. United States, 133 Fed. 337, 341, 66 C. C. A. 399, 403; Naftzger v. United States, 200 Fed. 494, 502, 118 C. C. A. 598, 604.

[4-6] It is essential to the sufficiency of an indictment that it set forth the facts which the pleader claims constitute the alleged transgression, so distinctly as to advise the accused of the charge which he has to meet, and to give him a fair opportunity to prepare his defense, so particularly as to enable him to avail himself of a conviction or acquittal in defense of another prosecution for the same offense, and so clearly that the court may be able to determine whether or not the facts there stated are sufficient to support a conviction. United States v. Britton, 107 U. S. 665, 669, 670, 2 Sup. Ct. 512, 27 L. Ed. 520; United States v. Hess, 124 U. S. 483, 488, 8 Sup. Ct. 571, 31 L. Ed. 516; Miller v. United States, 133 Fed. 337, 341, 66 C. C. A. 399, 403; Armour Pkg. Co. v. United States, 153 Fed. 1, 16, 17; 82 C. C. A. 135, 150, 151, 14 L. R. A. (N. S.) 400; Etheredge v. United States, 186 Fed. 434, 108 C. C. A. 356; Winters v. United States, 201 Fed. 845, 848, 120 C. C. A. 175, 178; Horn v. United States, 182 Fed. 721, 722, 105 C. C. A. 163, 167. If the pleader had set forth in this indictment any

fact or facts, such as the time, place, occasion, circumstances, persons present, or any other distinctive earmark whereby the defendant could have found out or identified the occasion or occasions when the government intended to attempt to prove that the defendant uttered any of the nine sayings charged he might have been able to investigate the basis of the charges, to learn who were or were not present on the occasions referred to, hence who were possible witnesses, and to prepare his defense; but there is nothing of that kind in the indictment. As it reads, he might have been called to meet on each of the nine charges testimony that at any time of day or night, at any place in New Salem, on any occasion, public or private, before the indictment was filed, and after the Espionage Act was passed on June 15, 1917, he had uttered to any one whomsoever any of the statements charged in the indictment. These considerations compel the conclusion that this pleading signally failed to state the facts which the government claimed constituted the alleged offense in this case, so distinctly as to give the defendant a fair opportunity to prepare his defense to meet any of them, and that he could not and did not have that notice of them required to give him a fair trial.

Nor were the charges in this indictment so certain and specific that upon conviction or acquittal thereon it or the judgment upon it constitute a complete offense to a second prosecution of the defendant for the same offense. In determining this question the evidence on the trial may not be, and the indictment and the judgment alone can be, considered, because the evidence does not become a part of the judgment, and as the indictment states no facts from which the time, places, or occasions on which the respective statements therein were alleged to have been made can be identified, the indictment and judgment failed to identify the charges so that another prosecution therefor would be barred thereby. Florence v. United States, 186 Fed. 961, 962, 964, 108 C. C. A. 577, 578, 580, and cases there cited; Winters v. United States, 201 Fed. 845, 848, 120 C. C. A. 175, 178.

[7, 8] Moreover, there is no such clear statement in the indictment of the facts which the government claims constituted the offenses charged as enables a court fairly and justly to determine that they would sustain a conviction. If the statements charged, when considered in the light of the times and circumstances under which they were uttered, were reasonably calculated to effect the results averred, the indictment was sufficient to require the court to send the case to the jury. If, on the other hand, upon its face, in the light of the times and circumstances it disclosed, the facts pleaded in the indictment were not reasonably susceptible to the inference that the statements were made by the defendant with the intent to interfere with the operation and success of the military and naval forces of the United States, and to promote the success of its enemies to the injury of the United States, or to cause or attempt to cause insubordination, disloyalty, and refusal of duty in the military and naval forces of the United States to its injury, or to obstruct the recruiting and enlistment service of the United States to the injury thereof, the demurrer should have been sustained. "The question in every case," said Mr. Justice Holmes in

Schenck v. United States, 249 U. S. 47, 52, 39 Sup. Ct. 247, 248, 63 L. Ed. 470, "is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent."

The statements set forth in this indictment are such that, if uttered under some circumstances, as, for example, in a public address advocating in the presence of the members of the military or naval forces of the United States, or of those eligible to become such members, or if written and circulated among such men, they might be calculated to produce the results alleged. But there is none of these statements that, if uttered in private conversations or discussion with or in the presence of loyal men of ordinary intelligence, in the absence of other circumstances to indicate evil intents, susceptible to any such inference. Illustrations of the case of the former class are Doe v. United States, 253 Fed. 903, 166 C. C. A. 3; O'Hare v. United States, 253 Fed. 538, 165 C. C. A. 208. Illustrations of the latter class are Von Bank v. United States, 253 Fed. 641, 165 C. C. A. 267; Wolf v. United States, 259 Fed. 388, — C. C. A. —. As was said by Judge Carland in the Von Bank Case:

"The jury * * * had no right to find a criminal intent, unless such intent was the necessary and legitimate consequence of the words spoken."

Whether or not the statements in the indictment were reasonably calculated to indicate the intents stated, or to "create a clear and present danger" of the results alleged, was conditioned by the time and circumstances in which they were said. It is an elementary rule of criminal law that when language does not constitute a crime if uttered under some circumstances, and does constitute a crime if uttered under other circumstances, it is not enough to charge that it was used with intent to violate the law. That would be a mere conclusion. The facts must be set forth, so that the court can determine, and not the pleader, whether or not they constitute the crime. United Staes v. Hess, 124 U. S. 483, 8 Sup. Ct. 571, 31 L. Ed. 516; United States v. Cruikshank et al., 92 U. S. 542, 23 L. Ed. 588; United States v. Carll, 105 U. S. 611, 26 L. Ed. 1135; Shilter v. United States, 257 Fed. 724, 725, — C. C. A. —.

Take, for example, the first charge in the indictment, that the President secured his election on the slogan "kept us out of war," and by using his high office whipped the members of Congress into line to secure the authority to enter the war. If that statement was made in a private conversation with a loyal citizen, in the presence of no other person, his utterance of it was not susceptible to the inference that he made it with any of the evil intents charged, or to the inference that it was reasonably calculated to produce the results alleged. Perhaps, however, if it had been made in a public address, in the presence of men who were members of the military or naval forces of the United States, such an utterance might, in view of other things said in the same address, have been susceptible to a different inference. Take the fifth statement, that he "stated to his congregation and to divers persons, whose true names are to the grand jurors unknown, false and in-

judicious statements as aforesaid." That charge is so indefinite and ambiguous that it is clearly insufficient to warrant the introduction of any evidence under it. No court can determine from it whether it means that he made the statements preceding it, or that he made other injudicious statements to them, in the same way that he made the preceding statements. The allegations in the indictment regarding the other statements are likewise indefinite and insufficient, and for the reasons which have been suggested the demurrer to the indictment should have been sustained, and the defendant should have been discharged without a trial.

[9] When, at the close of the evidence, the defendant's counsel moved for a directed verdict, the setting of time, situation, and circumstances which the testimony had supplied had not improved the case stated by the government in the indictment. There was conflicting testimony on some of the issues, but the evidence of these facts was uncontradicted. The defendant was born in Germany; his father was an Italian, and his mother was a German. He came to the United States when he was 16 years of age. In 1917 he was 45 years of age. He was a full citizen of the United States. He was, and for eight years had been, the pastor of the German Evangelical Church of New Salem in North Dakota, which had a congregation of about 200 people, who lived in that town and on the farms around it within five or six miles. He had a wife and five children, the oldest of whom was 14 and the youngest of whom was 2 years old. The war was declared on April 6, 1917. The law which he was charged with violating was enacted June 15, 1917. Four of the members of his congregation enlisted in, and 34 or 36 entered, the military and naval forces of the United States during the war. On the second Sunday after April 6, 1917, he addressed his congregation from his pulpit in substantially these words:

"We are now at war with the old Fatherland. This is our country. We adopted this country when we became citizens of the United States, and we promised and swore to the Constitution that we would stand by this country. Now is the time to prove and show it that we are willing to do our duty, and I ask you to do your duty as a citizen of the United States, and to give up everything, if it has to be, to the last man."

Every Sunday during the war he prayed in his pulpit, in the presence of his congregation for God to bless our country, our people, our President, our congregation, and to help that they may serve to promote the sanctification of His name and welfare of His people; that He would stop the war through his mercy; that He would prevent bloodshed and devastation and give us an honorable peace. A witness for the government testified that on one occasion between April 8 and May 29, 1917, he prayed for our old Fatherland, that God would give him victory over his foes and destroy and shatter all who wants his evil. But this was before the Espionage Act was passed, and many witnesses came to testify that he made no such prayer after war was declared. Another witness testified that during a few Sundays just after April 6, 1917, he prayed for His blessing for the old Fatherland and for the new Fatherland, that peace between them might not be broken,

that bloodshed between them might be avoided, and that those who would break off peaceful relations be hindered in their efforts. But this was also before the passage of the act of June 15, 1917. One witness for the government testified that, in answer to this question asked over the telephone regarding a sermon the defendant had delivered on a certain day in August, 1917, to wit, "I understood you to say in your sermon to-day that, as the Lord was with his people, the children of Israel, and helped them to overcome their enemies, so he gave the German people ways and means to stand off their enemies of the world," he answered, "Yes, I believe I did." Another government witness testified that what he said in that sermon was, "God specially blessed the German people because they had the submarines as a means of warfare," but the larger number of the witnesses and the great weight of the testimony was that he did not make these statements, but that at the close of a sermon on "Temptation to Sin," on that day in August, he said in substance:

"Germany, in her fight against a great number of enemies, has a weapon which enabled her to hold out until now; but God has given every Christian a weapon with which he can defeat all temptation at all times, namely, prayer. Watch and pray that ye enter not into temptation. The Spirit indeed is willing, but the flesh is weak."

The substance of all the evidence there is in this case relative to any public statements, writings, or prayers made by the defendant has now been recited. In it all—

(1) There is no evidence whatever that he ever made any of the nine statements set forth in the indictment to his congregation or to any one on any public occasion, and there is no such evidence in this case.

(2) All of the evidence recited, except that with reference to the sermon in August, relates to expressions used prior to June 15, 1917, for the use of which he could not be convicted if they had been charged.

(3) Even if the expressions in the sermon on "Temptation to Sin," to which the government's witnesses testified, were used, they were not reasonably calculated, in view of the fact that they were but a sentence or two, in a sermon occupying some 20 or 30 minutes on "Temptation to Sin," and were used merely for the illustration of the argument the defendant was making, to indicate any criminal intent or purpose, much less to sustain a finding that such intent inspired and caused them. So it is that there was no evidence in this case of any public advocacy or suggestion or insinuation by the defendant of any of the evils the United States was endeavoring to prevent by the act of June 15, 1917, or of any views tending to prove any of the evil intents denounced by the law.

There was conflicting evidence on the issues whether or not the defendant made to certain private persons in his own house and in other private places some of the statements written in the indictment. This was the setting of the first statement therein with reference to the President's election and his use of his power to secure authority to conduct the war. The cashier of a bank in New Salem went to the defendant's

home, and in his presence and in the presence of his wife, but in the presence of no other person, asked him on October 24, 1917, to subscribe for Liberty Bonds. The defendant had a wife and five children under 15 years of age. His salary was $1,000 per year, out of which he supported them. He owned $1,000 stock in a bank, and owed over $2,000. He declined to subscribe then, although later he did so. He and his wife testified that he told the banker that he was not able to subscribe; that the banker offered to loan him the money to pay for his bonds at 6 per cent., but that he said he could not afford to pay the interest or the principal. The banker denied these statements, testified that nothing was said about financial matters, but that the defendant said he did not want to do anything to use his influence to help out the administration on the war, because the President was elected on the slogan, "He kept us out of war," and then afterwards he used his power as President to put us into war, by telling the members of Congress that he would expose them to the light, and in that way forced the country into war; that he said that the sinking of the Lusitania was a humane act on the part of Germany, because there were munitions on board, and by sinking it a lot of lives in Germany were saved; and that he said that he was very proud of the fight the German people were making.

The defendant testified that all he said about getting into the war was that he believed the country was ready for peace, because he believed that the President was elected on account of the slogan, "He kept us out of war," and that it seemed to him that after he was elected he was in favor of the war; that he never talked with the banker about the Lusitania; that he never said to him that he was proud of the fight the Germans were making; that he never told him he would not subscribe for Liberty Bonds because it would encourage the administration, but that he did tell him that he would not buy any bonds of him anyhow, because, if he had the money, he would buy the bonds of the bank where he did his banking business. He testified further, and this testimony was not contradicted, that what he said after he had declined at the commencement of the conversation to buy the bonds was in answer to questions of the banker; that the banker asked if he did not think the bonds were a good investment, and he answered that he thought they were; that he wished he had a lot of money, he would invest it in Liberty Bonds; that the banker asked what he thought of the draft law, and he replied that he thought it a good law, and that we ought to have had it a couple of years before the war.

The record in this case has been searched in vain for evidence that the defendant, before the indictment was filed, ever made in public or in private to any one the fourth, fifth, seventh, eighth, or ninth statements alleged therein, and the conclusion is that there never was any testimony in support thereof. The only evidence that the defendant made the first, second, third, and sixth statements, or any part of them, is the testimony of the banker which has been recited, and upon this testimony the verdict rests. There are a great many pages of the record which recite evidence permitted to be presented to the jury upon the question of the defendant's intent, which relate to collateral

issues, such as what the defendant said about subscribing to the Red Cross, in view of the fact that he had read in some paper that it would not relieve wounded and suffering enemies of the United States, and of the fact that it had refused to accept a German nurse.

All this evidence upon the collateral issues has received perusal and meditation; but, conceding that the defendant made the statements to which the banker testified in the privacy of his home, and conceding the truth of the testimony of the witnesses for the government upon the various collateral issues, the conclusion is nevertheless irresistibly forced upon our minds that, in view of the established fact that the defendant never by public act or speech engaged in any opposition to any of the endeavors of the government to prosecute the war, but, promptly upon its declaration, from his pulpit instructed his parishioners to discharge their full duty to the nation therein, that by his constant public prayers he continued this influence, that he testified that he had never had any of the evil intents or purposes denounced by the statute, and in view of the fact that the statements in the conversations with the banker in his home were not appropriate to accomplish any such purposes, it is impossible to conclude that there was in this case any substantial evidence to sustain the finding of the jury that he willfully made those statements to interfere with the operation or success of the military or naval forces of the United States, or to cause or attempt to cause insubordination, disloyalty, or refusal of duty therein, or to obstruct, or that he did thereby obstruct, the recruiting or enlistment service of the United States. Those statements were not made where they would or could naturally and reasonably have had any such effect, nor were they indicative of any such intent, nor was any such result the necessary or legitimate consequence thereof.

Let the judgment be reversed, and let the case be remanded to the court below, with directions to discharge the defendant.

CARLAND, Circuit Judge, concurs in the result, upon the ground that the trial court erred in overruling the demurrer to the indictment, but expresses no opinion upon the sufficiency of the evidence.

DYER v. INTERNATIONAL BANKING CORPORATION.

(Circuit Court of Appeals, Ninth Circuit. January 5, 1920. Rehearing Denied February 16, 1920.)

No. 3144.

1. BILLS AND NOTES ⊜453—NONNEGOTIABILITY OF NOTE ACCOMPANIED BY CONTRACT.

Under Civ. Code Cal. § 1459, making notes accompanied by a contract nonnegotiable as to persons with knowledge of the contract, an indorsee with knowledge of a contract executed at the same time as a note holds the note subject to all conditions and defenses that would have attached, had the note remained in hands of the payee.

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

2. BILLS AND NOTES ⊂=434—RECOVERY OF PAYMENT ON NOTE, BEFORE PAYMENT DUE ACCORDING TO COLLATERAL CONTRACT, NOT DEPENDENT ON RESCISSION OF SUCH CONTRACT.

Where maker of note, although not liable thereon, under the terms of a contract accompanying the note, until the payee had performed certain work called for by the terms of the contract, paid the note, mistakenly believing the work had been done, to payee's assignee, who had notice of the contract conditions, maker's right to recover such payment did not depend on his rescission, for both his original right to avoid payment for nonperformance and his resulting right to recover payment made prior to performance depended on the contract's operation, and not its rescission.

3. BILLS AND NOTES ⊂=434—PAYEE'S SOLVENCY IMMATERIAL IN MAKER'S ACTION TO RECOVER PAYMENT FROM INDORSEE.

In maker's action to recover payments mistakenly made on a note to an indorsee, who took the note with knowledge of a related contract between maker and payee, the payee's solvency when he indorsed the note is immaterial, since the indorsee secured a nonnegotiable instrument, which gave it no right of recourse against the payee on the maker's default, in view of Civ. Code Cal. §§ 3108, 3116–3186, relating to the indorsement, presentment, and dishonor of negotiable instruments.

4. BILLS AND NOTES ⊂=434—RECOVERING PAYMENTS MADE WITHOUT INVESTIGATION.

A maker of a note may recover payments mistakenly made from an indorsee taking the note with knowledge of a related contract between maker and payee, although the maker made no investigation, at the time he paid the note, as to whether the payee had fulfilled his obligations under the related contract.

In Error to the District Court of the United States for the Second Division of the Northern District of California; Oscar A. Trippet, Judge.

Action by Edward F. Dyer against the International Banking Corporation. Judgment for defendant, and plaintiff brings error. Reversed and remanded for a new trial.

Powell & Dow, of San Francisco, Cal., for plaintiff in error.

R. P. Henshall, of San Francisco, Cal., for defendant in error.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

HUNT, Circuit Court. Action at law by Dyer to recover money paid to the International Banking Corporation because of an alleged mistake. There was a verdict and judgment in favor of the Banking Corporation. The facts appear to be these:

On April 1, 1914, Dyer, plaintiff in error, and one Green, who died in September, 1914, made a contract whereby the Green-Dyer Company, a corporation, was to be formed to engage in the billboard business. Green agreed to subscribe and pay for all capital stock of $10,000; Dyer to buy from Green half of this stock for $30,000, payable as follows: $10,000 upon the execution of the agreement, $10,000 on July 1, 1914, and $10,000 on October 1, 1914. The contract contained the following clause:

"No payment shall be made by said Dyer, other than said $10,000, until the said plants shall have been duly and legally transferred to the Green-Dyer Company, as hereinbefore required, and until said plants shall have been completed as provided in paragraph IX hereof."

By paragraph IX Green agreed to complete the plants on or before June 1, 1914, by increasing the capacity of the billboards, so that the linear footage thereof should be 10,000 feet. In paragraph IX there was also this provision:

"That should the said Green fail or refuse to complete said plants by June 1, 1914, or within 60 days, as provided in the last proviso, the said Green shall at the election of said Dyer return forthwith to said Dyer all moneys received by him under this contract together with interest thereon at 8 per cent. per annum from April 1, 1914, until paid."

Paragraph VI of the contract provided that if Dyer, before April 1, 1915, should become dissatisfied with the purchase arranged for, and should desire a return of all moneys paid by him under the contract, he should notify Green to that effect, and Green promised to pay Dyer all moneys paid under the contract, payments in return to be as follows: $10,000 on April 1, 1915, $10,000 on or before July 1, 1915, and final payment of $10,000 on or before October 1, 1915; the deferred payments of $10,000 each to be evidenced by notes, and the whole of the $30,000 to bear interest at the rate of 8 per cent. from April 1, 1915.

Green transferred the $10,000 note (dated April 1, 1914) to the International Banking Corporation, defendant in error, a few days after execution; the corporation then having knowledge that the plaintiff, Dyer, was not required to pay the money represented by the note unless the plants should be completed to 10,000 linear feet. On July 1, 1914, Dyer paid the note held by the corporation, although at the time of the payment the work of completing the plants to 10,000 linear feet had not been done; Dyer, however, believing that it had been done, and the payment being made while he was under that belief. Thereafter Dyer learned that the necessary work had not been performed, and brought this action to recover the amount he had paid on the note.

It was in evidence that Green negotiated the note for value prior to maturity; that after it was discovered that Green had not performed his contract, as agreed, Dyer first made demand for the payment of the money; that Green was then dead, and his estate was insolvent, although Green may not have been insolvent when he discounted Dyer's note at the bank. Dyer never rescinded the contract, and never tendered the note back to the bank, or offered to restore the stock he had received under the contract, and as late as March, 1915, demanded of Green's estate all of the moneys paid by Dyer under the contract of April 1, 1914, including the $10,000 involved in this suit. It is also in evidence that, after the nonpayment of such money on October 15, 1915, Dyer sold out all of the stock of Green in the company for $10,000 in collection of his demand. This right to sell was claimed by him under the fourth paragraph of the contract, which provided that the entire capital stock of the Green-Dyer Company should be deposited in escrow, and that Dyer should notify Green, before April 1, 1915, whether he elected to continue or withdraw from the company, and that in the event of election to continue the stock should be delivered by the escrow holder to the parties, 50 shares to each, and

in the event of election to withdraw the stock should remain in escrow as security for the payments required to be made by Green to Dyer, and, if Green should fail in payments as required, the stock should be delivered to Dyer by the escrow holder, to be held as security.

The principal errors assigned arise upon the instructions to the jury. Among other things, the court charged that Dyer could not recover unless he rescinded the contract, and that when he discovered that the work had not been done it was his duty to offer to rescind the contract. The court also charged that the banking corporation was in as good a position as Green, and that, if the money had been paid to Green, Dyer could not recover from Green on the ground of mistake without rescinding the contract.

The argument in behalf of Dyer is that, as the Green-Dyer contract and the note in question were made at the same time, in the same transaction, and between the same parties, the contract and note were in effect one instrument as to all persons having knowledge that they were concurrent and dependent; that the banking corporation, having notice of the provisions of the contract, received the assignment of the note as a nonnegotiable instrument, subject to all conditions and defenses that would have attached to it, had it remained in the hands of the original payee; and that, as the work required by the contract to mature the note was not done, the banking corporation had no enforceable claim against Dyer at the time the note was paid.

On the other hand, it is the contention of the banking corporation that Dyer in no event can recover the money he paid under the contract unless he first rescinded the contract. It is said that Dyer could have rescinded when he discovered breach by Green, or could have affirmed, electing to hold Green under the terms of the contract, but, not having elected to rescind, his right to sue Green in general assumpsit is gone.

The case is simplified by avoiding confusion of the rights of Dyer as against Green with the rights of Dyer as against the banking corporation. As between Dyer and Green, the contract measures their respective rights; whereas, any right that Dyer has against the bank rests not upon a purely contractual relationship, but upon the principle that, where one has paid money to another under a mistake which, in equity and good conscience, should not have been paid, he may have redress by an action in the nature of assumpsit. United States v. Barlow, 132 U. S. 271, 10 Sup. Ct. 77, 33 L. Ed. 346; Steamship Co. v. Joliffe, 69 U. S. (2 Wall.) 450, 17 L. Ed. 805; Page on Contracts, § 789. This principle is in no way inconsistent with the rule, relied upon by plaintiff, that the several notes and contract should be considered together. Civ. Code Cal. § 1642; Goodwin v. Nickerson, 51 Cal. 166.

We are in accord with the opinion expressed in Spotton v. Dyer, 184 Pac. 23, where the main questions now presented were decided. In the case just cited the District Court of Appeal of the First District of California had before it the very contract now here involved. There Spotton, for the bank, sued Dyer upon the note payable October 1, 1914. Dyer set up the contract with Green, and pleaded that

the work necessary to mature the note had not been done, and that the bank knew of this fact. The appellate court affirmed the decision of the trial court, and held that the making of the notes and the contract were parts of one transaction; that the notes were nonnegotiable, because of the accompanying contract, of which the banking corporation had knowledge when it purchased the notes. The question of the duty of Dyer to rescind was also considered and the court pointed out that under the contract in addition to completing the plants and repaying Dyer, if he elected to withdraw, Green was under obligation to do a number of other things not involved in that action, and that if Dyer had rescinded, or if the contract had contemplated rescission, the result would have been a nullification of the provisions of the contract whereby, in the event of the election of Dyer to withdraw from the venture, the stock was to remain in the hands of the depository, and, if Green should fail to repay Dyer the money he had advanced, the stock was to be delivered to Dyer for security. The court said:

"To hold that Dyer was compelled to abandon his contractual rights as a prerequisite to his enforcement of them would be absurd."

The Supreme Court of the state denied the motion of the bank for a hearing, and the judgment has become final.

[1, 2] By section 1459, Civil Code of California, a note accompanied by a contract is nonnegotiable as to all persons having notice of the contract. The banking corporation, having full knowledge of the provisions of the contract, received the assignment of the note here sued upon as a nonnegotiable instrument, subject to all conditions and defenses that would have attached, had the note remained in the hands of the original payee. Smiley v. Watson, 23 Cal. App. 409, 138 Pac. 367; Metropolis v. Moonier, 169 Cal. 592, 147 Pac. 265. It therefore follows that, as the work called for by the terms of the contract to mature the note was not done, the banking corporation had no enforceable claim against Dyer at the time the note was paid, and, this being so, the bank has no right to the money so paid, which in good conscience belongs to Dyer. Dyer always stood upon the contract, as he had a right to do, and, there being no legal obligation on his part to pay the bank the moneys here sued for, the provisions of the contract may yet be in force, including the agreement that Dyer was not to pay any more money until the plant should be completed, of which provision the bank knew when it bought the note in suit.

The error of the District Court was in assuming that, because there was a breach of the Green-Dyer contract by Green, rescission was essential before Dyer could maintain action against the bank. The relevancy of the contract referred to was to show that by virtue of its terms, all of which were known to the bank, Dyer was not obliged to make payment unless certain work specified in the contract was performed before June 1, 1914; but the bank had no contractual relationship with Dyer which required Dyer to rescind, nor would the liability of the bank be affected by a rescission by Dyer.

[3] Although the evidence was that the bank had "grave doubts"

of Green's responsibility, the question of his solvency at the time that he sold the note to the bank is not material, because under the record the bank had no claim against Green arising out of the purchase from him of the note in question. As the case was developed, it appeared that the bank bought a nonnegotiable instrument, nonnegotiable in fact, and therefore there was in the indorsee no right of recourse in the event of Dyer's failure to pay the note. Spotton v. Dyer, supra; sections 3108, 3116–3186, Civil Code of California. And as the bank could have had no recourse against Green, if Dyer had refused to pay the note, it follows that the circumstance that Dyer paid the note, and thereafter sought a return from the bank of the money paid to it, did not create on the part of Green any liability to the bank or give rise to any claim by the bank against Green. Kendall v. Parker, 103 Cal. 319, 37 Pac. 401, 42 Am. St. Rep. 117; McEwen v. Black, 44 Okl. 644, 146 Pac. 37.

[4] The fact that Dyer had the means of ascertaining that the work had not been done as required by the contract did not change the position of the bank. He was not obliged to make an investigation in order to maintain action. National Bank v. Miner, 167 Cal. 532, 140 Pac. 27; Crocker Bank v. Nevada Bank, 139 Cal. 564, 73 Pac. 456, 63 L. R. A. 245, 96 Am. St. Rep. 169; 15 Am. & Eng. Enc. of Law, p. 1106.

The judgment is reversed, and the cause is remanded, with directions to grant a new trial.

BUSHONG v. R. R. THOMPSON ESTATE CO.

In re MULTNOMAH HOTEL CO.

(Circuit Court of Appeals, Ninth Circuit. January 5, 1920.)

No. 3373.

1. JUDGMENT ⊂⊃711—IN FAVOR OF CREDITOR OF PURCHASER OF HOTEL COMPANY'S STOCK NOT ADJUDICATION THAT PURCHASER WAS BOUND TO PAY ALL DEBTS OF COMPANY.

Defendant, on buying stock of a hotel company, agreed with the seller to devote the purchase price of the stock to the payment of the hotel company's debts, and also to make an advance to the seller, which was surety for the company's debts. *Held*, that a judgment in favor of an existing creditor of the company against defendant, which required defendant to pay such creditor's claim, was not an adjudication which established defendant's liability to pay all the debts of the hotel company, which would warrant the trustee in bankruptcy of the hotel company in recovering from defendant sums paid by the company itself in discharge of debts.

2. CORPORATIONS ⊂⊃218—PURCHASER OF HOTEL COMPANY'S STOCK NOT LIABLE TO COMPANY'S TRUSTEE IN BANKRUPTCY ON ACCOUNT OF DEBTS PAID BY COMPANY ITSELF.

Where defendant purchased the stock of a hotel company under an agreement that the purchase price should be devoted to discharging the company's debts, and that defendant should make an advance to the seller of the stock, which was surety for the hotel company's debts, *held*

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

that, after bankruptcy of the hotel company, its trustee could not recover from defendant the amount of debts paid by the hotel company; the company not being a party to the agreement between defendant and the seller of the stock, and the hotel company being primarily liable for its debts.

3. EVIDENCE ⊜219(1)—FILING OF CLAIM BY PURCHASER OF HOTEL STOCK AGAINST ESTATE OF SELLER NOT ADMISSION THAT PURCHASER WAS BOUND TO PAY ALL DEBTS.

Where defendant purchased all of the stock of a hotel company under an agreement that the purchase price should be devoted to payment of its debts, and that it would make an advance to the seller, which was surety on the debts of the company, *held* that, as any loss would ultimately fall on defendant, the fact that defendant filed claim in bankruptcy against the estate of the seller on account of debts which it had not paid, but which the company had partly paid and given notes therefor, was not an admission that defendant was bound to pay such debts, which exceeded the purchase price of the stock.

In Error to the District Court of the United States for the District of Oregon; Robert S. Bean, Judge.

Action by H. F. Bushong, trustee in bankruptcy of the estate of the Multnomah Hotel Company, against the R. R. Thompson Estate Company to recover damages on a contract between defendant and Gevurtz & Sons. There was a judgment for defendant, and plaintiff brings error. Affirmed.

Under an agreement between Gevurtz & Sons, a corporation in Oregon, and the Estate Company, the Estate Company was to erect a hotel building and to lease the same to Gevurtz & Sons for a term of years. The Hotel Company issued common stock of $200,000 and preferred stock of $150,000, for which it paid by transferring the lease with the Estate Company, and began business in 1912; all of the stock of the company being owned and controlled by Gevurtz & Sons, a corporation. The Hotel Company became involved, and under a contract or option dated January 10, 1913, in consideration of $175,000, the Estate Company purchased the stock of the Hotel Company and agreed to pay the then existing indebtedness of the Hotel Company to the extent of $175,000, and to advance to the Gevurtz & Sons corporation, upon a note, a sum not to exceed $35,000 to liquidate any obligations of the Hotel Company in excess of 175,000. Under this agreement the Gevurtz corporation guaranteed the Estate Company against all debts and liabilities of the Hotel Company above $210,000, and indemnified the Estate Company against demands and liabilities of every character due by the Gevurtz corporation, or to any other person or corporation, arising out of and incurred in the operation of the Multnomah Hotel "from the time of its beginning to the date of the delivery of possession." The contract or option further provided that the payment of $175,000 and the loan of $35,000 were only matters of "accommodation" to Gevurtz & Sons, and were not to be "any acknowledgment of any assumption by said Thompson Estate Company of any further liability, or for the payment of any greater sum for the assets of the Multnomah Hotel Company then represented by the purchase price of the common and preferred stock.

The Estate Company paid all of the debts of the Hotel Company, except four claims, which are the subject of this action, and the Estate Company paid in cash a portion of each of these four claims, and gave the Hotel Company's notes for the balances due. On May 9, 1913, Gevurtz & Sons was adjudged bankrupt, and the Hotel Company went into bankruptcy on January 26, 1916. After the Gevurtz Company went into bankruptcy, the Estate Company filed a claim for $57,506, made up of $35,000 loaned to the Gevurtz Company and a balance of $21,506 claimed to be due under the agreement (heretofore re-

ferred to) of the Gevurtz Company to indemnify the Estate Company for payment of additional debts of the Hotel Company. The claim filed did not include any part of the $175,000 paid by the Estate Company to Gevurtz Company for the stock of the Hotel Company, but did include the so-called Weinhard claim for $4,500, which afterwards became the subject of litigation, and resulted in judgment in favor of Weinhard against the Estate Company.

The defense of the Estate Company is that the debts sued on were those of the Hotel Company, which was primarily liable for their payment; that no consideration passed from the Hotel Company to the Gevurtz Company, or to the Estate Company for the latter's assumption of any secondary liability by Gevurtz Company for those debts; that the trustee herein represents no creditor existing at the time of the alleged promise of the Estate Company to pay the existing debts of the Hotel Company, or at the time of payment of those debts by the Hotel Company.

The District Court directed a verdict in favor of the Estate Company, and the trustee brought writ of error.

Teiser & Smith and Julius Silvestone, all of Portland, Or., for plaintiff in error.

Bauer, Greene & McCurtain, of Portland, Or., for defendant in error.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

HUNT, Circuit Judge (after stating the facts as above). [1, 2] Plaintiff in error takes the ground that the contract referred to was made for the benefit of the Hotel Company, as well as for the benefit of its creditors; that the Hotel Company is a party in privity and entitled to recover money paid out of its treasury, which inured to the benefit of the Estate Company, and which should have been paid out of the funds of the Estate Company, and relies principally upon the decision of this court in Weinhard et al. v. Estate Co., 247 Fed. 951, 160 C. C. A. 376, affirming Weinhard et al. v. Estate Co. (D. C.) 242 Fed. 315. We there held that, under the contract between the Estate Company and the Gevurtz Company, the Estate Company assumed the entire indebtedness of the Hotel Company and looked to the indemnity evidenced by the warranty obligation for reimbursement for any liabilities in excess of the $210,000 that it might have to pay in order to clear the hotel property of the debts incurred by the Hotel Company. The facts of that case were that Weinhard's claim against the Hotel Company was upon a note executed March 6, 1912, to the Estate Company by the Hotel Company and the Gevurtz corporation, and we regarded the claim as a part of the debt of the Hotel Company owing upon January 10, 1913, or at the time of the purchase and assumption by the Estate Company, and therefore held the Estate Company liable for its payment. The rule of that case clearly controls as to all creditors of the Hotel Company who were such prior to and at the date of the agreement of assumption and to whom Gevurtz Company was liable. The question here is whether, under the contracts, the Estate Company is liable for the balances due upon the debts of the Hotel Company here sued upon and which have been paid.

At the time of the purchase of the stock by the Estate Company, the Hotel Company owed about $244,000. The Gevurtz Company, which sold the stock, was secondarily liable to pay these debts. The Estate Company made no contract, directly, at least, with the Hotel Company

or with any of the creditors of the Hotel Company. It did agree, however, with the Gevurtz corporation, to clear the Hotel Company of the debt which the Gevurtz corporation was then carrying. It was not held in the Weinhard Case, supra, that the Estate Company assumed any other or greater liability than that which rested on the Gevurtz corporation, or that the Estate Company would be liable for a greater amount than the Hotel Company owed at the time of the transfer. Nor was it decided that there was any agreement whereunder the Hotel Company was relieved of the obligation to pay its own debts. In other words, it has not been held that the Estate Company substituted itself as a principal debtor so as to relieve the Hotel Company of all liability. We must measure the obligation of the Estate Company solely by the terms of the contract it made with the Gevurtz Company and what was done thereunder. Clearly the purpose of the contract between the Estate Company and the Gevurtz corporation was to clear the Hotel Company of debts which it owed at the time of the purchase of the stock. The money which the Estate Company was paying for the stock was to be applied in payment of claims against the Hotel Company.

But the language of the contract expressly provided that the Estate Company disclaimed the assumption or acknowledgment of any liabilities of the Hotel Company or the payment of any greater sum for the stock than represented by the purchase price of the stock. The $35,000 advanced was "accommodation" to the Gevurtz corporation and not an acknowledgment of any assumption of debt of the Hotel Company. The obligation of the Hotel Company to pay its own debts never was extinguished, although a creditor of the Hotel Company on January 16, 1913, could have enforced payment as against the Estate Company because of the implied assumption of payment of his claim under the Estate Company contract with the Gevurtz corporation. Such a claim, however, was against the Hotel Company, yet enforceable against the Estate Company because of the guaranty. The attitude of the Estate Company was not unlike that of a surety to a contract.

The allegation by the trustee that the Estate Company, as owner of the stock of the Hotel Company, "caused" the Hotel Company to pay debts amounting to $14,000, which the Hotel Company owed, implies, as we understand it, that the Hotel Company was obliged to do that which it ought not to have done, and that the Estate Company has become responsible for a depletion of the estate of the Hotel Company to the amount of $14,000. But, as it is plain that the Hotel Company owed the money, paying it was certainly not wrongful, even though another corporation was secondarily liable for the payment of the debts. The fact that the Estate Company had agreed with the Gevurtz corporation to pay debts that the Hotel Company failed to pay does not make the payment by the Hotel Company unlawful.

While the Estate Company could have made a general enforceable promise to pay the claims of the creditors of the Hotel Company, it did not do so, and when it acquired ownership of the hotel it had a right to "cause" the Hotel Company to pay $14,000 of its own debts out of its own earnings, provided, always, there was no fraud or unlawful preference. Questions of unlawful preference, however, are

not material. If the Gevurtz corporation had remained owner of the Hotel Company stock, the Gevurtz Company would have had the right to cause the Hotel Company to pay the debts for which the Gevurtz Company was surety, and, if there had been a failure, it would have had the right to require the Estate Company to make the payment.

[3] It is said, however, that in its proof of claim in the Gevurtz Company bankruptcy proceedings the Estate Company included the four claims involved in this suit, and which amounted to some $14,000, and that the Estate Company received a dividend of some 23 per cent. on the claims out of the assets of the Gevurtz Company estate in bankruptcy. Assuming that the court should have ruled that such proof was admissible, it would not have affected the case. The Estate Company being liable for payment of the claims on an implied assumption of the Gevurtz corporation obligation to pay them, whether the Estate Company paid the $14,000 directly or not, or whether the Hotel Company paid it, the loss would come finally upon the Estate Company as owner of the stock of the Hotel Company, and such loss would be covered by the indemnity contract between the Gevurtz corporation and the Estate Company. Under the terms of the warranty the Estate Company had a right of action against the Gevurtz corporation to recover the $14,000, and therefore had a provable claim against the Gevurtz Company estate in the bankruptcy court.

The primary liability of the Hotel Company is the determining point; and as the Hotel Company has paid the debts in question, the transactions had between the Estate Company and the Gevurtz corporation cannot be made the subject of complaint by the Hotel Company. The trustee of the estate of the Hotel Company, bankrupt, cannot avail himself of the benefit of a promise made by the Estate Company to the Gevurtz corporation, when the Hotel Company could not have compelled the Gevurtz corporation to pay the debts of the Hotel Company. Those who were benefited by the Gevurtz guaranty and the Estate Company's assumption were those creditors of the Hotel Company in existence January 16, 1913, and, as all such have been paid, the Hotel Company has no cause of action. Brower Lumber Co. v. Miller, 28 Or. 570, 43 Pac. 659, 52 Am. St. Rep. 807; Jefferson v. Asch, 53 Minn. 446, 55 N. W. 604, 25 L. R. A. 257, 39 Am. St. Rep. 618; Parker v. Jeffery, 26 Or. 186, 37 Pac. 712; Washburn v. Investment Co., 26 Or. 436, 36 Pac. 533, 38 Pac. 620.

Nor can we find any fraud upon creditors. The creditors, except the Estate Company, of the Hotel Company, have been paid, and there seems to be no cause of action in favor of the Hotel Company against the Estate Company for failure to perform the contract with Gevurtz Company, made for the benefit of the existing creditors of the Hotel Company.

The judgment is affirmed.

MARKS v. HILGER.

(Circuit Court of Appeals, Ninth Circuit. January 5, 1920.)

No. 3372.

1. WATERS AND WATER COURSES ⊜142—APPROPRIATION GIVES APPROPRIATOR TITLE TO USE WATERS.

The state of Montana has assumed to itself ownership of rivers and streams in the state, and has granted the right to appropriate waters in accordance with statute, which appropriation vests in the appropriator, with full title to the use of such waters.

2. WATERS AND WATER COURSES ⊜143—APPROPRIATOR ENTITLED TO SEEPAGE WATER.

It is established in Montana that the prior appropriator of water is entitled to the use of all water in the stream to satisfy his appropriation, whether such waters come from seepage or from water naturally flowing.

3. WATERS AND WATER COURSES ⊜143, 152(3)—NO EXCUSE TO APPROPRIATOR TAKING EXCESSIVE QUANTITY THAT EXCESS WAS RETURNED TO STREAM BY SEEPAGE.

An appropriator of water, who took a greater quantity than he was allowed to take under decree fixing priorities, cannot justify his taking on the ground that the water was taken in the flood season, and was returned to the stream by seepage, and was really a benefit to subsequent appropriators, but such appropriator is guilty of contempt.

In Error to the District Court of the United States for the District of Montana; George M. Bourquin, Judge.

Suit by the Ames Realty Company against the Big Indian Mining Company and others, in which water rights were fixed. On petition of Peter Hilger, I. W. Marks was adjudged in contempt, and contemnor brings error. Affirmed.

C. A. Spaulding, of Helena, Mont., for plaintiff in error.

C. W. McConnell, of Helena, Mont., for defendant in error.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

HUNT, Circuit Judge. This is a contempt proceeding, arising in the following manner: In 1911 the District Court made a decree in the case of Ames Realty Company, Complainant, v. Big Indian Mining Company et al., Defendants, decreeing certain rights in the waters of Prickly Pear creek and its various tributaries. I. W. Marks and Peter Hilger, and many others, were landowners and parties defendant in that action. Marks was decreed a right of user of 21 inches of water from Prickly Pear creek of date April 1, 1865, also a right to 8 inches of date April 1, 1893, and to 7 inches of date April 1, 1894, out of Dutchman creek, a tributary to Prickly Pear. Hilger was awarded a right to the use of 67 inches from Prickly Pear of date April 4, 1866, and of 100 inches of date November 24, 1866. The decree also enjoined each of the parties from in any wise interfering with any of the water rights of any and all other parties as fixed and decreed. In July, 1918, Hilger by affidavit alleged that Marks had violated the decree by using more water from Dutchman creek than the decree had awarded to him, and that he had failed to comply with the provisions

of the decree requiring each owner to construct proper measuring boxes in his ditches conveying water from Prickly Pear and Dutchman creeks. The lands of Hilger and some others were along Prickly Pear creek, some miles below the point where Dutchman creek flows into Prickly Pear. Some of these lands were irrigated with Prickly Pear creek water under water rights adjudged to be prior to Marks' rights by the decree hereinbefore referred to. Marks appeared, testimony was heard, and Marks was found guilty of contempt and fined $1. He brought writ of error.

The substantial facts as found by the District Court are these: The boxes used by Marks were out of order in July, 1918, and were practically useless for accurately measuring the flow of the water; but the evidence shows that Marks was diverting 50 inches of water from Dutchman creek through four ditches upon his land, and that but for such diversion the water would have flowed down to the use of the Ames Realty Company and others. Marks owned a strip of about 50 acres through which Dutchman creek ran for about a mile and a half. He turned the water from Dutchman creek into four ditches that would carry 200 inches or more of water, and irrigated the 50 acres in grass and grain crops until the water became less in flow, when he began to turn it off. Marks so used the water that sometimes by seepage there was more water in Dutchman creek at the point of departure from his land than at its entrance, but there was no storage of the seepage water. The seepage or waste was nothing "out of the usual" which was returned to the stream, although some indefinite part of the seepage in July may have been from irrigation carried on by Marks in May or June. It was found that the measurements by Marks were very indefinite, and that under the method of his use the saturation of the land permitted large quantities of water to go to waste, and that such method was not proper, and did not constitute the creation of a reservoir. It was further found that the water which Marks "borrowed" was a part of the natural flow of Dutchman creek, and that such natural flow was not limited to the water that was in the creek at the entrance to Marks' land, but is that quantity which ought to be in the creek at its departure from Marks' land, namely, the flow at the entrance plus the seepage from Marks' land.

[1-3] The position of Marks is that in the beginning of the season, when there is an abundance of water, he turns such quantities upon his lands that they become saturated, and that at a later time in the season the waters upon these lands, by reason of seepage, flow back into Dutchman creek and serve to increase the flow in Dutchman, and to create a flow even greater in amount than the usual flow of water in Dutchman creek above the lands of Marks, and that because of this seepage flowing from his lands he has a right to take as much water from Dutchman creek as the capacity of his ditches will allow, even though the original decree of the court limited him to 15 inches of waters of Dutchman creek.

We cannot uphold the argument. In Kansas v. Colorado, 206 U. S. 46, 27 Sup. Ct. 655, 51 L. Ed. 956, it was claimed in behalf of the state of Colorado that there was a right to the use of the waters of

the Arkansas river over Kansas, because the use of the waters of the Arkansas river in irrigating within Colorado stored the waters, and caused more water to flow out by seepage below than was actually used upon the lands in Kansas. The court, through Justice Brewer, commented upon the difficulty of obtaining proof of the extent to which seepage operates in adding to the flow of a stream, and said:

"Aside from this surplus water, some may be returned through overflow of the ditches or from seepage. What either of these amounts may be is not disclosed. Indeed, the extent to which seepage operates in adding to the flow of a stream, or in distributing water through lands adjacent to those upon which water is poured, is something proof of which must necessarily be almost impossible. We may note the fact that a tract, bordering upon land which has been flooded, shows by its increasing vegetation that it has received in some way the benefit of water, and yet the amount of water passing by seepage may never be definitely known. The underground movement of water will always be a problem of uncertainty."

We need not go back to inquire into the common-law rule respecting water rights, for the reason that in Smith v. Denniff, 24 Mont. 21, 60 Pac. 398, 81 Am. St. Rep. 408, decided in 1900, it was held that by necessary implication the state of Montana had assumed to itself ownership sub modo of rivers and streams in the state, and had expressly granted the right to appropriate waters of such streams, which right, if properly exercised, in compliance with the requirements of the statutes, vests in the appropriator full legal title to the use of such waters by virtue of the grant made by the state as owner.

It is established in Montana that the prior appropriator of water is entitled to the use of all the water in the stream to satisfy his appropriation, whether such water come from seepage or from the water naturally flowing in the stream. In Beaverhead Canal Co. v. Dillon Electric Co., 34 Mont. 141, 85 Pac. 882, the court said:

"The prior appropriator of a particular quantity of water from a stream is entitled to the use of that water, or so much thereof as naturally flows in the stream, unimpaired and unaffected by any subsequent changes which, in the course of nature, may have been wrought. To the extent of his appropriation his supply will be measured by the waters naturally flowing in the stream and its tributaries above the head of his ditch, whether those waters be furnished by the usual rains or snows, by extraordinary rain or snow fall, or by springs or seepage which directly contribute."

Again, under the doctrine that the prior appropriator is entitled to the quantity of water appropriated from the stream, the prior appropriator is entitled to satisfy that right, and it is immaterial whether such satisfaction is to be had out of the waters that naturally flow in the stream and its tributaries above the head of its ditch, or come from waters which run into the stream by rains, snows, springs, or seepage.

Referring again to Kansas v. Colorado, supra, the court held in effect that an upper riparian proprietor could not maintain a defense based upon a use to which he had appropriated the water by contending that he had given benefit to the lower proprietor. "The question," said the court, "will be one of legal right, narrowed to place, amount of flow, and freedom from pollution."

The doctrine of a right of use by appropriation is inconsistent with a claim of right of ownership of seepage not held in reservoir, and which is merely incidental to usual irrigation. Nor can an upper proprietor plead that by the use to which he had appropriated the water he had benefited the lower proprietor, or that the lower proprietor has received an equivalent.

In Smith v. Duff, 39 Mont. 382, 102 Pac. 984, 133 Am. St. Rep. 587, there was a contention that the respondents in that case were entitled to the use of certain waters of Willow Swamp by reason of water developed by the draining of the swamp from a canal; but the court held that whether the water which saturated the swamp came from subterranean springs or through percolation from higher adjacent lands, or whether it was supplied from a subsurface flow, was not apparent; yet the general principle was stated to be that the subsurface supply of a stream, whether from tributary swamps or runs in sand and gravel, constituting the bed of the stream, is as much a part of the stream as is the surface flow, and is governed by the same rules.

In Spaulding v. Stone, 46 Mont. 483, 129 Pac. 327, the court held that one who claimed upon the ground that he had developed a new supply of water must establish by satisfactory proof the amount which he has developed, especially when he has mingled his alleged new supply with that to which another is entitled, for he cannot justify an interference with a right which he does not question.

In Durkee Ditch Co. et al. v. Means et al. (Colo.) 164 Pac. 503, it was held that seepage water, which was originally diverted from a stream for irrigation and flowed into a gulch tributary to the same stream, could not be diverted from the gulch to the prejudice of the rights of senior appropriators on the stream. The court there held that the waters of the gulch, being naturally tributary to a certain creek, were not subject to independent appropriation and diversion, but would be considered a part of the stream, to be permitted to return to the stream for the benefit of other appropriators in the order of their priorities.

In Trowel Land & Irrigation Co. v. Bijou Irrigation District (Colo.) 176 Pac. 292, it was held that seepage waters from irrigation ditches and reservoirs, proceeding by open ditches or by percolation, on their return to, but not having reached, the stream which largely depends on such waters for supplying appropriations under a judicial decree, are tributary to the stream, and, after being drained into it by constructed ditches, may not be diverted as against the rights of prior appropriators. In states which recognize, at least in a modified way, the doctrine of riparian rights, doubtless the rules are different. Miller & Lux v. Madera Canal & Irrigation Co., 155 Cal. 59, 99 Pac. 502, 22 L. R. A. (N. S.) 391. The decisions of the courts of those states are not controlling in Montana.

Our conclusion is that the lower, but prior, appropriators are entitled to the uninterrupted flow of the waters of the stream and its tributaries, and that, where seepage water may have found its way

into the creek, the prior appropriators are entitled to the use of such water, limited of course to the extent of the quantity of water judicially decreed to them from the creek. Weil on Water Rights, § 337. In the present case it must therefore follow that, inasmuch as the decree awarded Marks only 15 inches of water from Dutchman creek, he had no right to take from that stream 50 inches of water, and that he cannot justify his action upon the ground that he has benefited the lower appropriators, or has given to them the equivalent of what he has taken.

The judgment rendered was proper, and is affirmed.

JOHNSON v. COWGILL et al.

(Circuit Court of Appeals, Ninth Circuit. January 5, 1920.)

No. 3344.

1. TRUSTS ⟸262—BURDEN ON CESTUI TO PROVE THAT ATTORNEYS FOR ESTATE DIVIDED FEE WITH TRUSTEE.

In a suit by the cestui against the trustee and attorneys for the estate, who it was claimed divided their fee with the trustee, the cestui has the burden of proving an agreement between the attorneys and trustee to share the fee.

2. TRUSTS ⟸231(1)—ATTORNEY AND TRUSTEE WHO DIVIDED FEE LIABLE TO CESTUI.

It is the duty of the trustee and attorneys for the estate to be perfectly true to the estate and cestui, and where the attorneys divided their fee with the trustee, etc., the cestui may recover the payment made to the trustee.

3. TRUSTS ⟸262—EVIDENCE INSUFFICIENT TO SHOW ATTORNEYS DIVIDED FEE WITH TRUSTEE.

In a suit by the cestui against the trustee and attorneys for the estate, evidence *held* insufficient to show the attorneys divided their fee with the trustee.

Appeal from the District Court of the United States for the Second Division of the Northern District of California; Frank H. Rudkin, Judge.

Suit by Frank Hansford Johnson against Lewis I. Cowgill and others. From a decree for defendants, complainant appeals. Affirmed.

John L. McNab and Byron Coleman, both of San Francisco, Cal., for appellant.

Goodfellow, Eells, Moore & Orrick and Mastick & Partridge, all of San Francisco, Cal., and Oscar Lawler, of Los Angeles, Cal., for appellees.

Before GILBERT, MORROW, and HUNT, Circuit Judges.

HUNT, Circuit Judge. Johnson sued Cowgill and the firm of Denson, Cooley & Denson, attorneys, praying that the firm set forth the nature of their claim to a certain sum of money, and that any adverse claim they had should be declared of no validity, and for judgment against Cowgill for $10,312.50, with interest. The complaint is found-

ed upon the allegations: That in 1910 Johnson conveyed his estate, worth about $450,000, to his father and Cowgill, defendant herein, as trustee, to be managed by the trustee for 5 years; that in June, 1911, the father died, and Cowgill became and acted as sole trustee until about November 27, 1915, at which time he reconveyed certain property, and was relieved as trustee; that from 1911 until the close of the trust Denson, Cooley & Denson were attorneys for the trust and for Cowgill as trustee, and that about July 12, 1911, Johnson agreed with Denson, Cooley & Denson that they should act in the matter of the recovery of certain property claimed by Johnson; that in payment for the services rendered by the attorneys Johnson made two certain promissory notes for $10,000 each, payable 6 and 12 months, respectively, after date; that the notes by their terms were to be paid by the trustee out of the trust estate, and were approved and accepted by the trustee in writing as a charge against the trust estate; that when the attorney's fee of $20,000 was fixed, it was secretly agreed between the law firm and Cowgill that the law firm and Cowgill would divide the fee, and that when the two notes, of $10,000 each, should be delivered, one should be the property of Cowgill, and the other of Denson, Cooley & Denson; that Cowgill, as trustee, about November 1, 1911, took the notes to the law firm, and that the elder Denson indorsed one of them on behalf of the firm and handed it to Cowgill as his share of the $20,000; that Cowgill retained the note as his private property, and that from May 31, 1912, to November 6, 1912, Cowgill, as trustee, fraudulently took from the estate certain sums for interest on the $10,000 note retained by him; that about November 6, 1912, Cowgill paid the law firm $10,000 from the estate funds, and fraudulently took $10,000 from the estate funds for his own use in payment of the other note, and falsely represented to plaintiff that he had paid these sums as trustee to the law firm in settlement of the note; that Cowgill fraudulently, as trustee, told plaintiff that he paid the $10,000 and certain interest to the law firm on account of the note retained by him, whereas such amount was never paid by Cowgill to the law firm on behalf of the trust estate; that Cowgill never has accounted, and did conceal from plaintiff the fact that the amount was appropriated to his own private use; that the law firm, although retained to act for Cowgill as trustee, never told plaintiff of the transactions; and that plaintiff never knew of the matter referred to until August 18, 1916, when he demanded the return of the $10,312.50 from Cowgill.

Denson, Cooley & Denson admit professional employment and plead that the notes of $10,000 each were given in payment of professional services and are the property of the firm, and aver that the only reason that payment in full of both notes was not made at maturity was because of the then financial condition of the trust estate. They deny all secret agreements and fraud and division of the notes with Cowgill, and ask judgment against Johnson and Cowgill for $10,000 and interest. Cowgill also denies fraud or any agreement with the law firm, whereby he was to receive any benefit in a personal way, and asks judgment in favor of Denson, Cooley & Denson against plaintiff and against himself.

The District Court found that there was no agreement between Cowgill and the law firm, or any member of it, for any division of the $20,000 mentioned in the complaint, or any agreement that Cowgill should become the owner of either one of the notes given in payment of the fee, or the proceeds thereof, and that the entire fee and both of the notes and the proceeds thereof were always the property of the defendants Denson, Cooley & Denson. The complaint was ordered dismissed, without costs to either party.

The first important question is whether or not there was any arrangement or understanding of any kind between the law firm, or any member of it, and Cowgill, whereby Cowgill was to receive any part of the $20,000 which Johnson agreed to pay the attorneys for professional services rendered under the agreement between Johnson and Denson, Cooley & Denson. If there was any such arrangement, it must have been made between Judge Denson and Cowgill, for clearly they were the only persons who had to do with the making of it. It is essential, therefore, that the evidence be considered.

Johnson testified that in July, 1911, he employed the law firm upon the recommendation of Cowgill, and that after settlement of the legal matter was made in August, 1911, neither he nor the trust had the money to pay the lawyers; that Cowgill said that he would arrange so that two notes would be given, and that the two notes were then given by Johnson and were delivered to Cowgill. It appears that one of the notes was paid November 6, 1912, and that two payments were made on the other note in November, 1912. Three checks were offered in evidence—one dated November 6, 1912, for $5,000 to L. I. Cowgill, signed by F. H. Johnson Trust, L. I. Cowgill, Trustee; one dated November 6, 1912, in favor of L. I. Cowgill, for $17,517.50, signed by F. H. Johnson Trust, by L. I. Cowgill, Trustee; another dated November 8, 1912, in favor of L. I. Cowgill, for $10,018.31, signed by L. I. Cowgill, Trustee. Johnson also said that the trust was closed on November 27, 1915, and that it was not until six months afterward that he learned that Cowgill had received a part of the $20,000 fee; that when the trust was closed Cowgill turned over certain property to him.

Mr. Berry, who had been attorney for plaintiff, Johnson, preceding the summer of 1916, testified that in July, 1916, he called upon Judge Denson in relation to the fee of $20,000; that Judge Denson told him that the $20,000 fee received in settlement of Johnson's claim against his father's estate was not all received by Denson, Cooley & Denson; that Cowgill "demanded or asked" a division with him, and that Denson said that Cowgill was an old client, and "I was not in a position to refuse, and we did divide it with him." Witness said he never told Johnson what Denson said, as at the time he was not friendly with Johnson.

Mr. G. H. Smith, counsel for Frank Johnson, testified in substance that he first met Judge Denson on August 18, 1916, at Denson's office, whither he went as attorney for Johnson "to demand from Cowgill half of that $20,000 fee that Denson, Cooley & Denson had divided with him and half of any other fees that the law firm might have di-

vided with him." Mr. Smith says that he opened the conversation with that demand, and after a pause Judge Denson said that that was "the only one"; that Judge Denson talked for some minutes, and said that Cowgill had brought business to the firm, and that they had not charged Cowgill anything. Witness said that Denson said he thought the matter of the fee might come up, and that he had kept himself clear; that the firm had recovered the property for Johnson, and was entitled to the fee. Mr. Smith said:

"I asked him if Mr. Cowgill had had anything to do with the fixing of the fee, and he said he had. I asked him if he had agreed to divide the fee with Mr. Cowgill at the time it was fixed, and he said 'No.' He said he agreed to divide the fee before the notes were given, but not at the time the contract was made."

Mr. Smith also said that Denson told him he drew the notes, and that Mr. Cowgill brought them back to him all signed; that Cowgill came into his (Denson's) office and laid the notes down on his desk, and that he took one, and indorsed it, and handed it to Cowgill, and had never seen the notes again, and never spoke of it again. Mr. Smith also testified that Judge Denson said that the fee had been earned, and he thought Cowgill was entitled to compensation, and that he had given him one of the notes; that there was then some conversation with respect to the ethical and legal point of view, and that Denson, in answer to a question, replied that he had a right as attorney for the trust to divide his fee with the trustee as he had, but also said that he had kept himself "in the clear out of this all the time." Witness said that Denson agreed to communicate with Cowgill; that Denson made no claim to the money or the note which he indorsed and delivered to Cowgill; that he told Denson that, if Cowgill did not pay the money immediately, suit would be instituted. Mr. Smith further said that Denson told him that he had seen Cowgill, and that if there was any money belonging to Johnson he wanted to pay it; that he did not think he had any money of Johnson's, and that Cowgill had suggested an arbitration, whereby some disinterested counsel should consider the facts, and that, if he found that "this money" belonged to Johnson, Cowgill would pay it, and if the money was found to belong to Cowgill, Cowgill would retain it; that witness declined any suggestion of arbitration, and told Denson that suit would be brought unless the money was forthcoming by the 28th of August, and that as the money was not paid at that time this present suit was brought about August 30, 1916; that in February, 1917, Cowgill, with his counsel, Mr. Lawler, called upon the witness, and stated that Cowgill had obtained the privilege of using the money from Denson until he "got all of his money out of the estate, and that he had now gotten all his money out of the estate, and they were willing to pay the money to whom it belonged."

S. C. Denson, referred to as Judge Denson, who died after the present suit was filed, and who was senior member of the firm of Denson, Cooley & Denson, in his deposition testified that Johnson consulted him about the right to recover certain property which, under an understanding had with his father, Johnson claimed should come back to

him, and that in July, 1911, the arrangement already referred to concerning fees was made; that afterwards a compromise was had whereby certain property was taken back, subject to certain liens which Cowgill, the trustee of Frank H. Johnson, was to take care of; that Johnson went to the office of the law firm, but, not having the $20,000 to pay the firm, said he would give notes, and the two notes were drawn up and delivered by Johnson to him for the firm; that the notes were in settlement of the services performed by the firm, and were the property of the firm; that there never was at any time any arrangement with Cowgill for a division of the fee; that the subject never was discussed, and that neither of the notes had ever been given to Cowgill as a share of the fee. Mr. Denson said that he gave the two notes to Cowgill as president of the Merchants' National Bank with which bank the firm had an account; that they desired to borrow $6,000, and would give a note for that sum to the bank; that they borrowed $6,000 upon the firm note; that later on the firm was notified that one of the notes had been paid, and that after the firm note of $6,000 was paid to the bank they still had a credit of $4,035; that he did not know what became of the other $10,000 note, but that he handed it to Cowgill as president of the bank, and never saw it afterwards, and supposed there would be a settlement some time; that he knew Cowgill did not have the money with which to settle the Johnson trust, and that he was willing that Cowgill should use the $10,000 note "to help carry him through"; that there was no arrangement with Cowgill, whereby Cowgill was to collect either of the notes and retain the proceeds for his own use, and no agreement as to any division of the notes or fee at any time or place, or under any circumstances, and that there was no division. On cross-examination Mr. Denson said that his firm was retained in October, 1911, and remained attorneys for the Johnson trust until November, 1915, that he had been attorney for Cowgill and Cowgill's bank for many years; that he expected to be paid out of the Johnson estate; that he had never spoken to the bank about the $10,000 note, although he had spoken to Cowgill about it, and Cowgill never had paid interest on the note from November, 1911, and that when Cowgill and Johnson had their settlement, in 1916, Johnson was obliged to give Cowgill a note and mortgage on certain property to secure the balance he owed; that he remembered the visit of Mr. Berry to his office, and, although he might have told Mr. Berry that he had not received the balance of the money, he never told him or anybody else that there had been any division, or any request by Cowgill for half the fee, or any demand made by Cowgill for one of the $10,000 notes. He also said that in response to questions he may have told Mr. Smith, at the interview had in August, 1916, that he understood a question would arise concerning the fee, but that he said he had nothing to fear about it; that he had not told Mr. Smith that it had been understood between him and Cowgill that there was to be a division of the notes; that there was a good deal of talk between him and Mr. Smith, and that he told Mr. Smith that he had seen Cowgill, and that Smith said suit would be brought, and that Cowgill suggested a submission to arbitration, so that, if Johnson was entitled to any-

thing, he was ready to give it to him, and that the matter might be adjusted without litigation. Witness also said that he let the $10,000 matter drift, and carried the matter along as an asset coming to the firm; that he knew Cowgill was embarrassed in having to carry the Johnson trust, and had not received the money due him; that when he spoke of arbitration he believed that his firm would get the money, as he knew they were entitled to it, and that arbitration was a suggestion made by Cowgill to him to avoid litigation. Witness said he was 77 years old.

Cowgill said that he advised Johnson to employ Denson, whom he had known for many years and whom he believed capable and reliable; that he introduced Johnson to Denson, and at Johnson's request was present when they talked about what fee should be paid to Judge Denson; that when the properties were finally recovered he knew notes had been given to Judge Denson, because they were brought to him to be "accepted" by him as trustee; that neither of the notes came into his possession until the law firm made application for the $6,000 loan, about February, 1912; that when this sum was borrowed, one of the notes was handed to him as security for the $6,000, and the other still remained in the possession of the law firm; that afterwards, when the bank of which Cowgill was president consolidated with another bank in June, 1912, objection was made to taking over the attorneys' note secured by the Johnson trust, because the Johnson trust also owed the bank, whereupon Cowgill said that he would see that the note was taken up, and accordingly about May 22d he took up the note, paying the firm $10,000 on the first note out of his own funds; that when this was done he told Judge Denson of the objections to the firm's obligation, and that he would take up the $6,000 note, if Denson would allow him to take the other $10,000 note, "so that it could not come up against the trust, and we could not be forced to pay it at any time"; that he wanted to hold such other note until he got his own money out of the trust, as it was hardly fair that they should get all their money out of the trust, when he personally had to carry the trust and could not get his own money.

Cowgill denied positively that there was any agreement or understanding with the firm for a division of the $20,000, or that he had ever made any claim to any part of such sum. He said: That on November 8th he received $20,000 and interest, which was credited on the books to the notes. That the trust then owed him a large sum. That he put the papers in connection with certain estate transactions in an envelope and wrote upon it as follows: "Agreement Frank H. Johnson; due Denson $10,000; interest 6% from 5/1/12." That this writing was made about May 1, 1912, and prior to June 1st. On cross-examination Cowgill said that he never saw the notes until he was called upon to approve and accept them; that the first note was given to him as president of the bank about February 1, 1912, and that he got the second note the latter part of May, 1912, when he took up the two notes, paid the cash on the first, and took the second with the understanding of carrying the one if he would give him the other to be held until he got his money out of the estate; that he first

learned of the demand of Johnson for the payment of $10,000 after Mr. Smith had interviewed Judge Denson.

A. E. Cooley, of the firm of Denson, Cooley & Denson, said: That under date of July 7, 1911, he entered in the ledger as follows: "To retainer and services in settlement of general business in connection with the estate of Frank S. Johnson, $20,000." That thereafter, under date of November 1, 1911, entered as follows: "Promissory note for services in settling claim against estate of Johnson et al., to be received as payment when notes actually paid, $20,000." And again, on May 22, 1912, as follows: "L. I. Cowgill, $10,035." Witness said that the notes were given to him by Judge Denson about November, 1911, and that they remained in the firm safe until February 1, 1912; that he then took the first note for $10,000 to the bank, with their own note, and borrowed $6,000 already referred to; that Judge Denson was mistaken when he said he had indorsed both notes, as the second note never was indorsed by Judge Denson; that on February 1, 1912, the cashbook of the firm shows the loan from the bank and a division of the $6,000 among the members of the firm; that the other note remained in the safe until Judge Denson had to do with it in May; that he never consented to any division of the fee, and urged Judge Denson to collect it; that no statement ever was made by Judge Denson of any agreement to give part of the fee to Cowgill; that Judge Denson said that Cowgill was a friend of the firm, and that it was hard to urge him to pay the money immediately.

H. B. Denson, also a member of the firm, said that the one note was turned over to the bank when the $6,000 loan was made to the firm, and that the other note remained in the safe until the elder Denson delivered it to Cowgill; that he never knew of any arrangement for division, and that his father never told him there was any such arrangement; that he frequently spoke to his father about collecting the note, but that his father said that he could not press Cowgill, but that they would get it as soon as affairs were straightened up.

The evidence showed entries in the cashbook of the Johnson trust, the entries having been made by the bookkeeper under the direction of Cowgill. Among the items are these:

"November 2, L. I. Cowgill, bills payable, on account of note of Denson, Cooley & Denson, $10,000;" same date, "To L. I. Cowgill, bills payable, interest note Denson, Cooley & Denson, $10; November 6, bills payable, L. I. Cowgill, second note of Denson, Cooley & Denson, $5,000; November 8, L. I. Cowgill, bills payable, balance account of note Denson, Cooley & Denson, $5,000; interest paid in full, $6.67."

[1-3] It is clear that the firm of Denson, Cooley & Denson made their contract for professional services with Johnson as an individual, and at a time before the firm became attorneys for the Johnson trust. It is also evident that in May, 1912, Cowgill paid the first note out of his own private funds and there is strong evidence to support the view that, as a part consideration for the payment so made by Cowgill, Judge Denson agreed that Cowgill could hold and use the other $10,000 note until such time as he would be paid sums which he had advanced to the Johnson trust. From a strict evidential standpoint it

was therefore incumbent upon Johnson to prove that there was an agreement between Denson and Cowgill to share the $20,000 fee to be paid for services to be performed under the agreement with Johnson. But we have examined the case without adhering to close discrimination as to who holds the burden of proof, for upon principle in the dealings between Denson and Cowgill and Johnson the lawyers and Cowgill were under the strictest obligation to be perfectly true to Johnson and to the trust, and we readily concede that, if it were established that Denson gave the $10,000 note to Cowgill, the plaintiff should have a decree. But there is no substantial direct evidence upon which to base a finding that Cowgill ever made any profit from the trust estate on the notes involved in this litigation.

There is testimony that Judge Denson admitted to Mr. Smith and Mr. Berry that he had divided the fee with Cowgill. Judge Denson, however, positively denied ever having made any admissions of such character, and he gave an explanation of his connection with the notes which, if credible, is not inconsistent with rectitude and integrity. If there had been a gift of the note to Cowgill, or if there had been any arrangement whereby Cowgill was to receive any part of the fee, would it not have been natural that he should have told his partners, and not concealed the matter from them? What motive could have existed for such a violation, not only of obligation to general morality, but of fair dealing to his partners, one of whom was his son? None is proven. Mr. Smith, evidently feeling a deep sense of outrage at the report that Cowgill and Denson had made such arrangement, and acting under the belief that it was true, arraigned Judge Denson, and says that Denson admitted that he had divided with Cowgill; yet Mr. Smith says that Judge Denson more than once stated that he had kept himself "in the clear" or "out of the grease."

Inasmuch as even a slight mistake or error of recollection by Mr. Smith might alter the effect of the statements, we look to circumstances to aid us in reaching the proper result; and as indicating fallibility in the recollection of Mr. Smith we find that Mr. Smith said that Denson told him that he drew the notes and that Cowgill brought them back to him all signed, and that he (Denson) took one and indorsed it and handed it to Cowgill, and had not seen the notes thereafter; whereas Cooley testified that the notes were both handed to him by Judge Denson about November, 1911, and were both put in the safe, and remained there in the office of the law firm until February 1, 1912, when the $6,000 loan matter came up, and he himself indorsed one of the notes, and personally delivered it to the bank, and received a credit to the account of the firm of $6,000. As corroborative of this statement of Cooley, there is evidence that there is an indorsement of Denson, Cooley & Denson by Cooley in his handwriting, and a waiver of protest and demand and notice on the notes. This evidence also shows that Judge Denson erred when he said he had indorsed both the notes. But, furthermore, the cash book of the firm of Denson, Cooley & Denson shows that on February 1, 1912, the firm received $6,000 loan from the bank and that the $6,000 was divided among the members of the firm. More than this, Mr. Denson, the younger, says that he knew that the notes

were left in the office of the firm and put in the safe in Mr. Cooley's room, and that they remained there for several months, or until about February, when the $6,000 note was made, and that afterwards the $10,000 note was delivered by the elder Denson to Cowgill.

We therefore have, upon the vital question, the positive denial of Judge Denson that he ever made the statements attributed to him by Mr. Smith and Mr. Berry, and his affirmative statement that there never was any agreement or understanding that Cowgill was to have any part of the fee; also the positive statement by Cowgill that no arrangement of any kind for division of the fee was made by him with Judge Denson, and that it was understood that he was only to hold the second note until he could collect the money due him from the Johnson trust estate. Upon this point, and confirming the testimony of Cowgill there is the envelope in which Cowgill had put certain papers for final settlement of the Johnson trust, upon which Cowgill had indorsed what is in effect acknowledgment of an indebtedness to Denson, Cooley & Denson upon the second $10,000 note. Cowgill, when the trust was wound up, charged Johnson with the second note and with interest thereon to maturity. It is also shown that payment of this second note was made to Cowgill; he having charged the trust with the payment of both notes, and having assumed the obligation to the law firm, deferring payment of the second note until he could get his money from the trust, payment of which sum was not made until subsequent to the institution of this suit.

There is the further evidence of Cooley and Denson that no information was ever given to them by Judge Denson that there had been any agreement of division with Cowgill. When we weigh this evidence, it leads to a judgment, in accord with that of the District Court, that there never was any agreement made with relation to a division of the fee between Cowgill and Denson. A contrary conclusion could be founded only upon the view that the elder Denson had willfully committed perjury in his deposition, that Cowgill had also deliberately perjured himself, and that the two had combined in a wicked purpose to deceive Johnson and to enrich Cowgill, the trustee of the Johnson trust. It would also have to be founded upon the premise that Denson, a lawyer of presumably good character, had wrongfully concealed from his associates all knowledge of a matter in which they were deeply interested, morally as well as financially, and concerning which he should have fully informed them.

In conclusion, after a very attentive examination of all of the testimony, our opinion is that the findings of the District Court must be sustained, and that the dismissal of the complaint, without costs to either party, was right.

Affirmed.

STANDARD AMERICAN DREDGING CO. v. CITY OF OAKLAND.

(Circuit Court of Appeals, Ninth Circuit. January 5, 1920.)

No. 3336.

CONTRACTS ⊂=231(2)—DREDGER ENTITLED UNDER CONTRACT TO HALF COMPENSATION FOR MATERIAL DREDGED BEYOND THE SPECIFIED AREA.

Under a contract providing for the dredging of a channel of specified width and depth, *held*, that three classes of material were to be subjected to half measurement and paid for accordingly: First, material dredged from below specified depths, definitely fixed as in the channel; second, material dredged from the specified area as marked by the city engineer beyond the fixed limits of the channel; and, third, the side slopes from the specified area at the specified rates of flatness.

In Error to the District Court of the United States for the Second Division of the Northern District of California; Frank H. Rudkin, Judge.

Action by the Standard American Dredging Company against the City of Oakland. Judgment for defendant, and plaintiff brings error. Affirmed.

Samuel Knight, F. Eldred Boland, and C. Irving Wright, all of San Francisco, Cal., for plaintiff in error.

H. L. Hagan, City Atty., and John Jewett Earle, Asst. City Atty., both of Oakland, Cal., for defendant in error.

Before GILBERT, MORROW, and HUNT, Circuit Judges.

HUNT, Circuit Judge. This action involves the construction of certain clauses of a dredging contract between the Dredging Company, plaintiff in error, and the city of Oakland. The contract called for work specified as sections A, B, and C, and the present litigation arises out of work done within what is called section C, an approach channel in Oakland harbor. The specifications required that the approach channel here involved should be dredged to a depth of 25 feet below low tide, the bottom width to be not less than 300 feet, and that the cut in the section (C) should be continuous from the southeasterly end of section B. "Top widths of said section shall be such as slopes may assume." Included in the specifications was the following paragraph:

"Material dredged from below the specified depths or from beyond the specified areas as marked out by the city engineer, and side slopes therefrom at rates not flatter than one vertical to four horizontal, will be estimated at half the actual volume of excavation and paid for accordingly: Provided, however, that no payment will be made for material dredged from below a depth of one foot below the specified depth, nor from a distance of more than ten feet beyond said flattest limits of slope for said specified areas to be dredged. All material must be removed down to the depths specified over the whole area to be dredged."

Over 37,000 cubic yards of material were excavated on the side slopes in the area not flatter than one vertical to four horizontal, which was estimated at half the actual volume of excavation and paid

for accordingly. The Dredging Company contended that it was entitled to full rates, but the District Court found in favor of the defendant city.

The annexed diagram, Figure 1, illustrates the situation, and we use the general explanation of the situation given in another, but similar, case hereinafter cited.

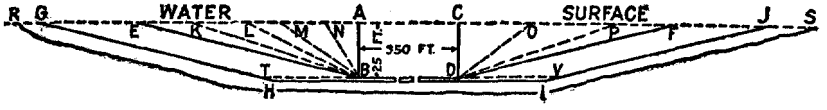

FIGURE 1

In the cut a section of vertical plan of the channel is represented. The rectangle A B C D represents the specified area as marked out by the city engineer, having a width of 350 feet and vertical sides of 25 feet in height. By the plan the dredging is to be performed within this area and the material is to be removed therefrom; the side "slopes" being such as the material naturally "assumes" in the course of operations. The lines E B, K B, L B, M B, N B, O D, P D, and F D represent some of the side slopes from the specified area assumed by the material in the course of the dredging operations; B E and F D being lines at the angle of one vertical to four horizontal, the flattest limits for each payment as allowed. The actual side slopes, however, may lie without this limit, and the lines G H, H I, and I J represent the extreme of pay work; that is to say, an excess depth of one foot and an access width on each side of the channel of 10 feet beyond the one by four slope. The line R S is drawn to indicate the actual channel dredged, as was in places the case, beyond the horizontal and vertical limits for which payment could be made.

No dispute arises concerning excavation performed within the area of main channel A B C D. Certain other matters as to payments for material are conceded, so that the question for decision narrows to this: Is payment due for material dredged from the side slopes that is not within the lines E B A C D F upon the basis of full measurement or half measurement of the quantity removed?

In the solution of the matter we have been greatly aided by the careful and analytical opinion of the District Court of Appeal of California in Standard American Dredging Co. v. City of Oakland, 30 Cal. App. 237, 157 Pac. 833, an action involving the same question upon the same contract and between the same parties as are now herein before the court; the only difference being that the suit in the state court was brought to recover upon a different installment claimed to be due. After discussion of the features of the contract work, the court, through Judge Chipman, said:

"It seems to us that the natural and grammatical construction of the specifications is, as claimed by defendant, and as was held by the lower court, that three classes of material were to be subjected to half measurement and paid for accordingly, namely: '(1) Material dredged from below the specified

depth'; that is, depths that were definitely fixed—as in the channel. '(2) Material dredged from the specified area as marked out by the city engineer'; that is, beyond the fixed lines of the channel. '(3) Side slopes therefrom (from the specified area) at rates not flatter than one vertical to four horizontal, with a proviso that no payment would be made for material dredged beyond certain vertical and horizontal lines.' That is, the phrase, 'will be estimated at half the actual volume of excavation,' is qualified by what precedes it and relates to dredging 'below specified depths,' to dredging 'from beyond the specified areas,' and to 'side slopes therefrom [from the specified area] at rates not flatter than one vertical to four horizontal.' And the limiting clause which follows seems to confirm this view, for it expressly provides 'that no payment will be made for material dredged from a depth of one foot below the specified depth nor from a distance of more than 10 feet beyond said flattest limits of slope for said specified areas to be dredged.' The parties understood that side slopes were inevitable, and dredging to some extent below specified depths, for the exact depth could not always be maintained, and so a limit as to depth beyond which no payment would be made was provided for, and a one-half rate was fixed for dredging on slopes not flatter than one to four, and no payment would be made for material dredged 'from a distance of more than 10 feet beyond' this slope of one to four. We are unable to accept plaintiff's construction, for by it there would be no material subject to half measurement, except such as was situated beyond the area specified by the city engineer and also beyond 'the side slopes therefrom.' Grammatically, as the specifications are phrased and punctuated, the verb 'will be estimated' had for its subject material 'from beyond the specified depths' and from beyond the specified areas, and, as a further subject, the 'side slopes.'"

The Dredging Company argues that the meaning of the contract and specifications is that the words "specified area" necessarily refer to the area theretofore specified in the specifications, namely, the area included between the bottom width of 350 feet and the top width such as the slopes may assume. They also say that difficulty with respect to the words "specified areas" has arisen from the parenthetical insertion of the words "as marked out by the city engineer" between the words "specified areas" and the words "side slopes therefrom," and they contend that the disjunctive "or" separates the phrase "material dredged from below the specified depths" from the phrase "material dredged from beyond the specified areas," and that the conjunctive "and" conjoins the phrase "material dredged from beyond the specified areas" with the phrase "side slopes therefrom."

We cannot adopt this reasoning. The omission to include the word "beyond" before the words "side slopes" indicates that the parties did not intend to provide that the material subject to half measurement should be only that which was removed from an area lying both beyond the specified areas as marked out by the city engineer and beyond the side slopes therefrom. Without attaching too much importance to the punctuation, it is nevertheless to be observed that there are commas after the word "engineer" and after the word "horizontal." This would indicate that the draftsman of the contract thought it necessary to separate the words "side slopes" from grammatical connection with what immediately preceded it; that is, "beyond the specified areas as marked out by the city engineer." The preposition "beyond" does not govern the words "side slopes," and it is quite clear that the items of work to be estimated at half the volume are "material dredged from below the specified depths or from beyond

the specified areas as marked out by the city engineer," and "side slopes therefrom at rates not flatter than one vertical to four horizontal." Two subjects of the verb "will be estimated" are apparent, namely, "material" and "side slopes"; material being of two classes, one "from below the specified depths" and the other "from beyond the specified areas." If the parties had intended that material between the specified area and the flattest limit of slope was to be measured at full quantity, it would not have been necessary, in designating what material should be measured at half quantity, to refer to material dredged "from beyond the specified area." The use of the conjunctive "and" following the comma placed after the word "engineer" was to join the two subjects of the verb "will be estimated," namely, "material" and "side slopes."

The contention that the side slopes were part of the specified area is not well founded, because as pointed out by the opinion of Judge Chipman, the only lines which the city engineer could mark out were the vertical lines of the channel.

We do not think it necessary to elaborate further than to say that, after a careful reading of the opinion of the appellate court of the state, we are satisfied that the construction adopted by that court is in accord with grammatical rules and harmonizes with the evident intent of the parties. The Supreme Court of the state refused to transfer the cause for further hearing after the decision of the appellate court. Under the circumstances this court will adopt the construction put upon the contract by the appellate court, and our judgment will be entered in a way to conform to that made by the state tribunal.

The judgment is affirmed.

In re KING. MOORE v. BARNES. SAME v. EMPIRE TIRE & RUBBER CO.

(Circuit Court of Appeals, Ninth Circuit. January 5, 1920.)

No. 3293.

1. BANKRUPTCY ⟸140(3)—ONE DELIVERING TIRES TO BANKRUPT, TO BE KEPT SEPARATE FROM BANKRUPT'S STOCK, ENTITLED TO RECLAMATION.

Where, after dissolution of partnership and notice, the retiring partner delivered to the bankrupt, who continued in business, automobile tires, which were to be kept separate from the bankrupt's general stock, and were to be sold for the benefit of the retiring partner, etc., *held* that, under the circumstances, the retiring partner might, on bankruptcy, claim unsold tires as against the trustee.

2. BANKRUPTCY ⟸140(3)—ONE DELIVERING GOODS TO BANKRUPT ON CONSIGNMENT FOR SALE ENTITLED TO RECLAMATION.

One delivering goods to bankrupt on consignment for sale *held*, in view of the transactions between the parties and the fact that there was no holding out by the consignor which would enable the consignee to commit any fraud on the public, entitled to reclaim the goods on bankruptcy, notwithstanding there was no express agreement that title should not pass or that the goods should be returned, etc.

Appeal from the District Court of the United States for the Southern Division of the Southern District of California; Benjamin F. Bledsoe, Judge.

In the matter of George H. King, individually, doing business as the George H. King Rubber Company and also as the George H. King Tire Company, bankrupt. Claims of D. D. Barnes and the Empire Tire & Rubber Company, a corporation, for reclamation of tires and accessories, were allowed, and in each case William H. Moore, Jr., trustee in bankruptcy, appeals. Judgment in each case affirmed.

Bicksler, Smith & Parke, of Los Angeles, Cal., for appellant.

Jesse F. Waterman and John W. Kemp, both of Los Angeles, Cal., for appellees.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

ROSS, Circuit Judge. There are two appeals in this case—one by the trustee from the judgment in favor of Barnes, who claimed by petition of the trustee certain automobile tires and accessories; and the other an appeal by the trustee from the judgment in favor of the Empire Tire & Rubber Company for the reclamation of certain other tires and accessories, all of such property being claimed by the trustee to belong to the bankrupt. The two cases are brought here and submitted on one record.

[1] It shows that Barnes and King had been carrying on business at 1331 South Main street, in the city of Los Angeles, as partners under the firm name of George H. King Rubber Company—Barnes, it seems, having put in all the money—which partnership was dissolved November 14, 1916; due notice of such dissolution being published November 27, 1916. King continued business at the same place, and on the day of the publication of the notice of dissolution of partnership Barnes and King entered into a written agreement reciting that Barnes had delivered to King "at his automobile tire store at 1331 South Main street, in the city of Los Angeles, California, a number of automobile tires, each suitably tagged and separately numbered, of different sizes, different makes and values, the number, value, and size of which fully appeared on" certain annexed exhibits attached to and made a part of the contract, which contract provided that King should use his best efforts to sell the tires at his place of business, and would account to and pay to Barnes, upon request, the price and account for each tire so sold, as specified on the exhibits, retaining any excess of the amount or amounts so specified as his commission for selling the tires. The contract further provided that King should keep such tires "separate and apart from other tires which he may have for sale, and to keep a separate and distinct sales book, showing the sales of all tires belonging to" Barnes, which book, as well as the inventory of the property, should be open to the inspection of the latter. The contract further provided, among other things, that Barnes guaranteed only the title to the property, and that the tires should not, without his consent, be removed by King to any other location for sale. The contract contained this further provision:

"It is distinctly understood that the title to said tires is to and does remain in said first party [Barnes] until the same are sold, and nothing herein shall be construed as a sale by first party to second party [King] of said tires; no time being specified as to how long said second party shall have an opportunity of selling said tires, but it is agreed that it shall be a reasonable length of time, depending upon the success which second party shall have in selling the same."

In both of the cases the contention of the appellant is that the application to them of the decision of this court in the case of Miller Rubber Co. et al. v. Citizens' Trust & Savings Bank, 233 Fed. 488, 147 C. C. A. 374, requires a reversal of the judgments given by the court below. As respects the Barnes Case, we think it clear that this is not so. In that case, after referring to the case of Ludvigh v. Am. Woolen Co., 231 U. S. 522, 528, 34 Sup. Ct. 161, 58 L. Ed. 345, and the decision of this court in the case of General Electric Co. v. Brower, 221 Fed. 597, 602, 137 C. C. A. 321, 326, where it was held that, "to constitute a sale, there must have been in the contract a vendor and a vendee, and a provision for a transfer of property by the vendor to the vendee, and an obligation by the vendee to pay an agreed price therefor, or the circumstances outside of the contract must have been such as to show that it was the intention of the parties to make of the contract a fraudulent concealment of an actual sale," we said (233 Fed. at page 491, 147 C. C. A. at page 377):

"There were in neither of those cases such fraudulent circumstances; but we do not think that that can be affirmed of the present case, for here, not only was the agent permitted to mingle the consigned goods with his own stock, but the contract expressly provided that the consignors would furnish the consignee 'free of all charge all samples of tires and accessories and necessary advertising matter, imprinted with the name and address of the' consignee. It is difficult to see how the consignors could have more effectually held the consignee out to its customers as the real owner of the consigned property. To permit them to retake from the stock of the bankrupt the remaining portion of the consigned goods would, in our opinion, operate as a fraud on the creditors of the bankrupt. We find confirmation of this view in the failure of the consignors to fix by the contract the prices at which the agent could sell the goods to its customers, and in their failure to therein make any provision for the remitting to the consignors of the proceeds received by it for the goods so sold; the agent being required by the contract to itself pay to the consignors for the goods so sold by it prices fixed on the invoice, less the deductions specified, and in the provision that, when the agent desired, 'four months notes drawing interest at 5 per cent. will be accepted by first parties in settlement for all purchases made by second party from first parties; provided, however, that the total maximum of such notes shall not exceed twenty-five thousand dollars ($25,000) at any one time during the first year of this contract, and that such maximum after the first year is to be subject to the mutual agreement of both parties, but not less than twenty-five thousand dollars ($25,000), unless credit of second party becomes impaired.' For the reasons stated, we think the court below was right in confirming the conclusion of the special master that, as to the creditors of the bankrupt, the title to the consigned goods in question should be held to have passed to the consignee."

In the Barnes Case there was in the contract between the parties, not only no holding out of King to his creditors as the owner of the consigned property, nor anything in the method provided therein for the handling and sale of the property tending to deceive or defraud any one, and no evidence of anything of that sort, but, on the contrary,

the evidence shows that the tires were separately tagged and numbered, and kept by King in his place of business separate and apart from other tires.

[2] In the case of the Empire Tire & Rubber Company there was a verbal agreement between the company and King that it would keep him supplied with a small stock of tires on "consignment for sale," for which he would make a settlement each month "by payment of an amount 20 per cent. less than the list price of the tires sold, with a further 5 per cent. off of said list price for a settlement of accounts within 30 days," as his commission. The findings are:

"All goods delivered to King by the Empire Company were accompanied with a statement bearing the heading 'Consigned Account,' and listing the goods sent. The amount of the goods so consigned was also entered in the books of account of the Empire Company, with the date, on a sheet marked 'Consigned Account, George H. King Rubber Company.' At the end of each month, usually on the last day or two, a representative of the Empire Company—at most times Mr. Jarman—went to King's shop and checked over the stock of Empire tires on hand. Returning to the office of the Empire Company, it was the practice to ascertain the amount of goods sold by King since the last settlement, by comparing the list of goods delivered to him since that time. The list of goods sold during the month, ascertained in this manner, was then billed to King on a statement marked 'Regular Account,' which listed the goods sold and their list prices, and stated the amount for which King should account by deducting 20 per cent. from the total of the list prices, and stated a discount of 5 per cent. for an accounting made before 30 days. The amount for which King was required to account was entered in the books of the Empire Company on a sheet marked 'Regular Account, George H. King Rubber Company.' This account was kept separately from the account marked 'Consigned Account.'

"The bill listing the goods sold during the month and stating the amount required to be accounted for by King was presented monthly, usually in person by Mr. Jarman. King made his payment by check to the Empire Company regularly each month up to the 1st of September, 1917.

"No account of sales was made by King, nor sent to the Empire Company. Shortages in the stock of tires on hand at his shop were filled regularly by the Empire Company after the monthly inventory of the stock; such replenishments being made without any order from King. King sometimes suggested an increase or decrease in the stock of certain sizes or kinds of tubes or casings, but he never placed orders for goods.

"There is no evidence of any express agreement to the effect that the title to the goods delivered by the claimant to King should remain in the claimant; nor is there any evidence of any express agreement providing for the return at any time upon any conditions of goods unsold by King or remaining in his hands.

"As receiver, the present trustee took, and now as trustee holds, in his possession all the Empire tires in stock at King's shop. The tires so seized and held are the tires described in claimant's petition, and were all furnished to King under the agreement and practice above described."

The fact that there was no express agreement that the title to the property delivered by the Empire Company to King should remain in the former, nor for the return by King of such portion of it as remained unsold by him to the consignor, does not show, nor, indeed, tend to show, that the transaction between the parties was anything more than the ordinary one of the consignment of personalty for sale, unattended, as it was, by any positive act of the consignor that can

be properly held to have enabled the consignee to commit any fraud upon the public. Ludvigh, Trustee, v. Am. Woolen Co., 231 U. S. 522, 34 Sup. Ct. 161, 58 L. Ed. 345.

The judgment in each of the cases is affirmed.

DONOVAN v. UNIVERSAL MOTOR TRUCK CO.

(Circuit Court of Appeals, First Circuit. January 6, 1920.)

No. 1407.

1. SALES ⟨⟩479(8)—EVIDENCE REGARDING PLAINTIFF'S TITLE AND RIGHT TO POSSESSION JURY QUESTION IN CONDITIONAL SELLER'S REPLEVIN ACTION.
In replevin, based on a conditional sale contract, evidence regarding defendant's refusal to pay installment notes when due, etc., made a jury question as to plaintiff's title and right to immediate possession.

2. SALES ⟨⟩479(8)—INSTRUCTION IN CONDITIONAL SELLER'S REPLEVIN ACTION ON LOSS OF NOTE AS EXCUSE FOR NONPRESENTMENT.
In replevin action, based on a conditional sale contract, an instruction that the loss of an installment note would excuse its nonpresentment, if plaintiff made that fact known to defendant and offered him security against further demands on it, was not error, since it was more favorable to appellant defendant than was authorized by Rev. Laws Mass. c. 73, § 87, relating to necessity of presentment.

3. SALES ⟨⟩479(8)—INSTRUCTION IN CONDITIONAL SELLER'S REPLEVIN ACTION ON DUTY TO PAY NOTES NOT PRESENTED BECAUSE LOST.
In a replevin action, based on a conditional sale contract, an instruction that defendant's absolute refusal to perform the contract absolved plaintiff from the necessity of presenting for payment notes which thereafter fell due was unduly favorable to plaintiff.

4. APPEAL AND ERROR ⟨⟩1064(1)—ERRONEOUS INSTRUCTION ON NECESSITY OF PRESENTING NOTES NOT PREJUDICIAL, IN VIEW OF DEFENSE MADE.
In replevin, based on a conditional sale contract, an instruction that defendant appellant's absolute refusal to perform the contract absolved plaintiff from the necessity of presenting for payment notes thereafter falling due, while unduly favorable to plaintiff, was not prejudicial, where defendant based his refusal to pay, not on the fact that the notes had been lost, but on the unsatisfactory character of the article sold to him.

5. SALES ⟨⟩479(8)—REQUESTED INSTRUCTION IN CONDITIONAL SELLER'S REPLEVIN ACTION NOT SUSTAINED BY EVIDENCE.
In a replevin action, based on a conditional sale contract, a requested instruction that there was no evidence that plaintiff and the payee were identical was properly refused, where there was evidence that the payee was a selling department of plaintiff company.

In Error to the District Court of the United States for the District of Massachusetts; James M. Morton, Judge.

Replevin action by the Universal Motor Truck Co. against Patrick F. Donovan. Judgment for plaintiff, and defendant brings error. Affirmed.

James H. Kenney, of Boston, Mass., for plaintiff in error.

John H. Powers, of Boston, Mass. (Henry W. Beal, of Boston, Mass., on the brief), for defendant in error.

Before BINGHAM, JOHNSON, and ANDERSON, Circuit Judges.

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

JOHNSON, Circuit Judge. This is a writ of error from a judgment recovered by the defendant in error in an action of replevin. For convenience, the parties will be designated as they were in the lower court.

The material facts in the case are these: On June 11, 1913, the defendant entered into a contract to purchase of the plaintiff two Universal motor trucks, one to be delivered forthwith and the other in 40 days or less. At the time of placing his order he made a payment of $100, on account of the purchase price of one of the trucks, and upon the delivery of the truck made a further payment of $600, and gave to the plaintiff 12 notes, nine for $266.66, and three for $133.35 each, all aggregating $2,800, and payable to the Universal Motor Truck Company of New York. They were made payable at the Federal Trust Company of Boston, and when the first note became due on July 19, 1913, it was there presented and paid. The remaining notes were never presented for payment to the Federal Trust Company, and none of them had been paid when the action was brought, and it was claimed at the trial that they were lost early in the fall of 1914.

The agreement under which the truck was purchased contained the following provision:

"Upon failure of undersigned to make any payment provided for herein, at the time same is due and payable, you, or any person by your order, may take possession of and remove said motor truck, with or without leave or process. * * * It is agreed that title to said motor truck shall not pass to undersigned until the price thereof, or any judgment for all or part of the same, is paid in full, and that until such payment said motor truck shall remain the property of the Universal Motor Truck Company."

Each note contained a similar provision in regard to right of possession upon failure of payment and the retention of title.

There was a jury trial, and a verdict for the plaintiff. Upon questions submitted to them the jury found specially that the notes given by the defendant to the plaintiff had been lost; that the defendant had paid none of the notes in question given by him, except the one due July 19, 1913, which was in evidence; that the defendant notified the plaintiff's representatives, before some of the notes became due, that he would not pay such notes because of his dissatisfaction with the truck.

The assignments of error are the refusal of the court to direct a verdict for the defendant, and the refusal to instruct the jury, in substance, that, in order for the plaintiff to prevail, it was necessary to prove that the series of notes signed by the defendant, when due, were presented to the Federal Trust Company at Boston, and there not paid; also that there was no evidence that the Universal Motor Truck Company of Detroit, Mich., and the Universal Motor Truck Company of New York, are identical.

[1] Under date of August 19, 1913, James H. Kenney, acting as attorney for the defendant, wrote the following letter to the plaintiff:

"I understand that one of his notes was due to-day, and I have advised him not to pay it, because, as I understand it from his statement, the damage

which he has sustained, being obliged to hire another truck to do his work and the inability of the truck which he has in his possession to do the work, greatly exceeds any amount due from him to you."

There was also evidence that in April or May, 1914, there was a conference at the office of the defendant's attorney in Boston, at which the defendant and his attorney were present, and also certain representatives of the plaintiff company; that at this conference either the defendant or his attorney said:

"Mr. Donovan would not pay any more notes; that the first one got through the bank before they knew it, and that they had notified the bank not to pay any more of them"

—that the defendant was then told that the unpaid notes had been lost, and at this time several notes were not yet due.

We think there was substantial evidence of the plaintiff's title and right to immediate possession to be submitted to the jury, and that there was no error in the refusal of the presiding judge to direct a verdict for the defendant.

[2] The learned judge of the District Court gave the requested instruction in regard to the necessity of presentation of the notes at the place of payment at their maturity, in order to entitle the plaintiff to recover, but with the qualification that this would not apply if they should find that the notes had been lost; that "the loss of a note would be an excuse for nonpresentment, but in that event it would devolve upon the plaintiff to make that fact known to the defendant and to offer him security against further demands upon the note; in other words, against having to pay that note twice." This instruction was more favorable to the defendant than authorized by the Revised Laws of Massachusetts, c. 73, § 87, and the decisions of its Supreme Court (Carley v. Vance, 17 Mass. 389; Ruggles v. Patten, 8 Mass. 480, 483; Tucker Mfg. Co. v. Fairbanks, 98 Mass. 101; Farmers' National Bank v. Venner, 192 Mass. 531, 534, 78 N. E. 540, 7 Ann. Cas. 690), and the following decisions of the Supreme Court of the United States: Wallace v. McConnell, 13 Pet. 136, 10 L. Ed. 95; Brabston v. Gibson, 9 How. 263, 13 L. Ed. 131; Cox v. National Bank, 100 U. S. 704, 25 L. Ed. 739.

Under the Massachusetts statute, and under these decisions, the defendant was in default, even if the notes were not presented for payment according to their terms, unless he could prove that he had offered or given directions to pay them at the time and place of payment, and had continued ready and willing to pay them.

[3, 4] The jury were further instructed that if the defendant—

"unconditionally and absolutely declined to go on with the contract for the purchase of the truck, the plaintiff had the right to take him at his word and was absolved from the necessity of presenting for payment the notes which thereafter fell due. * * * Unless you find that there was such a refusal, your verdict should be for the defendant. If you find that there was such a refusal, and that afterwards installments fell due and which were not paid, not because the notes were not presented, but because the defendant had made up his mind not to go on with the contract, and had so told the plaintiff, then there was a breach of the contract which justified the plaintiff in retaking the truck, and your verdict should be for the plaintiff."

The jury found specially that the defendant had notified the plaintiff that he would not pay the notes, and that he had not paid them; and while we think this instruction, so far as it relates to the duty of the plaintiff to present the notes for payment, was, as already indicated, unduly favorable to the plaintiff, the defendant clearly was not injured by it. He testified that he did not know the notes were lost, and although two representatives of the plaintiff testified that they told him in April or May, 1914, after several had matured, that they had been lost, his failure to offer to pay them, or make provision for their payment, could not have been occasioned by his knowledge of their loss. Neither was the notice given by his attorney to the plaintiff when the second note fell due prompted by any knowledge that that note or the other unpaid notes had been lost and could not be surrendered; but the only reason assigned by him for refusal to pay the notes was that the plaintiff had failed to deliver the truck contracted for, and that this failure had caused his client greater damage than the balance of the purchase price which had not been paid.

[5] The remaining error assigned, which we think it necessary to consider, is the refusal to instruct the jury—

"that there was no evidence to show that the Universal Motor Truck Company of Detroit, Mich., and the Universal Motor Truck Company of New York, are identical."

There was evidence that the Universal Motor Truck Company of New York was a selling department of the plaintiff company, and therefore the notes were made payable to it; and there was no error in refusing to give this instruction.

The judgment of the District Court is affirmed, with costs in this court to the defendant in error.

NATIONAL SURETY CO. v. LEFLORE COUNTY, MISS., et al.

(Circuit Court of Appeals, Fifth Circuit. December 16, 1919.)

No. 3416.

1. APPEAL AND ERROR ⊜323(3), 336(1)—FAILURE TO JOIN CODEFENDANT, WHERE JUDGMENT IS JOINT, FATAL TO JURISDICTION, UNLESS THERE IS A SEVERANCE.
   Where judgment is joint, failure to join a codefendant in the appeal, in the absence of severance, is fatal to the jurisdiction of the appellate court, and will be noticed by it, though no motion to dismiss the appeal has been made.

2. JUDGMENT ⊜532—JUDGMENTS UNDER MISISSIPPI LAWS JOINT AND SEVERAL.
   Judgments and decrees under the laws of Mississippi are joint and several, and not merely joint.

3. APPEAL AND ERROR ⊜336(2)—OMITTED PARTIES MAY BE BROUGHT IN BY AMENDMENT.
   On proper application, a writ of error or appeal may be amended by the insertion of omitted parties.

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

4. APPEAL AND ERROR ⊂=323(2)—SURETY NEED NOT JOIN PRINCIPAL IN APPEAL, WHERE THERE WAS NO JOINT LIABILITY.

After a surety filed its bill against a bank and county to cancel a bond which the surety had signed to enable the bank to become a county depository, the county filed a cross-bill against the surety and bank, and recovered a decree against the two; the bill of the surety being dismissed. *Held* that, as the bank asserted the validity of the bond, it was not necessary for the surety to join the bank in its appeal, or obtain a severance thereto; the judgment under the laws of the state being joint and several, and the bank occupying a position adverse to that of the surety.

5. DEPOSITARIES ⊂=2—BOND OF BANK NAMED AS COUNTY DEPOSITORY NOT CANCELABLE BECAUSE OFFICER OF BANK WAS MEMBER OF BOARD OF SUPERVISORS SELECTING BANK.

A surety on the bond of a bank, which was named as county depository, is not entitled to have the bond canceled because the bank was designated as depository by a bare quorum of the board of supervisors, one member of which was interested in the bank and voted in the selection, for, while the designation was unlawful and it was an offense for the interested supervisor to vote, the bank could not have received county funds without the execution of the bond.

6. DEPOSITARIES ⊂=13—LIABILITY OF BANK AS COUNTY DEPOSITORY AND SURETY ON ITS BOND.

Under Laws Miss. 1912, c. 194, § 10, providing that the board of supervisors may employ counsel to enforce payment and collection of funds deposited under its authority and charge the fees against the depository, and that in addition the depository shall be liable in damages for delay in paying over funds, and the surety of the depository shall be liable for such expense and damages, the depository is primarily liable for the attorney's fees and damages, and a surety on its bond is not liable for such sums in excess of the amount of the penalty of the bond; so, where the surety failed to pay the amount of liability when incurred, the utmost for which the surety can be held liable for its own delay is interest from the date the liability was incurred on an amount not in excess of the penalty of the bond.

7. DEPOSITARIES ⊂=2, 13—STATE CAN IMPOSE CONDITIONS ON COUNTY DEPOSITORY.

Laws Miss. 1912, c. 194, § 10, making public depositories liable in case of default for penalties for delay and for counsel fees, and also making a surety on the depository's bond liable therefor to the extent of the penalty of the bond, is valid, and the depository and surety accepted such conditions when they accepted the designation as depository and executed the bond.

8. DEPOSITARIES ⊂=14—NO NECESSITY FOR DEMAND ON COUNTY DEPOSITORY WHICH HAD CLOSED DOORS.

Where a bank designated as county depository, after refusing to pay county warrants, closed its doors, the county need not make demand, in order to collect damages and attorney's fees provided by law, etc.

9. TRIAL ⊂=105(1)—FAILURE TO OBJECT TO EVIDENCE OF VALUE OF COUNSEL FEES ADMITS AUTHORITY TO EMPLOY COUNSEL.

On cross-bill against county depository on its bond, providing a penalty and counsel fees for default, failure of surety to object to introduction of evidence of value of counsel fees admitted authority of county to employ counsel.

Appeal from the District Court of the United States for the Northern District of Mississippi; Edwin R. Holmes, Judge.

Bill by the National Surety Company against Leflore County, Miss., and another. From a decree dismissing its bill, and granting relief

to the county on its cross-bill, complainant appeals. Reversed and remanded, with directions.

John R. Tyson, of Montgomery, Ala., for appellant.

R. C. McBee, A. F. Gardner, and E. V. Hughston, all of Greenwood, Miss., for appellee.

Before WALKER, Circuit Judge, and GRUBB and ERVIN, District Judges.

GRUBB, District Judge. This is an appeal from a final decree, dismissing appellant's bill of complaint, which was filed to cancel a bond executed by appellant, as surety, in favor of Leflore county, in the state of Mississippi, a municipal corporation, appellee, and also by the Itta Bena Banking & Trust Company, as principal, and granting to appellee Leflore county relief on its cross-bill, which sought the enforcement of the bond against the appellant and its codefendant, the Itta Bena Banking & Trust Company. The Itta Bena Banking & Trust Company had acted as depository of the public funds of Leflore county, under a designation claimed by appellant to have been void, because its selection was by a bare quorum of the board of supervisors, one of whom was incapacitated to act, because he was a director and stockholder of the Itta Bena Banking & Trust Company.

[1-4] It was called to the attention of the court upon the hearing of the appeal that the Itta Bena Banking & Trust Company had not joined in the appeal, and that there had been no summons and severance as to it. This court has held, in the case of The Bylands, 231 Fed. 101, 145 C. C. A. 289, that the failure of a codefendant, where the judgment is joint, to join in the appeal, in the absence of a summons and severance, was fatal to the jurisdiction of the court, and would be noticed by it, though no motion to dismiss the appeal had been made, following the case of Estis v. Trabue, 128 U. S. 225, 9 Sup. Ct. 58, 32 L. Ed. 437. In that case, however, the Supreme Court stated that the rule would not apply if the judgment or decree was distributive, so that it could be regarded "as containing a separate judgment against the claimants and another separate judgment against the sureties." Judgments and decrees, under the law of Mississippi, are joint and several, and not merely joint.

It has also been held that on proper application the writ of error or appeal may be amended by the insertion of the omitted parties. Inland Co. v. Tolson, 136 U. S. 572, 10 Sup. Ct. 1063, 34 L. Ed. 539; The Mary B. Curtis, 250 Fed. 9, 162 C. C. A. 181; The Seguranca, 250 Fed. 19, 162 C. C. A. 191. In the case of Winters v. United States, 207 U. S. 564, 28 Sup. Ct. 207, 52 L. Ed. 340, the Supreme Court, speaking of a case in which five of the defendants, who had defaulted, were not joined in the appeal of other defendants, who had answered and defended the bill, said:

"The rule which requires the parties to a judgment or decree to join in an appeal or writ of error, or be detached from the right by some proper proceeding, or by their renunciation, is firmly established. But the rule only applies to joint judgments or decrees. In other words, when the interest of a defendant is separate from that of other defendants, he may appeal without them."

The Supreme Court held that the default of the defendants, who did not join in the appeal, separated their interest from that of the defendants who answered and defended the bill, and, for that reason, excused the appellant from joining them in the appeal. The Supreme Court in that case said:

"Joinder in one suit did not necessarily identify them. Besides, the defendants other than appellants defaulted. A decree pro confesso was entered against them, and thereafter, according to equity rule 19 [29 Sup. Ct. xxvii], the cause was required to proceed ex parte and the matter of the bill decreed by the court. Thomson v. Wooster, 114 U. S. 104 [5 Sup. Ct. 788, 29 L. Ed. 105]. The decree was in due course made absolute, and, granting that it might have been appealed from by the defaulting defendants, they would have been as said in Thomson v. Wooster, absolutely barred and precluded from questioning its correctness, unless on the face of the bill it appeared manifest that it was erroneous and improperly granted. Their rights, therefore, were entirely different from those of the appellants; they were naked trespassers, and conceded by their default the rights of the United States and the Indians, and were in no position to resist the prayer of the bill. But the appellants justified by counter rights, and submitted those rights for judgment. There is nothing, therefore, in common between appellants and the other defendants. The motion to dismiss is denied, and we proceed to the merits."

In the case of Orleans-Kenner Electric Ry. Co. v. Dunbar, 218 Fed. 344, 134 C. C. A. 152, this court said, in overruling a motion to dismiss an appeal for nonjoinder of appellants:

"The interest of the railway company which was affected by the decree rendered was so separate and distinct from that of the other defendant that the former is entitled to maintain an appeal in which the latter does not join. Obviously, the pecuniary or proprietary interest acquired or claimed by the grantee of such a privilege is very different from that of the public governmental body which undertook to confer the privilege. * * * The beneficial proprietary interest which the latter has in the privilege which it claims to have acquired entitles it to maintain an appeal from a judgment or decree adversely affecting its interest, though the official body which undertook to confer the privilege, and which was also a party defendant to the cause, does not join in the appeal. Where the respective interests of several defendants, which are affected by a judgment or decree against all of them, are separate and different, one of them may appeal without joining the others."

In this case, the Itta Bena Banking & Trust Company answered appellant's original bill of complaint by denying the facts stated in it, and that appellant was entitled to the relief asked in it; i. e., the cancellation of the bond. There was therefore no identity of interest between appellant and the Itta Bena Banking & Trust Company in the subject-matter of the decree upon the original bill. The Itta Bena Banking & Trust Company did not answer or defend the cross-bill of the appellee Leflore county, and was in default upon the cross-bill. There was nothing, therefore, in common between its position and that of appellant, even upon the decree upon the cross-bill, for it had arrayed itself on the other side of the litigation from appellant. It was not, therefore, necessary that it be joined in the appeal, or a severance had as to it.

[5] The question on the merits of the appeal is whether the invalidity of the proceeding through which the Itta Bena Banking & Trust Company was selected as a depository for the funds of Leflore county avoided the bond executed by appellant as surety, for the purpose of

securing the funds of the county deposited with the bank. It may be conceded that the appointment was void, and that the interested supervisor, whose vote was necessary to the designation, was guilty of an offense in casting his vote, according to the Constitution and laws of the state of Mississippi. It is, nevertheless, undisputed that the depository was commissioned, entered upon the discharge of its duties, and received funds of the county under color of its office, which it failed to account for. It was enabled to do these things by virtue of the bond which the appellant, as surety, had executed with it. But for the filing of the bond, it could neither have been commissioned as depository nor received the county's funds in that capacity. In view of these undisputed facts, we think the appellant cannot assert, as against the county, the invalidity of the appointment of the depository and of fidelity bond; this not merely because the bond recited the appointment, but because by reason of the execution of it, and its delivery to the county, in consideration of a premium paid to the appellant, the loss of the funds deposited was brought about. We think the weight of reason and authorities support this conclusion. Of the many cases so holding we cite and quote from one only. In the case of United States v. Maurice, Fed. Cas. No. 15747, 2 Brock. 96, Chief Justice Marshall said:

"Admitting the appointment to be irregular, to be contrary to the law and its policy, what is to be the consequence of this irregularity? Does it absolve the person appointed from the legal and moral obligation of accounting for public money which has been placed in his hands in consequence of such appointment? Does it authorize him to apply money so received to his own use? If the policy of the law condemns such appointments, does it also condemn the payment of money received under them? Had this subject been brought before the Legislature, and the opinion be there entertained that such appointments were illegal, what would have been the probable course? The Secretary of War might have been censured; an attempt might have been authorized to make him ultimately responsible for the money advanced under the illegal appointment; but is it credible that the bond would be declared void? Would this have been the policy of those who make the law? Let the course of Congress in another case answer this question. It is declared to be unlawful for any member of Congress to be concerned in any contract made on the part of the United States, and all such contracts are declared to be void. What is the consequence of violating this law, and making a contract against its express provisions? A fine is imposed on the violator, but does he keep the money received under the contract? Far from it. The law directs that the money so received shall be forthwith repaid, and, in case of refusal or delay, 'every person so refusing or delaying, together with his surety or sureties, shall be forthwith prosecuted at law, for the recovery of any such sum or sums of money advanced as aforesaid.' If, then, this appointment be contrary to the policy of the law, the repayment of the money under it is not, and a suit may, I think, be sustained, to coerce such repayment on the bond given for that purpose."

[6] We conclude that the District Court correctly entered a decree dismissing the original bill, and in favor of the appellee on its cross-bill in some amount. The penalty of the bond was $15,000. The statute of Mississippi (section 10, c. 194, Laws Miss. 1912) provides that the board of supervisors is authorized to employ counsel to enforce the payment and collection of funds deposited under its authority, and to charge such counsel fees against the depository, and in

addition thereto that the "depository shall be liable for damages at the rate of one per cent. per month for any delay in paying over any county funds when lawfully demanded, and the bond of any depository shall be liable for said expenses and damages." The District Judge awarded damages by way of delay and counsel fees in excess of the penalty of the bond and legal interest on it, from the date the liability was incurred, upon the theory that the penalty and counsel fees were, by the statute, inflicted primarily upon the surety, as well as upon the depository. We think the statute imposes damages by way of penalty for delay and counsel fees for collection primarily only upon the depository, and not upon the surety. The defaults punished by the statute are those of the depository alone by the very terms of the statute, and the damages and counsel fees are imposed upon the depository, and it alone.

The statute, however, makes the bond of the depository stand as security for such damages and counsel fees, just as it does for the moneys deposited and unaccounted for. Clearly the total liability for the acts of the depository secured by the bond and recoverable from the surety cannot exceed the penalty of the bond. We think, therefore, the District Court erred in awarding damages and counsel fees, which, together with the moneys deposited and lost, exceeded the penalty of the bond and legal interest from date of accrual of liability. We think the proper rule to be applied would limit the entire damages for which the surety was liable to the appellee for the defaults of his principal to the amount of the penalty of the bond. If the surety failed to pay the amount of the liability when it was incurred, the utmost for which it could be held liable for its own delay, as distinguished from that of its principal, the depository, would be interest at the legal rate from the date the liability was incurred (in this case May 28, 1913) until the rendition of the decree, upon an amount not in excess of the penalty of the bond.

[7] We think it was competent for the Mississippi Legislature to provide that public depositories should be liable in case of default for penalties for delay and for counsel fees. The terms of the statute in this respect enter into the contract between the county and the depository. The depository was free to accept or reject this added liability. For a like reason it was competent for the Legislature to provide that the depository's bond should secure the penalties and counsel fees to the extent of the penalty of the bond. The surety accepted the added responsibility voluntarily, by executing the bond, with knowledge of the terms of the statute. Fidelity & Deposit Co. v. Wilkinson County, 109 Miss. 879, 69 South. 865; Fidelity Mutual Life Insurance Co. v. Mettler, 185 U. S. 308, 22 Sup. Ct. 662, 46 L. Ed. 922.

[8, 9] The refusal of the depository to pay the warrants of the appellees and the closing of its bank excused a demand on the depository. Fidelity & Deposit Co. v. Wilkinson County, 109 Miss. 879, 69 South. 865. It was therefore liable for the statutory penalty and counsel fees, and as the counsel fees alone, in addition to the moneys deposited and unaccounted for, exceeded the penalty of the bond, the entire penalty of the bond was a liability of the depository secured by the bond on

which appellant was surety. The cross-bill averred the employment of counsel by the county, and this averment was not put in issue or denied by appellant, and required no proof to sustain it.

Evidence of the reasonableness of counsel fee was not objected to by appellant, when offered by the appellee. It could have been material only in the event the employment of counsel was authorized, and failure of appellant to object to it constituted a tacit admission of authority.

We think the decree of the District Court, as far as it related to appellant, was erroneous in amount only, and should have been for the sum of $13,636.13, with interest thereon at the rate of 5¾ per cent., the stipulated rate before default, from March 31, 1913, until May 28, 1913, the date of default, and thereafter, and until the decree is finally rendered, at the rate of 6 per cent., the legal rate in Mississippi, and that there should be added to the amount and interest so calculated for counsel fees the sum of $1,363.87—the difference between the penalty of the bond and the amount of moneys deposited and unaccounted for. No interest before final decree is to be allowed upon the counsel fees.

The decree is reversed, and cause remanded, with directions to enter a decree conformably to this opinion; and it is so ordered.

S. H. KRESS & CO. v. LINDSEY et al.

(Circuit Court of Appeals, Fifth Circuit. December 16, 1919.)

No. 3397.

1. ABATEMENT AND REVIVAL ⟸53—SALES ⟸255—NO PRIVITY OF WARRANTY BETWEEN SELLER OF INFECTED SHAVING BRUSH AND DEPENDENTS OF PURCHASER; NO SURVIVORSHIP OF WARRANTY TO PURCHASER'S DEPENDENTS.
   Where, from use of shaving brush, purchaser became infected with a fatal disease, there was no such contractual privity between the seller of the brush and purchaser's widow and children, as to give the latter a right of action for breach of alleged warranty, nor any survivorship to them under any breach of warranty directly to the purchaser himself.

2. DEATH ⟸46—COMPLAINT AGAINST DEALER FOR CUSTOMER'S DEATH FROM INFECTED SHAVING BRUSH MUST SHOW NEGLIGENCE.
   To recover under the Mississippi death statute (Laws Miss. 1914, c. 214) for the death of a customer of a dealer selling a shaving brush containing anthrax germs, it must appear from the complaint that the dealer knew of the infection in the brush or was guilty of some negligence, and a complaint which merely alleges breach of warranty cannot be treated as one under the statute.

In Error to the District Court of the United States for the Southern District of Mississippi; Edwin R. Holmes, Judge.

Action by Mrs. Emma McCarroll Lindsey and others against S. H. Kress & Co., begun in state court and removed to the federal court. There was a judgment for plaintiffs, and defendant brings error. Reversed.

Charles Rosen, of New Orleans, La., Carl Marshall, of Bay St. Louis, Miss., and S. E. Travis, of Harrisburg, Miss., for plaintiff in error.

V. A. Griffith and William Lyon Wallace, both of Gulfport, Miss., and M. M. Boatner, of New Orleans, La., for defendants in error.

Before WALKER, Circuit Judge, and GRUBB and ERVIN, District Judges.

ERVIN, District Judge. This was a suit instituted in the circuit court of Forrest county, Miss., by appellees against appellant, and removed to the federal court for the Southern district of Mississippi.

The suit was based upon the breach of an alleged warranty contained in a catalogue issued by Kress & Co., who were doing a mail order business in New Orleans, La., which catalogue contained, among others, the following statements:

After stating that there would be an increase in the price of the articles shown by the catalogue over prices previously charged, the catalogue offered what it termed "an adequate supply of dependable bargains." It further stated:

"Any lowering of quality from the Kress high standard would not be in keeping with our recognized policy of quality first."

Again:

"This information for you. Our guaranty: We guarantee that the merchandise shown in this catalogue is exactly as illustrated. We also guarantee, when you purchase from us, that the merchandise sold you will represent full value and a saving to you; that it will give you the service and satisfaction you have a right to expect for the money paid. If for any reason you are not satisfied with any article purchased from us, return it to us at our expense, and we will either exchange it, if you wish, or return your money, together with any shipping charges you may have paid;"

And on page 70 of said catalogue it states as follows:

"Notions, merchandise of merit, at low prices. In buying these dependable notions from the pages," etc.

Among said notions on page 76, which is headed in large printed words "Brushes of Value at a Very Small Cost," is found advertised and offered a shaving brush, the same being illustrated, and under same is printed the number "D 8732," and name "Lather Brush," and at various and divers places throughout said catalogue the said goods therein are represented to be of "dependable quality," of "high quality," of "wonderful values," of "serviceable quality," of "quality standard." And:

"We make and keep customers by saving them money, giving them the best goods their money will buy, and protecting them with our binding guaranty of satisfaction or money returned."

The suit is brought by the widow and minor children of one C. H. Lindsey, who was a resident of Mississippi. The complaint shows that Kress' catalogue further suggested that, where several neighbors wished certain articles from Kress, they might save shipping costs by combining their orders into one; that one Maud Dale, who was a neigh-

bor of C. H. Lindsey, intending to order certain goods, communicated this intent to the wife of C. H. Lindsey; that C. H. Lindsey had previously informed his wife that he needed a shaving brush, and requested her to procure one for him; that his wife communicated this request to said Maud Dale, who, in making the order for her own goods, included the order for the shaving brush for said C. H. Lindsey.

It avers that defendant selected, sold, and delivered unto said C. H. Lindsey, contrary to the representations, guaranties and warranties aforesaid, a shaving brush charged with the bacilli of anthrax, and that, when C. H. Lindsey undertook to shave himself in using said brush, he accidently cut himself slightly with his razor, and by reason of the use of the brush became inoculated with the germs of anthrax, and died from the effects thereof. The plaintiffs conclude with the statement that the plaintiffs, the wife and minor children of said Lindsey, are by reason and in consequence of the aforesaid wrong of the said defendant bereft of the husband's and father's care, protection, and companionship, and are left without support, except by their own exertions. The damages claimed were $30,000.

There were no allegations of negligence on the part of Kress & Co., or that they were informed or had reason to believe that the brush sold and delivered by them to C. H. Lindsey was charged with anthrax germs, nor was it alleged that Kress & Co. were the makers of said brush, but the facts averred show that they were mere dealers, who were selling commodities manufactured by other parties.

[1] The defendant filed a general demurrer, under the practice of Mississippi, to this complaint, and now urges that the court below erred in that, while the suit is brought for breach of an alleged warranty, under a sale to C. H. Lindsey, that the plaintiffs, as the widow and children of said Lindsey, have no privity with the contract containing said alleged warranty, and hence no right of action. We think this assignment of error is correct, as there is no survivorship to the wife and children of Lindsey under a breach of warranty directly to Lindsey himself.

[2] It is manifest from the allegations of the complaint, and also from the rulings of the court below, that both plaintiffs' attorneys and the trial court confused the right of action alleged, namely, a breach of warranty in the sale made by Kress to C. H. Lindsey with the right of action conferred by the "Death by Wrongful Act" statute of Mississippi. The conclusion of the complaint, which we have copied, tends to show this fact, and so does the charge of the court, which begins on page 39 of the record. On page 40 of the record the court says to the jury:

"This is not a suit for negligence. It is not a suit for tort. This is a suit by the plaintiffs for the alleged breach of a warranty that is embraced in a mail order catalogue."

The court then quotes certain statements contained in the catalogue, and on page 46 of the record the court explains to the jury what are the proximate and natural consequences of an actionable default or

breach of warranty. He then charges the jury that, if they should find for the plaintiffs, they—

"may and should assess the damages at such sum as the jury might determine to be just, or as will amount to full indemnity, taking into consideration all the damages of every kind to the decedent, and all damages of every kind to each and every plaintiff, and while the law can only allow compensation, there are many elements and things to be considered in arriving at a final sum. You may consider the amount which Henderson Lindsey would probably have earned during his life, according to his life expectancy, and contributed to his wife and children, or in any wise bestowed upon them. You may in this connection consider his capacity and competency for earning money, what he was earning at the time of his death, and what he would probably have earned in the future, his age and expectancy, his health, his habits of life and living, his disposition to work and his own personal expenditures, and in these connections you should also consider the expectancy of life of his wife and children, the plaintiffs here. You may consider any loss of comfort, companionship, and society and protection of the husband and father, in the light of all the evidence relating to the character, habits, and disposition of the husband and father towards his family, and the relations between them and him at the time of his death and prior thereto, the value of his service in the superintendence and attention to the care of his family, and in the education and training of his children; but you will allow nothing by way of solatium, or for their grief or distress over his sickness and death, as separated and distinguished from the elements already mentioned."

We have quoted enough from the court's charge to the jury to show that the court was submitting to the jury the damages provided for under the Mississippi "Wrongful Death Act," which is found in chapter 214 of the Laws of Mississippi Legislature of 1914, and which reads, so far as the matter at issue is concerned:

"*Actions for Injuries Producing Death.*—Whenever the death of any person shall be caused by any real wrongful or negligent act, or omission, or by such unsafe machinery, way or appliances as would, if death had not ensued, have entitled the party injured, or damaged thereby to maintain an action and recover damages in respect thereof, and such deceased persons shall have left a widow or children or both, * * * the person or corporation, or both that would have been liable if death had not ensued, * * * shall be liable for damages, notwithstanding the death, and the fact that death was instantaneous shall, in no case, affect the right of recovery. The action for such damages may be brought * * * by the widow, for the death of her husband, * * * or in the name of the child for the death of a parent, * * * or all parties interested may join in the suit. * * * In such action the * * * parties suing shall recover such damages as the jury may determine to be just, taking into consideration all the damages of every kind to the decedent, and all damages of every kind to any and all parties interested in the suit."

It is manifest, from the charge of the court and the verdict of the jury in this case, that the court submitted to the jury the damages provided for by this statute, and the jury ascertained the damages as provided for in the statute, though the action was on a breach of warranty alleged to have been made by Kress in the sale of a shaving brush to C. H. Lindsey. In this we think the court erred, for, the suit being based upon a breach of warranty made to C. H. Lindsey, there was not only no right of action in the widow and children of Lindsey, but the damages to be allowed and recovered are such damages as flowed from the breach of warranty, and not the damages as provided for

by the Mississippi "Death by Wrongful Act" statute. This act would have nothing to do with the measure of damages for a breach of warranty.

There being no such wrongful act or omission as is contemplated by this statute, and the action not being brought under the statute, but being founded on a breach of warranty, the next question is: What damages could have been recovered under the breach of warranty? This depends upon the question whether any special facts and circumstances were brought to the knowledge of the parties making and receiving the warranty, and what were the terms of the warranty. In other words, what damage did the parties to the contract, namely, Kress & Co. and C. H. Lindsey, contemplate and agree as the damages to flow from a breach by Kress of the alleged warranty.

It will be noticed that the statement in the catalogue is under the heading of:

"Our guaranty that the merchandise should be exactly as illustrated. We also guarantee, when you purchase from us, that the merchandise sold you will represent full value and a saving to you. It will give you the service and satisfaction you have a right to expect for the money."

Then follow these words, which are a part of the same statement:

"If for any reason you are not satisfied with any article purchased from us, return it to us at our expense, and we will either exchange it, if you wish, or return your money, together with any shipping charges you may have paid."

Again the catalogue states:

"We make and keep customers by saving them money, giving them the best goods their money will buy, and protecting them with our binding guaranty of satisfaction or money returned."

Now, it seems to us that the minds of these parties have met, so far as any alleged breach of warranty is concerned, on the proposition that, if the article purchased was not satisfactory to the purchaser for any reason, they have agreed that this article might be returned, and the seller will return the purchase price and pay any shipping charges which may have been paid by the buyer, so that any recovery for a breach of warranty, if there was a warranty contained in the statements made by Kress in his catalogue, was limited to this agreement on Kress' part, and the purchaser, therefore, or his personal representative, could not recover more than this sum. We therefore think the court erred in his charge as to the measure of recovery.

It is argued, however, by appellees, that this action is really in tort, and is based upon the breach of duty by defendant arising out of an alleged warranty contained in the catalogue. If this were so, in our opinion, the right of recovery and the measure of recovery would be fixed by the Mississippi statute we have quoted, as the use of the brush which is alleged to have inoculated C. H. Lindsey was in the state of Mississippi, and we think it was necessary, if the action were intended to be brought under this statute, that the complaint should contain some allegation of knowledge or notice on the part of Kress

& Co. that the brush contained anthrax germs, or some sufficient allegation of a negligent act or omission on the part of Kress & Co. which caused the injury to C. H. Lindsey.

Construing, therefore, the complaint according to this contention, the demurrers should be sustained. We, however, construe the complaint as being based upon the warranty alleged to have been made by Kress to C. H. Lindsey as the purchaser of the shaving brush, and finding, as we do, no right of action in the plaintiffs, the case should be reversed.

M. C. PETERS MILLING CO. v. INTERNATIONAL SUGAR FEED NO. 2 CO.

(Circuit Court of Appeals, Sixth Circuit. December 12, 1919.)

No. 3304.

1. TRADE-MARKS AND TRADE-NAMES ⟸61—MANUFACTURER HAS RIGHT TO USE ON DIFFERENT KINDS OF SAME ARTICLE.
   A manufacturer of stock food, rightfully using a trade-mark or symbol on what is known as "dry feed," cannot be so limited as to preclude it from using the same mark on "sweet feed" manufactured by it.

2. TRADE-MARKS AND TRADE-NAMES ⟸58—NO INFRINGEMENT.
   A trade-mark, consisting of a picture of a man on horseback, with the horse in moving position, *held* not infringed by a picture of a horse alone, standing still.

3. EVIDENCE ⟸574—OPINION AS TO SIMILARITY OF TRADE-MARKS INFERIOR TO OBSERVATION.
   In determining whether two marks or designs are so similar as to be likely to cause confusion and result in unfair competition, the judgment of the eye on comparison of the two is more satisfactory evidence than the opinions of witnesses.

4. TRADE-MARKS AND TRADE-NAMES ⟸70(2)—PICTURED DESIGNS SO DISSIMILAR AS NOT TO SHOW UNFAIR COMPETITION.
   Pictured designs, used by complainant and defendant, respectively, as trade-marks for horse feed, consisting in one case of a horse and rider, and in the other of a horse, taken in connection with their dress and surrounding reading matter, *held* so dissimilar in appearance as to preclude possibility of one being mistaken for the other, and to disprove any intent of unfair competition, in the absence of evidence of actual confusion in the trade.

5. TRADE-MARKS AND TRADE-NAMES ⟸68—"UNFAIR COMPETITION" DEFINED.
   "Unfair competition" consists in the use of methods, brands, or advertising matter intended to cause, or in fact causing, confusion in the trade, or to induce or mislead the trade into the belief that the goods of the person or firm marketed under such similar device are the goods of the person or firm which has established a trade and acquired a good will in business in connection with the rightful use of such trade token.
   [Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Unfair Competition.]

6. TRADE-MARKS AND TRADE-NAMES ⟸93(3)—CIRCUMSTANTIAL EVIDENCE MAY SHOW INTENT TO DECEIVE.
   It is not necessary to establish by direct evidence the intent to deceive, where the circumstances are such as to lead to no other rational conclusion.

Appeal from the District Court of the United States for the Western District of Tennessee; John E. McCall, Judge.

Suit in equity by the M. C. Peters Milling Company against the International Sugar Feed No. 2 Company. Decree for defendant, and complainant appeals. Affirmed.

T. Walter Fowler, of Washington, D. C., for appellant.

A. C. Paul, of Minneapolis, Minn., and Julian C. Wilson, of Memphis, Tenn., for appellee.

Before KNAPPEN, DENISON, and DONAHUE, Circuit Judges.

DONAHUE, Circuit Judge. On the 9th of March, 1916, the M. C. Peters Milling Company, a corporation organized under the laws of the state of Nebraska, commenced an action in the United States District Court in and for the Western District of Tennessee, against the International Sugar Feed No. 2 Company, a corporation organized under the laws of the state of Minnesota, to enjoin its alleged infringement of a registered trade-mark, and also for unfair competition.

The defendant, by its answer, denies that it has infringed plaintiff's trade-mark, or that it has in any way, manner, or form entered into or conducted any unfair competition. Upon the issues joined, the District Court found for the defendant, and dismissed the bill of complaint, with costs.

It appears from the evidence that the characteristic feature of plaintiff's trade-mark consists of two concentric circles. Within the innermost circle is the picture of a horse and rider. The trade-mark of the defendant also consists of two concentric circles, within which is another circle with saw-tooth outline. This third circle was inserted within the inner and outer circles about 1912 or 1913. It appears from the evidence, however, that this was omitted from some of the bags through mistake of the bag company furnishing the same; but as soon as this mistake was discovered it was corrected, and no bags have been used since that time without the saw-tooth circle. These concentric circles are within a rectangular field surrounded by heavy lines, also in saw-tooth form. Outside this border, around the rectangular field, and a part of it, are straight lines touching the saw-tooth points. Within the inner circle is the picture of a horse.

[1] It further appears from the evidence that, prior to registration of plaintiff's trade-mark practically all of its distinguishing features, except the rider, were in general use, in some form or other by the manufacturers of horse feed. It also further appears that it is and was a custom in general use by all manufacturers of stock feed to print or stamp on the bags containing the same a picture of the head or whole of the animal for which the feed is specifically intended. While this is conceded by the appellant, the claim is made in its behalf that the brands and trade-marks of this character were applied only to what is known to the trade as "dry feed," and that it was the first manufacturer to use such mark or brand in connection with the manufacture and sale of a mixture of grain, alfalfa, and molasses, known to the trade as "sweet feed"; that "dry" and "sweet feeds" are entire-

ly different products; and that for this reason it is entitled to the exclusive use of the concentric circles, and the picture of a horse within the inner one, in connection with the manufacture and sale of "sweet feeds."

This question is discussed and decided in the case of W. A. Gaines & Company v. Rock Springs Distilling Company, 226 Fed. 531, 537, 141 C. C. A. 287, 293. That case involved the distinction between straight whisky and blended whisky, and in that connection Judge Denison, speaking for the court, said:

"Whatever the extended classifications and subclassifications of the Patent Office practice may contemplate, neither the common law nor the registration statute can intend such confusion as must result from recognizing the same trade-mark as belonging to different people for different kinds of the same article."

The Supreme Court of the United States, in reviewing this case (246 U. S. 312, 320, 38 Sup. Ct. 327, 329 [62 L. Ed. 738]), quotes this language with approval.

It necessarily follows that, where it has been the common custom of the manufacturers of horse feed to print or stamp the picture of a horse on the bags containing the same, the appellant would not acquire any prior right to the use of such picture by reason of the fact that it was first to use the same on the feed containing an additional ingredient, for, after all, it is still horse feed, although differing in this respect as to its component parts.

[2] In determining whether the brand used by the defendant is an infringement of plaintiff's trade-mark, this court is not disposed to consider or apply any nice, technical distinctions, such as an artist's eye would readily perceive, but rather only such marked differences as would be readily apparent to the ordinary purchaser of horse feeds. The doctrine is fairly stated by Mr. Nims, in his work on Unfair Competition and Trade-Marks (2d Ed.) p. 583, in this language:

"Such a similarity as will deceive is that likeness which renders the average buyer unable to distinguish the defendant's name or mark from the memory of plaintiff's name which he carries in his mind, not such as will enable him to know them apart when the two are put side by side before him."

Applying this principle to the facts in this case, it is apparent that the defendant's trade-mark is so unlike the trade-mark of the plaintiff that the average buyer may easily distinguish between the two. The picture of the horse in the defendant's trade-mark is wholly unlike the picture of the horse in the plaintiff's design. They are as unlike as it is possible to draw two pictures of the same animal. One is the picture of a horse in action, with his right fore foot and left hind foot lifted from the ground; its tail falls against the hips, and the lower part of its head is drawn in against its throat. The other is the picture of a horse standing firmly on its four feet, with its tail raised far from its hips, and its head some distance from the lower part of the neck. Aside from these distinguishing features of the different types of horse shown in these designs, when the plaintiff's trade-mark is taken in connection with the rider, all similarity ends. This feature of the de-

sign was emphasized by the plaintiff in attempting to secure registration of its trade-mark.

After registration was refused by the Patent Office, because of its similarity to the trade-mark of Merriam & Rolph, consisting of the word "ARABIAN," the plaintiff then filed in the Patent Office an argument calling attention to the "picture of the man on horseback," contained in its design, as the distinguishing feature thereof from the word "Arabian," and, in that connection, used this language:

"The representation of the male figure on horseback, however, is arbitrary and fanciful, and hence cannot possibly be confused with a mere word printed in plain and black letters or otherwise."

This court is clearly of the opinion that this argument was entirely justified by the facts. Undoubtedly it met with the favor of the officials of the Patent Office, for, notwithstanding the former rejection, a certificate of registration was then issued to the plaintiff. For these reasons, this court has reached the conclusion that the design of the defendant is in no way intended to be, nor is it in fact, an infringement of plaintiff's trade-mark.

The question of unfair competition is so closely allied with the question of the infringement of a trade-mark that, in view of the conclusion reached, it would seem unnecessary to discuss the former at any length. As a general rule, the right to recover upon either of these causes of action depends, substantially, upon the same state of facts, excepting, of course, the statutory provisions applying to trade-marks, and excepting, also, that in disposing of the question of unfair competition, a court should take into consideration the dress, combination of colors, and manner and method of application and use of the respective marks in connection with the designs actually appropriated and protected by registration, if registration has, in fact, been secured.

In the case of Merriam Company v. Saalfield, 198 Fed. 369, 117 C. C. A. 245, Judge Denison, referring to the analogy between these two remedies, said:

"The entire substantive law of trade-marks (excepting statutory provisions and construction) is a branch of the broader law of unfair competition. The ultimate offense always is that defendant has passed off his goods as and for those of the complainant."

There is no evidence in this record that the design used by the defendant has in fact misled or deceived any purchaser, but there is some testimony that there is such a similarity between the designs of defendant and plaintiff as would tend to cause confusion in the trade and induce the ordinary customer to believe that the goods of the defendant were the goods of plaintiff's origin and manufacture.

[3] The opinion of the witnesses in that regard, however, must yield to the more positive evidence afforded by the exhibits in this case. Mr. Justice Field has very clearly expressed this idea in the case of Liggett Tobacco Co. v. Finzer, 128 U. S. 182, 9 Sup. Ct. 60, 32 L. Ed. 395, in this language:

"The judgment of the eye upon the two is more satisfactory than evidence from any other source as to the possibility of parties being misled, so as to

take one tobacco for the other; and this judgment is against any such possibility."

[4] Even a casual inspection of these trade-marks shows such material differences as would preclude the possibility of one being mistaken for the other.

The trade-mark of plaintiff is used by it in marketing the product known as "Peters' Arab Horse Feed." That name is stamped on the field within the concentric circles around the horse and rider. The picture of the rider is undoubtedly intended to represent an Arab soldier in full uniform, with red cap, red trousers, and green cloak. The bridle and a shawl or blanket, hanging from the saddle, are in red; a broad girth, extending around the breast of the horse, is in red and green. The colors used are red and green.

Upon the design of the defendant there is printed upon the space between the outer circle and the one of saw-tooth formation, the word "Ringleader," and around the top and outside of the larger circle is printed in semicircular form the word "International." Below these concentric circles there is printed, in large letters, "International Sugar Feed Number Two Co." Within the inner circle is the picture of a riderless circus ring horse, with bridle, reins, and surcingle. The reins are attached to the surcingle midway on the horse's sides. The color scheme is red and green. While it is true, as contended by counsel for appellant, that each trade-mark contains the picture of a stylish horse, yet they are of such different and distinctive types that one could not possibly be mistaken for the other.

The distinguishing features of the plaintiff's trade-mark are not only peculiarly appropriate to the trade-name of the product marketed by it, but are also so "arbitrary and fanciful" in character as to fully and completely differentiate it from the mark used by defendant.

[5, 6] Unfair competition consists in the use of methods, brands or advertising matter intended to cause, or in fact causing confusion in the trade, or to induce or mislead the trade into the belief that the goods of the person or firm marketed under such similar device are the goods of the person or firm who has established a trade and acquired a good will in business in connection with the rightful use of such trade token. While it is not necessary to establish by direct evidence the intent to deceive, where the circumstances are such as to lead to no other rational conclusion, yet in this case the distinguishing features of the trade-marks of the plaintiff and defendant, taken in connection with their dress and color scheme, as actually used by each, are so patent and obvious that the presumption as to the intent is to the contrary, and, in the absence of direct evidence showing that the defendant's trade-mark has in fact created confusion and misled and deceived customers, this presumption must obtain.

The judgment of the District Court is affirmed.

PHILLIPS CO. v. EVERETT.*
In re SPRINGFIELD REALTY CO.

(Circuit Court of Appeals, Sixth Circuit. December 12, 1919.)

No. 3338.

CORPORATIONS ⊜642(4½), 660—CONTRACT BY FOREIGN CORPORATION A MICHIGAN CONTRACT, SUPPORTING LIEN BY CONTRACTOR.

A contract to equip a building in Michigan with an automatic fire sprinkler system, made by a foreign corporation which had not complied with the laws of Michigan to authorize it to do business or make contracts in the state, and which executed the contract entirely through subcontractors, who manufactured and installed the system, furnishing both materials and labor, *held* a Michigan contract, and not an interstate transaction, which was void under the statute (Comp. Laws Mich. 1915, § 9063 et seq.), and would not support a mechanic's lien in favor of the contractor, regardless of whether its contracts with the subcontractors were local or interstate transactions.

Appeal from the District Court of the United States for the Southern Division of the Eastern District of Michigan; Arthur J. Tuttle, Judge.

In the matter of the Springfield Realty Company, bankrupt; Byron T. Everett, trustee. The Phillips Company appeals from an order denying its claim to mechanic's lien. Affirmed.

Thomas G. Long, of Detroit, Mich., for appellant.

Walter E. Oxtoby, of Detroit, Mich., and Stewart Hanley, of Detroit, Mich., for appellee.

Before KNAPPEN, DENISON, and DONAHUE, Circuit Judges.

DONAHUE, Circuit Judge. The Phillips Company, a corporation organized under the laws of the state of Wisconsin, with its principal place of business in Chicago, Ill., entered into a contract with the Springfield Realty Company, a corporation organized under the laws of Michigan, to equip its manufacturing plant in the city of Detroit, Mich., with a system of automatic fire sprinklers, for which it was to receive the sum of $31,776. Later additional equipment was ordered, making in the aggregate $32,224, for which amount the Phillips Company filed a mechanic's lien on the property equipped by it with such sprinkler system.

The Springfield Realty Company having gone into bankruptcy, an order was made staying proceedings for the enforcement of this lien in the state courts of Michigan, and requiring the same to be enforced in the bankruptcy proceedings against the fund derived from the sale of the plant and property. In accordance with this order, a petition was filed by the Phillips Company in the bankruptcy proceedings, seeking to have its mechanic's lien transferred to the fund arising from the sale of the bankrupt's property. The trustee in bankruptcy filed an answer to this petition, averring, among other things, that at the time the Phillips Company entered into the contract with the Springfield Realty Company, and at the time it equipped the plant of that company with an automatic fire sprinkler system, the Phillips Company had not

*Certiorari denied 251 U. S. —, 40 Sup. Ct. 344, 64 L. Ed. —.

complied with the provisions of the laws of Michigan with reference to foreign corporations, in that it had not procured from the secretary of state of the state of Michigan a certificate of authority to carry on business in that state, and that for this reason its contract with the Realty Company was in violation of the laws of Michigan, and its pretended mechanic's lien invalid and not enforceable in the courts of that state. Upon this issue the referee found from the evidence in favor of the trustee, and made an order denying the claimant's petition and lien, and this finding of the referee was affirmed by the court below.

The Michigan statute provides, among other things, that it shall be unlawful for any corporation organized under the laws of any state of the United States, except the state of Michigan, or of any foreign country, to carry on its business in that state, until it shall have procured from the secretary of state a certificate of authority for that purpose, and that no foreign corporation subject to this provision shall be capable of making a valid contract in Michigan, until it shall have fully complied with this requirement, and at the time of making such contract holds an unrevoked certificate to that effect from the secretary of state.

It is contended upon the behalf of the appellant that there is no evidence in this record tending to prove where the contract was executed; that the presumption obtains that it was lawfully executed in the state of Wisconsin, in which state the appellant was authorized to transact business, and that therefore it was not doing business in Michigan; that the installation of the automatic fire sprinkler system in the plant of the Springfield Realty Company at Detroit, Mich., was merely incidental to the contract; that a large portion of the material used in the construction of this system, either in the raw state or finished product, was shipped from other states into Michigan, and that for this reason the entire contract involved an interstate transaction not within the purview of the Michigan statute; and that, even if all of the transaction was not interstate commerce, at least a portion thereof was, and for that portion the Phillips Company is entitled to an allowance of its claim as upon a quantum meruit.

It appears, from the evidence taken before the referee, that the appellant is not engaged in the manufacture of automatic sprinkler systems, either in the state of Wisconsin or elsewhere, but, on the contrary, is engaged in the business of contracting for and procuring the installation of automatic sprinkler systems manufactured by other persons and corporations. In this particular case, the appellant entered into a contract with the General Fire Extinguisher Company of Michigan, a corporation engaged in the manufacture of automatic sprinkler systems, for a system of wet pipe Grinnell automatic sprinklers, which comprehended by far the larger part of appellant's entire contract. It also entered into a contract with the Pittsburgh-Des Moines Steel Company, of Pittsburgh, Pa., for the construction of a steel tower and tank to be used in connection with and as a part of the sprinkler system to be installed by the General Fire Extinguisher Company of Michigan. These companies were required to install in the plant of the

Springfield Realty Company, at Detroit, Mich., the respective portions of the equipment to be furnished by each in accordance with the plans and specifications, and subject to the inspection of the Michigan inspection bureau. It further appears that the Phillips Company exercised some general supervision over the installation of this system, but that the subcontractors furnished all the material, labor, and immediate supervision necessary to the installation of the portion of the entire system to be furnished by each.

The determination of the questions presented by this record involves no new principles, but rather the application of the established law to the facts of this case. While the state has no authority to impose a burden upon interstate commerce by taxation or otherwise, nevertheless it has authority to provide by legislation the terms and condition upon which a foreign corporation may engage in intrastate business within its territorial limits, or avail itself of the benefits of its laws and the aid and protection of its courts in the enforcement of contracts relating to such business. Baltic Mining Co. v. Massachusetts, 231 U. S. 68–83, 34 Sup. Ct. 15, 58 L. Ed. 127.

This court has held in the case of Hayes Wheel Co. v. American Distributing Co., 257 Fed. 881, — C. C. A. —, that the Michigan statute relating to corporations of other states does not offend against the federal Constitution, but, on the contrary, expressly provides that the act shall not be construed "to prohibit any sale of goods or merchandise which would be protected by the rights of interstate commerce." Comp. Laws 1915, § 9070. So that, if the installation of this automatic sprinkler system in the plant of the Springfield Realty Company at Detroit, Mich., was an interstate commerce transaction, then the appellant was not subject to the provision of the Michigan act, and ought to recover in this case the full amount of its claim, for there is no question here made that it has not complied with all the requirements of the mechanic's lien law of that state. Comp. Laws Mich. 1915, §§ 14796–14830.

In view of the evidence offered on behalf of the appellant, it is clear that the installation of this automatic sprinkler system was not merely an incident to its sale and purchase, for the appellant was not manufacturing sprinkler systems, and had none of its own either to sell or to install. Its contract with the Springfield Realty Company comprised the whole scope of the business for which it was organized. It could have done no more in the state of Wisconsin. The fact that it employed a Michigan corporation to perform a part of this contract for it, and that this Michigan company brought some raw materials from other states to be used in its factory in the manufacture of its finished product can in no wise affect the appellant's relation to the transaction, further than to show that it was not selling to the Springfield Realty Company an automatic sprinkler system manufactured by itself in its home state, or in any other state.

It is insisted that these subcontractors were each independent contractors; that part of the system furnished by the Pittsburgh-Des Moines Steel Company of Pittsburgh, Pa., comes clearly within the protection of the federal Constitution in reference to interstate com-

merce; and that the General Fire Extinguisher Company of Michigan is a local corporation and authorized to transact business within that state. It might be true that a court would hold that these contractors were independent contractors in an action by a third party for an injury to person or property caused through the fault or negligence of either in performing the particular part of the work covered by their respective contracts, but that principle cannot be applied to the parties themselves. So far as the Phillips Company is concerned they were its subcontractors; each performing for and on account of the Phillips Company a part of its contract with the Springfield Realty Company. The relation of the Phillips Company to the Springfield Realty Company was that of principal contractor. It was entitled to the benefits accruing from the proper installation of this sprinkler system by the subcontractors, and liable to the Springfield Realty Company for any defects in that system, either in material or labor, or for any unnecessary delay in installing the same, and therefore the claim that these subcontractors occupied the relation of independent contractors, so far as the Phillips Company and the Springfield Realty Company are concerned, is not tenable.

It is insisted, however, that the part of this sprinkler system installed by the Pittsburgh-Des Moines Steel Company of Pennsylvania was clearly interstate commerce, and that the appellant is therefore entitled to recover upon a quantum meruit. This proposition is equally untenable. As we have already seen, the status of the subcontractors cannot fix, change, or alter the status of the parties to the original contract. If that were true, the Phillips Company might transfer its entire business activities to the state of Michigan, and by subcontracting with persons or corporations outside that state defy its laws providing terms and conditions upon which nonresident corporations may do business within the state, and at the same time avail itself of the benefits of other statutes of that state and use its courts for its own protection and to enforce its rights.

For the purpose of this case it is perhaps immaterial where this contract was executed. In the case of Empire Fuel Co. v. John E. Lyons, 257 Fed. 890, — C. C. A. —, Judge Knappen, in discussing this question, said:

> "It does not follow from the fact that the contract was made in West Virginia that all business done under it must be regarded as done in that state"—citing in support of this proposition Lumbermen's Ins. Co. v. Meyer, 197 U. S. 407, 414, 25 Sup. Ct. 483, 49 L. Ed. 810.

There is some evidence, however, that this contract was executed in Michigan. It recites that the agreement is "made this 8th day of November, A. D. 1916." The first signature attached thereto is the signature of the Phillips Company; the second signature is that of the Springfield Realty Company; but in connection with the latter signature it further appears by the certificate of a notary public that the president and secretary of the Springfield Company acknowledged the signing and execution of this contract in Wayne county, Mich., on the 9th day of November, 1916. It is true that the Phillips Company may, and probably did, sign this paper writing at its office in Chicago,

Ill.; but it was not a contract until signed by the other contracting party, which, from the jurat of the notary public, appears to have been done in the state of Michigan on the 9th day of the same month.

This contract, however, contemplated by its terms performance by the Phillips Company within the state of Michigan, and the evidence relating to that company's method of performance clearly shows that no part thereof was merely incident to the main transaction, but rather that the contract, in its entirety, was a business transaction, local in its nature and indivisible in character. We have therefore reached the conclusion that the finding of the referee in this particular, and the judgment of the District Court affirming the same, are fully sustained by the evidence.

It is further urged on behalf of the appellant that, by reason of the installation of this automatic sprinkling system in the plant of the Springfield Realty Company, it thereby enhanced the value of its property and contributed largely to the fund arising from the sale thereof, and that for this reason it ought to recover as upon a quantum meruit, regardless of the validity of its contract. Undoubtedly, it did contribute largely to the value of the property from which this fund was derived; but this action is one to enforce a mechanic's lien, and the only question before this court at this time is the question of the validity of that lien, either as against the property itself or as against the fund arising from its sale.

In disposing of this question, this court has neither the right nor the authority to ignore the laws of Michigan pertaining to this transaction. It is, of course, unfortunate that the appellant must lose the cost of the material and labor that has added to the fund for distribution among the general creditors of the bankrupt; but that is not the fault of the referee in bankruptcy or of the court. The appellant could easily have protected itself from loss by complying with the laws of Michigan relating to nonresident corporations doing business within that state. It failed, neglected, or refused to do this, and the courts cannot relieve it from the consequences of its own neglect.

The judgment of the District Court is affirmed.

RHEA et al. v. NEWTON et al.

(Circuit Court of Appeals, Eighth Circuit. December 2, 1919.)

No. 5280.

1. CORPORATIONS ⊂=316(1)—BONA FIDE CONTRACTS WITH OFFICER VALID.
While a contract between a corporation and a director or officer will be closely scrutinized by the courts, it will be upheld if fair and made in good faith, and if no undue advantage was taken of the fiduciary relationship between the parties.

2. CORPORATIONS ⊂=312(5)—PURCHASE OF PROPERTY OF INSOLVENT CORPORATION BY DIRECTOR DID NOT MAKE HIM TRUSTEE.
Transactions by which stockholders of insolvent mining company, against which actions were pending, transferred their stock under an agreement that the property should be operated for a time by creditors,

and if the debts were so paid the stock should be returned, followed by a reorganization and the election of new officers and directors, who, after it had been determined that the property could not be profitably operated in its then condition, sold it in consideration of payment of the company's debts by the purchaser, *held* not to charge the purchaser, a director of the old company, who had no knowledge of the conditions of the transfer, with a trust in favor of such former stockholders.

3. CORPORATIONS ⟸289—ACTS OF DE FACTO OFFICERS VALID.
The acts of de facto officers of a corporation in good faith are as valid as respects third persons as are those of de jure officers.

4. CORPORATIONS ⟸182—STOCKHOLDERS OF INSOLVENT CORPORATION MAY SELL PROPERTY.
When a corporation is insolvent, and unable to meet its obligations, or to secure further funds with which to continue business, and creditors are pressing their claims, a majority of the stockholders have the power, in good faith, to make a sale of the entire corporate property to provide for its debts.

Carland, Circuit Judge, dissenting.

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

Suit in equity by Catherine K. Newton and others against William A. Rhea and others. Decree for complainants, and certain defendants appeal. Reversed.

This is an appeal from a decree holding that appellant Rhea and the Mont B. Mining Company were liable as trustees to account to appellees, who were plaintiffs below, and fixing the amount of the recovery. Two suits were begun, but later they were consolidated and heard and decided as one case. The plaintiff in one suit was Catherine Newton and in the other the plaintiffs were William H. Whitlock and his wife. The defendants were the same in both suits and were the First National Bank of Carthage, Mo.; Ernest B. Jacobs, its cashier, William A. Rhea, Mont B. Fairfield, and the Mont B. Mining Company, a corporation.

It was alleged that plaintiff Newton was the owner of 25,000 shares, and that plaintiffs William H. Whitlock and wife were the owners of 24,990 shares, of the capital stock of the Ananias Mining Company, a corporation with an authorized capital stock of 100,000 shares, but which had issued only 87,500 shares; that Rhea owned 25,000 shares, and of the remainder W. F. Webster owned 12,500 shares, E. M. Hall owned 5, and 5 were owned by C. T. Hall; that the Ananias Company owned a mining lease and mining machinery, and carried on mining operations on its land in Jasper county, Mo.; that Rhea was a director, secretary, and treasurer, and managed the mining operations; that the other directors were Whitlock and his wife and the two Halls, but that the Halls were the nominees of Whitlock and Rhea, and as directors conformed to the wishes of Rhea and Whitlock. It was alleged that the Ananias Company became involved in debts that it was unable to meet, and was pressed by its creditors, and that the bank, as one of the creditors, and Jacobs, its cashier, on behalf of the creditors, proposed to the stockholders that they should permit the mining property to be placed in the hands of a trustee, to be held until by its operations it should pay its debts, or be sold by the trustee and the debts paid, after which all remaining money realized by the company's operations was to be returned to the stockholders, and that this arrangement was to be effected by the stockholders assigning and placing their stock in escrow with Jacobs and the bank.

The Whitlocks' bill then alleged that, pursuant to this proposition, they assigned to Jacobs their 24,990 shares of stock, and that Jacobs and the bank accepted the trust. Newton's bill set out copies of letters between Jacobs as cashier, and Newton's attorneys, alleged as defining the terms of the trust

agreement between them. These letters are too extended to be set forth in full, but a portion of the bank's letter making the proposal is as follows:

"At this time it appears that an agreement can be reached among all creditors whereby they will enter into a contract to withhold the prosecution of their claims for a period of 90 days during which time they will place the property in the hands of a trustee, and he will operate the same with an experienced manager, and if within that time, as they confidently expect, the mine can be made to pay, then there will be no reasonable doubt that creditors will receive their money, and the property can be sold at a fair valuation. If this course is not adopted, bankruptcy proceedings will immediately ensue, and the result will be that the creditors will realize but very little upon their various claims, for the largest value of the company lies in its lease and the ground, which will immediately be forfeited by the owners of the land as soon as work is discontinued; such a course would necessarily leave the machinery as the only tangible asset out of which to pay the indebtedness.

"The creditors do not desire to advance the money necessary to put the mine in operation, unless they can feel assured that the stockholders will not interfere, or possibly stop their operations at a time which might be vital to the interest of all concerned, and it is proposed that all stock shall be assigned and placed in escrow in this bank, to be held subject to an agreement, which is to be prepared and accepted by the stockholders, whereby the creditors, after placing the mine upon a paying basis, may have the authority to make a sale of the property in order to pay the indebtedness and save the stockholders something upon their investment. Mr. Whitlock and Mr. Ray, local stockholders of the company, and who own one-half of the capital stock, have agreed to this proposition, and are willing to pool their stock as above indicated. It is also agreed by them that they shall both resign from the board, as well as other local parties and that a new board of directors, composed of the principal creditors, shall be elected in their stead.

"I believe I have outlined the matter sufficiently for you to obtain a fair idea of the situation, and I wish to urge that the stock held by the Newton estate be deposited with Mr. Whitlock's and Mr. Ray's, in order to consummate the plan above referred to. It is the only chance to save anything out of the property, either for creditors or stockholders, and if this course be not carried out and a bankruptcy court be the only resort, creditors will naturally be inclined to take such recourse as may be possible upon the individual liability of stockholders, through irregularities in the corporation, which appear to be numerous, as well as stock which has been unpaid for by various shareholders."

The answer of Mrs. Newton's attorneys contained the following:

"In further reply to yours of April 26th will say that I find that the stock of the Ananias Mining Company, owned by the estate of A. Newton and Catherine E. Newton, is already on deposit with you under certain agreement with Mr. Whitlock. That agreement is hereby canceled, and the stock is placed in your hands in accordance with the request contained in yours of April 26th. We desire to give you full authority to deposit the same in accordance with the wishes of the creditors as set forth in your letter, with this condition, however, that nothing must be done by which the estate of Mr. Newton or Mrs. Newton will become liable for $1 of any indebtedness or obligation whatever. Rather than do that, we would let the entire thing go. Hoping that in the end there will be something left for Mrs. Newton, we have, however, told her to forget all about the stock, and if she receives no return, well and good, and if in the end she does she is just that much better off."

To this letter the bank replied:

"I have neglected earlier replying to your letter of the 1st inst. in relation to the Ananias Mining Company stock owned by the estate of A. Newton and Catherine Newton. I have filed the stock with your instructions attached, and sincerely hope that better results may be reported for the future than the past; but Mr. Whitlock has gotten this company badly involved, and whether or not it can be pulled out of the hole will depend upon various conditions."

In each of the bills it was then alleged that the bank and Jacobs, after accepting the trust, took possession of the property of the Ananias Company and selected Rhea as the manager of the property. The Newton bill alleged that Rhea had full knowledge of the trust. The Whitlock bill alleged that Rhea was selected by Jacobs and the bank as manager of the property for the purpose of carrying out the trust alleged in their bill. In each bill it was averred that Rhea conspired with Jacobs, the bank, and with Mont B. Fairfield to obtain the title to the property, and in order to do so induced a creditor of the Ananias Company, holding a judgment against the Ananias Company, to levy an execution against its property and to sell it, and that at that sale Rhea caused the property to be bid in in the name of Mont B. Fairfield, and that the sheriff thereupon executed a bill of sale for the property to Fairfield. It was alleged that Fairfield conveyed the property to the Mont B. Company, but that this transfer was in breach of the trust. The bills then charged that all creditors of the Ananias Company had been paid out of the proceeds of the trust, but that defendants still retained plaintiffs' shares of stock and the property of the Ananias Company, and had made large profits therefrom. The prayers were for a decree declaring a trust to exist, as alleged, in the property of the Ananias Company, notwithstanding the form of a sale to Fairfield, and for an accounting.

There was a denial by Rhea of the alleged trusts, or of knowledge of them, or of purchase of the property through conspiracy. He alleged that the execution sale was fair and conveyed the title to Mont B. Fairfield, and that the Ananias Company also executed a conveyance of all its property to him; that the Ananias Company was in an insolvent condition, and the stockholders agreed to assign their stock to the creditors, and that the creditors should take the corporation and its property in full payment for their debts, with the right either to sell the corporate property or to continue the corporate existence for their own benefit, and that the property of the corporation and the shares of stock (except those belonging to W. F. Webster) were delivered to the creditors pursuant to this agreement, together with the resignation of the officers and directors, and that the new stockholders elected new directors, who chose new officers for the corporation. He alleged that the Ananias Company, by its new officers, made a written agreement to sell him the property, if he should be able to pay the claims of the creditors; that on the faith of this contract he expended a large amount in improvements on the property and in acquiring new mining ground adjacent to the property of the Ananias Company, from which he procured ores and from the proceeds of their sale was able to pay the debts of the Ananias Company. He alleged that the Mont B. Mining Company since its organization owned and operated the mines, and at its own expense had made extensive improvements and obtained new mining ground and operated mines thereon. The answer of the Mont B. Company was similar. The decree dismissed the suit as to Jacobs, the bank, and Fairfield, but held Rhea to be a trustee for plaintiffs, and ordered him to deliver to plaintiffs certain shares of stock in the Mont B. Mining Company, and to pay to them $183,733.76 as their share of the profits of the trust property. Rhea and the Mont B. Mining Company have appealed. There is some dispute as to the facts, but the essential facts as shown by the evidence are as follows:

In 1910 the Ananias Mining Company was organized under the laws of Missouri, with an authorized capital stock of $100,000, divided into 100,000 shares. Of this stock there was issued to W. A. Rhea 25,000 shares, to W. H. Whitlock 20,000 shares, to his wife, Blanche Whitlock, 4,990 shares, to E. M. Hall 5 shares, and to C. T. Hall 5 shares. Later there were issued 25,000 shares to A. Newton, who afterwards died, and these shares became the property of the plaintiff Catherine K. Newton; 12,500 shares were also issued to W. F. Webster; the remaining 12,500 shares were never issued. The directors were Rhea, the two Whitlocks, and the two Halls. Whitlock was president, and Rhea secretary. The property of the corporation consisted of a mining lease and of a mining or concentrating plant on the leased land. Mining operations were conducted until in April, 1911. At that time the company had an indebtedness of about $23,000, including an overdraft to the First

National Bank of Carthage of $4,600. The value of the property, including leasehold rights, did not exceed $5,000. Creditors were pressing for payment, and suits had been begun. One case was to be heard on April 22d. At a conference between Whitlock and Jacobs at the office of the attorney for the bank on the 21st of April means were discussed for averting the danger from this pending suit, and the bank decided to and did procure an attachment of all the corporate property on the afternoon of the 21st. It is at this conference that Whitlock claims the agreement was made between himself and Jacobs relating to the disposal of his stock in trust to Jacobs. The next day judgments were entered against the Ananias Company for about $4,400 and for the enforcement of liens securing this sum.

The next day was the 23d and on that day there was a general meeting of all the creditors. Mr. Whitlock was not present, but Rhea was. Jacobs explained that the bank attachment was not for the purpose of obtaining a preference, but to hold the property pending some possible arrangement among the creditors. The attorney for Rhea said that Rhea was ready to turn over his stock to the creditors. An attorney for the bank said that he was satisfied that the Whitlocks would transfer their shares, and Mr. Jacobs said he would endeavor to get Mrs. Newton to transfer her shares. The creditors agreed to have an expert examine the mines and report at a later meeting. This second meeting of the creditors occurred two days afterwards, on April 25th, at Webb City. The expert reported it to be doubtful if the mine could be made to pay, but Mr. Rhea said he believed the ground could be made to pay, and it was finally decided that if the creditors would forbear pressing their claims for 90 days, and the stockholders would turn over the property to the creditors, assign their stock, and resign as officers and directors, the creditors would proceed with mining operations, and they agreed who should be chosen as directors. The Whitlocks resigned as directors and officers, and their stock was turned over, assigned in blank to the bank's attorney. The evidence shows this to have occurred on the 25th. Halls' stock was also assigned then, and Rhea assigned his stock an the 25th or 26th. On the 26th a written agreement was drawn and signed by Whitlock for the Ananias Company, and later signed by creditors of the company representing $22,000 of claims, agreeing that Jacobs should act as trustee for the creditors, and that they would forbear legal proceedings for 90 days on the understanding that Jacobs should put some one in charge of the mining operations for 90 days, the proceeds to be paid to creditors. On the 26th also Jacobs wrote the letter to Mrs. Newton's attorneys.

On May 1st, there was a meeting of those claiming to be the stockholders of the Ananias Company, Mr. Hackney holding the Rhea and the Whitlock certificates and one of the Hall certificates, and five creditors having one certificate of 1 share each issued that day as a distribution of the 5 shares previously held by the other Hall, and Mr. Jacobs also acting. Five directors were chosen for the ensuing year. Jacobs was later elected president.

On this same day Mrs. Newton's attorney at Chicago wrote the answer to Jacobs' letter that has been referred to. On May 3d Rhea began work at the mine, thinking to run it for 30 to 90 days on trial, acting as a salaried employé of the new officers of the corporation. On June 15th the Ananias Company, by Jacobs as president, and Rhea entered into a written agreement authorized by the board of directors, by which the company agreed that if Rhea, during the period of his management, should cause all of the debts of the company to be paid, he should thereupon become the owner of all the corporate property, and that Rhea might have the exclusive right to sell the property for the unpaid portion of the corporate debts, and to have as a commission any surplus of price received above the amount of such debts. Jacobs also signed this agreement as trustee representing all the stock in the company, except Webster's shares and the 5 shares issued to directors in order to qualify them. This contract was made after Rhea had reported that he could not profitably operate the mine longer without much new machinery and was ready to quit, but was willing to continue and to put in the machinery at his own expense, if the company would give him such a contract. The directors and creditors were unwilling to purchase the new machinery, and so

the contract was made. Rhea expended between $2,500 and $3,000 for the new machinery. He operated the mine for the remainder of the year, and made unsuccessful efforts to sell the mine. In December he sold the ore which he had held for some time because of low prices, and was able to pay creditors a dividend of 32 per cent.

Soon afterwards Rhea again reported that the mines could not pay and that the ore faces were pinching out. The creditors again appointed an expert miner, who was one of the creditors, to examine the property and report, and he reported that the mine could not be operated so as to pay its debts. The creditors then offered Rhea a discount of 10 per cent. of, their claims if he would continue. Rhea associated Fairfield with him, and they acquired additional land under leases, and then decided to exercise the right of purchase of the Ananias Company's property, given him under the option agreement referred to. Supposing that a judgment sale was needed in order to clear the title of the property, because Webster had not assigned his stock, an execution sale on one of the judgments against the corporation was arranged, and the property was bid in on April 1, 1912, by Rhea in Fairfield's name, and the sheriff gave his conveyance to Fairfield. On the same day, the Ananias Company executed a deed to Fairfield of the same property, and Rhea or Fairfield delivered a guaranty of the payment of the remainder of the debts of the company, which amounted to a large sum. These debts were later paid, largely from operations in the mines on other ground and from Rhea's private funds.

A new company was organized, called the Mont B. Mining Company, of which Rhea held practically all the capital stock. To this company the Ananias property was conveyed by Fairfield, and it operated on the land formerly occupied by the Ananias Company, but under a new lease, on more favorable terms, and also on a much larger tract of land adjoining. Owing to the great increase in the prices of zinc and lead ores, these operations later proved to be very profitable. The trial court required Rhea to account for the profits he had made in all of these operations, on the theory that the several mines were but an expansion of the property of the Ananias Company, and that plaintiffs were entitled to such proportion of the shares in the Mont B. Mining Company's stock and in its profits as their shares of stock bore to the total capital of the Ananias Company.

Frank Hagerman and Thomas Hackney, both of Kansas City, Mo., for appellants.

Hiram W. Currey, of Joplin, Mo. (Hugh Dabbs, of Joplin, Mo., and A. W. Martin, on the brief), for appellees.

Before SANBORN and CARLAND, Circuit Judges, and MUNGER, District Judge.

MUNGER, District Judge (after stating the facts as above). The chief question in the case is the sufficiency of the evidence to support the decree. The evidence introduced on behalf of the Whitlocks tended to prove that Jacobs agreed with them that, if they would assign their stock to him as trustee for the creditors, he would put a competent manager in charge of the mine, and endeavor to pay off the corporate debts by the proceeds from the operation of the mine, and then would return the shares of stock to them. The theory of Whitlock's counsel is that this was as far as the agreement extended, and that no power of sale of the mine or of the stock was conferred on Jacobs or the bank, although this militates against the allegations of the bill. The case has been considered upon the evidence, as if the Whitlock bill conformed to this theory. Treating the evidence as proving the agreement of Jacobs to have been as Whitlocks' counsel now contend, and conceding, without deciding, that thereby a trust

was created in the property of the corporation, and also in Whitlocks' shares of stock, a question of fact arises as to what notice Rhea had of this trust agreement, binding him, as a purchaser of the corporate property, to account to Whitlocks.

Conceding, also, without deciding, that the correspondence between Mrs. Newton's attorney and Jacobs created a similar trust in her favor, a similar question of fact arises as to what notice, if any, Rhea had of the agreement between Mrs. Newton and Jacobs, and, if Rhea had no notice, the Mont B. Mining Company cannot be said to have had notice. Rhea was held to account to plaintiffs only because he acquired the property of the Ananias corporation, and from that property he thereafter made profits. Its corporate existence was not continued by him after he acquired its property, and the property acquired was transferred from him to the Mont B. Mining Company.

[1] Was there anything in the relationship of Rhea to the Ananias Company that invalidated his purchase of that company's mining property? He was an employé of the corporation under a verbal contract to operate the mine experimentally, with a view to discovering whether it would be profitable, if operated. His dealings for the purchase of the mine were made with the company's president, approved by the board of directors, and ratified by the holder of more than a majority of the issued capital stock. There is no reasonable question of his good faith toward the company in making his purchase. He did not in any manner represent the corporation in making the sale. That he was making the purchase for himself was not concealed, as the written contract named him as the vendee. The contract is shown to have been fair, and to the benefit of the corporation and of its stockholders. It provided for the payment of all of the debts of the corporation. There was no apparent prospect of development of the mine of the Ananias Company so as to be profitable, but with additional land that Rhea could acquire the property, with its mill, would be of some advantage. It is urged that Rhea was incapacitated to purchase the property because of his office, but this contention cannot be sustained. In the case of Wyman v. Bowman, 127 Fed. 257, 62 C. C. A. 189, this court, by Judge Sanborn, stated the rule as follows:

"In the first place, it is not true, as a general rule, that the directors of a corporation are incompetent to make contracts with themselves as individuals, or that agreements so made may generally be avoided at the suit of creditors or stockholders of the corporation. The only reason why a contract of this character may be set aside in any case is because directors occupy a fiduciary relation to the corporation, and to its creditors and stockholders. This relation is analogous to that of agent to principal, and trustee to cestui que trust; but it is not of so intimate and confidential a character as either of these. Still it is such a relation of trust and confidence that courts scrutinize with jealous care all transactions between directors as officers and as individuals, and require them to be characterized by good faith and the conscientious discharge of official duty. The vice against which they seek to guard them is that the adverse interest of the individuals may overcome the duty of the officials, and induce agreements and transactions detrimental to the corporation, and unduly beneficial to the individuals. Yet in many—probably in most—cases the interest of the directors and officers of the corporation is as

great, and it is often greater, in the welfare and success of the company, than in their individual prosperity. In many cases the prosperity of the individuals is conditioned by the success of the corporation they are managing. There is no sound reason why individuals who are directors of a corporation may not come to its assistance in days of financial distress, may not make their contracts to loan money to it, to receive security from it for repayment, to accept payment of obligations to them, to buy property from, or sell property to, it, or to do any other act beneficial to the corporation, or mutually advantageous to both the corporation and the individuals. The question here under consideration has often been discussed and determined by the courts of this country and of England, and, without entering upon an exhaustive review of the opinions, it may be safely said that these principles have become firmly established both by reason and by authority: Contracts and transactions between individuals and corporations of which they are directors or officers, which are fair, which are made in good faith, which do not secure to the individuals any undue or unjust benefit or advantage, and in which the interest of the individuals and the duty of the officials work in unison for the welfare of the corporation, are valid and enforceable both at law and in equity. Twin Lick Oil Co. v. Marbury, 91 U. S. 587, 590, 23 L. Ed. 328; Hotel Co. v. Wade, 97 U. S. 13, 22, 23, 24 L. Ed. 917; Gould v. Railway Co. (C. C.) 52 Fed. 680, 681; Sutton Mfg. Co. v. Hutchinson, 63 Fed. 496, 11 C. C. A. 320; Holt v. Bennett, 146 Mass. 437 [16 N. E. 5]; Smith v. Lansing, 22 N. Y. 520, 528; Duncomb v. N. Y., etc., R. Co., 88 N. Y. 1, 6, 9; Buell v. Buckingham & Co., 16 Iowa, 284, 291, 293 [85 Am. Dec. 516]; Ashurst's Appeal, 60 Pa. 291, 312, 315; Hallam v. Indianola Hotel Co., 56 Iowa, 178, 9 N. W. 111; Combination Trust Co. v. Weed (C. C.) 2 Fed. 24, 25–27; Gorder v. Plattsmouth Canning Co., 36 Neb. 548, 556, 54 N. W. 830."

Later cases have approved the same rule. Union Trust Co. of Maryland v. Carter (C. C.) 139 Fed. 717; Kessler & Co. v. Ensley Co. (C. C.) 141 Fed. 130; Cowell v. M'Millin, 177 Fed. 25, 100 C. C. A. 443; Howland v. Corn, 232 Fed. 35, 146 C. C. A. 227; In re Eastman Oil Co. (D. C.) 238 Fed. 416.

[2] It is also urged that Rhea had notice of the trust relationship between Whitlocks and Mrs. Newton and Jacobs. Rhea denies any knowledge of the contracts claimed by plaintiffs to have existed. Rhea had assigned his stock without conditions, although Jacobs' letter to Mrs. Newton's attorney stated otherwise. Rhea mistakenly considered that the corporate property had to be conveyed by a judicial sale before he could get a clear title, because Webster had not assigned his stock. Rhea did not see or know of the correspondence between Jacobs and Mrs. Newton's attorneys. He did not know that any of the stock was assigned on any condition, except that it was for the purpose of paying the corporate debts. Without stating the details of evidence relied upon by the appellants and appellees, a careful reading and consideration of all the evidence, and a comparison of it with the contentions made as to its legal effect, leaves the conviction that Rhea was a purchaser of the corporate property in good faith and without notice of any trusteeship by Jacobs as now claimed by appellees, and that the Mont B. Mining Company acquired the property from him, also in good faith and without notice of any right therein claimed by appellees.

[3, 4] Rhea dealt with those who were at least de facto officers. No other persons claimed to act as directors or president. The officers were recognized as such by all who had dealings with the corporation, and plaintiff's counsel conceded at the trial that the cred-

itors had the right to choose a new board of directors to manage the property. The acts of de facto officers in good faith are as valid as respects third persons as are those of de jure officers. 3 Cook on Corps. (7th Ed.) § 713; 2 Thomp. on Corps. (2d Ed.) §§ 1117–1120; Augusta T. & G. R. Co. v. Kittel, 52 Fed. 63, 2 C. C. A. 615. When a corporation is insolvent, and unable to meet its obligations, or to secure further funds with which to continue business, and creditors are pressing their claims, a majority of the stockholders have the power, in good faith, to make a sale of the entire corporate property in order to provide for such debts. 3 Cook on Corps. (7th Ed.) § 670; 3 Thomp. on Corps. (2d Ed.) § 2724; Hayden v. Official Hotel Red Book & Directory Co. (C. C.) 42 Fed. 875; Marks v. Merrill Paper Co., 203 Fed. 16, 123 C. C. A. 380; Skinner v. Smith, 134 N. Y. 240, 31 N. E. 911; Sewell v. East Cape May Beach Co., 50 N. J. Eq. 717, 25 Atl. 929; Phillips v. Providence Steam Engine Co., 21 R. I. 302, 43 Atl. 598, 45 L. R. A. 560; Rothwell v. Robinson, 44 Minn. 538, 47 N. W. 255; Bowditch v. Jackson Co., 76 N. H. 351, 82 Atl. 1014; Sawyer v. Dubuque Printing Co., 77 Iowa, 242, 42 N. W. 300; Price v. Holcomb, 89 Iowa, 123, 56 N. W. 407; Traer v. Lucas Prospecting Co., 124 Iowa, 107, 99 N. W. 290; Treadwell v. Mnfg. Co., 7 Gray (Mass.) 393, 66 Am. Dec. 490; Descombes v. Wood, 91 Mo. 196, 4 S. W. 82, 60 Am. Rep. 239; Common Sense Min. & Mill. Co. v. Taylor, 247 Mo. 1, 152 S. W. 5; Jones on Insolvent Corporations, § 56; Purdy's Beach on Corporations, §§ 830–834.

Rhea purchased this property from the stockholders and board of directors; both they and he acting in good faith, and believing that authority existed for the making of the conveyance, and that it was for the best interests of the corporation and of the creditors that the property should be sold. No other opportunity had been found to dispose of it, and the price was fair. Rhea was justified in believing that the other stockholders who had assigned their stock had made such transfer on the same terms that he had, as a surrender of their office and a surrender of the shares of stock to the creditors, so that they might obtain payment of their claims, either by operation of the mines or by sale of the mining property. As nothing impugns his good faith in making the purchase from the directors and holder of the majority of the stock, neither he nor the Mont B. Mining Company can be held to be a trustee for plaintiffs.

These conclusions render unnecessary a discussion of other questions presented. For the reason stated, the decree will be reversed, with instructions to dismiss the suits.

CARLAND, Circuit Judge, dissents.

BUSINESS MEN'S ACC. ASS'N OF AMERICA v. SCHIEFELBUSCH.*

(Circuit Court of Appeals, Eighth Circuit. December 2, 1919.)

No. 5423.

1. INSURANCE ⊜455—DEATH FROM BLOOD POISONING CAUSED BY "ACCIDENTAL MEANS."

The death of an insured from blood poisoning from an infected abrasion, caused by rubbing his head, which was bald, with an infected towel, *held* caused by "accidental means," within the terms of the policy, in the absence of evidence that he knew of the infected condition of the towel when he used it.

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

2. APPEAL AND ERROR ⊜173(14)—NEW DEFENSE BY INSURER CANNOT BE RAISED FOR FIRST TIME ON APPEAL.

In an action on an accident policy for death of insured from an infection, caused by his own voluntary act, that he knew the probable consequences of such act *held* matter of defense, and the question one for the jury, which cannot be raised for the first time in the appellate court.

3. INSURANCE ⊜665(5)—EVIDENCE OF CAUSE OF DEATH AS ACCIDENTAL.

Evidence *held* sufficient to sustain a finding that the cause of death of insured was accidental.

In Error to the District Court of the United States for the Western District of Oklahoma; Joseph W. Woodrough, Judge.

Action at law by Bertha Schiefelbusch against the Business Men's Accident Association of America. Judgment for plaintiff, and defendant brings error. Affirmed.

Solon T. Gilmore, of Kansas City, Mo. (C. G. Horner, of Guthrie, Okl., on the brief), for plaintiff in error.

A. G. C. Bierer, of Guthrie, Okl. (Frank Dale and N. E. McNeill, of Oklahoma City, Okl., on the brief), for defendant in error.

Before CARLAND and STONE, Circuit Judges, and ELLIOTT, District Judge.

CARLAND, Circuit Judge. This is an action by defendant in error, hereafter called plaintiff, to recover from plaintiff in error, hereafter called defendant, a death loss on an accident policy issued to her husband, Mathis Schiefelbusch. The plaintiff recovered a verdict below, and the defendant brings the case here, assigning error. The policy contained the following provisions:

"Hereby insure him against loss resulting from bodily injuries, effected directly, independently, and exclusively of all other causes, contributing or proximate, through external, violent, and accidental means." "* * * For loss of life, $5,000.00" "Blood poisoning resulting directly from bodily injuries shall be deemed to be included in the said term 'bodily injuries.'"

The plaintiff stated her cause of action as follows:

"That the said Mathis Schiefelbusch being a man that is termed and designated as bald-headed would frequently during the summer time and in hot weather in wiping and rubbing the perspiration from the top of his head would do so with a towel, and that upon the 17th or 18th day of July, 1916, the exact date being unknown to said plaintiff, the said Mathis Schiefelbusch

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

*Rehearing denied March 31, 1920.

did violently and by external means in attempting to rub the perspiration from the crown of his head used a towel which had been used in his dental work, and by rubbing over his head did cause a slight abrasion of the skin and after receiving said injury and abrasion of the skin that thereafter and thereby an infection set in and that by reason of said infection and as a direct result from the violent rubbing of said head, which caused an abrasion of the skin, and as a direct result blood poisoning resulted and of said injury said Mathis Schiefelbusch died on or about the 24th day of July, 1916, which said death was caused and resulted directly from the external, violent and accidental injury received from the rubbing of the towel or cloth over the head of said Mathis Schiefelbusch thereby causing a slight abrasion of the skin."

It was admitted at the trial that the deceased died from blood poisoning. Counsel for defendant submit two propositions for reversal. They are as follows:

(a) "There can be no recovery under a policy insuring against the result of an injury effected through accidental means, where such injury, although totally unexpected, fortuitous, and undesigned, and in that sense accidental, is occasioned by voluntary act on the part of the insured, executed in an expected and ordinary way, since such injury, though accidental, is not the result of accidental means."

(b) "The theory that Dr. Schiefelbusch's death resulted from the causes named in the petition is based upon a chain of presumptions or inferences, and violative of the rule of law that, whenever circumstantial evidence is relied upon to prove a fact, the circumstances must be proved, and not themselves be presumed."

[1, 2] The defendant introduced no testimony. The evidence on the part of the plaintiff shows the following facts: The deceased was a dentist, and practiced his profession at Yale, Okl. He was bald-headed, and perspired profusely on his head and neck during hot weather. He had a habit or practice of using, to the extent of a dozen times a day or more, the towels used by him in the practice of his profession, to wipe perspiration from the top of his head and neck. He used these towels for this purpose when they were dirty, and had blood and pus upon them, coming from the mouths of patients. He wiped his hands upon these towels after having his hands in the mouths of patients. The towels often had upon them hardened particles of plaster of paris. The practice of using these towels was so common that Dr. Bacon had talked to the deceased about it.

The history of the illness of deceased was substantially as follows: On Wednesday, July 21, 1916, deceased complained of pain at the back of his neck and the top of his head. There were circumscribed red spots upon the top of the head and upon the neck. They were inflamed and swollen. Deceased suffered with pain in the locality mentioned on Thursday and Friday. Saturday morning he had a chill, and went to bed exhausted. He continually grew worse, became delirious on Sunday afternoon, and died on Monday morning about 1:30 o'clock. Dr. Hudson incised the red spot on the top part of the head on Thursday. He found a small necrotic area underneath the skin and no free pus. In the judgment of the doctor, deceased had been infected by bacterial or septic infection. There was medical testimony that not a day passed upon which deceased could not have been infected by the towels with the streptococcus germ; that the continual rubbing of the head under the circumstances shown would be sufficient to carry

a germ into the body of deceased; that there was no indication that the germ was carried into the body from any other source or manner than by the use of the towels; that it was very probable that deceased was infected by the rubbing of the towels, and that the infection originated in the localized places upon the head.

There was no allegation in the answer that, when deceased used the towels upon his head in the manner alleged in the complaint, he knew they were infected and were liable to infect him. The case below was not tried upon that theory. The trial court did not charge the jury upon that question, nor was it requested so to do by the defendant, and the jury did not pass upon that question. The plaintiff, in her effort to show that the towels were the cause of the infection and consequent blood poisoning of the deceased, came near showing that deceased must have known of the infected condition of the towels and that they were liable to infect him; but, as we have said, that question was not before the court. The question in all events was one for the jury to determine under the evidence, and a verdict could not have been directed on the ground that deceased did know of the infected condition of the towels, and that they were liable to cause an abrasion of the skin and infect him. If the deceased knew that the towels he used in the manner indicated would cause an abrasion of the skin, and also were infected with the streptococcus germ, then the means of death was not accidental, within the language of the policy. Interstate Business Men's Acc. Ass'n v. Lewis, 257 Fed. 241, — C. C. A. —.

There is no finding, however, that deceased had the knowledge mentioned, and the evidence upon the subject could not be considered by the trial or this court, except for the purpose of deciding whether there was enough to go to the jury. The fact that deceased had this knowledge was matter of defense. Plaintiff was not required to defeat her own cause of action. If the deceased used the towels without knowledge that they were infected, and were liable to cause an abrasion of the skin and also infect him, then plaintiff showed that death was caused by accidental means, as he could not be said to have intended the use of a towel that would infect him. We cannot say that deceased had the knowledge mentioned for two reasons: (a) The case below was not tried on this theory; (b) the evidence upon the subject is such that the question would have to be submitted to a jury. We are therefore of the opinion that the death of deceased was caused by accidental means.

[3] As to the claim that the verdict of the jury is based upon a chain of presumptions or inferences, we are satisfied that, even if this be so, it does not invalidate the verdict, if there were facts from which the jury had the right to draw legitimate inferences. The deceased was a man in good health. He did rub his head with towels which were liable to cause an abrasion of the skin and the introduction of streptococcus germs into his body. There was nothing to indicate that the germ which caused blood poisoning came from any other source. There was medical testimony to the effect that it was probable that the

infection came from the source stated. Dr. Hudson, when testifying, said:

"Well, owing to his habits of rubbing the towel over his head in that way, rubbing off the tender cells of the skin which lay in layers on the outside of the skin, I would say it was very probable he got an infection through the skin in that way."

The testimony of Dr. Hudson was supported by physical facts testified to by the plaintiff and corroborated by three other reputable physicians. We think there was sufficient evidence to sustain the verdict of the jury. Such evidence has been held sufficient in many other cases. Preferred Acc. Ins. Co. of New York v. Barker, 93 Fed. 158, 35 C. C. A. 250; McCarthy v. Travelers' Ins. Co., 15 Fed. Cas. 1254; 1 Cyc. p. 292; M., K. & T. Ry. Co. v. Minor (Okl.) 181 Pac. 142; Waters-Pierce Oil Co. v. Deselms, 212 U. S. 159, 29 Sup. Ct. 270, 53 L. Ed. 453.

There was some attempt on cross-examination to show that the blood poisoning may have been the result of a mosquito bite. There was no evidence, however, that any mosquito ever bit the deceased. There was testimony, also, that refuted any claim that deceased was infected by the incision made by the physicians. The jury were called upon to decide the question presented by the evidence, and they have decided it upon sufficient testimony, and their verdict is final.

Judgment below affirmed.

SINGLETON et al. v. MOORE.

(Circuit Court of Appeals, Second Circuit. December 1, 1919.)

No. 103.

1. PARTNERSHIP ⟸280—EFFECT OF PROVISIONS FOR LIQUIDATION AT EXPIRATION OF CONTRACT PERIOD.
   It is competent to provide in partnership articles that, when the term fixed for the duration of the partnership business has expired, the power of liquidating the partnership business shall vest in some specified one of the partners, and it thereupon becomes the duty of such partner, as liquidating agent, to collect the assets, adjust the debts, etc.
2. PARTNERSHIP ⟸280—PARTNER DESIGNATED AS LIQUIDATING AGENT ON TERMINATION OF PARTNERSHIP HAS SOLE CONTROL.
   Where partnership articles designated one partner as liquidating agent on termination of the partnership, the other partners have no power to act, but all power is conferred on the liquidating partner.
3. PARTNERSHIP ⟸280—NONINTERFERENCE BY COURTS WITH PARTNER APPOINTED AS LIQUIDATING AGENT.
   When partnership articles intrust the charge of the property and the winding up of the partnership affairs to one of the partners, the courts will not interfere with his proceedings, unless a palpable breach of the partnership articles is shown, or misconduct appears, which amounts to fraud and endangers the property.
4. PARTNERSHIP ⟸282—LIQUIDATING PARTNER SHOULD SELL STOCK WHICH HAD ACQUIRED HIGH MARKET VALUE FROM COMPETITION BETWEEN FORMER PARTNERS.
   Where, after expiration of a partnership by its terms, corporated stock pledged by the partnership greatly increased in value, because the liqui-

dating partner and the other partners were each seeking to obtain control of the corporation whose stock was pledged, *held*, that it was the duty of the liquidating partner to sell the stock at the period of high price, though such sale would be injurious to him as an individual; it being for the benefit of the firm.

5. PARTNERSHIP ⊂=282—LIQUIDATING PARTNER SHOULD SELL STOCK WHICH HAD ACQUIRED HIGH MARKET VALUE FROM COMPETITION BETWEEN FORMER PARTNERS.

Where partnership, which had disposed of textile products, expired, and the partner named as liquidating agent and the other group of partners each continued in the business, and desired to control a textile corporation, shares of which the firm had pledged as collateral to secure a debt, *held* that, where the annual meeting of the corporation was not far distant, and these after demand for stock would lessen, and price would fall, it was the duty of the liquidating partner to sell same, instead of dividing it between the partners; hence as, if such sale would work any inequality, it might be corrected on subsequent reference and accounting, the liquidating partner cannot complain of an order directing sale of such stock.

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

Suit by Louis F. Singleton and others against Edgar B. Moore. From an interlocutory order appointing a receiver, and directing the sale of corporate stock which had been pledged by a partnership that had expired according to the terms of the partnership agreement, defendant appeals. Affirmed.

This cause comes here upon an appeal from an interlocutory order entered on July 5, 1919, in the United States District Court for the Eastern District of New York. The order appealed from appointed a receiver of 435 shares of capital stock of the Camden Woolen Company, a corporation organized under the laws of the state of Maine. These shares of stock belonged to the firm of E. B. Moore & Co., which firm is in liquidation, and is composed of appellant and respondents, and the shares aforesaid are held by the Lincoln National Bank as collateral for a loan amounting to $32,657.57. E. B. Moore, the appellant, is the liquidator of the partnership by the terms of the articles of copartnership. The firm and liquidator are both solvent. No rights of creditors are involved.

The order appealed from directed the sale of this stock by the receiver at public auction, the repayment of the loan for which the stock is held as collateral, and that the balance be held subject to the further order of the court. The appellant obtained a supersedeas upon filing a bond for $20,000.

All of the firm capital of E. B. Moore & Co., or practically all of it, was contributed by appellant, who founded the firm prior to 1904. The partnership expired according to its terms on December 31, 1918. In the year 1917 the appellant's share of the firm profits had been 55 per cent.; the respondents each receiving 15 per cent. In the year 1918, which was the last year of the partnership, his share was 40 per cent., while each of the respondents received 20 per cent.

The respondents were former employés of the firm, who became members of it in 1910. The appellant was always the financially responsible member of the partnership, and always financed it with his own personal credit and financial connections.

Fitzgerald, Stapelton & Mahon, of New York City (Luke D. Stapelton, of New York City, of counsel), for appellant.

Wood, Malloy & France, of New York City (Melville J. France and

Francis X. Mahon, both of New York City, on the brief), for appellees.

Before WARD, ROGERS, and MANTON, Circuit Judges.

ROGERS, Circuit Judge (after stating the facts as above). The appellant contends that, as the partnership articles expressly provided that upon the expiration of the partnership he should have the right to liquidate the partnership affairs, the court below acted without authority in taking matters out of his hands by appointing a receiver and directing him to obtain possession of and sell the stock, an asset of the partnership, in the event that he, the liquidating partner, continued to refuse to offer it for sale.

[1-3] It is elementary that it is competent to provide in the partnership articles that, when the term fixed for the duration of the partnership business has expired, the power of liquidating the partnership business shall vest in some specified one of the partners. It then becomes the duty of the liquidating partner to collect the assets and adjust debts due to the firm. It is also his duty to turn the assets into money and then to pay and discharge the outstanding liabilities. After these duties have been performed he is to pay over to the other partners their proper share in the remaining surplus. 22 Am. & Eng. Encyc. of Law, 218. And the designation of a liquidating partner takes away from the other partners authority to act and confers it exclusively upon the liquidating partner. Hayes v. Heyer, 4 Sandf. Ch. (N. Y.) 485; Montreal Bank v. Page, 98 Ill. 109. He is the sole agent of the partnership for the purpose of winding up its affairs. And when the partnership articles intrust the charge of the property and the winding up of the partnership to one of the partners, the court will not interfere with his proceedings unless a palpable breach of the partnership articles is shown, or misconduct appears which amounts to fraud or which endangers the property. Walker v. Trott, 4 Edw. Ch. (N. Y.) 38.

The court below admitted, as indeed it would be expected to do, that there is no question that under the partnership agreement, the appellant as the liquidating partner has the legal right to dispose of the stock in his own way, at his own time, and in his own discretion, unless in doing so he thereby would work a fraud upon his former partners.

[4] This being the law, we shall state more in detail the facts which led the court below to take the action complained of on this appeal, and shall then inquire whether the facts justify the order which is here under review.

Prior to the dissolution of the partnership of E. B. Moore & Co., which had been engaged as distributors of textiles, E. B. Moore had informed his copartners that he intended to continue his business after the dissolution under the name of E. B. Moore & Co., as the agreement provided that he might do. In the meanwhile the plaintiffs, who had formed a new firm under the name of Frankenberg, Morgan & Singleton, with offices in the same building in which E. B. Moore & Co. had been established, it is claimed were maneuvering to be in a

position to take over and control the profitable part of the business of the partnership upon its termination. Both the plaintiffs and the defendant were anxious to gain control of the Camden Woolen Company, which operated a woolen mill at Camden, Me. The firm of E. B. Moore & Co. handled the product of this mill, and each side desired control of this Camden Company so as to handle the output of the mill to the exclusion of the other at the termination of the partnership. Affairs had been so managed that, when the new firm of Frankenberg, Morgan & Singleton began business, it became the exclusive selling agents of the Camden Woolen Company. Then began a contest to obtain enough of the stock of the Camden Company to control the affairs of that company. The plaintiffs began to purchase in the open market all of the shares they were able to buy, and had control of 214 shares, and defendant controlled 369 shares out of a total of 1,130 shares. The annual meeting of the Camden Company was to be held on July 16, 1919.

The activities of these parties in canvassing the shareholders to buy their stock created a market value for the stock which it had never had before, and which it is said it will not have again after the annual meeting is held. The 433 shares of Camden stock were carried on the books of E. B. Moore & Co. at about $20,000, or about $46 per share. The last previous sale in 1917 brought $55 per share, and the ordinary selling price was about $60 per share. Because of the active competition for purchase of the stock in order to control the annual meeting, the stock, if sold prior to the meeting, will bring $90 per share, and possibly $160 a share. After the annual meeting has been held, the evidence is that the stock will drop back to $60 per share. In other words, it appears that, if the 433 shares which belong to the partnership are sold at public auction prior to the annual meeting at even $90 per share, they will bring $38,970, and discharge the firm's "outstanding liability" of $32,657.57, and leave remaining a surplus of $6,312.43; whereas, a sale after the annual meeting will, as defendant admits, bring the normal price of $60 a share, or a total of $25,980. This not only would fail to discharge "the outstanding liability" above referred to, but it would leave a deficit of $6,677.57, instead of a surplus of $6,312.43. There is, moreover, a possibility, as the evidence discloses, that the stock may bring as much as $43,300 in excess of its normal value. If this block of 433 shares is not sold, the liquidating partner can control the annual meeting, and for this reason he is opposed to a sale, and asks that the court's order be reversed. The course he proposes is in his interest as an individual. It is not in the interest of the members of the firm.

On this state of facts the court below entered the order appointing the receiver and directing the sale—to be made on 10 days' notice at public auction. That order proceeds upon the theory that to withhold the stock from sale under the circumstances disclosed would operate as a fraud upon the rights of the other members of the firm in liquidation. It would be to prefer the personal interest of the liquidating partner to the interest of the firm as a whole. This it seems to us he has no right to do, and that he cannot do it without defrauding those

whose interests are intrusted to his keeping. His plain duty undoubtedly it was to sell the stock at the high price obtainable under the peculiar conditions which existed, and his failure to perform that duty justified the order which the court entered.

[5] The defendant, objecting, however, to the order of sale, has suggested that the stock should be divided and distributed in specie among the several members of the firm, instead of being sold. His claim is that if a sale takes place, and he and the plaintiffs bid at the sale, they will not go in on a fair and equal footing. He argues that the plaintiffs can afford to outbid him at the sale, as under the partnership agreement they will be entitled to receive back as profits 60 per cent. of whatever the stock brings over $50 a share, while defendant is to receive only 40 per cent. of the profits. It is therefore a more just and equitable method, he insists, to distribute the stock in specie.

It would seem to be a sufficient answer that the partnership articles specifically provide that the firm stocks shall be sold at the termination of the partnership. These articles read that—

"All the stocks, merchandise, indebtedness owing to the firm, and other assets of the said business shall be converted into cash, and there shall be repaid to each of the partners the amounts of their capital standing to their respective credit on the books of the partnership, and, after payment of the same, the remaining assets of the firm shall be divided among them as follows."

The partners made their own contract, and no court has any authority to change it into something different. Courts do not make contracts.

The defendant relies on Kelley v. Shay, 206 Pa. 209, 55 Atl. 925. In that case the court admitted that the general rule was that upon the dissolution of a partnership it is the right of each partner to have the partnership property converted into money by a sale, but said that the rule did not apply where the circumstances of the parties would give to one an advantage in the bidding; and the court held that in such a case, if all the debts were paid, the court might divide the property in specie. It is evident that that case differs from the instant case, in that in this case the debts are not paid, and in the former case it does not appear that the articles of partnership expressly declared that the firm's stock should be sold.

In Dickinson v. Dickinson, 29 Conn. 600, the bill asked for the division of the property of the firm. The court declared:

"We had supposed this object could only be effected by a sale of the property, and a conversion of it into cash, and then dividing the cash, because as between partners there is no other mode, where they do not agree, of ascertaining the value of the partnership property, or of disposing of it."

And in Sigourney v. Munn, 7 Conn. 11, the court declared that—

"In every case in which a court of equity interferes to wind up the concerns of a partnership, it directs the value of the stock to be ascertained in the way in which it best can be done; i. e., by a conversion of it into money. Each party may insist that the joint stock shall be sold."

The rule is correctly stated in 30 Cyc. 744, where it is laid down as follows:

"In an action for partnership dissolution and accounting, the entire property of the firm is to be converted into cash, unless all the partners, by an honest and lawful agreement, assent to a distribution of the assets in specie."

The order appointing the receiver and directing the sale of the stock provides that any party to the action may purchase the stock, and that any bid may be rejected by the receiver or disapproved by the court, if inadequate, and the court in its opinion stated that, if subsequent proceedings showed that defendant had been inequitably caused to create a fund, of which the plaintiffs received 60 per cent. to defendant's 40, the equities might be adjusted in the subsequent accounting during the litigation, and the order so provides.

We fail to discover error in the order as entered, and it is affirmed.

LONG, Mayor, et al. v. MILLER et al.

(Circuit Court of Appeals, Fifth Circuit. December 9, 1919.)

No. 3386.

COMMERCE ⊂⊃69—CITY WITHOUT POWER TO GRANT EXCLUSIVE LICENSE TO INTERSTATE FERRY.

A village ordinance granting an exclusive license to operate a ferry across the Mississippi river between the village and a city in another state, and making it an offense for any other person to operate a ferry between such places, and Act No. 111 of Acts La. 1912, and Act No. 68 of Acts La. 1896, in so far as authorizing such ordinance, *held* void, as in violation of the commerce clause of the Constitution.

Appeal from the District Court of the United States for the Western District of Louisiana; George W. Jack, Judge.

Suit by George H. Miller and others and the Vicksburg & Delta Ferry Company against R. Burney Long, Mayor of the Village of Delta, La., and others. From an order granting a preliminary injunction, defendants appeal. Affirmed.

The following is the opinion of Jack, District Judge, in the court below:

Plaintiffs ask an injunction against defendants, mayor and aldermen of the village of Delta, La., restraining them from further prosecution of petitioners for a violation of an ordinance of the town of Delta, granting an exclusive right to operate a ferry between Vicksburg and Delta Point, to the Missouri River Transportation Company and making it an offense for any other person to operate a ferry.

The authority of the town of Delta for a monetary consideration to grant such exclusive ferry privilege is claimed under Act 111 of 1912 of the Louisiana Legislature, under which said town is incorporated, which gives it the right "to license ferries and to regulate the same and the landing thereof within the corporate limits," and under Act 68 of 1896, which makes it unlawful for any person not a lessee of a public ferry to transport for hire any person across the Mississippi river or other streams in the state within a distance of two miles of any public ferry landing duly established under ordinance of a municipality. These acts, petitioners allege, in so far as they may be held to

authorize such ordinance, are violative of the due process of law and the commerce clause of the United States Constitution.

The ferry operates between Vicksburg and Kings Point, in the state of Mississippi, and Delta, La. It is not a part of a through system of transportation, being a local ferry, although some few articles of freight for Delta come by rail to Vicksburg from points beyond. The petition avers that the number of passengers carried average 150 a day and the freight 6 tons; that the value of the business is about $3,000 per month, and the value of the property invested is $6,000. We think the court has jurisdiction.

The petitioners live in Vicksburg, Miss., and have leased a private wharf at Delta, to and from which the ferry makes its regular trips. It is well settled that transportation by ferry across a stream from one state to another constitutes interstate commerce, and as such, where Congress has acted, is under its exclusive control. Where Congress has not acted, however, the states may exercise a measure of regulatory power not inconsistent with the federal authority and not actually burdening or interfering with interstate commerce.

The question of the authority of a state in licensing and regulating ferries across a navigable stream to an adjoining state has been before the Supreme Court a number of times. The earlier decisions have been modified by the later jurisprudence, and the extent to which a state may go in its regulatory laws is now well defined.

Fanning v. Gregoire (1853) 16 How. 524, 14 L. Ed. 1043, was one of the earliest cases. The court held that the Legislature of Iowa, in granting the plaintiff the right to establish a ferry across the Mississippi river at Dubuque, and prohibiting the county in which the city is located from granting such right to any other party, did not thereby cut itself off from granting thereafter to the city of Dubuque the right to license other ferries.

In the case of Conway v. Taylor (1861) 1 Black, 603, 17 L. Ed. 191, an exclusive franchise had been granted plaintiff by the state of Kentucky to operate a ferry across the Ohio river to the state of Ohio, and the courts of Kentucky restrained a competitor on the Ohio shore from operating his ferry from the Kentucky side back to Ohio. They recognized, however, the right of the Ohio ferry owner to carry passengers and freight from Ohio to Kentucky. This judgment was approved by the United States Supreme Court.

In Wiggins Ferry Co. v. East St. Louis (1882) 107 U. S. 365, 2 Sup. Ct. 257, 27 L. Ed. 419, the ferry company had a franchise to operate across the Mississippi river between Illinois and Missouri. The suit was to recover a license tax for the privilege of carrying on the ferry, and the Supreme Court maintained that right, referring to a passage in the opinion of Chief Justice Marshall in Gibbons v. Ogden, 9 Wheat. 1, 6 L. Ed. 623. In that case Chief Justice Marshall said:

"Internal commerce must be that which is wholly carried on within the limits of a state, as, where the commencement, progress, and termination of the voyage are wholly confined to the territory of the state. This branch of power includes a vast range of state legislation, such as turnpike roads, toll bridges, exclusive right to run stagewagons, auction licenses, licenses to retailers, and to hawkers and peddlers, ferries over navigable rivers and lakes, and all exclusive rights to carry goods and passengers, by land or water. All such laws must necessarily affect, to a great extent, the foreign trade, and that between the states, as well as the trade among the citizens of the same state. But, although these laws do thus affect trade and commerce with other states, Congress cannot interfere, as its power does not reach the regulation of internal trade, which resides exclusively in the states. * * * They [state inspection laws] form a portion of that immense mass of legislation, which embraces everything within the territory of a state, not surrendered to the general government, all which can be most advantageously exercised by the states themselves. Inspection laws, quarantine laws, health laws of every description, as well as laws for regulating the internal commerce of a state, and those which respect turnpike roads, ferries, etc., are * * * parts of this mass."

The case of Gloucester Ferry Co. v. Pennsylvania (1885) 114 U. S. 196, 5 Sup. Ct. 826, 29 L. Ed. 158, first announced a contrary doctrine. In that case the

ferry company was domiciled in New Jersey and operated a ferry over the Delaware river from Camden to Philadelphia. The situs of its boats was in New Jersey, but the company owned a wharf in Philadephia. The suit was to test the validity of a tax against the corporation on the estimated value of its capital stock. The court held that a tax upon receiving and landing passengers and freight is a tax upon their transportation and upon the commerce between the two states, and the fact that the transporation was by ferry did not change the character of the business. Considering the language above quoted from Gibbons v. Ogden, the court held that Chief Justice Marshall had plainly referred to ferries entirely within the state, and not to ferries transporting passengers and freight between the states and a foreign country. The court held that such a ferry is a necessary means of commercial intercourse between the states bordering on the dividing waters, and that it therefore must be conducted without the imposition of any tax or other burdens, and the tax imposed was therefore held to be invalid.

The doctrine of the Gloucester Case was again applied in Covington & Cincinnati Bridge Co. v. Kentucky, 154 U. S. 204, 14 Sup. Ct. 1087, 38 L. Ed. 962, involving a law regulating the tolls to be charged on a bridge across the Ohio river between Kentucky and Ohio. It was held that, as the bridge was over a navigable stream, the power to regulate the tolls was in Congress, and therefore the state regulation was void.

All of these cases were reviewed in St. Clair v. Interstate Sand & Car Co. (1904) 192 U. S. 454, 24 Sup. Ct. 300, 48 L. Ed. 518; Mr. Justice White having been the organ of the court. The plaintiff in that case sought to recover penalties of the defendant for operating without having obtained a license a ferry across the Mississippi river from St. Clair, in the state of Illinois, to a point opposite in the state of Missouri. It was held that, under any view which might be taken of the prior cases, they were each conclusive of the case under consideration, because none of them imposed the power in a state to directly control interstate commerce, and said Justice White:

"Conceding, arguendo, that the police power of a state extends to the establishment, regulation, and licensing of ferries on a navigable stream, being the boundary between two states, none of the cases justifies the proposition that such power embraces transportation by water across such a river which does not constitute a ferry in a strict technical sense. In that sense 'a ferry is a continuation of the highway from one side of the water over which it passes to the other, and is for transportation of passengers or of travelers with their teams and vehicles and such other property as they may carry or have with them.' Mayor, etc., of New York v. Starin, 106 N. Y. 1, 11 [12 N. E. 631, 632]."

The court, however, held that the defendant was not operating a ferry within the technical sense of the term; it being a link in the chain of transportation of railroad cars in interstate commerce. It was further stated that the power conferred upon the county was not merely to grant licenses, but to withhold them and the acceptance imposed upon the licensee the duty of carrying on a technical ferry business, to operate at designated hours, etc. However valid such a regulation might be when applied to a ferry business in its restricted sense, the court held that it was not valid in the instant case, because a direct burden on interstate commerce was made a condition precedent to doing business of that character. The court, in concluding, adds:

"Because we have, arguendo, rested our conclusion in this case upon the assumption that the respective states have the power to regulate ferries over navigable rivers constituting boundaries between states, we must not be understood as deciding that that doctrine, which undoubtedly finds support in the opinions announced in Fanning v. Gregoire and Conway v. Taylor, has not been modified by the rule subsequently laid down in the Gloucester Ferry Case and the Covington Bridge Case. As this case has not required us to enter into those considerations, we have not done so."

That this early doctrine was subsequently modified by the rule laid down in the Gloucester Ferry Case and the Covington Bridge Case is made clear by the two recent cases (1914) of Port Richmond Ferry v. Hudson County, 234 U. S. 317, 34 Sup. Ct. 821, 58 L. Ed. 1330, and City of Sault Ste. Marie v. In-

ternational Transit Co., 234 U. S. 333, 34 Sup. Ct. 826, 58 L. Ed. 1337, 52 L. R. A. (N. S.) 574, decided the same day; Mr. Justice Hughes having been the organ of the court in both cases.

In the former case, the board of freeholders of Hudson county, N. J., under authority of the Legislature of New Jersey, by resolution established rates to be charged by the ferry which conveyed persons from Port Richmond, N. J., across the Kill von Kull to Staten Island, N. Y., and likewise rates which might be charged for round trip passage. The plaintiff contended that the action of the board was void, for the reason that the transportation was interstate and the fixing of rates therefor was a direct regulation of interstate commerce. The ferry, unlike the St. Clair Case, was not operated in connection with a railroad, and was a ferry in the technical sense of the term, so the issue was clear-cut.

The court held that the transportation of persons and property from one state to another is none the less interstate commerce because conducted by a ferry, and that whatever may be regarded as a direct burden upon interstate commerce as conducted by such ferries operating between states is beyond authority of a state to impose. The opinion cites the Gloucester Ferry Case and approvingly quotes: "The only interference of the state with the landing and receiving of passengers and freight, which is permissible, * * * is confined to such measures as will prevent confusion among the vessels, and collision between them, insure their safety and convenience, and facilitate the discharge or receipt of their passengers and freight, which fall under the general head of port regulations."

The court further quoted: "It is true that, from the earliest period in the history of the government, the states have authorized and regulated ferries, not only over waters entirely within their limits, but over water separating them; and it may be conceded that in many respects the states can more advantageously manage such interstate ferries than the general government, and that the privilege of keeping a ferry, with a right to take toll for passengers and freight, is a franchise grantable by the state, to be exercised within such limits and under such regulations as may be required for the safety, comfort, and convenience of the public. Still the fact remains that such a ferry is a means, and a necessary means, of commercial intercourse between the states bordering on their dividing waters, and it must therefore be conducted without the imposition by the states of taxes or other burdens upon the commerce between them. Freedom from such impositions does not, of course, imply exemption from reasonable charges, as compensation for the carriage of persons, in the way of tolls or fares, or from the ordinary taxation to which other property is subjected, any more than like freedom of transportation on land implies such exemption."

It was held that ferries were simply the means of transit from one shore to another, and have always been regarded as instruments of local convenience, which, for the proper protection of the public, are subject to local regulations, and that, where the ferry is conducted over a boundary stream, each jurisdiction, with regard to the ferriage from its shore, has exercised this protective power; that apart from said rules as to navigation, such ferries had not engaged the attention of Congress; that the issue involved was not one of "discriminatory requirements or burdensome exactions imposed by the state, which may be said to interfere with the guaranteed freedom of interstate intercourse or with constitutional rights of property," but merely a simple one of reasonable charges, and that, where there had been no federal action, the state might protect the public from extortionate rates.

Under this decision, then, each state may fix the rates to be charged in carrying passengers or property from its shore across the boundary stream. The court did not construe the ordinance as requiring the sale of round-trip tickets, but merely as fixing the price of such tickets when sold on the New Jersey shore, if the company should determine to sell such round-trip tickets, and, viewed as a limitation upon rates for round-trip tickets when sold in New Jersey, the court held the ordinance valid.

In the Sault Ste. Marie Case, 234 U. S. 333, 34 Sup. Ct. 826, 58 L. Ed. 1337, 52 L. R. A. (N. S.) 574, the ordinance attacked was not merely a regulatory

ordinance or one fixing rates, but an ordinance by the city of Sault Ste. Marie requiring the payment of $50 for a license to operate a ferry across St. Mary's river to Canada. The court said: "It will be observed that the question is not simply as to the power of the state to prevent extortion and to fix reasonable ferry rates from the Michigan shore; it is not as to the validity of a mere police regulation governing the manner of conducting the business in order to secure safety and the public convenience. See Port Richmond, etc., Ferry Co. v. Board of Chosen Freeholders [234 U. S.], p. 317 [34 Sup. Ct. 821, 58 L. Ed. 1330], decided this day. The ordinance goes beyond this. The ordinance requires a municipal license; and the fundamental question is whether in the circumstances shown the state, or the city acting under its authority, may make its consent a condition precedent to the prosecution of the business. If the state, or the city, may make its consent necessary, it may withhold it. The appellee, having its domicile in Canada, is engaged in commerce between Canada and the United States. At the wharf which it leases for the purpose on the American shore, it receives and lands persons and property. Has the state of Michigan the right to make this commercial intercourse a matter of local privilege, to demand that it shall not be carried on without its permission, and to exact as the price of its consent—if it chooses to give it—the payment of a license fee? This question must be answered in the negative."

In answer to the contention that, under the early decisions cited, a state, directly or through its municipalities, may establish and license ferries, the court said: "But, since the decision in Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196 [5 Sup. Ct. 826, 29 L. Ed. 158], it has been clear that, whatever authority the state may have for this purpose, it does not go so far as to enable the state to interdict one in the position of the appellee from conducting the commerce in which it is engaged, or justify the state in imposing exactions upon that commerce in the view that business of this character may be carried on only by virtue of its consent express or implied."

The court, after noting, as held in the Gloucester Case, that transportation in ferryboats passing between states is none the less interstate commerce, concluded: "The fundamental principle involved has been applied by this court in recent decisions in a great variety of circumstances, and it must be taken to be firmly established that one otherwise enjoying full capacity for the purpose cannot be compelled to take out a local license for the mere privilege of carrying on interstate or foreign commerce."

The town of Delta, under the authority delegated to it by the state of Louisiana to license and regulate ferries, could not have required of the plaintiff the payment of a license as a condition precedent to its engaging in the ferry business. But it went further, by an ordinance granting an exclusive franchise to one party and penalizing all others who might thereafter engage in the operation of a ferry between Delta and Vicksburg. The ordinance must be held void; and Act 111 of 1912, granting to the town of Delta the authority to license and regulate ferries, and act 68 of 1896, prohibiting any person not a lessee of a public ferry to transport for hire any person across the Mississippi river or other stream in the state within a distance of two miles of any public ferry landing, in so far as such acts may be construed as authorizing the ordinance, are repugnant to the commerce clause of the federal Constitution and must be held as of no effect.

A decree will be entered, granting an interlocutory injunction as prayed for.

E. H. Randolph, of New Orleans, La., for appellants.

F. G. Hudson, Jr., of Monroe, La. (Henry & Canizaro, of Vicksburg, Miss., and Hudson, Potts, Bernstein & Sholars, of Monroe, La., on the brief), for appellees.

Before WALKER, Circuit Judge, and GRUBB, District Judge.

PER CURIAM. For reasons sufficiently stated in the opinion rendered when the court ordered the issuance of the interlocutory injunction prayed for, the decree appealed from is affirmed.

HETHERINGTON v. PALMER et al.

(Circuit Court of Appeals, Eighth Circuit. December 2, 1919.)

No. 5410.

MORTGAGES ⊂=594(1)—RIGHT OF REDEMPTION FROM FORECLOSURE SALE CANNOT BE EXERCISED BY STRANGER.

The right to redeem from a foreclosure sale of property is a legal and not an equitable right, and under Mills' Ann. St. Colo. § 4248, limiting the right of redemption to the mortgagor, his heirs, executors, or administrators, an attempted redemption by a stranger, not shown to be acting for the mortgagor, *held* ineffective.

Appeal from the District Court of the United States for the District of Colorado.

Suit in equity by E. G. Palmer, Public Trustee, against the Brant Independent Mining Company. From an order allowing the Camp Bird Mining, Leasing & Power Company to redeem from foreclosure sale, George Hetherington, trustee, appeals. Reversed.

J. G. Hutchison, of Kansas City, Mo. (M. J. Ostergard, of Kansas City, Mo., and George Hetherington, of Gunnison, Colo., on the brief), for appellant.

Dexter T. Sapp, of Gunnison, Colo., for appellee.

Before CARLAND and STONE, Circuit Judges, and ELLIOTT, District Judge.

CARLAND, Circuit Judge. The appellant has appealed from an order allowing the Camp Bird Mining, Leasing & Power Company, hereafter called Camp Bird Company, to redeem from a sale on mortgage foreclosure. The facts are as follows:

On September 19, 1917, the District Court, in an action wherein E. G. Palmer, public trustee for Gunnison county, Colo., was plaintiff, and the Brant Independent Mining Company, hereafter called Mining Company, was defendant, entered a decree of foreclosure and sale whereby certain real estate, mining claims, mining locations, water rights, mill site, office building and furniture, assay office and instruments, two bunkhouses, one stable and barn, wagons, horses, and harness, mining and milling machinery, tools, and all other property, real and personal of the Mining Company, was ordered sold at public auction to the highest bidder at Gunnison county, Colo., as an entirety. May 19, 1918, the special master appointed to make the sale reported to the court that he had sold the above-described property to the appellant on May 6, 1918, for the sum of $5,012.50. On June 4, 1918, the report of the special master was approved and confirmed. On October 15, 1918, the special master made a supplemental report to the court as follows:

"To the Honorable Robert E. Lewis, Judge of Said Court:

"I have to report that on the 14th day of October, 1918, the Camp Bird Mining, Leasing & Power Company tendered and paid to me, as special master in the above-entitled case, the sum of $5,188.48 as and for redemption by the

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

said company from the sale of the properties of the said defendant company made by me on the 6th day of May, 1918, and demanded that I, as such master, issue to it a certificate of redemption from said sale, which certificate was by me issued to said company.

"Thereupon I tendered the amount so paid to me to George Hetherington, trustee, who refused to accept said tender, and his specific reasons for said refusal are stated in extenso in an exhibit hereto attached.

"Thereupon I requested of Dexter T. Sapp, solicitor for the said Camp Bird Mining, Leasing & Power Company to withhold the record of said certificate until the parties hereto could be advised by the court in the premises.

"Thereupon said solicitor agreed to so withhold the record of said certificate until further order of the court. Sprigg Shackleford, Special Master."

October 18, 1918, the Mining Company and appellant filed a petition in the District Court asking for an order restraining the Camp Bird Company from recording the certificate of redemption issued to it, as stated in the supplemental report of the special master, and also praying that the special master be directed and empowered to recall and cancel said certificate, for the reason that the Camp Bird Company had no right or authority to redeem from the sale made under the decree of foreclosure. October 31, 1918, the petition of the Mining Company was denied. The only right or authority by virtue of which the Camp Bird Company claimed a right to redeem was an agreement made and entered into May 21, 1914, by and between the Mining Company, "for convenience called lessor," and T. R. L. Daughtrey & Co., "for convenience called lessee." In this agreement the lessor leased to the lessee for the purpose of development and mining the following mining claims, Paonia, Morning Glory, London, Copper Sulphide, Protection, Option No. 1, Option No. 2, Option No. 3, Option Fraction, Contec Lode, or Winnie Fraction, and the northwest quarter of the northeast quarter of section 21, township 50 north, range 4, and all improvements and equipments on above claims and the ten-stamp mill located at Bowerman. The lease was for a period of 10 years beginning August 10, 1914. The lessee was given the right to assign the lease to a company to be incorporated for the purpose of taking over the lease and operating under it. The lease was assigned to the Camp Bird Company. It contained the following, among other provisions:

"It is expressly understood and agreed that the lessor reserves the property and right of property in and to all ores extracted from said premises during the period of this lease."

The agreement was an ordinary mining lease for the purpose of development, the consideration therefor being a royalty of the net profits. There were no words of grant conveying any interest in the property leased to the lessee. The Camp Bird Company was the owner of $44,100 of the bonds of the Mining Company secured by the mortgage which was foreclosed. The total amount of the bonds issued under the mortgage was $87,000. The Camp Bird Company was therefore the holder of a majority of the bonds. Being such holder it delivered the same and the coupons attached thereto to said E. G. Palmer, public trustee for Gunnison county, and demanded that he proceed forthwith to foreclose the mortgage. The trust deed or mortgage was executed and delivered on March 1, 1909, and recorded on March 10, 1909. The appellant bid the property in at the foreclosure sale as

trustee for the minority bondholders and stockholders. The Camp Bird Company was also a bidder at the foreclosure sale, but failed to bid as much as the appellant. The order denying the Mining Company's petition does not state the grounds upon which it was made. We find in the record, however, a memorandum opinion of the District Judge which gives the reasons which influenced him in making the order. The judge was clearly of the opinion that the Camp Bird Company as tenant was not given the right by the Colorado statute (section 3657, Rev. Stat. Colo. 1908) to redeem from the foreclosure sale in its own behalf, saying:

"The statute grants the right, and no one can exercise it who does not come within its terms. Conway v. John, 14 Colo. 30, 36 [23 Pac. 170]; Parker v. Dacres, 130 U. S. 43 [9 Sup. Ct. 433, 32 L. Ed. 848]; 11 Amer. Eng. Enc. Law, 232."

Mortgaged lands sold by the decree of a court of equity in Colorado are redeemable by the mortgagor, his heirs, executors, or administrators in the same manner prescribed for the redemption of lands sold by virtue of executions issued upon judgments at common law. Section 4248, Mills' Anno. Stat. Colo. 1912. The Camp Bird Company could not therefore redeem from the mortgage sale. The controversy below ought to have ended here, but the trial court at the hearing, on the suggestion of counsel for the Camp Bird Company, decided that it would treat the redemption as having been made by the Camp Bird Company for the mortgagor, the Mining Company. Up to the time the suggestion referred to was made by counsel there had been no pretense that the redemption had been made in the interest of any one but the Camp Bird Company. The report of the special master so stated, and the certificate of redemption was issued accordingly. The trial court had no authority or evidence upon which to base a decision that the redemption of the Camp Bird Company was in the interest of the mortgagor, even conceding that the Camp Bird Company could so act. There was no evidence that the Mining Company ever requested the Camp Bird Company to redeem from the sale and as the right to redeem was a personal privilege the Mining Company could not be compelled to exercise it. Notwithstanding the position taken by the court, it did not incorporate the result of its views into its order. The application of the Mining Company was simply denied. This left the certificate of redemption issued by the special master intact as a redemption by the Camp Bird Company in its own interest.

We decline to consider the question whether the Camp Bird Company could by virtue of its lease redeem from the foreclosure sale for the Mining Company, as there is no evidence that it ever did so. Appellant further contends that, as the mortgage property consisted of real and personal property sold in solido, the redemption statute does not apply; that the so-called lease was not a lease, but a mere license; that as the Camp Bird Company was only interested in a portion of the property it could not redeem. We do not consider these questions, for the reason that so far as the record shows the redemption of the Camp Bird Company was in its own interest, and it had no right under the statute to do so, and the trial court had no authority to hold the re-

demption to be something that it was not. The right to redeem is a legal and not an equitable right.

The order appealed from is reversed, and the case remanded, with directions to the trial court to enter a decree canceling the pretended certificate of redemption. The appellant to recover costs of this proceeding.

BRANT INDEPENDENT MIN. CO. v. PALMER.

(Circuit Court of Appeals, Eighth Circuit. December 2, 1919.)

No. 5411.

CORPORATIONS ⟸479—TRUSTEE ON FORECLOSURE OF MORTGAGE NOT ENTITLED TO DEFICIENCY JUDGMENT.

A trustee in a corporation mortgage securing bonds, on foreclosure of the mortgage, is not entitled as such trustee to recover a deficiency judgment for the amount found due on the bonds over and above the proceeds of the sale, unless such right is given him by the mortgage.

Appeal from the District Court of the United States for the District of Colorado; Robert E. Lewis, Judge.

Suit in equity by E. G. Palmer, trustee, against the Brant Independent Mining Company. From a deficiency judgment, defendant appeals. Reversed.

J. G. Hutchison, of Kansas City, Mo. (M. J. Ostergard, of Kansas City, Mo., on the brief), for appellant.

Dexter T. Sapp, of Gunnison, Okl., for appellee.

Before CARLAND and STONE, Circuit Judges, and ELLIOTT, District Judge.

CARLAND, Circuit Judge. This appeal arises out of the same foreclosure as is mentioned in the case of George Hetherington, as Trustee, Appellant, v. E. G. Palmer et al., Appellees, 262 Fed. 367, — C. C. A. —, this day decided. It is from a deficiency judgment in the sum of $108,373, against the Brant Independent Mining Company in favor of Palmer as trustee. The judgment is the difference between the amount found due upon the bonds issued by the Mining Company, with interest and costs, less the amount received from the sale of the mortgage property. The decree of foreclosure found the amount due on the bonds. The plaintiff, Palmer, is the public trustee of Gunnison county, Colo., by virtue of his office as county treasurer. The public trustee of said county and the Pioneer Trust Company were the trustees named in the deed of trust. The Trust Company refused to act in the matter of foreclosure; hence the public trustee is the sole plaintiff. There was no allegation in the complaint, nor any adjudication, that the plaintiff had any interest in the bonds secured by the trust deed. The complaint contained no prayer for a deficiency judgment, but did contain a prayer for general relief and that the amount due upon the bonds be ascertained. On this record appellant contends that the deficiency judgment was unauthorized. We are of the opin-

ion that the question presented is ruled adversely to the plaintiff by the decision of this court in Mackay v. Randolph Macon Coal Co., 178 Fed. 881, 102 C. C. A. 115. Section 271, Colo. Code, and equity rule 10 (198 Fed. xxi, 115 C. C. A. xxi), refer in our opinion to cases where the plaintiff is the owner of the debt secured, or where, in the instrument securing the debt, a right is given to him to recover the debt, as well as to foreclose the trust deed.

Deficiency judgment reversed.

STONE, Circuit Judge. I concur in the result and in the opinion, except for the final expression, "or where, in the instrument securing the debt a right is given him to recover the debt, as well as to foreclose the trust deed," unless this expression be limited to cases wherein the trustee occupies the legal position of a creditor of the mortgagor as to the unpaid balance. My reasons for this view are set forth in Rome Lane v. Equitable Trust Co. of New York, 262 Fed. 918, — C. C. A. —.

SULLIVAN v. NITRATE PRODUCERS' S. S. CO., Limited.

(Circuit Court of Appeals, Second Circuit. December 10, 1919.)

No. 42.

1. JUDGMENT ⊂=812(2)—DECREE IN REM BAR TO SUIT IN PERSONAM.
A decree in rem may be successfully used under the plea of res judicata, in an action in personam on the same cause of action.

2. ADMIRALTY ⊂=95—ADJUDICATION IN ACTION IN REM FOR INJURY TO SEAMAN BAR TO SUIT IN PERSONAM.
In a suit in rem by a seaman to recover indemnity for injury on board, a decree of dismissal because libelant was on an English ship on the high seas when injured, and under English law indemnity was not recoverable, *held* a bar to a second suit in personam for maintenance and cure, which, although given by British statute, might have been recovered in the prior suit.

3. ADMIRALTY ⊂=30—SINGLE CAUSE STATED IN SUIT FOR INJURY IN SERVICE.
A libel by a seaman injured in the service to recover the expense of maintenance and cure, and also for negligence in failing to provide proper medical care and attention, *held* to state but a single cause of action.

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

Suit by John Sullivan against the Nitrate Producers' Steamship Company, Limited. Decree for respondent, and libelant appeals. Affirmed.

For opinion below, see 254 Fed. 361.

This suit is in personam against the owner of the British steamship Anglo-Patagonian. Before this litigation, Sullivan sued the steamship in rem (in another district), setting forth in his libel that he had "joined" the vessel "as a horse handler in the employ of the Federal Export Corporation," and as such was on board her on a voyage from Philadelphia to Bordeaux. He was injured, as he alleged, "solely through the fault and negligence of the boatswain and a member of the crew of said vessel"; he being (as was also alleged) not a member of the steamship's crew.

Damage was asserted in $5,000, and after the usual allegations of jurisdiction and prayers for process, the libel in rem concludes: "That this honorable court may be pleased to decree the payment of your libelant's claim in the sum of five thousand ($5,000.00) dollars, and that said vessel may be condemned and sold to pay the same, and, in the event that he should *fail to prove said vessel was unseaworthy for the reasons aforesaid*, that he be awarded the expense of his maintenance and cure and wages to the end of the voyage for which he signed, and such other and further relief as to the court may seem just and proper."

The answer to this libel in rem denied that Sullivan was employed by the Federal Export Company, and admitted that he received injury while on board as a member of the ship's crew and after signing articles as such. It further asserted that the accident happened on a British vessel and on the high seas, and pleaded the Merchant Shipping Acts and Workmen's Compensation Act of Great Britain.

Trial was had under these pleadings, and libelant adjudged to have been a member of the crew, with the status of a seaman. The court further held that, if he did receive injury as and when he asserted, the occurrence was on a British vessel, on the high seas, and by reason of the negligence of a fellow servant. As a conclusion of (British) law, therefore, it followed that Sullivan could not maintain any action for damages through negligence, and was remitted to the British Workmen's Compensation Act for relief. Final decree was entered accordingly, which still stands unmodified; all periods for appeal having expired. Thereupon the present suit was begun, in which libelant alleges that he was a member of the Anglo-Patagonian's crew, that he suffered the same injuries as before complained of, and was neglected by the steamship's officers; so that, beside the normal results of such a hurt as he received, "he suffered additional and excruciating pain [and] * * * it became necessary to remove a portion of two of his fingers," which could have been saved with "proper medical care and attention." Wherefore he demanded (as one cause of action) "maintenance and cure," estimated at $1,000, and (as a second cause of action) damages of $3,000 for the neglect of his wound.

The respondents pleaded to the merits, but set up in addition the record of the first suit, after inspection of which the court below dismissed the libel.

Silas B. Axtell, of New York City (Arthur Lavenburg, of New York City, of counsel), for appellant.

Kirlin, Woolsey & Hickox, of New York City (L. De Grove Potter, of White Plains, N. Y., of counsel), for appellee.

Before ROGERS, HOUGH, and MANTON, Circuit Judges.

HOUGH, Circuit Judge (after stating the facts as above). [1] It was correctly assumed in the court below that a decree in rem may be successfully used under the plea of res adjudicata in an action in personam. Bailey v. Sundberg, 49 Fed. 583, 1 C. C. A. 387.

[2] We then consider (1) the scope and nature of Sullivan's earlier suit, and (2) what was decided or might have been decided in that action, remembering that it is an inexorable rule of law that a judgment is a bar to subsequent demands which either were or might have been litigated in the action productive of the judgment. Watts v. Weston, 238 Fed. 149, 151 C. C. A. 225, and cases cited.

Libelant's pleading in rem is now said to contain obvious mistakes, amounting to something like "clerical error." The fact is, however, that it is drawn in a common form, and is reasonably appropriate when and if the vessel sued is American, and the law applicable that of the United States.

By denying that libelant was a member of the Anglo-Patagonian's crew, it was plainly expected to avoid The Osceola, 189 U. S. 158, 23 Sup. Ct. 483, 47 L. Ed. 760; but if Sullivan was proved to be (in contemplation of law) a seaman, then he evidently expected to avail himself of The Bouker No. 2, 241 Fed. 831, 154 C. C. A. 533. Such pleading was sufficient for this purpose, in the admiralty at all events, under The Gazelle, 128 U. S. 487, 9 Sup. Ct. 139, 32 L. Ed. 496, and the prayer for general relief as construed in Sonsmith v. The J. P. Donaldson (C. C.) 21 Fed. 671.

But it turned out on the evidence that to this injury, received on the high seas by a member of the crew and on a British vessel, British law alone was applicable (The Eagle Point, 142 Fed. 453, 73 C. C. A. 569), and under that law libelant has no right to an indemnity, though for reasons quite different from those authoritatively stated for us in The Osceola, supra. Further, such libelant had no right to maintenance and cure (Organ v. Brodie, 10 Ex. 449), except by virtue of the British Merchant Shipping Act, which as last enacted in 1906 contains in section 34 a statutory direction equivalent to or identical with the doctrine of The Osceola, supra, on this point.

It follows that the earlier suit settled once and for all libelant's status, viz. that he must recover under British law or not at all. If, however, he had any right to recover anything under that law, we think he was entitled in the United States to the remedies of admiralty; wherefore his suit was well brought.

[3] In the present case Sullivan is suing (1) for the reasonable expense of the maintenance and cure that should have been granted him; and (2) for the negligence of the steamship in failing to provide for him "proper medical care and attention"—and these two items or kinds of damage are labeled separate causes of action.

Exact definition of the phrase "cause of action" is elusive. It has been said that the "cause of action in a suit is the act or thing done or omitted to be done." Metropolitan, etc., Co. v. People, 106 Ill. App. 516, affirmed 209 Ill. 42, 70 N. E. 643. Long before Codes rendered the phrase a commonplace, it was held that, even where actions were promoted under different writs the cause of action was the same where the same evidence would support a recovery. Rice v. King, 7 Johns. (N. Y.) 20; Johnson v. Smith, 8 Johns. (N. Y.) 383. An ambitious attempt at definition is found in Secor v. Sturgis, 16 N. Y. at page 558, that:

"The true distinction between * * * rights of action which are single and entire and those which are several and distinct is that the former immediately arise out of one and the same act or contract, and the latter out of different acts or contracts."

Of this we incline to think that the criticism made in Oregon, etc., Co. v. Oregon Railway Co., 28 Fed. at page 511, is well founded, viz. that the test suggested has "not been found satisfactory, and each case must be decided largely on its own circumstances"; and as much was admitted by Earl, J., in Veeder v. Baker, 83 N. Y. 160.

But though complete and definitive statement is, we think, impossible, the above descriptions or tests require us to hold that this libelant

not only might have asked, but did ask, for everything that he now seeks to recover in the suit first brought by him.

In The City of Alexandria (D. C.) 17 Fed. 395, it is said that neglect of a seaman after he had been wounded in the service of the ship "becomes a different and additional cause of action against the ship," and this may be quoted as authority holding that Sullivan's second cause of action is something never before advanced by him against the Anglo-Patagonian or its owner.

We doubt whether the dictum was intended to go so far; but, if it was, the authorities cited yield no such doctrine. We hold the question whether so-called causes of action are in truth singular or plural is one largely dependent on the facts of each case, and further hold that in this instance Sullivan has shown no cause of action different from, additional to, or independent of his demand for maintenance and cure.

The reason for this is that, as pleaded, the only ground of complaint that he has is that maintenance and cure were denied him, and the absence of such cure or attempted cure is the one and only thing that constitutes the neglect alleged as a second cause of action. It is conceivable that a shipmaster or an ignorant or unqualified ship's doctor might, while affording maintenance, be negligent in cure; but no such case is pleaded or suggested. The same act—i. e., refusal of maintenance and cure—cannot give rise to two causes of action. The attempt is an endeavor to arrive at the same result by different media concludendi, or grounds for asserting the right. This was condemned in United States v. California, etc., Co., 192 U. S. 355, 24 Sup. Ct. 266, 48 L. Ed. 476.

It may be added that, even if the present libel did set forth a different and hitherto unadvanced cause of action, the same is measurable by the British law only, and for such a suit no authority is shown to exist. Whatever right libelant has must depend on the statutes of Great Britain, as to which he was definitely concluded in the earlier action.

Decree affirmed, with costs.

UNITED STATES v. ONE FORD AUTOMOBILE AND FOURTEEN PACKAGES OF DISTILLED SPIRITS.

(Circuit Court of Appeals, Second Circuit. December 10, 1919.)

No. 102.

1. CUSTOMS DUTIES ⊜130—INTOXICATING LIQUORS ⊜247—CUSTOMS FORFEITURE STATUTE DOES NOT APPLY TO IMPORTATIONS VIOLATING THE PROHIBITION STATUTE.

Rev. St. §§ 3061, 3062 (Comp. St. §§ 5763, 5764), providing for seizure and forfeiture of merchandise imported in violation of the customs laws, and also any vehicle used in its importation, held not to apply to spirituous liquor, brought into the United States from Canada in violation of the prohibition of Act Aug. 10, 1917, c. 53, § 15 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 3115¼l), nor to an automobile used in such importation.

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2. CRIMINAL LAW ⟸1208(3)—STATUTE CREATING NEW OFFENSE AND PRESCRIBING PUNISHMENT.

Where a statute creates a new offense, by making that unlawful which was lawful before, and prescribes the punishment for such offense, only such punishment can be imposed.

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

Libel by the United States against One Ford Automobile and Fourteen Packages of Distilled Spirits; Robert Tourville, claimant. From the judgment dismissing the libel as to the automobile, libelant brings error. Affirmed.

For opinion below, see 259 Fed. 894.

D. B. Lucey, U. S. Atty., of Ogdensburg, N. Y., for the United States.

George J. Moore, of Malone, N. Y., for defendant in error.

Before WARD, ROGERS, and MANTON, Circuit Judges.

MANTON, Circuit Judge. [1] The parties have agreed to a statement of facts of which the following are material: On the 2d of November, 1918, one Robert Tourville and others took a Ford automobile, which he owned and which has been attached in this proceeding, and drove from the county of Franklin, in the state of New York, into the Dominion of Canada, and there procured two quart bottles of Imperial whisky, one quart bottle of Geneva gin, ten two-quart bottles of White whisky, and one jug partly full of White whisky, and loaded the same into this automobile, and then drove from Canada across the international boundary line, back to the county of Franklin, within the Northern district of New York. It is conceded that the contents were distilled spirits, as referred to in the act of August 10, 1917 (40 Stat. 283, § 15 [Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 3115⅛*l*]).

Tourville was arrested by the customs authorities of this government. The automobile and the distilled liquors were seized. Tourville and his companions were indicted on December 6, 1918, by the grand jury, for a violation of this act of August 10, 1917. The act prohibits the importation of distilled spirits. Later, on December 10, 1918, Tourville appeared in court, pleaded guilty to the indictment, and was fined in the sum of $50. He paid this fine. The automobile and the liquors were relinquished by the customs authorities to the marshal of the United States for the Northern district of New York, who took possession under a process of seizure pursuant to the libel filed herein. They had no license or permit to take the whisky and gin in question from Canada to New York state, and clearly violated section 15, chapter 53, of the act of Congress of August 10, 1917. That act, however, provides for punishment by fine or imprisonment, or both. It does not provide for seizure or forfeiture, either of the vehicle used in transporting the prohibited liquors or of the distilled spirits smuggled into the country. The act reads as follows:

"From and after thirty days from the date of the approval of this act no foods, fruits, food materials, or feeds shall be used in the production of distilled spirits for beverage purposes: Provided, that under such rules, regulations, and bonds as the President may prescribe, such materials may be used in the production of distilled spirits exclusively for other than beverage purposes, or for the fortification of pure sweet wines as defined by the act entitled 'An act to increase the revenue, and for other purposes,' approved September eighth, nineteen hundred and sixteen. Nor shall there be imported into the United States any distilled spirits. * * * Any person who willfully violates the provisions of this section, or who shall use any foods, fruits, food materials, or feeds in the production of malt or vinous liquors, or who shall import any such liquors, without first obtaining a license so to do when a license is required under this section, or who shall violate any rule or regulation made under this section, shall be punished by a fine not exceeding $5,000, or by imprisonment for not more than two years, or both."

This libel was filed in the month of February, 1919. It alleges that the automobile was the subject of seizure and forfeiture because it was unlawfully used in the importation of the distilled spirits. The libel refers to sections 3061–3082 of the Revised Statutes of the United States (Comp. St. §§ 5763–5765, 5767–5785), and claims further support under the act of August 10, 1917.

Section 3062 of the Revised Statutes provides:

"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 traveling, 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."

The sections of the Revised Statutes (sections 3061–3082, inclusive) are provisions of the customs law, and are applicable only to such goods as are taxable under the law. They have no application, however, to the case of merchandise which cannot be entered in the custom house at all. By the act of August 10, 1917, it is an offense to import distilled spirits, and the act prescribes a new and specific punishment for its violation. It was a war measure. The customs law statutes referred to do not make it a crime to bring in distilled spirits into the United States from the Dominion of Canada, and it was not until August 10, 1917, that such action constituted a breach of the criminal law. This act makes no reference to any other statute, and if a forfeiture be granted now of the automobile of the defendant in error, it would be imposing added punishment not provided for in the statute. Indeed, it would be a double punishment for the commission of one offense, and this is not permissible. The customs laws referred to have for their purpose and intention a prevention of smuggling merchandise into the United States. It was intended to provide custom duties to be paid for the importations. After August 10, 1917, Tourville could not bring distilled liquors into the United States, irrespective of the customs law.

The government, on finding the indictment, elected to proceed un-

der the statute of August 10, 1917, and having done so, it cannot now invoke the aid of the customs law, in its endeavor to successfully maintain the libel for forfeiture of the vehicle of transportation.

[2] The power to prescribe the offense carries the power to name and define the punishment as Congress may determine, under the Constitution restrictions. A statute may provide for a prohibition against an act or damage which will constitute a new crime, and may prescribe a punishment by penalty for the breach of such a crime, but such punishment as prescribed by the statute only can be imposed for the commission of the offense. A statute may provide both a civil remedy and a criminal punishment. McBroom v. Scottish Co., 153 U. S., 318, 14 Sup. Ct. 852, 38 L. Ed. 729; Barnet v. National Bank, 98 U. S. 555, 25 L. Ed. 212; Farmers, etc., Nat. Bank v. Dearing, 91 U. S. 29, 23 L. Ed. 196; People v. Stevens, 13 Wend. (N. Y.) 341.

In interpreting what is meant by the statute, we must follow strictly its provision in regard to the punishment prescribed (1 Wharton's Criminal Law [11th Ed.] § 31), and, of course, the fact that a statute provides a civil remedy for an offense does not prevent the imposition of criminal punishment. The creation of a new offense, however, by statute making that unlawful which was lawful before, and prescribing a penalty therefor, the prosecution and punishment under such act must be in accordance with the terms of that act. U. S. v. 90 Demijohns, Case No. 15,887, 27 Fed. Cas. 167; Bags of Sugar, Case No. 14,324, 24 Fed. Cas. 505.

We find that, upon examination of the act of August 10, 1917, there is made a new offense to import distilled liquors as the defendants named in the indictment did import them, and prescribed a punishment by fine or imprisonment, or both. Thus the statute is complete, and it makes no reference to any other statute which would give rise to a right of action for forfeiture of the vehicle of transportation, and we cannot add to the punishment already inflicted upon Tourville the forfeiture of his automobile.

For the reasons here announced, it was erroneous to sustain the libel, in so far as the District Court granted seizure of the distilled spirits. While the question is not presented to us by the plaintiff in error, and the defendant in error has not taken an appeal, we announce our view, since the United States attorney invited our consideration of this on the oral argument.

The judgment is affirmed.

KAMBEITZ et al. v. UNITED STATES.

(Circuit Court of Appeals, Second Circuit. December 17, 1919.)

No. 47.

1. LARCENY ⊂⊃7—STEALING PROPERTY SHIPPED OVER RAILROAD IN FEDERAL CONTROL.

Stealing property in course of transportation on a railroad operated under federal control, in which the United States has a special property as bailee, *held* to constitute an offense, under Criminal Code, § 47 (Comp. St. § 10214), making it an offense to steal any valuable thing whatever of the property of the United States.

2. RAILROADS ⊂⊃5½, New, vol. 6A Key-No. Series—INTERFERENCE BY LARCENY OF PROPERTY SHIPPED OVER FEDERAL CONTROLLED RAILROAD.

Property of a shipper, stolen while in course of transportation on a railroad operated under federal control, is not "property derived from or used in connection with the possession, use, or operation" of the railroad, within the meaning of Federal Control Act March 21, 1918, § 11 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 3115¾k).

3. RAILROADS ⊂⊃5½, New, vol. 6A Key-No. Series—INTERFERING WITH OPERATION OF FEDERAL CONTROLLED TRANSPORTATION COMPANY.

Stealing property in course of transportation by an express company operated under federal control constitutes an offense under Federal Control Act March 21, 1918, § 11 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 3115¾k), as "interfering with and impeding the possession, use, operation, and control" of the express company.

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

Criminal prosecution by the United States against Otto Kambeitz and John F. Tobin. Judgment of conviction, and defendants bring error. Affirmed.

See, also, 256 Fed. 247.

Lester W. Bloch, of Albany, N. Y., for plaintiffs in error.

D. B. Lucey, U. S. Atty., of Ogdensburg, N. Y.

Before WARD, ROGERS, and MANTON, Circuit Judges.

WARD, Circuit Judge. Kambeitz and Tobin, employés on the New York Central Railroad, were convicted of stealing on the 20th day of November, 1918, certain furs, clothing, and dresses shipped through the American Railway Express Company on a train of the railroad company running between Albany and Syracuse in the state of New York.

The indictment contained three counts. The first charged:

"* * * Did unlawfully and feloniously embezzle, steal, and purloin property of the United States, to wit, one fur coat, one fur neckpiece, and two ladies' dresses, then and there being transported by the United States and in its possession in a certain railroad car and then and there on the New York Central Railroad then and there run and operated as a part of a train between the city of Albany and the city of Syracuse in said district, * * * the said railroad having theretofore been taken over by the United States under and by virtue of that certain proclamation of the President of the United States issued on the 26th day of December, 1917, and which said railroad was on said 20th day of November, 1918, being operated under the control and in the possession of the United States, whereby the government

of the United States had a special property in said goods, so stolen, as aforesaid, and was liable and responsible to the shippers or consignees for the money value thereof. * * *"

The second charged:

"* * * Were engaged in railroad and transportation service as employés on the New York Central Railroad, the said railroad then and there being under federal control and in use by the United States both in intrastate and interstate commerce, having theretofore been taken over by the United States, under and by virtue of that certain proclamation of the President of the United States issued on the 26th day of December, 1917, said defendants did unlawfully, knowingly and feloniously take and convert to their own use certain goods, to wit, one fur coat, one fur neckpiece, and two ladies' dresses, which said goods were then and there property used in connection with the possession, use, and operation of said railroad, in that said goods were then and there being transported in said district on said railroad, whereby the government of the United States had a special property interest in said goods so transported and was liable and responsible to the shippers or consignees for the money value thereof. * * *"

The third charged:

"* * * The said defendants then and there being engaged in railroad and transportation service and employed by the New York Central Railroad, which said railroad was then and there a common carrier and was being used and operated under federal control in the transportation of both intrastate and interstate commerce, did knowingly, willfully, unlawfully, and feloniously interfere with and impede the possession, use, operation, and control of a certain transportation system, to wit, the American Railway Express Company, which said transportation system was theretofore taken over by the United States under and by virtue of that certain proclamation of the President of the United States, issued on the 16th day of November, 1918, and which said express company then and there was being operated under the control and in the possession of the United States, in that the said defendants and each of them on the said 20th day of November, 1918, did steal, take, and carry away from a certain express car in a certain train then and there being operated and running between the city of Albany and the city of Syracuse, in said district, as a part of such transportation system, certain goods, to wit, one fur coat, one fur neckpiece, and two ladies' dresses, which said goods were then and there being transported by the said transportation system over certain of its lines in said district, and by the United States in so possessing, using, and operating such system. * * *"

The act of August 29, 1916 (chapter 418, Laws 1916), to take effect in time of war, under the heading "Ordnance Department," authorized the President, through the Secretary of War, to take possession and assume control of any system of transportation within the boundaries of the continental United States. December 26, 1917, the President by proclamation did, through the Secretary of War, take possession and assume control of every railroad within the United States, and by proclamation November 16, 1918, he took over all the express companies. The New York Central Railroad and the American Railway Express Company is each a system of transportation.

The act of March 21, 1918 (chapter 25, Laws 1918 [Comp. St. 1918, Comp. St. Ann. Sup. 1919, §§ 3115¾a–3115¾p]), entitled "An act to provide for the operation of transportation systems while under federal control, for the just compensation of the owners, and for other purposes," provides in section 11 (section 3115¾k):

"* * * Shall knowingly interfere with or impede the possession, use, operation, or control of any railroad property, railroad, or transportation system hitherto or hereafter taken over by the President, * * * shall be guilty of a misdemeanor. * * * For the taking or conversion to his own use or the embezzlement of money or property derived from or used in connection with the possession, use, or operation of said railroads or transportation systems, the criminal statutes of the United States, as well as the criminal statutes of the various states where applicable, shall apply to all officers, agents and employés engaged in said railroad and transportation service, while the same is under federal control, to the same extent as to persons employed in the regular service of the United States."

The act of October 23, 1918 (chapter 194, Laws 1918 [Comp. St. Ann. Supp. 1919, § 10199]), amended section 35 of the Criminal Code, so as to read:

"* * * Or whoever shall take and carry away or take for his own use, or for the use of another, with intent to steal or purloin, any personal property of the United States, * * * shall be fined not more than $10,000 or imprisoned not more than ten years, or both. * * *"

Section 11 of chapter 25, Laws 1918, provides that the criminal statutes of the United States shall apply to all officers, agents, and employés engaged in said railroad and transportation service while the same is under federal control who shall convert to their own use "property derived from or used in connection with the possession, use, or operation of said railroads or transportation systems." The same section makes it a misdemeanor for any one—

"to knowingly interfere with or impede the possession, use, operation or control of any railroad or transportation system hitherto or hereafter taken over by the President."

All this legislation was a constitutional exercise of the war power of Congress. Northern Pacific Ry. Co. v. State of North Dakota, 250 U. S. 135, 39 Sup. Ct. 502, 63 L. Ed. 897. It is not restricted to interstate commerce.

Section 47 of the Criminal Code (chapter 321, Laws 1909 [Comp. St. § 10214]), provides:

"Whoever shall embezzle, steal, or purloin any money, property, record, voucher, or valuable thing whatever, or the moneys, goods, chattels, records, or property of the United States, shall be fined not more than five thousand dollars, or imprisoned not more than five years, or both."

[1] A majority of the court think the foregoing federal legislation applies to goods in which the United States has a special property as bailee, as well as to such as it owns absolutely. Phelps v. People, 72 N. Y. 344. Therefore the first count of the indictment is good.

[2] A majority of the court think that the goods stolen were not property "derived from or used in connection with the possession, use or operation" of the New York Central Railroad and that the act contemplates instrumentalities of transportation rather than merchandise carried for freight. Therefore the second count of the indictment is bad.

[3] We all agree that the third count is good, because stealing goods in the course of transportation did interfere with and impede the pos-

session, operation, and control of the American Railway Express Company as charged.

As the defendants were convicted on all three counts, and fined $50, the conviction on the first and third counts is sufficient to support the judgment.

Judgment affirmed.

BEVERIDGE v. CRAWFORD COTTON MILLS et al.

(Circuit Court of Appeals, Fifth Circuit. January 15, 1920.)

No. 3448.

SPECIFIC PERFORMANCE ⟸114(1)—BILL INSUFFICIENT TO SHOW INADEQUACY OF REMEDY AT LAW.

Bill for specific performance of an alleged contract between complainant and defendants for organization of a corporation, since formed by defendants, and division of its stock and offices, *held* not to state a cause of action for equitable relief; complainant's remedy, if any, being an action for damages.

Appeal from the District Court of the United States for the Northern District of Georgia; William T. Newman, Judge.

Suit in equity by George Beveridge against the Crawford Cotton Mills and others. Decree for defendants, and complainant appeals. Affirmed.

Edgar E. Pomeroy and Charles E. Cotterill, both of Atlanta, Ga. (Moore & Pomeroy, of Atlanta, Ga., and W. W. Mundy, of Cedartown, Ga., on the brief), for appellant.

Richard B. Russell, of Atlanta, Ga., for appellees.

Before WALKER, Circuit Judge, and GRUBB and JACK, District Judges.

JACK, District Judge. The plaintiff in error, alleging an agreement between himself and defendants Ingle and Comer for the formation of a corporation to take over and operate a cotton mill owned by Ingle, and likewise a mill on which Comer had an option, brought this suit against the said Ingle and Comer and against the Crawford Cotton Mills, a corporation organized by such parties pursuant to such agreement, to enforce specific performance of the alleged contract.

Petitioner avers that he is an expert in the handling and weaving of textile fabrics, and that he and certain other associates had in operation at Cedartown, Ga., a dyeing and finishing plant, and likewise a mill for the manufacture of duck; that, being desirous of forming a connection with other duck mills to supply material for his dyeing and finishing plant, he entered into an agreement with defendant Ingle to form a corporation to take over the White City Manufacturing Company plant owned by the latter.

This agreement, it is alleged, was superseded by a new agreement, entered into by petitioner and Ingle and defendant Comer, who held an option on two other mills, known as the Edwards mill and the

Edwards power plant. Under this agreement the Edwards properties were to be purchased for the sum of $135,000 by the proposed corporation, and such properties, together with the White City Manufacturing Company plant, to be acquired from Ingle at a price of $40,000, were to be bonded for $145,000, out of which the price of the Edwards properties were to be paid, less $20,000 cash to be advanced by Ingle and Comer. Thirty-five thousand dollars was to be borrowed from a selling agent to operate on. Petitioner further alleges that an expert engineer was employed, and that he appraised the three properties at $242,568.20.

This agreement, it is alleged, provided for the formation of the corporation, to be known as the Crawford Cotton Mills, with a capital stock of $250,000, $100,000 to be preferred stock and $150,000 common stock; that Ingle and Comer should receive preferred stock for the $20,000 cash advanced by them, and that Ingle should receive $40,000 of preferred stock for the White City plant and machinery and all merchandise and products on hand; that the common stock should be issued, one-third to each of the parties, and they in turn should then transfer back to the company, to be held as treasury stock, all but $45,000 of the common stock, each retaining $15,000 of common stock, for which each should execute his note to the corporation; that Beveridge should be president, Ingle vice president, and Comer manager, each at a salary of $10,000, out of which salaries were to be paid their notes at the rate of $5,000 a year.

Petitioner alleges that the corporation was organized and chartered, but that the stock was not issued as per agreement; that, on the contrary, Ingle and Comer demanded that he pay at once $15,000 in cash for his stock, which he refused to do, but for which amount he offered to execute his note, as per the original agreement; that subsequently he was presented a subscription blank to be signed, subscribing for 150 shares of preferred stock, $15,000, and 500 shares of common stock, $50,000, payment to be made on the call of the board of directors; that, being satisfied that this was a scheme to freeze him out, and that Ingle and Comer, constituting a majority of the board, would at once call upon him for the full amount of $65,000, he declined to sign the subscription blank, stating that he was willing to subscribe for the stock on the conditions and terms previously agreed upon by the parties, whereupon the stock in full was subscribed by Ingle and Comer and defendant O'Neal.

Petitioner avers that the White City Manufacturing Company plant and the Edwards properties were all taken over by the corporation, and bonds were issued as originally contemplated. He avers that the corporation refused to let him have anything to do with its management, and refused to pay him the salary as president agreed upon between the promoters.

Petitioner alleges that his damages "are too vague and indefinite to be the cause of an action at law, but that they would amount to the sum of $50,000, or other large sum." His prayer is that on final hearing Comer and Ingle be required to specifically perform the contract entered into, and that he be decreed the owner of 150 shares of the

common stock upon execution and payment of his note for that amount, and that he be declared the president of the corporation from the date of its organization at a salary of $10,000 a year; that Ingle and Comer be decreed to be the owners of such stock only as may have been subscribed and paid for by them, and that he have judgment against the Crawford Cotton Mills Company for the sum of $10,000 salary as president, and judgment against Ingle and Comer for the sum of $50,000 damages.

In an amendment to his petition plaintiff avers that, in accordance with an agreement with the defendants Ingle and Comer, he had made a trip to Philadelphia and New York, and secured the services of a competent selling agent, who agreed to and did thereafter advance to the company the sum of $35,000. The court below sustained a motion on behalf of the defendants to dismiss, holding that, even if plaintiff had a valid contract, his remedy was not in equity for specific performance, but an action in damages for its breach; that inasmuch, however, as plaintiff had expressly set forth in his petition that his damages were "too vague and indefinite to be the cause of an action at law," an order would not be entered transferring the case to the law docket. The court found that there was no equity in the petition, nor any ground for equitable relief set forth, and, further, that there was a misjoinder of parties and of causes of action.

In this ruling we think the court was correct. Plaintiff, recognizing the impossibility of the relief asked, before the final decree was signed, moved to strike out that portion of the prayer asking to be decreed president of the corporation and awarding him judgment for salary as such, and likewise to strike out his prayer for damages as against Ingle and Comer. The court disallowed the amendment, because it came too late, and, further, because it did not sufficiently change the character of the case to justify the relief prayed for in the petition as amended. The effect of this amendment, if allowed, would have been to eliminate the prayer for a moneyed judgment, and to restrict the equitable relief sought to a compliance with the alleged agreement of the promoters as to the issuance and division of the stock of the corporation.

The court had no more authority to decree the plaintiff owner of 150 shares of the common stock of the company, on his executing his own note therefor in accordance with such alleged agreement, than it had to declare him president of the corporation. Whatever remedy he had, if any, was at law for breach of contract, and by his own allegations his rights at law are too vague and indefinite to sustain a recovery.

Plaintiff had no contract whatever with the Crawford Cotton Mills, but relies altogether on an alleged agreement between him and the promoters of the corporation prior to its organization. The only claim that he could have against the corporation, which is a distinct legal entity from Ingle and Comer individually, is one for services rendered with reference to the purchase of looms and the acquisition of a sales agent, which, however, as the court stated, is so vaguely and indefinitely set out as not to be entitled to consideration.

The decree of the lower court will be affirmed.

MORRIS & CO. v. THURMOND.

(Circuit Court of Appeals, Fifth Circuit. January 3, 1920. Rehearing Denied February 28, 1920.)

No. 3425.

1. MASTER AND SERVANT ⟸228(1)—NEGLIGENCE OF INJURED EMPLOYÉ AS AGENT IN CHARGE A DEFENSE.

Although an employer is debarred by a state statute from relying on contributory negligence or assumption of risk in an action for injury to an employé, he cannot be held liable where the negligence charged against him was that of the employé injured, as his agent in charge.

2. MASTER AND SERVANT ⟸289(23)—EMPLOYÉ'S DUTY OF INSPECTION QUESTION FOR JURY.

Where plaintiff's intestate, a salesman for defendant, was killed as alleged by reason of the defective condition of an automobile furnished by defendant for his use, evidence tending to show that deceased had full charge of the machine, with instructions to have it repaired at defendant's expense when and where he desired, and that he did so, *held* to entitle defendant to have the question whether deceased was its agent intrusted with the duty of inspection and repair, and through whose negligence the accident occurred, submitted to the jury.

In Error to the District Court of the United States for the Southern District of Texas; Joseph C. Hutcheson, Judge.

Action at law by Mrs. Lila Thurmond against Morris & Co. Judgment for plaintiff, and defendant brings error. Reversed and remanded.

H. M. Garwood, Rodman S. Cosby, and C. R. Wharton, all of Houston, Tex., for plaintiff in error.

Hutcheson, Bryan & Dyess, of Houston, Tex., for defendant in error.

Before WALKER, Circuit Judge, and FOSTER and GRUBB, District Judges.

GRUBB, District Judge. The plaintiff in the District Court (defendant in error in this court) was the widow of R. J. Thurmond, who was killed, while in the employment of the defendant in the District Court (plaintiff in error in this court) by the wrecking of an automobile, which he was driving from Houston to Ellington Field. At the time of the accident, Thurmond was a salesman for the defendant, and it was his duty to visit the camps in the neighborhood of Houston, and the defendant for that purpose furnished him with the automobile, which he was driving when he received the injury from which he died. The plaintiff claimed that the steering gear and radius bar of the automobile were out of repair, that the defendant was responsible therefor, and that the defective condition of the automobile caused the accident.

[1] Under the law of Texas, the defenses of contributory negligence and assumption of risk were not available to the defendant. It could defend only by showing that it was free from all negligence on its part which helped to bring about the injury. The negligence charged

against the defendant was that it negligently failed to furnish the intestate a reasonably safe automobile in which to do his work, as was its legal duty. The evidence tended to show the existence of the two defects in the car already mentioned, and their continued existence for a time long enough to have made it negligent on the part of the defendant not to have remedied them before the accident. Whether the accident was caused by the defects or by something else admits of doubt. The defendant could escape liability for the intestate's death, if due to its negligence in not correcting the defects, only by showing that it had imposed upon the intestate the exclusive duty, for it, of inspecting the car, determining when it needed repairing, and, when found to need repairs, of taking the car to the garage and having the repairs made. It would also have to show that the defects were discoverable and repairable defects, which could have been remedied, so as to make the car safe to run. If the defendant was negligent, but only negligent because of the negligence of the intestate, then, while such negligence would be imputed to it in favor of others than the intestate, it would not be negligence as between it and the intestate, of which he or his legal representative, in the event of his death, could complain.

If intestate was placed in sole control of the car, with the duty of determining when it was out of order, and of having it put in order when he made the determination, then his negligent failure to make the determination, or to act upon it when made, would be not merely contributory negligence, but would free the defendant, as to him, from all negligence, and so leave him, or, in the event of his death, his survivors, without a right of action for injuries so brought about. While he cannot be held to have assumed the risk of his fellow servant's negligence, or that of his employer, it cannot be said that his own negligence is that of his employer, as between them, nor is it in any sense the negligence of the fellow servant.

The master's duty of furnishing safe appliances is not delegable to a fellow servant of the injured employé; but this is far from saying that the master cannot delegate to the injured employé the duty of inspecting and causing to be repaired an appliance furnished to him for his use, and which from the situation must necessarily be in his exclusive possession and control, and that when the only negligence charged against the employer is that of the injured employé the employer may still be liable to him for the injury. In the case of Pioneer Mining & Manufacturing Co. v. Thomas, 133 Ala. 279, 32 South. 15, the Supreme Court of Alabama approved the following language from the brief of appellee in that case:

"We recognize the rule that if the injured employé is himself the agent through whom the employer undertakes the responsibility of seeing that the ways, works, machinery, and plant are in proper condition he cannot complain of personal injuries sustained by him by reason of a defect in the condition of such ways, works, machinery, or plant."

To the same effect are the cases of Great Northern Railway Co. v. Wiles, 240 U. S. 444, 36 Sup. Ct. 406, 60 L. Ed. 732; Owl Creek Coal

Co. v. Goleb, 210 Fed. 209, 127 C. C. A. 27; Crawford v. Fayetteville Co., 212 Fed. 107, 128 C. C. A. 623.

[2] The record in this case does not disclose by undisputed testimony an instance of sole control committed to the injured employé—the intestate in this case—and the District Judge rightfully refused to direct a verdict for the defendant on this theory. However, we think a tendency of the evidence was to that effect, and that the defendant was therefore entitled to have the issue submitted to the jury. The District Judge withdrew the issue from the consideration of the jury, both by his oral charge and by his denial of instructions requested by defendant. The plaintiff's witness Allen testified that the local manager of defendant, Goedert, a couple of days before the accident, told the intestate, when he complained that the car was not in good condition, to go and have it fixed, and to have it fixed that day, if he had time.

The defendant's witness, Goedert, testified that, when repair work was needed on the car, the intestate had it done himself; that he took it to a garage of his own selection; that he ordered the work and approved the bills for it, which were then paid by defendant, on his approval; that, when Thurmond was employed by him, he "gave him authority to have the car repaired whenever it was necessary, and left it to his judgment to determine as to when repairs would be necessary"; that shortly before the death of intestate he reported to witness that the car was in bad condition, and suggested that it be sent to another garage for repairs; and that witness thereupon told him to take it to whatever garage he wanted. The witnesses, Frank and James, who were owners of garages, testified that on different occasions the intestate brought the car to their garages for repairs, gave instructions as to what was to be done to it, and approved the bills therefor. The bills themselves—some bearing Thurmond's approval—were introduced in evidence. One, dated April 20, 1918, contained an item for the cost of one radius rod, which was one of the two parts charged by the plaintiff to have been defective The fatal accident happened on May 29th thereafter.

We think the foregoing evidence tended to sustain the contention of the defendant that the intestate was intrusted with the sole duty of inspecting and having the car repaired, and that the District Court erred in withdrawing that issue from the jury, and the judgment must be for that reason reversed, and the cause remanded; and it is so ordered.

CUYAMEL FRUIT CO. v. JOHNSON IRON WORKS, Limited.*

(Circuit Court of Appeals, Fifth Circuit. January 6, 1920.)

No. 3410.

1. CONTRACTS ⟸213(1)—CONSTRUCTION INCLUDING STRIKE CLAUSE AS EXCUSING DELAY.
Where a proposal for repairing a vessel fixed the time for completion of the work, "barring labor troubles or any unforeseen cause," and the letter head on which it was written contained a printed statement that all contracts were made subject to delays caused by labor troubles or unforeseen contingencies, and the proposal was accepted without change, except to shorten the time for completion, the strike provision *held* to be a term of the contract.

2. APPEAL AND ERROR ⟸997(3)—WHERE BOTH PARTIES MOVE FOR DIRECTED VERDICT FINDINGS ARE CONCLUSIVE.
Where both parties move for a directed verdict, both are concluded by the findings of fact made by the court.

3. CONTRACTS ⟸300(5)—STRIKE CLAUSE EXCUSING DELAY IN PERFORMANCE.
To preclude a party to a contract from availing himself of a strike clause in case performance is delayed by a strike of his workmen, it must be shown that it was brought about through bad faith on his part.

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

Action at law by the Cuyamel Fruit Company against the Johnson Iron Works, Limited. Judgment for defendant, and plaintiff brings error. Affirmed.

Solomon Wolff, of New Orleans, La., for plaintiff in error.

Joseph W. Montgomery, of New Orleans, La., for defendant in error.

Before WALKER, Circuit Judge, and GRUBB and ERVIN, District Judges.

GRUBB, District Judge. This is a writ of error to a judgment of the District Court for the Eastern District of Louisiana, in an action at law for damages by the plaintiff in error against the defendant in error, and in which the defendant in error filed a reconventional demand. Judgment was for the defendant upon the original cause of action, and also in its favor on the reconvention. The action and cross-action were based upon a contract by which the defendant in error agreed to make certain repairs on the steamship Omoa at the instance of the plaintiff in error. The contract was evidenced by a written proposal made by the defendant in error, and by the acceptance of it by letter written by the plaintiff in error. The repairs were actually made, but it is claimed not within the stipulated time, and the original action sought to recover damages for the delay, and the reconvention sought a recovery for the contract price for the work done and materials furnished, which the plaintiff in error had declined to pay because of the delay.

[1] Dispute arose about what the contract provided as to the time of completion, and, as it was in writing, the construction of it was

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

*Certiorari denied 252 U. S. —, 40 Sup. Ct. 481, 64 L. Ed. —.

for the court, as a matter of law. The disputed question was as to whether or not a strike clause constituted a term of the contract. The petition of the plaintiff in error recognized the existence of the strike clause in the contract, and the only issue presented by the pleadings and litigated by the parties before judgment was whether or not the defendant in error could defend under it, having, as claimed, itself brought on the strike. If we concede, however, that the proper construction of the contract is still open for contestation, in view of the pleadings, we think the contract was properly construed to be subject to the strike clause. The defendant in error's letter of December 28, 1917, which contained the proposal to do the work, contained this provision as to the time of performance:

"Work to be completed on Saturday, January 5, 1918, or sooner, if possible. If the ship goes in dock Friday evening or Saturday morning, 7 a. m., will come out of dock Tuesday noon, barring labor troubles or any unforeseen cause."

The letter of the Cuyamel Fruit Company, dated December 28, 1917, accepting the proposal contains this statement as to time of completion of work:

"It is understood that this work will be completed within six days."

The work in fact was not completed earlier than 30 days from the delivery of the steamship to the defendant in error. The latter defends against the delay under the strike clause, which it claims was contained in the contract. The letter heads of the defendant in error, upon which its letter of December 28, 1917, was written, contained a printed stipulation to the effect that all contracts made by it were subject to delays caused by labor troubles and unforeseen contingencies. Conceding that the words "barring labor troubles or any unforeseen cause," which are to be found in the body of the letter of December 28, 1917, are to be restricted to the agreement to deliver the steamship repaired on Tuesday noon, yet it should not have the force of excluding the general time of performance from the benefit of the strike clause, which was printed at the top of the letter head and which, therefore, was applicable to the entire agreement contained in the letter. So the letter of December 28, 1917, may be construed, so far as the needs of this case go, to be a proposal by the defendant in error to complete the work by Saturday, January 25, 1918, unless delayed by a strike. This was a period of eight days.

The plaintiff in error, in accepting the proposal, reduced the stipulated time for completion to a period of six days. The defendant in error accepted the modification, which reduced the time from eight to six days, by undertaking the work under it. Nothing was said in the written acceptance of the plaintiff in error upon the subject of strikes. In the absence of any expression by the plaintiff in error, in his letter of acceptance, as to the nonapplication of the strike clause, his letter of acceptance should be construed to leave that clause as it was in the letter of proposal. As we have construed it, there, to apply to the work proposed to be done, it should also apply to it, after the acceptance. The effect of the acceptance was merely to reduce the time

from 8 to 6 days, and the 6-day period of the acceptance was subject to enlargement for the same reason as was the 8-day period of the proposal. We think the strike clause applied to the contract.

It is not disputed that a strike occurred that delayed the completion of the work for 30 days. The other contention of the plaintiff in error is that the defendant in error precipitated the strike by putting in effect a new wage scale without having given the 30 days' notice that was provided for in a contract between the defendant in error and its employés, and that for that reason it cannot defend under it. There are disputed questions of facts shown by the record, relating to the effect of the wage scale—as to whether or not it contained any decreases of wages, as to whether or not the defendant in error was justified in putting it into effect, without having given the 30 days' notice, and as to whether or not it applied to existing work in the shop, including the repairing of the Omoa.

[2, 3] Both the plaintiff and the defendant in the court below requested the District Judge to direct a verdict in its favor. The District Judge directed a verdict for the defendant. The effect of this was to preclude the plaintiff in error from questioning any decision of fact involved in the court's ruling, and hence from now disputing the conclusion of fact that the District Judge found that the defendant in error was not in fault in a way showing bad faith in precipitating the strike that delayed the completion of the work. This is especially the case, in view of the principle of law that it requires a showing of bad faith on the part of the employer to prevent him from availing himself of a strike clause in a contract of similar kind. Hawkhurst Steamship Co. v. Keyser (D. C.) 84 Fed. 693; Railway Co. v. Bowns, 58 N. Y. 574. As bad faith is the test prescribed, we think the plaintiff in error must fail, both because the District Judge found that there was no bad faith on the part of the defendant in error in bringing on the strike; and because his finding in that respect is conclusive as the case comes to us; and also for the reason we find no evidence of bad faith from an examination of the record. The judgment of the District Court against the plaintiff on the original cause of action, and in favor of defendant on its reconventional demand for the amount sued for, interest, and costs, is affirmed.

WESSELS v. UNITED STATES.*

(Circuit Court of Appeals, Fifth Circuit. December 15, 1919. Rehearing Denied January 16, 1920.)

No. 3258.

1. INDICTMENT AND INFORMATION ⟸34(3)—INDORSEMENT OF STATUTE UNDER WHICH IT WAS BROUGHT IS NO PART OF INDICTMENT.

Where defendant was indicted for unlawfully and willfully obstructing the recruiting service of the United States, which offense is denounced by Espionage Act, § 3 (Comp. St. 1918, § 10212c), the fact that there was indorsed on the indictment the expression: "Charge: Obstructing the recruiting and enlistment service of the U. S.; violation section 3 of Act of

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*Certiorari denied 252 U. S. —, 40 Sup. Ct. 481, 64 L. Ed. —.

May 18, 1917"—will not render the indictment bad, though Act May 18, 1917 (Comp. St. 1918, §§ 2044a–2044k), did not denounce the offense; the indorsement being no part of the indictment.

2. INDICTMENT AND INFORMATION ⊂=34(3)—INDICTMENT NOT BAD, THOUGH ERRONEOUSLY RECITING STATUTE UNDER WHICH IT WAS FOUND.
An indictment charging a violation of Espionage Act, § 3 (Comp. St. 1918, § 10212c), by obstructing the recruiting and enlistment service of the United States, is not bad because an indorsement thereon erroneously recited it was found under Act May 18, 1917 (Comp. St. 1918, §§ 2044a–2044k), which act did not include the offense, where the indictment alleged facts sufficient to bring it under the proper statute.

3. ARMY AND NAVY ⊂=40—ESPIONAGE ACT VIOLATED, THOUGH ATTEMPT TO OBSTRUCT ENLISTMENT NOT EFFECTIVE.
An attempt to obstruct the enlistment and recruiting service of the United States, though unsuccessful, is a violation of Act June 15, 1917, § 3 (Comp. St. 1918, § 10212c), and defendant is properly punishable for such attempt.

4. CRIMINAL LAW ⊂=1177—SENTENCE HARMLESS WHERE EITHER COUNT OF INDICTMENT IS SUPPORTED BY EVIDENCE.
As the Espionage Act provides a maximum penalty of 20 years for violation, and denounces the offense of attempting to obstruct the recruiting and enlistment service, a defendant sentenced to three years under indictment of two counts charging obstructing of recruiting and enlistment and attempt to cause disloyalty and refusal of duty, cannot complain, if the evidence supported either count, for the punishment assessed was within the scope of the act.

5. CRIMINAL LAW ⊂=371(1)—EVIDENCE OF SEDITIOUS UTTERANCES ADMISSIBLE TO SHOW INTENT IN PROSECUTION FOR OBSTRUCTING ENLISTMENT.
In a prosecution for attempting to obstruct the recruiting and enlistment service of the United States, etc., evidence that defendant stated that the United States should not have gone to war with Germany, and that, if he had President Wilson, he would fill him so full of holes he would be unrecognizable, is admissible to show defendant's intent.

In Error to the District Court of the United States for the Western District of Texas; Duval West, Judge.

Gerhardt Wessels was convicted of a violation of the Espionage Act, and he brings error. Affirmed.

R. H. Ward, of Wichita Falls, Tex., for plaintiff in error.
Hugh R. Robertson, U. S. Atty., of San Antonio, Tex.

Before WALKER, Circuit Judge, and FOSTER and GRUBB, District Judges.

FOSTER, District Judge. Plaintiff in error (hereafter called the defendant) was indicted in two counts. The first count charged him with unlawfully and willfully obstructing the recruiting and enlistment service of the United States by making substantially the following statement to a negro named Harvey Smith:

"That the United States had no business going into this war against Germany, and that the negroes should not have anything to do with it, and for him, the said Harvey Smith, to go and tell the young negroes who had been registered, and also some of the older negroes, to meet at the house of a negro by the name of Floyd Lott, and that he, the said Gerhardt Wessels, would tell them how they could avoid being drafted into the army of the

United States; that he would explain to them that they could claim that their eyesight was bad and that they could not see the letters and figures when they were given an eye test before the local exemption board."

The indictment alleges that said negro, acting upon defendant's suggestion, repeated substantially the same statement to a number of negroes, who had heretofore registered in accordance with requirements of Act May 18, 1917 (Comp. St. 1918, §§ 2044a–2044k), and six persons to whom the statement had been made were named in the indictment.

The second count is substantially the same, except that the charge is unlawfully and willfully attempting to cause disloyalty and refusal of duty in the military forces of the United States. A demurrer to the indictment was overruled. The case went to trial. A motion to direct a verdict of acquittal was refused, and the general verdict of guilty on the whole indictment was returned. A sentence of three years' imprisonment was imposed.

[1, 2] Nine errors are assigned. The first assignment is to the overruling of the demurrer. The demurrer is lengthy, but its substance is that the indictment did not charge a crime. In returning the indictment there was indorsed on it:

"Charge: Obstructing the recruiting and enlistment service of the U. S.; violation section 3 of Act of May 18, 1917."

This was undoubtedly a clerical error, as the offense that is set out is cognizable under section 3 of the Act of June 15, 1917, known as the Espionage Act (Comp. St. 1918, § 10212c), and not under the Selective Draft Act. It is well settled that the indorsement on an indictment is no part of the indictment. It is also well settled that, if the prosecution be mistaken as to the particular law violated, nevertheless, if the indictment charges a crime under any law of the United States, it is sufficient to support the verdict.

[3, 4] The third error assigned is to the refusal of the court to direct a verdict in defendant's favor. There was evidence tending to show that defendant made the statement as charged; that it was repeated to a number of witnesses; that at the time appointed he visited the house of Floyd Lott, but, no one else appearing, no meeting was held. It is also shown that defendant was a member of the local draft board. He denied that he made the statement, or that he visited Lott's house. The point is made that the defendant was not guilty of obstructing the recruiting and enlistment service of the United States, and did not cause disloyalty or refusal of duty.

Conceding for the sake of argument that the evidence was not sufficient on the first count, the second count charges that he did "unlawfully and willfully attempt to cause disloyalty and refusal of duty," etc. Section 3 of the Act of June 15, 1917, reads:

"Whoever * * * shall willfully cause or attempt to cause insubordination, disloyalty, mutiny, or refusal of duty, in the military or naval forces of the United States, or shall willfully obstruct the recruiting or enlistment service of the United States, to the injury of the service or of the United States, shall be punished by a fine of not more than $10,000 or imprisonment for not more than twenty years, or both."

Under the provisions of the act it was not necessary that the defendant should succeed in his efforts. The mere attempt constituted a crime. If the jury believe the evidence for the government, the defendant was clearly guilty. As the act provides a maximum penalty of 20 years, and the court imposed a sentence of only 3 years, if either count of the indictment be supported by the proof, the sentence was valid.

[5] The second error assigned is to certain evidence admitted over objection. A witness, William Cox, was on the stand, and was asked the following question:

"I will ask you whether or not you heard the defendant, Wessels, some time after registration day, June 5, 1917, state substantially that President Wilson had no business going into this war with Germany, and that if he had him he would fill him so full of holes you wouldn't know him?"

To which he answered:

"I heard him make that statement a couple of days or some time right after registration day. The defendant was in his room just prior to making that statement. I heard him talking, or reading, or something. I heard him making a fuss in there some way, and he came out on the gallery, and I walked out there, and he made that remark."

We think this evidence was properly admitted on the question of defendant's intent.

The fourth, fifth, sixth, seventh, eighth, and ninth assignments of error run to portions of the judge's charge. Without repeating what the court said, it is sufficient to say that we find no error in the portions of the charge given.

Judgment is affirmed.

CLINCHFIELD FUEL CO. v. HENDERSON IRON WORKS CO.

(Circuit Court of Appeals, Fifth Circuit. January 13, 1920.)

No. 3444.

COLLISION ⊂=153—DECREE AFFIRMED ON CONFLICTING EVIDENCE OF INJURY TO BARGE.

Decree affirmed, which found on conflicting evidence, in part taken in open court, that the leaking condition of a barge was not caused by collisions, but existed previously, and denied recovery of damages therefor.

Appeal from the District Court of the United States for the Southern District of Alabama; Robert T. Ervin, Judge.

Suit in admiralty for collision by the Clinchfield Fuel Company against the Henderson Iron Works Company. Decree for libelant, from which it appeals. Affirmed.

See, also, 254 Fed. 411, 165 C. C. A. 631.

Harry T. Smith and William G. Caffey, both of Mobile, Ala., for appellant.

T. M. Stevens and Stevens, McCorvey & McLeod, all of Mobile, Ala., for appellee.

Before WALKER, Circuit Judge, and GRUBB and JACK, District Judges.

GRUBB, District Judge. This is an appeal from a decree of the District Court in favor of the appellant (libelant in that court) against the appellee (libelee in that court) for $100, for damages for injuries to the barge of appellant, which was caused to collide with a pier (Pier 19, Galveston) and with a steamship (the American), while being towed by a tug of appellee, in Galveston harbor, on June 22, 1915.

The District Judge found that both collisions were caused by the negligence of the tug, and the only question presented by this appeal relates to the sufficiency of the award of damages. The District Judge allowed damages for injuries done to the guard rail and fender of the barge, but denied damages to compensate for alleged injuries to her hull, which it was claimed caused her to leak and required her to be overhauled and caulked. He also denied appellant damages for the cost of a survey, claimed to have been made necessary by reason of the collisions.

The sole question is one of fact, and it is whether or not the leaking of the barge was caused or increased by either or both of the collisions. This question was resolved against appellant by the District Judge. Its solution depends upon whether the record shows that the barge leaked substantially more after the collisions than it had been doing before. The libelant relied entirely upon the claim of subsequent leakage to sustain its case. The record discloses no evidence of visible injury to the barge below the water line. Libelant's claim is that the force of the collisions opened the butts and seams of the barge, and that the immediate leaking of the barge, after the collisions, substantiates this contention. The whole case, therefore, depends upon whether the barge began to leak, or increased its leakage substantially, just after the collisions.

The libelant offered evidence tending to show that the barge was comparatively new; that it had just come off the ways, after having been overhauled, and was tight; that the only trip the barge had made, after having been overhauled, was a nine-mile trip across Galveston Bay from Texas City on the evening preceding the day of the two collisions. The libelant also offered in evidence the deposition of the master of the barge to the effect that he had examined the barge at 6 a. m. on the morning on which the collisions happened, and that there was only 1 inch of water in the barge at that time, and that he had again examined her at about 9:15 a. m., and after the happening of both collisions, and then found 15 inches of water in her hold. The barge remained afloat the remainder of that day and the next day, near the place of the last collision. Part of her cargo of coal was there unloaded into the vessel with which she had collided, part unloaded into another vessel, and the remainder was transferred to another barge. The injured barge was then taken to the Houston Ship Canal, to go on the ways, which were, however, found to be occupied. After remaining there some time the barge was taken to Lake Charles in September, where she was hauled up on the ways, and it was then that her seams and butts were found to be open. No examination of her hull had been or could have been made until then.

The libelee introduced the oral evidence of three witnesses—the

chief engineer of the tug, whose name was Taylor, and two of its deck hands, named Beretietch and Burns—to the effect that on the morning of the collisions, and the day succeeding the evening on which the barge had been towed from Texas City, they examined the position of the barge in the water as she lay at Pier No. 10, Galveston, where she had been put up overnight, and that she then listed perceptibly, in a way that showed that she had taken on considerable water. Burns also testified that he went on the barge and looked down into her hold and saw the water, and that there was a great deal of it. All three testified that Barrell, master of the barge, stated to them or in their presence that the barge was leaking. The witnesses also testified that the barge had encountered rough water on the preceding evening on the way over from Texas City to Pier No. 10, and that it was of a kind that would tend to cause her seams and butts to open, if she was too limber.

As tending to show that she was too limber, libelee points to the fact that when overhauled at Lake Charles, in September, after the collisions, new bulkheads were put in her at the instance of her owners for the purpose of stiffening her. The libelee also relies upon the statement of her master, Barrell, that when he examined the barge, after the collisions, she had 15 inches of water in her hold, and that he gauged the water entering her and found that she was taking on water at the rate of an inch an hour. If no greater rate than that had obtained, even since the earlier collision, it is clear that the 15 inches of water cannot be accounted for by the collisions, the earlier of which occurred only 3 hours before the water was gauged. To this argument libelant answers that the seams and butts may have reverted to their original positions, in the interim between the collisions and the time of the gauging of the water, and that this may have checked the entrance of the water, and that for that reason the rate of leakage may not have been constant during the whole period.

This contention, however, is a matter of theory, and not of evidence. Other facts and inferences are relied upon by the parties in support of their respective contentions, as to when substantial leakage commenced with relation to the time of the collisions. Thus the issue is not only one of fact, but of fact depending upon conflicting oral testimony, in part, of witnesses, who appeared in person before the District Judge, and whose demeanor and intelligence were accordingly available to him—as they are not to us—in determining their truthfulness and accuracy. The District Judge found from the evidence that the leakage was not, in fact, increased by the two collisions, but was as great before either of them occurred as it was after both of them occurred. In view of this affirmative finding as to the fact, he very naturally did not permit the natural tendency of such collisions to cause or increase leakage to control. Whatever conclusion we might have reached, if the issue had been presented to us as an original proposition, passing on it in the light of the District Judge's finding and the presumption of correctness that attaches to it, we are not prepared to disturb his conclusion that the entire leakage was due to the limber condition of the barge, and to its journey in that condition through

rough water from Texas City to Pier No. 10, and that the leakage was neither caused or substantially increased by the collisions.

If the leakage in its entirety existed before either collision, the District Judge was right in not charging the cost of the survey to appellee, since in that event it would have been required, though no collisions intervened.

The decree of the District Court was correct and is

Affirmed.

UNITED STATES v. KRAMER.

(Circuit Court of Appeals, Fifth Circuit. December 23, 1919.)

No. 3453.

ALIENS ⇐71½, New, vol. 7 Key-No. Series—SUFFICIENCY OF EVIDENCE OF FRAUDULENT NATURALIZATION.

That a naturalization certificate was obtained fraudulently and not in good faith may be established by subsequent acts and statements of the naturalized citizen, showing his disloyalty and continued adherence to his former sovereign.

Appeal from the District Court of the United States for the Western District of Texas; Duval West, Judge.

Suit by the United States against Herman Kramer for cancellation of naturalization certificate. Decree of dismissal, and the United States appeals. Reversed and remanded.

The United States, through the United States attorney, brought her bill against Herman Kramer, formerly a subject of the German emperor, to cancel his certificate of citizenship issued to him on December 30, 1912, on the ground that it was fraudulently and unlawfully obtained.

The bill showed that Herman Kramer had been admitted to citizenship by the United States District Court for the Western District of Texas, in which court the bill was filed, and was then residing within the jurisdiction of the court, and further substantially alleged that Kramer, at the time he was admitted to citizenship, declared under oath that he would obey the Constitution and laws of the United States and bear true faith and allegiance to same; that he then and there renounced forever all allegiance to any foreign sovereign, particularly the emperor of Germany; that the court relied on the truth and good faith of his representations and admitted him to citizenship; that the said representations were false, in that he did not in truth and in fact renounce his allegiance to the emperor of Germany, but falsely declared that he did so for the purpose of obtaining the rights, privileges, and protection of American citizenship, without assuming, or intending to assume, any of the duties thereof.

Annexed to the bill was an affidavit of one A. H. Rebentish, stating that on May 25, 1917, Kramer told him that he would do all he could against the United States; that any information he could get from soldiers at the aviation field he would get for him (Rebentish), same to be sent to Germany; that when this war was over he would either go to Germany or Mexico to live, as he did not care to live in this country any longer; that on May 31, 1917, Kramer stated to him that he could report to Germany that the aviation service of the United States did not amount to anything.

To this the defendant filed a pleading, which he termed an answer, but which was more in the nature of a general demurrer, and also a motion to dismiss the bill. These pleadings are too lengthy and diffuse to be briefly stated, and it is unnecessary to do so, in view of what subsequently transpired.

Without any action on the pleadings, the case went to trial, and the evidence of two witnesses, Secret Service agents, was heard on behalf of the government. One of these witnesses was the affiant, Rebentish, and the other was one Wyndelts. The evidence of these witnesses shows that defendant was repeatedly guilty of disloyal remarks similar to those set out in the affidavit above quoted; that he was keeper of a saloon near the United States aviation field at San Antonio; that it was his intention to return to Germany after the war; that his sympathy was entirely with Germany in the war, and he expected her to be successful; that he was in close accord with one Ludwig, a soldier in the United States army, stationed at the aviation field; that the witness Wyndelts visited Kramer's place on May 11, 1917, in company with said Ludwig, and Ludwig made certain disloyal remarks of which Kramer seemed to approve; that they sang German songs; that Ludwig would tell Kramer what was going on at the aviation field, and Kramer would question him about it; that on one occasion Wyndelts, Ludwig, another soldier, and Mr. and Mrs. Kramer were in the saloon, no one else being present, and Ludwig said they trusted Rebentish, who was posing as a German spy, and they said, "If he is a German spy, we will help him all we can." There was much more testimony to the same effect.

The government also introduced in evidence the order admitting the defendant to citizenship. The government then rested. The defendant introduced no evidence at all. There was nothing to discredit or impeach the testimony of these witnesses for the government. After the evidence was in, the defendant filed an amended motion to dismiss the bill of complaint, by which he waived his original motion. The amended motion was directed, not only to the sufficiency of the bill of complaint, but also to the competency and the sufficiency of the evidence offered in its support on the following grounds: That the bill showed no equity, because it did not allege that at the time and prior to the granting of the said certificate of citizenship defendant had any fraudulent intent not to renounce his allegiance to the German government; that defendant's citizenship could not be forfeited and canceled for acts done and words spoken by defendant subsequent to the date of the decree awarding him citizenship; that the evidence was wholly insufficient in equity to sustain a decree, because the disloyal statements were made long after defendant's citizenship was granted. Thereupon the court entered an order dismissing the bill, without a written opinion.

Hugh R. Robertson, U. S. Atty., of San Antonio, Tex.

Before WALKER, Circuit Judge, and FOSTER and GRUBB, District Judges.

FOSTER, District Judge (after stating the facts as above). In the absence of an opinion by the District Court, we assume the judgment rested upon the conclusion that evidence of acts of disloyalty occurring after defendant's admission to citizenship was not sufficient to show want of good faith and fraudulent intention at the time he was admitted.

The statute, under the provisions of which defendant was admitted to citizenship, provides that if a naturalized citizen returns to the country of his nativity, or goes to any other foreign country, and takes permanent residence therein, within five years after his certificate of citizenship is issued to him, it shall be prima facie evidence of lack of intention to become a permanent citizen at the time of filing his application for citizenship, in the absence of countervailing evidence. Section 15, Act June 29, 1906 (Comp. St. § 4374); Luria v. U. S., 231 U. S. 9, 34 Sup. Ct. 10, 58 L. Ed. 101. Congress thereby clearly indicated that subsequent acts of a naturalized citizen would be sufficient

evidence of his fraudulent intention at the time of his admission. If mere removal is sufficient evidence of fraud, why not subsequent acts of disloyalty, or statements indicating his want of allegiance? In the nature of things it is impossible for the government to make more than a cursory examination into the loyalty or the general character of the applicant for citizenship before admission, and the court must of necessity rely upon the good faith and truthfulness of the applicant when appearing before it and taking the oath of allegiance. In a criminal case, a man's intention may be judged by his acts. A conspiracy to defraud is usually proven by showing what the defendants did after the date upon which the conspiracy is alleged to have been formed, and the jury may consider such evidence in opposition to the testimony of defendant on the question of intention, and render a verdict of guilty upon it. Why not the same rule in a suit to cancel a certificate of naturalization?

American citizenship is a priceless possession, and one who seeks it by naturalization must do so in entire good faith, without any mental reservation whatever, and with the complete intention of yielding his absolute loyalty and allegiance to the country of his adoption. If he does not, he is guilty of fraud in obtaining his certificate of citizenship.

There can be no doubt that, had the defendant in this case been guilty of the utterances with which he is charged before his naturalization, and that fact had been known to the court, he would not have been admitted. The proof makes out a prima facie case of the disloyalty of the defendant, and shows his continuing allegiance to the German emperor. We think the court might well have rested a judgment of cancellation upon it, and it was error to dismiss the bill. U. S. v. Ellis, (C. C.) 185 Fed. 546; U. S. v. Olsson (D. C.) 196 Fed. 562; U. S. v. Wursterbarth (D. C.) 249 Fed. 908; U. S. v. Swelgin (D. C.) 254 Fed. 884.

In view of a new trial, we deem it well to say that it is settled that a suit to cancel a certificate of naturalization is a proceeding in equity. Luria v. U. S., supra. In this case the bill conforms to equity rule 25 (198 Fed. xxv, 115 C. C. A. xxv), contains a plain statement of the ultimate facts upon which the plaintiff asks relief, and is sufficient. The affidavit annexed to the bill shows, not only the authority, but the absolute duty, of the United States attorney to institute the proceedings under the provisions of the statute.

For the error in dismissing the bill the judgment is reversed, and the case remanded for further proceedings.

Reversed and remanded.

YA-KOOT-SA et al. v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. January 5, 1920. Rehearing Denied February 9, 1920.)

No. 3387.

1. INDIANS ⟸13—DECREE REGARDING ALLOTMENTS NOT CONCLUSIVE ON HEIRS NOT PARTIES TO PROCEEDING.

A decree under Act Feb. 6, 1901 (Comp. St. §§ 4214, 4215), providing that suits to determine title of Indian allotted lands shall be defended by the United States, etc., is not binding on Indian heirs, who were not parties to and had no knowledge of the proceeding, and whose interest was unknown to the district attorney defending the action.

2. COURTS ⟸52—FEDERAL COURT HAS JURISDICTION TO SET ASIDE PREVIOUS DECREE REGARDING INDIAN ALLOTTED LANDS.

Act June 25, 1910, withdrawing from federal courts the jurisdiction to determine claims to Indian allotted lands, and conferring exclusive jurisdiction thereover on the Secretary of the Interior, does not preclude a federal court from setting aside a decree entered March 10, 1910, as a cloud on the title which the Secretary of Interior had, in the meantime, determined.

Appeal from the District Court of the United States for the District of Oregon; Robert S. Bean, Judge.

Suit by the United States against Ya-koot-sa and another. Decree for the United States, and defendants appeal. Affirmed.

In July, 1907, Ya-koot-sa and A-lip-ma, Indian women, filed their bill of complaint in the court below against the United States, as trustee, seeking a decree that they be adjudged to be the only heirs of Ta-ma-was, a deceased Walla Walla Indian, who was allottee No. 130, containing 80 acres, on the Umatilla Indian reservation, and that as such heirs they be adjudged to be the owners of said allotment. The bill alleged that Ta-ma-was died July 5, 1901, leaving surviving her an infant daughter named Am-nap-um, and no other lineal descendant, which said daughter in 1903 died without issue, and that the complainants were the only sisters of said Ta-ma-was. The United States attorney, appearing for the United States, answered, denying the allegations of the bill. No testimony was taken, and on March 10, 1910, a decree was entered with the consent of the district attorney adjudging the complainants in that suit to be the only heirs at law of Ta-ma-was, and entitled to the possession of said allotment of land.

On June 10, 1918, the United States filed its bill of complaint, setting out the proceedings in the suit just described, and alleging that James Peters, an Indian ward of the United States, was the rightful owner of said allotment, and that said James Peters did not appear in those proceedings for the reason that he had no notice thereof; that the United States attorney had no authority to confess said judgment as against him; that said James Peters was the son of Pete Eahtean, who after his birth married Ta-ma-was; that two daughters were the issue of said marriage, the first of whom died before the birth of the second; that the second daughter was named Emma Eahtean; that Ta-ma-was died in 1905; that thereafter Emma Eahtean died, without issue, leaving her father, Pete Eahtean, her sole heir, who thereafter died, leaving as his sole surviving heir his son, said James Peters, who is the rightful owner of said allotment. The bill made Ya-koot-sa and A-lip-ma parties defendant, and prayed that they be required to set forth the nature of their claim to the land, and that the decree so entered on March 10, 1910, be set aside, and that James Peters be declared to be the owner of said Indian allotment. The court below by its decree set aside the decree of March 10, 1910, holding that it was void and of no effect as to James Peters. The court

did not consider the question of heirship, holding that it was without jurisdiction to pass thereon in view of Act June 25, 1910, 36 Stat. 855.

Soon after the original decree of March 10, 1910, was entered, the Secretary of the Interior, under the authority given him by the said Act June 25, 1910, heard and determined the question of the right of the respective claimants of the allotment in question, and decided that James Peters was heir to the estate, that the former decree was not binding upon James, because he was not a party thereto, and awarded to him the property, and issued a trust patent to him, and subsequently a patent in fee. In 1915 the superintendent of the Umatilla Indian reservation sold the allotment under the authority of and with the approval of the Secretary of the Interior, for the sum of $8,290. Ya-koot-sa and A-lip-ma, notwithstanding the decision of the Secretary of the Interior, and the sale, continued to assert title to the land, and brought suits setting up their claim thereto, for which reason the United States, in the name of Peters as guardian and trustee, brought the present suit to set aside and vacate the former decree as a cloud upon the title. From that decree the present appeal is taken.

J. W. Brooks, of Walla Walla, Wash., for appellants.

Bert E. Haney, U. S. Atty., and Barnett H. Goldstein, Asst. U. S. Atty., both of Portland, Or.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

GILBERT, Circuit Judge (after stating the facts as above). [1] The appellants contend that the decree of the court below of March 10, 1910, was a final adjudication of the title to the property in controversy, and was binding upon all persons, irrespective of whether they appeared in that proceeding or not, and that such is the effect of the acts of Congress of October 15, 1894 (28 Stat. 305), and February 6, 1901 (31 Stat. 760), being Comp. St. §§ 4214, 4215, authorizing such proceedings to be brought against the United States. The appellee, on the other hand, contends that James Peters, not having appeared in the court in that proceeding was not bound by the decree. Unquestionably the decree therein is not binding as to James Peters, unless by the provisions of Act Feb. 6, 1901, 31 Stat. 760, the United States as party to that suit is to be held to have represented the interests of all unknown and unnamed heirs. We do not think that such is the meaning of the statute. It provides that all persons who are or claim to be entitled to an allotment—

"may commence and prosecute or defend any action, suit or proceeding in relation to their right thereto in the proper Circuit Court of the United States."

It is true that the act further provides that in said suit the parties thereto shall be the claimant as plaintiff and the United States as party defendant, and that the judgment or decree in favor of any claimant to an allotment shall have the same effect when properly certified to the Secretary of the Interior as if such allotment had been allowed and approved by him. But it makes it the duty of the district attorney to appear and represent "the interests of the government in the suit." Taking the whole statute together, with its provision that any person claiming an allotment may "defend" any action or suit in relation thereto, and the provision making it the duty of the district attorney to defend only "the interests of the government in the suit," we think it

is not to be inferred that the intention of the statute was to adjudicate in such a proceeding the interest of a claimant who was not advised of the proceeding and whose claim was unknown to the District Attorney. Such seems to have been the view of the courts in United States v. Fairbanks, 171 Fed. 337, 96 C. C. A. 229, and Oakes v. United States, 172 Fed. 305, 97 C. C. A. 139.

[2] Nor was the court below without jurisdiction to make the decree which is here appealed from. Act June 25, 1910, 36 Stat. 855, withdrew the jurisdiction which Congress had given to the federal courts to determine claims to allotments and questions of heirship and descent as affecting allotted lands during the trust period, and conferred exclusive jurisdiction thereover upon the Secretary of the Interior. Hallowell v. Commons, 239 U. S. 506, 36 Sup. Ct. 202, 60 L. Ed. 409; Parr v. Colfax, 197 Fed. 302, 117 C. C. A. 48. The power of the courts to deal with those questions was thus abruptly terminated. But that does not meet the question here involved. The suit here is not brought to adjudicate the title of an heir to allotted land. It is brought solely to set aside a former decree, which stands as a cloud upon a title which has been finally determined by the Secretary of the Interior. The transfer of jurisdiction to the Secretary of the Interior had not the effect to deprive the court below of jurisdiction to set aside its former erroneous decree. In so doing, and in entering the decree which is here appealed from, the court below was not exercising jurisdiction which had been conferred upon the Secretary of the Interior. It was simply setting aside its own decree, which stood as a cloud upon title, and had given rise to adverse claims on the part of the appellants herein, who had harassed the owner of the allotment with several suits. We find it unnecessary to consider the question whether or not the decree of March 10, 1910, was void, for the reason that the act of 1901 gave the courts jurisdiction only of controversies which involved claims to allotments, and was not sufficiently broad in scope to include claims of heirs to an allotment which had already been made. In either view the court below had jurisdiction to declare void its former decree.

The decree is affirmed.

PINASCO v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. January 5, 1920.)

No. 3379.

1. INTERNAL REVENUE ⊂⊃12—LICENSE REQUIREMENTS NOT REPEALED BY REED AMENDMENT.

Internal revenue statutes, penalizing persons for distilling spirituous liquors without giving bond and notice in writing to the collector, etc., were not repealed by the Reed Amendment of March 3, 1917 (Comp. St. 1918, §§ 8739a, 10387a–10387c), relating to shipments of liquor in interstate commerce.

2. INTERNAL REVENUE ⊂⊃12—LICENSE REQUIREMENTS UNAFFECTED BY WAR-TIME PROHIBITION ACT.

A prosecution for violating, on January 3, 1919, the internal revenue statutes, penalizing distillation of spirituous liquors without giving bond

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

and notice to the collector, etc., was unaffected by War-Time Prohibition Act Nov. 21, 1918, since that act did not take effect until May 1, 1919.

3. INTERNAL REVENUE ⟸12—LICENSE REQUIREMENT UNAFFECTED BY STATE PROHIBITION LAW.

A conviction under the federal statutes penalizing the distillation of spirituous liquors without giving bond and notice to the collector, etc., is not precluded by the fact that the violation occurred in a state which had prohibited the manufacture of intoxicating liquors under any circumstances.

4. INTERNAL REVENUE ⟸47—ELECTION BETWEEN INDIVIDUAL PROSECUTION AND FORFEITURE PROCEEDINGS UNNECESSARY.

The government cannot be required to elect whether it will proceed under an indictment charging violation of the internal revenue laws in distilling spirituous liquor without having given bond, etc., or proceed under a pending suit seeking forfeiture of the distillery, etc., pursuant to Rev. St. § 3257 (Comp. St. § 5993).

In Error to the District Court of the United States for the Northern Division of the Western District of Washington; Jeremiah Neterer, Judge.

Guiseppi Pinasco was convicted of distilling liquor contrary to the internal revenue laws, and appeals. Affirmed.

Wilmon Tucker, George H. Rummens, and William R. Bell, all of Seattle, Wash., for plaintiff in error.

Robert C. Saunders, U. S. Atty., and Charlotte Kolmitz, Asst. U. S. Atty., of Seattle, Wash.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

GILBERT, Circuit Judge. [1, 2] The plaintiff in error was convicted under four counts of an indictment which charged him with violation of the internal revenue laws of the United States, in that (1) on January 3, 1919, at a place named, he unlawfully and feloniously carried on the business of a distiller without having given bond as required by law; (2) that at the same time and place he was engaged in the business of distilling without having given notice in writing to the collector of internal revenue, as required by section 3259, Rev. Stat. (Comp. St. § 5995); (3) that at the same time and place he unlawfully made and fermented certain mash for distillation in a dwelling house, which was not an authorized distillery; (4) that at the same time and place he unlawfully used a certain still for distilling in a dwelling house. There was a motion to quash the indictment, one of the grounds of which was that the statutes under which the indictments were laid had been repealed by the act of March 3, 1917, commonly known as the Reed Amendment. The Reed Amendment (39 Stat. 1069 [Comp. St. 1918, §§ 8739a, 10387a–10387c]) provides that liquor in interstate commerce shall not be shipped into any state contrary to the laws of such state, and does not purport to make unlawful the distillation of spirituous liquor. Nor does the War-Time Prohibition Act of November 21, 1918 (40 Stat. 1045, c. 212), affect the question here involved, for that act by its terms was not to take effect until May 1, 1919, and the offenses with which the plaintiff in error is charged occurred on January 3,

1919. But the prohibition law of the state of Washington became effective on January 1, 1916, and it prohibits all manufacture and distillation of spirituous liquor within the state.

[3] It is contended that inasmuch as the purpose of the internal revenue law is to raise revenue only, and the adoption of prohibition by the state of Washington makes it impossible for any one in that state to procure a license to distill intoxicating liquors, it is a legal absurdity to say that a man may be punished criminally for failure to secure a license or give a bond therefor, or otherwise to comply with the federal statutes. A similar contention was made and adversely answered in License Tax Cases, 5 Wall. 462, 18 L. Ed. 497, where, upon a certificate from the Circuit Court of Massachusetts certifying that the defendant was indicted for carrying on the business of retailing liquors without a license, and it appeared that the defendant was a retail dealer as charged, and that the business was prohibited by the laws of Massachusetts, the question presented was whether the defendant could be legally convicted upon the indictment for not having complied with the act of Congress by taking out the required license to carry on the business. The court held that the recognition of the power of the state to prohibit the business was consistent with an intention on the part of Congress to tax such business for national purposes, and that it was not necessary to regard the acts of Congress as giving authority to carry on the prohibited business within the state in which it was prohibited. Said the court:

"There is nothing hostile or contradictory, therefore, in the acts of Congress to the legislation of the states. What the latter prohibits, the former, if the business is found existing notwithstanding the prohibition, discourages by taxation. The two lines of legislation proceed in the same direction, and tend to the same result. It would be a judicial anomaly, as singular as indefensible, if we should hold a violation of the laws of the state to be a justification for the violation of the laws of the Union."

[4] The plaintiff in error moved the court below that the government be required to elect whether it would proceed under the indictment or try another proceeding then pending in the same court, wherein the government sought to declare forfeited under section 3257, Rev. St. (Comp. St. § 5993), the distillery, apparatus, distilled spirits, and material on the premises of the plaintiff in error, and error is assigned to the denial of that motion. It is sufficient to say in answer to this that no case was made for election of remedies. There was no ground to require the district attorney, while proceeding to prosecute the plaintiff in error under the indictment, to say that he would dismiss the forfeiture proceeding. If the government could not lawfully pursue both proceedings, that defense was thereafter available in bar of the forfeiture proceeding. Coffey v. United States, 116 U. S. 436, 6 Sup. Ct. 437, 29 L. Ed. 684, is authority for the proposition that an acquittal under an indictment under section 3257 is conclusive in favor of the accused on a subsequent trial of a suit in rem for forfeiture, where the existence of the same act or fact is the matter in issue. But that is far from saying that a conviction on an indictment under section 3257 may be availed of as a defense to a civil action

for forfeiture based upon the same acts or transactions. That question, however, although discussed in the briefs in the present case, is not properly here for decision on a review of the ruling of the court below upon the motion to elect. We find no error.

The judgment is affirmed.

DANVILLE BEN. & BLDG. ASS'N et al. v. HUFF et al.

In re PORTERFIELD.

(Circuit Court of Appeals, Seventh Circuit. October 7, 1919. Rehearing Denied December 5, 1919.)

No. 2690.

BANKRUPTCY ⊂=260—ORDER FOR SALE OF REAL ESTATE NOT ESTABLISHING VALIDITY OF MECHANIC'S LIEN.

An order for sale of real estate of a bankrupt free of liens, expressly reserving the question of priority "between holders of mortgage incumbrances * * * and the holders of mechanics' liens," *held* not to conclusively establish validity of a mechanic's lien set up in an answer and alleged to be prior to the mortgages, as against the mortgagee, which made default; validity of its mortgages being admitted in the petition.

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

Suit by H. B. Boyer, trustee in bankruptcy, against the Danville Benefit & Building Association, S. E. Huff, and others. From an order in favor of S. E. Huff, adjudicating the priority of liens, the Danville Benefit & Building Association and others appeal. Reversed.

The trustee in bankruptcy filed a bill of complaint setting forth his interest in certain real estate, acknowledging the validity of two certain mortgages, held by appellant, covering separate tracts of land, setting forth appellee Huff's two claims for mechanics' liens covering the same tracts of land, and charging, among other things, that certain other transfers, in no way before this court at this time, were fraudulently made, and praying among other things for a sale of all real estate free and clear of all incumbrances. Appellee Huff answered the bill, and set forth his claims for mechanics' liens, and claimed priority therefor over the two mortgages of appellant. No copy of such answer was served upon appellant, who defaulted as to the trustee's bill. The decree which followed did not determine any issue of priority as between appellant and appellee Huff, but especially reserved that question in the following language:

"13. It is further ordered, adjudged, and decreed by the court that the question of priority of payment between the holders of mortgage incumbrances on the real estate above described, and the holders of mechanics' liens as against said real estate is reserved for the further consideration of the court upon the coming in of the report of the sale of the said real estate as hereinafter provided, excepting as to said mortgage of Trevitt-Mattis Banking Company above mentioned, which is held to be a first lien upon the real estate described in said mortgage, and that such reservation is without prejudice to the rights of the respective parties in interest in said mortgage incumbrances and mechanics' liens on such subsequent hearing. * * *"

The amount realized from such sale being insufficient to pay both mortgages and the liens in full, a determination of the issue of priority was necessary. Upon such hearing it was established that the two mortgages were executed

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

and recorded June 20, 1916, and November 10, 1916, respectively, and the contracts for furnishing material for the two houses, for which Huff claimed liens, were entered into October 1, 1915, and March 9, 1916, respectively. Both claims for liens were filed December 9, 1916, too late according to appellant's contention to defeat its mortgages. A decree in favor of appellee Huff as holder of the mechanic's liens resulted in this appeal.

Donald C. Dobbins, of Champaign, Ill., for appellant.

Henry I. Gruon, of Urbana, Ill., for appellee.

Before BAKER, ALSCHULER, and EVANS, Circuit Judges.

EVANS, Circuit Judge (after stating the facts as above). The District Judge in disposing of this issue of priority relied entirely upon the earlier decree of sale, saying:

"* * * Said decree establishing the validity of said liens of S. E. Huff necessarily implied that the said S. E. Huff had filed his claims for lien within the time required by the state statute, for otherwise said claims would not have been valid liens as against the trustee of said bankrupt representing said judgment creditors, and that therefore the effect of said decree is to foreclose the question as to the validity of said mechanics' liens, and the court adheres to its announcement to counsel at the trial of this cause, that the only question for consideration herein on distribution, as to the liens of S. E. Huff is as to the time that said liens attached as compared to the time of the execution and delivery of the mortgages on said tracts Nos. 1 and 3 above described. * * *"

All evidence tending to show the claim for liens was insufficient or not filed in time was excluded. Appellee offered no evidence to show the date when the last material was delivered, while appellant's offer to prove such date was more than four months prior to December 9, 1916, was rejected. The court also excluded appellant's testimony tending to show both lien claims were insufficient as against valid mortgages, in that they failed to set forth "a sufficiently correct description of the lots or tracts of land to identify the same."

We think the District Court misconceived the scope of the reservation appearing in the prior decree. The decree of sale did not determine in any way the issue of priority between mortgagee and the lienholder. As against appellant the court could not have determined this issue in appellee's favor. While appellant, upon its default, was bound by any decree that was supported by allegations in the bill as filed, it was not subject to a decree based upon allegations in appellee's answer and not appearing in the bill. Had the latter party wished to litigate this question of priority with his codefendant in that suit a cross-bill tendering such an issue should have been served upon appellant.

That this was the view of the late Judge Humphrey in entering the decree of the sale is, we think, apparent from the language used. The court left open for later determination all of those issues of fact that bore upon this question. In reaching this conclusion we have not overlooked appellee's argument that the decree of sale recognized the validity of the lien and that such recognition was necessarily an adjudication that the claims were seasonably filed and that each contained a sufficient description of the real estate. The Illinois statute (Hurd's R. S. 1917, c. 82, §§ 15, 21) however, does not support the

conclusion that an adjudication of validity necessarily implies adjudication by the court that the claims were sufficient in form and were timely filed. Had Huff failed to file his claim within four months from the date of the delivery of the last article that went into the improvement, his lien would have been lost as against the mortgagee, but it still would have been good as against the bankrupt. Schmidt v. Anderson, 253 Ill. 29, 97 N. E. 291.

Grant that the decree upholding the validity of the lien necessarily involved and disposed of the question arising out of the misdescription as well as the date of the delivery of the last article, so far as the trustee in bankruptcy is concerned, still these issues were open to appellant, not only because the court especially reserved them in its decree, but because the court was without authority, on the pleadings as they existed at the time of the decree, to conclude these questions against the appellant.

The decree is reversed, with directions to take testimony upon the issues of fact which are determinative of the issue of priority between appellant and the appellee, Huff.

THE ATLANTIC.

EDWARDS LUMBER & MFG. CO. v. MILLER.

(Circuit Court of Appeals, Fifth Circuit. January 3, 1920.)

No. 3398.

1. TOWAGE ⟸15(1)—LACHES IN BRINGING SUIT FOR INJURY TO TOW EXCUSED.
Absence of a towing vessel from the district *held* to excuse delay in bringing suit against her for injury to her tow.

2. TOWAGE ⟸11(2)—VESSEL LIABLE FOR INJURY TO TOW.
A schooner, which undertook to tow a motorboat which was unseaworthy, and by a towline improperly attached to her steering gear, instead of at the bow, and libelant's agent, who delivered the boat and attached the line, both *held* in fault for her injury.

Appeal from the District Court of the United States for the Eastern District of Louisiana; Rufus E. Foster, Judge.

Suit in admiralty by Thomas D. Miller against the schooner Atlantic; the Edwards Lumber & Manufacturing Company, claimant. From the decree, both parties appeal. Affirmed.

W. W. Young and Terriberry, Rice & Young, all of New Orleans, La., for claimant.

David Sessler and Bernard C. Shields, both of New Orleans, La., for libelant.

Before WALKER, Circuit Judge, and GRUBB and ERVIN, District Judges.

GRUBB, District Judge. This is an appeal and cross-appeal from a decree of the District Court in favor of libelant (appellee) for dam-

ages for injury done to a motorboat (the Nolco) through the negligence of the appellant company, which towed the Nolco from New Orleans to Biloxi. During the voyage the schooner Atlantic which had her in tow, encountered rough water, the motorboat started to sink, and was taken on board the schooner to prevent her from sinking, and the injury to her was then done, and it practically destroyed her value.

The appellant makes three contentions: (1) That the claim was unenforceable, because of staleness; (2) that the contract of towage was a purely gratuitous one; and (3) that there was no negligence on the part of the master of the schooner which would impose liability on the appellant.

[1] 1. The Nolco was delivered to the appellant, to be towed to Biloxi, on October 1, 1912. Notice of the injury done to her first reached appellee's agent about October 10, 1912. The libel was not filed until June 9, 1916. Soon after the injury, the appellee libeled a companion schooner, the Pacific, belonging also to appellant, under the impression that she was the schooner that towed the Nolco. That libel was dismissed upon the discovery of the error. From June 9, 1913, until February 11, 1916, the Atlantic did not come to New Orleans. Claim was presented in writing for the damage to appellant on behalf of appellee in December, 1912, and was finally declined by appellant on January 11, 1913. The absence of the schooner Atlantic from the district of the domicile of the person in charge of the motorboat for the appellee and of the appellee himself, and of the place of the making of the towage contract, excused the delay in filing the libel against her, under the circumstances recited.

2. There was a conflict between the witness Shields, for libelant, and the witness Edwards, for the libelee, as to the terms of the towage contract. Shields' testimony was to the effect that the service was agreed to be paid for on a basis thereafter to be agreed upon, and which was to be satisfactory to him. Edwards testified that it was to be gratuitous. The District Judge found that the agreement was that it should be paid for, and that it was not to be gratuitous. We see no reason for disturbing the finding of the District Judge, in this respect.

[2] 3. We think the record abundantly sustains the conclusion of the District Court that the master of schooner and the person who made delivery of the motorboat to the schooner were both to blame for the injury done her. The master of the schooner was in fault: (1) For undertaking to tow the motorboat when she was in an obviously unseaworthy condition for towing; (2) in undertaking to tow her with a line fastened to the steering gear in the cock pit, instead of at the bow; and (3) in the method used in putting the boat aboard the schooner, shown to have been a negligent one by the character of the injury, which could have been caused only by rough handling. We also concur in the conclusion of the District Court that the person in charge of the motorboat was in fault (1) in that he delivered the boat to the schooner, when she was in an unseaworthy condition for towing; and (2) in that he fastened the tow line to the steering wheel and delivered her to the schooner in that way to be towed.

The District Judge found the value of the boat to have been $250,

and further found that she was worthless after the occurrence. Being of the opinion that appellant and appellee were both at fault, he divided the loss equally between them, a result in which we concur.

It is ordered that the decree of the District Court upon both the appeal, and cross-appeal be affirmed.

Affirmed.

GRIER v. UNITED STATES.

(Circuit Court of Appeals, Fifth Circuit. December 2, 1919.)

No. 3257.

ARMY AND NAVY ⟸40—ON CHARGE OF APPLYING MILITARY PROPERTY TO OWN USE, DEFENDANT MAY EXPLAIN POSSESSION OF PROPERTY.

A charge against a defendant of applying military property to his own use, in violation of Criminal Code, § 36 (Comp. St. § 10200), is equivalent to a charge of receiving stolen property, and defendant has the right to explain his possession, and in doing so to testify as to what was said to him by the person from whom he received the property.

In Error to the District Court of the United States for the Western District of Texas; Duval West, Judge.

Criminal prosecution by the United States against A. D. Grier. Judgment of conviction, and defendant brings error. Reversed.

S. Engelking, of San Antonio, Tex., for plaintiff in error.

Hugh R. Robertson, U. S. Atty., of San Antonio, Tex.

Before WALKER, Circuit Judge, and FOSTER and GRUBB, District Judges.

FOSTER, District Judge. Plaintiff in error (hereinafter referred to as defendant) was indicted, charged with unlawfully, knowingly, and fraudulently applying to his own use one tent, one pair of shoes, two barrack bags, one pair of olive drab trousers, one olive drab blouse, and one khaki suit, the property of the United States, in violation of section 36, Criminal Code (Act March 4, 1909, c. 321, 35 Stat. 1096 [Comp. St. § 10200]), and was convicted. In the course of the trial the defendant took the stand in his own behalf, and in an endeavor to justify his lawful possession of the articles mentioned stated that they were left in his possession by a man known as Yank. He was then proceeding to repeat what Yank told him about the various articles, saying:

"Yank said the commanding officer was going to burn it, was going to throw it off the truck there at the old bridge, where they burn all that old junk, and he (Yank) asked the lieutenant for it. He (Yank) said that the lieutenant told him—"

The assistant United States attorney here objected to the witness stating what Yank had told him the lieutenant said about the stuff, on the ground that it was hearsay. Counsel for the defense endeavored to tell the court the purpose for which he was offering the statement,

but the court declined to hear him. The court sustained the objection, proper exception was taken to the ruling, and the whole incorporated in a bill of exceptions. There was other testimony in the case tending to show that the defendant was employed as a teamster, hauling around the military camp; that Yank worked for him, and wore old clothes given to him by people around the camp, similar to the clothes worn by the soldiers.

It is apparent that the ruling of the court was error. The prosecution under the statute is identical to a case of receiving stolen goods. It is a well-known exception to the hearsay rule that a person so charged may repeat what was said to him by the person from whom he claims to have obtained the goods. The rule is clearly stated in Elliott on Evidence, par. 3119:

"It has been held competent for the defense to show by the accused, he being a witness in his own behalf, when, from whom, how, and under what circumstances he received the property, and what was done and said at the time in connection with the receipt of it by himself; such facts being part of the res gestæ, to be submitted as evidence and weighed by the jury."

To the same effect, see Underhill on Criminal Evidence (2d Ed.) par. 301. In justification of the possession of the articles, the defendant was entitled to repeat what the person from whom he had obtained them said to him regarding his own lawful possession. If the articles were in fact condemned, and a lieutenant in charge of their disposition had given them to Yank rather than destroy them, that fact was material to the defense.

Other errors are assigned, but in the view we take of the case it is unnecessary to consider them.

For the error above referred to, the judgment of the District Court is reversed.

HAUBTMAN & LOEB CO., Limited, v. HOOVEN-OWENS-RENTSCHLER CO.

(Circuit Court of Appeals, Fifth Circuit. January 3, 1920.)

No. 3411.

1. APPEAL AND ERROR ⊂=714(1)—NECESSITY OF BILL OF EXCEPTIONS.
Papers not forming part of the record proper in a law case, and not by bill of exceptions made part of the record, are not properly before the reviewing court on writ of error.

2. APPEAL AND ERROR ⊂=694(1)—RULINGS ON EVIDENCE NOT REVIEWABLE WITHOUT BILL OF EXCEPTIONS.
When the bill of exceptions does not set forth the evidence, the action of the court with reference to that evidence as a whole is not presented for review by writ of error from the judgment rendered.

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

Action at law by the Hooven-Owens-Rentschler Company against the Haubtman & Loeb Company, Limited. Judgment for plaintiff, and defendant brings error. Affirmed.

C. F. Borah, of Franklin, La., for plaintiff in error.

John P. Sullivan and David Sessler, both of New Orleans, La. (W. C. Shepherd, of Hamilton, Ohio, on the brief), for defendant in error.

Before WALKER, Circuit Judge, and GRUBB and ERVIN, District Judges.

WALKER, Circuit Judge. The judgment in this case is sought to be reversed because of the action of the court in overruling six objections to evidence, and because of what was done by the court after the evidence was concluded, to which last-mentioned action no exception was reserved. As to five of the objections the bill of exceptions does not show that the evidence objected to was admitted. As to the remaining objection, the bill of exceptions does not negative the conclusion that the objection was made after the testimony objected to was given by a responsive answer to a question calling for it, which was not objected to, and the objection is unintelligible in the absence of a contract to which it referred, and which is not shown by the bill of exceptions. The transcript contains what purports to be a report of the evidence adduced in the trial. That report is not made a part of, and is not referred to in, the bill of exceptions, and is not in any way authenticated by the presiding judge.

[1] Papers not forming part of the record proper in a law case, and not by a bill of exceptions made a part of the record to be reviewed on a writ of error, are not properly before the reviewing court. Leftwitch v. Lecanu, 4 Wall. 187, 18 L. Ed. 388; Reed v. Gardner, 17 Wall. 409, 21 L. Ed. 665. Each of the above-mentioned rulings on objections to evidence is unavailable as a ground of reversal either because of a failure to show that the evidence objected to was admitted, or because of a failure properly to present the ruling for review.

[2] When the bill of exceptions does not set forth the evidence adduced in a law case, the action of the court with reference to that evidence as a whole is not presented for review by a writ of error from the judgment rendered. Jones v. Buckell, 104 U. S. 554, 26 L. Ed. 841.

No question of law was raised by the pleadings in the case. The record does not show that there was error in any ruling of the trial court which is presented for review.

The judgment is affirmed.

INDIVIDUAL DRINKING CUP CO. v. PUBLIC SERVICE CUP CO.

(Circuit Court of Appeals, Second Circuit. December 8, 1919.)

No. 147.

1. APPEAL AND ERROR ⟸1216—MOTION IN APPELLATE COURT TO STRIKE OUT PROVISION OF JUDGMENT NOT CONFORMING TO MANDATE SUSTAINED.
Where complainant contended that a provision of the decree entered pursuant to a mandate of the appellate court was erroneous, the proper practice would be for complainant to appeal from the order denying its motion to strike the provision out of the decree; but where complainant made a motion in the appellate court to strike the same pursuant to suggestions of the trial judge, etc., the appellate court will act thereon.

2. APPEAL AND ERROR ⟸719(5)—APPELLATE COURT HAS NO JURISDICTION TO DETERMINE MATTER NOT ASSIGNED AS ERROR.
In an infringement suit, where the trial judge refused to permit testimony to be taken before the master as to a particular device, without prejudice to an application for relief in a new suit, and plaintiff appealed from the final decree, but failed to assign the order as error, the matter was not before the appellate court, and could not be determined.

3. PATENTS ⟸327—PREVIOUS JUDGMENT CONCLUSIVE WHERE PARTIES WERE REALLY THE SAME, THOUGH FORMALLY DIFFERENT.
Where parties to a previous suit for infringement of patent were really the same, though formally different, the judgment in that suit is a conclusive adjudication.

Appeal from the District Court of the United States for the Eastern District of New York; Thomas I. Chatfield, Judge.

Action by the Individual Drinking Cup Company against the Public Service Cup Company. After decree and appeal, complainant applied to strike out a certain clause from the decree of the court below (261 Fed. 555). Insertion of clause held error.

See, also, 226 Fed. 465; 234 Fed. 653; 237 Fed. 400.

Dunn, Goodlett, Massie & Scott, of New York City (Clifford E. Dunn, of New York City, of counsel), for Individual Drinking Cup Co.

Briesen & Schrenk, of New York City (Hans v. Briesen, of New York City, of counsel), for Public Service Commission.

Before WARD and ROGERS, Circuit Judges, and MAYER, District Judge.

PER CURIAM. [1] The proper practice would be for the plaintiff to appeal from an order to be entered by Judge Chatfield in accordance with his opinion dated October 20, 1919, denying its motion to strike out from the decree of June 15, 1918, entered under our mandate of May 27, 1918, the provision as to the defendant's free dispenser, Plaintiff's Exhibit Push Button Bracket. As, however, he has held up the matter, suggesting an application to this court, and both parties, in order to avoid the delay and expense of an appeal, prefer this course to be taken, we will state what we meant by our said mandate.

[2] Judge Chatfield by an order dated July 14, 1916, refused to permit testimony to be taken before the master as to this free dispenser without prejudice to an application for relief in a new suit. The plaintiff appealed, but, not having assigned error as to this order, the subject of the free dispenser was not before us in this suit. We had, therefore, no jurisdiction whatever to pass upon it, did not intend to do so, or to cover it by our mandate, and the clause in question should

not have been inserted in the decree of the court below entered thereunder.

[3] If, as the defendant alleges, the parties to the suit of Individual Drinking Cup Company v. Erret, in the Southern district, in which we held the free dispenser not to be an infringement (250 Fed. 620, 162 C. C. A. 636), are, though formally different, really the same as the parties to the suit in the Eastern district, the question is res adjudicata between them in any new suit the plaintiff may bring.

BACKSTAY MACHINE & LEATHER CO. v. HAMILTON (two cases).*

(Circuit Court of Appeals, First Circuit. January 6, 1920.)

Nos. 1423, 1424.

1. PATENTS ⊜324(5)—ENTIRE PRIOR ART CONSIDERED ON APPEAL IN DETERMINING VALIDITY, REGARDLESS OF CLAIM IN LOWER COURT.
Although appellant assigned as error that the court below erred in holding the patent in suit anticipated by a particular patent, and lower court stated that no device, except that particular patent embodied plaintiff's device, nevertheless the court on appeal will consider the entire prior art as disclosed by the whole record.

2. PATENTS ⊜328—INVENTION FOR FINISHING WELT ANTICIPATED.
Patent No. 1,226,600, claims 1, 2, 5, and 6, of May 15, 1915, for a finishing welt, *held* invalid, because anticipated.

3. PATENTS ⊜328—INVENTION FOR FINISHING WELT HELD INVALID.
Patent No. 1,226,600, claims 3 and 4, of May 15, 1917, for a finishing welt, is invalid, because for a combination of the article claimed to have been invented with some other article which the inventor does not describe.

4. PATENTS ⊜328—DESIGN FOR MOLDING OR WELT VOID FOR LACK OF INVENTION.
Patent No. 51,804, for a design for a molding or welt, *held* void for lack of invention.

Appeals from the District Court of the United States for the District of Massachusetts; George H. Bingham, Judge.

Two patent infringement suits by the Backstay Machine & Leather Company against Helen Wade Hamilton. Decrees for defendant, and plaintiff appeals. Affirmed.

William E. Dyre, of Washington, D. C. (Henry D. Williams, of New York City, and George K. Woodworth, of Boston, Mass., on the brief), for appellant.

W. Orison Underwood, of Boston, Mass., for appellee.

Before JOHNSON and ANDERSON, Circuit Judges, and ALDRICH, District Judge.

JOHNSON, Circuit Judge. These were appeals from the final decrees of the District Court of Massachusetts in two patent cases. In one the plaintiff alleged infringement of patent No. 1,226,600, issued May 15, 1917, for a finishing welt, hereinafter referred to as the article patent; and in the other infringement of patent No. 51,804,

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

*Certiorari denied 252 U. S. —, 40 Sup. Ct. 485, 64 L. Ed. —.

issued February 19, 1918, to Robert C. Schemmel, for a "design for a molding or welt," hereinafter referred to as the design patent.

There were six claims in the article patent, all of which were in issue. Under claims 1, 2, 5, and 6 a patent was claimed for a welt or molding constructed so that two longitudinal, parallel beads superimposed close together upon a base could be separated, the base between them nailed, stitched or otherwise sewed, to any article to cover rough joints, and then the beads, because of their resiliency, made to assume their former positions, thus hiding the tacks, stitches or other securing means.

In his application the patentee thus described his invention:

"My present invention pertains to the finishing of leather and analogous work as used on vehicles and in other connections; and it contemplates the provision of a finishing welt constructed and arranged with a view to being readily nailed, stitched or otherwise attached to the article by which it is carried in such manner that subsequently to the nailing, stitching or other attachment, the welt can be made to assume or assumes of itself such a state that the attaching means will be entirely hidden from view and the finished appearance of the work as a whole will be enhanced."

Claim 1 of the patent is as follows:

"As a new article of manufacture, a welt comprising a body, and longitudinal parallel beads superimposed on and connected with the body, the body being constructed and arranged to permit of the beads being spread apart and subsequently resuming their normal close-together positions, for the purpose set forth."

Claims 2, 5, and 6 were substantially like claim 1.

Claims 3 and 4 were for a combination of an article, without describing any particular article, and the welt described in claim 1 and "attaching means" by which the welt could be attached to the article.

The court below found claims 1, 2, 5, and 6 void for lack of invention and anticipated, and claims 3 and 4 invalid. The reason for the finding of the court in regard to the latter claims was stated as follows:

"It does not seem to me that the third and fourth claims are valid; the invention, if any, resides in the welt and cannot be held to extend to and include any and every article to which the welt may be attached."

The design patent was for "the ornamental design for a molding or welt as shown," the one "shown" being that described in the article patent. This was found void for lack of invention.

The errors assigned in the suit upon the article patent are:

"(1) The court erred in holding claims 1, 2, 5, and 6 void for lack of invention over patent No. 221,801, issued November 18, 1879, to A. B. Felt.

"(2) The court erred in holding claims 3 and 4 void for the reason that the invention, if any, resides in the welt, and cannot be held to extend to and include any and every article to which the welt may be attached."

"(5) The court erred in dismissing the bill of complaint, with costs to the defendant."

The other errors assigned were that the court erred in finding that the claims of the patent in suit were not infringed.

In the suit upon the design patent the errors assigned were:

"(1) The court erred in holding the patent in suit void for lack of invention over the prior art offered in evidence by the defendant."

"(4) The court erred in dismissing the bill of complaint, with costs to the defendant."

Errors 2 and 3, not given, related to infringement.

[1] The appellee contends that the validity of the article patent is not open on appeal, because the appellant, in his assignment of errors, has set out as error, not the decision, but the reason of the court, given in his opinion, for finding that claims 1, 2, 5, and 6 are void for lack of invention.

It is true that the learned judge sitting in the District Court states in his opinion:

"Moldings or welts of the character here under consideration pertain to the art of upholstering. Concealed tack moldings are old, and have been made in various forms; but none of the devices that have been called to my attention, with a single exception, have embodied the characteristics of the plaintiff's device. The exception to which I refer is the product of a machine upon which a patent was granted to Alvin B. Felt, November 18, 1879, in United States letters patent No. 221,801."

While the appellant has alleged that the court below erred in holding that the patent in suit was anticipated by the patent to Felt, and although it was said by that court in its opinion that no other devices called to its attention "embodied the characteristics of the plaintiff's device," we think, upon appeal, we are not confined to a consideration of the patent to Felt only, but that we should consider the prior art as disclosed by the whole record. Electric Gaslighting Co. et al. v. Fuller et al., 59 Fed. 1003, 8 C. C. A. 442; Walker on Patents (5th Ed.) § 655; Brown v. Piper, 91 U. S. 37, 41, 23 L. Ed. 200; Slawson v. Grand Street R. R. Co., 107 U. S. 649, 652, 2 Sup. Ct. 663, 27 L. Ed. 576.

We find, upon referring to the opinion, that the court below took into consideration, in determining whether the patent in suit was anticipated, not only the patent to Felt, but also the fact that "concealed tack moldings are old and have been made in various forms." We are entirely satisfied with the conclusion reached and the reasons stated in the opinion, which we quote:

"In that patent (the patent to Felt) it states that the cording attachment for sewing machines for which he sought a patent related 'to the manufacture and application of corded strips to various articles or fabrics,' including 'trimmings for dresses, for cording seams of military trousers or the edges of cushions, and for other purposes.'

"The cording produced by this machine is shown in Defendant's Exhibit 23 and Plaintiff's Exhibit W. It discloses two parallel beads or cords superimposed upon a base and close together, only one of which is capable of being moved back from the other, and, on being released, resuming or tending to resume its normal or close position to the other bead or cord. To make this corded structure into a finished welt it would only be necessary to turn under and secure the edges of the base as shown in Plaintiff's Exhibit B introduced in evidence. This would involve nothing more than the use of mechanical

skill, and that not of a high order. Although in the article produced by the Felt machine only one of the cords is capable of being moved back in relation to the other, and on being released of resuming its normal position, while in the structure of the plaintiff's patent each cord is capable of being moved back and again resuming its normal position, this is due to the positioning of the cords or strips. The principle by which it is accomplished is the same in both, and is clearly shown in the Felt construction.

"The language of Judge Sanborn in considering a similar question in Warren Webster & Co. v. Dunham Co., 181 Fed. 836, 839, 104 C. C. A. 346, 349, seems to me applicable. He there said:

" 'Where a machine or a combination is discovered in a remote art, where it is used to perform a different function, and where it was not designed and was not apparently suitable to accomplish the thing desired, the application of it with proper mechanical adaptation to a new use is often the result of the exercise of the inventive faculty and may be protected by patent. But the thought that an existing machine or combination, discovered in the same art or one nearly analogous to it, designed and suitable to perform a similar function, may be used or adopted to accomplish the desideratum, is not the product of inventive genius, but the result of the application of the skill of the mechanic to the subject under consideration. It is only when the new use is so recondite and remote from that to which the old device and combination has been applied, or for which it was conceived, that its application would not occur to the mind of the ordinary mechanic skilled in the art, seeking to devise means to perform the desired function, with the old machine or combination before him, that its conception may rise to the dignity of invention.' "

[2, 3] We therefore think there was no error in finding that claims 1, 2, 5, and 6 of the article patent lacked invention, because anticipated by the patent to Felt, and by the prior art as disclosed by the record; nor do we find that there was any error in finding that the third and fourth claims were invalid. These claims are not for an article of manufacture, but for the combination of the article which the inventor claims to have invented with some other article which he does not describe, and we think the court correctly held that—

"The invention, if any, resides in the welt, and cannot he held to extend to and include any and every article to which the welt may be attached."

[4] In considering the design patent the court below said:

"The question presented, so far as the validity of the design patent is concerned, is whether the patentee in his article patent having conceived of a welt having a base with superimposed parallel beads or raised portions, mechanically constructed to function in a given manner, which may be of various shapes, and beads of some shape being essential to the functioning of the device, can be said to have exercised inventive thought of a character sufficient to warrant a design patent for a welt with beads or raised portions circular in cross section. It seems to me that to state the question is to answer it; that, having devised an article of manufacture with a base having parallel beads which may be of any suitable shape and beads of some shape being essential to constitute the article, it cannot be invention warranting a design patent to conclude that they should be round in cross section rather than some other suitable shape.

"Furthermore, the use of beads or raised portions, circular in cross section, in connection with moldings, whether superimposed upon a base or not, is of such long standing that I cannot on the evidence regard the use made of them by the patentee in his design as disclosing inventive thought. Tubular Rivet & Stud Co. v. Standard Finding Co., 231 Fed. 170, 173 [145 C. C. A. 358]. The conclusion reached renders it unnecessary to consider whether the design patent was an attempt at double patenting or not."

We see no occasion for disagreeing with the finding involved in this statement, or for adding anything to the reasoning by which it is sustained.

In each case—

The decree of the District Court is affirmed, with costs to the appellee in this court.

H. D. SMITH & CO. v. PECK, STOW & WILCOX CO.

(Circuit Court of Appeals, Second Circuit. December 10, 1919.)

No. 81.

1. PATENTS ⊂=328—FOR SCREWDRIVER VALID AND INFRINGED.
The Ward patent, No. 737,179, for a screwdriver, *held* not anticipated by prior patents or structures of the prior art, and to disclose invention; also *held* infringed.

2. PATENTS ⊂=35—COMMERCIAL SUCCESS MAY BE CONSIDERED ON QUESTION OF INVENTION.
Whether a patented structure involves invention is a question of fact, and the determining factor is not whether the achievement was difficult or easy, but whether it has in point of fact given the world something of value that it did not have, and upon that question great commercial success may be considered in its favor.

3. PATENTS ⊂=56—ANTICIPATION NOT SHOWN BY POSSIBILITY OF MODIFICATION OF PRIOR DEVICE TO ACCOMPLISH SIMILAR FUNCTIONS.
It is not sufficient to constitute anticipation that the device relied on might, by modification, be made to accomplish the function of the patented article; but it must be designed by the maker and adapted for the performance of such function.

4. PATENTS ⊂=328—DESIGN PATENT FOR SCREWDRIVER INVALID.
The Ward design patent, No. 37,214, for a design for a screwdriver, *held* invalid, as relating to a subject-matter not an appropriate subject for a design patent.

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

Suit in equity by H. D. Smith & Co. against the Peck, Stow & Wilcox Company. Decree for complainant, and defendant appeals. Modified and affirmed.

For opinion below, see 258 Fed. 40.

H. E. Hart, of Hartford, Conn., for appellant.

Archibald Cox, of New York City, and Henry E. Rockwell, of New Haven, Conn., for appellee.

Before WARD, ROGERS, and MANTON, Circuit Judges.

MANTON, Circuit Judge. The appellee now owns, by assignment, letters patent No. 737,179, granted August 25, 1903, for a screwdriver, and design letters patent No. 37,214, of November 8, 1904, for a design for the screwdriver. Both were issued to William S. Ward. The mechanical patent was considered by this court in an action wherein the present appellee was plaintiff and the Southington Manufacturing Company was defendant. 247 Fed. 342, 159 C. C. A. 436. In

that case, however, the plaintiff agreed, by stipulation, that the patent was valid, and therefore did not contest its validity for want of invention. The defenses offered in that litigation were noninfringement and invalidity because of anticipation. It was held there that there was nothing in the prior art like the combination of this article, to wit, the screwdriver, and the defendant failed on both of its defenses, to wit, the noninfringement and anticipation because of the prior art.

[1] In this case, the appellant is not bound by such an admission, and therefore the question of whether or not the patent discloses invention is open to it. It has also offered in evidence patents which were not in the case of Smith v. Southington Mfg. Co., and which it contends establishes anticipation because of prior date. Likewise the defense is interposed that evidence of prior use establishes anticipation. There is a denial of infringement of the patent by use of the structure which the appellee says infringes its patent.

The District Judge held that, in view of the result in this court in the case of Smith v. Southington Mfg. Co., supra, it was not incumbent upon him to do more than examine such patents offered in the prior art as were not considered by this court, and such new evidence as amplified or added to the claim of anticipation due to prior use. In this we think the learned District Judge was correct. The mechanical patent provides for a new make of screwdriver. Screwdrivers have existed for a long time, but in this invention we believe that the inventor gave to the world a new and better screwdriver than it has had, and thus has moved the art forward. It consists of a combination of a particular structure and a particular shape. It consists of integral solid drop forging beginning at the top of an oval, but having a flat hammer face, and continuing into a flat handle web, into which scales of an elliptical shape gradually decreasing in width are riveted, continuing into a conical tapering bolster, continuing into a round shaft, ending up in a flat blade; the handle portion being elliptical in the cross-section for the most part, but gradually merging with the conical bolster by a gentle taper into a circular tool shank, thus providing a firm grasp, while facilitating a nice control by pressure of the finger and thumb upon the shank of the tool. There has been created for it a very substantial and large demand. It commands a high price for such a tool in the market. Its shape and handles provide for turning the tool on its elliptical axis.

Two important characteristics stand out as necessary for successful use by operators: (1) It should be of such a character that the blade may be inserted in the kerf of the screw as easily and certainly as possible; and (2) provide for the application of as much power as possible to turn it. Hand power is applied, and the hand grip must be attained by the shape upon which the hand rests and obtains control of the tool, and is brought to bear in the turning operation. The combination must have such structural strength as to meet increased strains occasioned by the increased control and turning power. The structure provided by this integral solid drop forging provides for wooden hand scales so shaped as to provide the foregoing characteristic. The shape

can be seen plainly by the eye and felt by the hand. In the lower part of the handle, the elliptical cross-section merges with an abrupt break into a circular cross-section, and the two then decrease in diameter until there is a comparatively small circular cross-section and then continuing down becomes still smaller and then flattens out as a blade.

[2] Whether the structure involves invention is a question of fact, and the determining factor is not whether the achievement is difficult or easy, but whether it has, in point of fact, given the world something of real value, that it did not have—a benefit conferred upon mankind. O'Rourke Engineering Const. Co. v. McMullen et al., 160 Fed. 933, 88 C. C. A. 115.

This court, upon the appeal in the other litigation, considered it very useful, and pointed out that a considerable demand had arisen for it. The record here shows that 4,700,000 of these screwdrivers have been sold at a price of at least 10 per cent. higher than the next highest priced screwdriver. This willingness of the purchasing public to pay is a practical demonstration of its substantial value. The appellant's conduct in copying the structure and shape of the appellee's structure is a strong indication that it, too, appreciates the value of this advance in the art. We conclude that the combination constitutes invention, and that the patent is valid.

We shall consider the various patents in this record which were not considered in the case of Smith & Co. v. Southington Mfg. Co., 247 Fed. 342, 159 C. C. A. 436. In that case, the defendant introduced the same three table knife patents, No. 78,328, issued May 26, 1868, to Moses Rubel, No. 86,252, issued January 26, 1869, to Moses Rubel, and No. 172,874, issued February 1, 1876, to James D. Frary; the screwdriver patent, No. 267,709, issued November 21, 1892, to Philip Nadig; three wrench patents, No. 553,059, issued January 14, 1896, to Robert C. Ellrich, No. 666,029, issued January 15, 1901, to Amos Sheppard, and design No. 34,136, issued February 26, 1901, to William S. Ward; and all were held not to anticipate the patent in suit. We adhere to the conclusion there announced. In addition to the foregoing patents, this appellant has offered and introduced three other patents, one to Franz Lehman, No. 96,928, issued November 16, 1869, for a horseshoer's hoof parer, one to Munson, No. 104,056, issued June 7, 1870, relating to rubber-coated carriage trimmings, and one to Conklin, No. 128,020, issued June 18, 1872, for an ice pick and meat maul. The ice pick is made of a single piece of cast metal, with handle scales attached. The carriage trimmings tool consists of a piece of metal covered with rubber, and the hoof parer of a curved piece of metal with a curved knife fastened to one end, and two pieces of horn riveted to either side. They have neither the structure nor the shape of the patent in suit. It is plain that none of these prior patents could provide for the patented screwdriver without modification of the things shown in the patent.

[3] It is not sufficient to constitute anticipation that the device relied upon might, by modification, be made to accomplish the function performed by the patent in question. It must be designed by the maker

and adapted for the performance of such function. Topliff v. Topliff & Co., 145 U. S. 156, 12 Sup. Ct. 825, 36 L. Ed. 658. The prior wrench patents to Ellrich (No. 553,059) and Sheppard (No. 666,029) do not show or suggest any part of the shape of the patented screwdriver, except only at one end of the six mentioned parts. They do not disclose or suggest either the butt at one end or any of the shape below the handle portion, where the elliptical cross-section gradually merges into a round cross-section, nor the continued contracted diameter through the conical bolster into the circular tool shank. They lack half the combination of the article, because, if a blade is formed on the end of one of these wrenches, the device still lacks the shape, and they cannot be declared an anticipation. We shall consider the design patent to Ward later.

The tools made pursuant to the prior patents were not screwdrivers, and do not suggest the idea in their construction of being at all adapted to a tool utility by turning on its longitudinal axis. To adapt these old devices to this new function would require modification or changes, and therefore they do not anticipate. Hobbs v. Beach, 180 U. S. 383, 21 Sup. Ct. 409, 45 L. Ed. 586; Barry v. Harpoon Castor Mfg. Co., 209 Fed. 207, 126 C. C. A. 301.

The improvised tools used by employés of both in their factory and at their homes were simply wrench bars and were not anticipations. They had not become established facts, accessible to the public, in contributing definitely to the advance of the art. They had not taken their place as part of the known established art, to which the public may at any time resort. Ajax Metal Co. v. Brady Brass Co. (C. C.) 155 Fed. 409. These tools do not suggest or show the merging of the elliptical cross-section into the circular cross-section, or the portion of the tool below that. To prove anticipation by an unpatented device, if attempted by oral testimony, the existence and use must be proven by clear, satisfactory proof and beyond a reasonable doubt. The Barbed Wire Patents, 143 U. S. 275, 12 Sup. Ct. 443, 36 L. Ed. 154. We find nothing in the prior use of the various tools, which have been offered in evidence and been considered, which warrants our concluding, beyond a reasonable doubt, that the appellee's patented structure has been anticipated by such use.

The proof of infringement is ample. The appellant's screwdriver is so near in structure and shape to the appellee's screwdriver that we are convinced of its infringement.

[4] The appellee has sued upon both patents in this action. This it may properly do. Eclipse Mach. Co. v. Harley-Davidson Motor Co. (D. C.) 244 Fed. 463. To successfully establish the validity of the design patent, and to entitle the inventor to protection, he must establish a result obtained, which indicates, not only that the design is new, but that it is beautiful and attractive. It must involve something more than mere mechanical skill. There must be invention of design. The District Judge concluded that the screwdriver is beautiful and attractive, and he says, even ornamental. We cannot, however, agree that the appellee's structure, made pursuant to this patent, has such a pleasing effect imparted to the eye as to create beauty or attractiveness,

or to make it ornamental. It provides for a new utility. Design patents refer to appearance. Their object is to encourage works of art and decorations which appeal to the æsthetic emotions—to the beautiful. We do not think that the device constructed by the appellee has a subject-matter for such beauty and attractiveness as is contemplated by the statutes, which permit the Patent Office to grant design patents, and conclude that the learned District Judge erroneously sustained this patent.

We therefore modify the decree by affirming the result reached by the District Judge as to the letters patent, No. 737,179, granted August 25, 1903, and reverse the decree as to design letters patent, No. 37,214.

The decree below is thus modified and affirmed.

IMPERIAL MACHINE & FOUNDRY CORPORATION v. G. S. BLAKESLEE & CO.

(Circuit Court of Appeals, Second Circuit. December 10, 1919.)

No. 119.

1. PATENTS ⊂=328—PATENT FOR VEGETABLE PEELING MACHINE NOT ANTICIPATED.

The Robinson patent, No. 809,582, for a vegetable peeling machine, *held* not anticipated, and to cover a pioneer invention; also infringed by a machine operating on the same principle, although the abrading surface of the rotary disk is of different material.

2. PATENTS ⊂=297(2)—PRELIMINARY INJUNCTION AGAINST INFRINGEMENT PROPER WHERE CASE IS CLEAR.

While an application for preliminary injunction in a suit for infringement is addressed to the discretion of the court, where the validity of the patent has been sustained by many prior adjudications and infringement is clear, its refusal would be error.

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

Suit by the Imperial Machine & Foundry Corporation against G. S. Blakeslee & Co. From an order granting a preliminary injunction, defendant appeals. Affirmed.

A. H. Adams and J. L. Jackson, both of Chicago, Ill., and J. J. Kennedy, of New York City, for appellant.

A. Alexander Thomas, of New York City, for appellee.

Before ROGERS, HOUGH, and MANTON, Circuit Judges.

MANTON, Circuit Judge. The appellee sued for an infringement of claims 1, 2, 3, and 4 of the Robinson patent, No. 809,582, for improvements on machines for peeling vegetables. A preliminary injunction was granted and the appellant appeals.

The patent has been held valid and infringed in previous litigations. Imperial Machine Co. v. Jacobus (D. C.) 212 Fed. 958 (Judge Lacombe granted a preliminary injunction); Imperial Machine Co. v. Streeter

& Co. (D. C.) 214 Fed. 985 (Judge Hazel); Imperial Machine Co. v. Smith & McNell (Judge Hough), filed February, 1914; Imperial Machine Co. v. Reinhold Mfg. Co. (Judge Tuttle), filed July, 1919; Imperial Machine Co. v. American Fruit Machinery Co. (D. C.) 212 Fed. 959, note (Judge McPherson); Imperial Machine Co. v. Whyte (Judge Learned Hand), filed December, 1918; Imperial Machine Co. v. Rees et al. (D. C.) 261 Fed. 612 (Judge Mayer), filed November, 1919.

[1] However, since the validity of this patent is presented to this court for the first time, we have examined the patent and are of the opinion that it is valid. It discloses a practical machine for peeling vegetables in a deep mass. Indeed, we think it is a pioneer patent. The claims in suit are as follows:

"1. In a device of the class described, an impelling and abrading member comprising a rotary disk composed of a horizontal flat striated portion and a raised portion extending from near the circumference inward and having two sides sloping down to the flat striated portion of said disk, substantially as described.

"2. In a device of the class described, an impelling and abrading member comprising a rotary disk composed of a number of horizontal flat striated portions separated by raised portions at intervals extending from near the circumference inward, substantially as described.

"3. In a device of the class described, an impelling and abrading member comprising a rotary disk composed of a horizontal flat striated portion and a rounded raised portion rising gradually from near the center toward the circumference, substantially as described.

"4. In a device of the class described, an impelling and abrading member comprising a rotary disk composed of a horizontal flat striated portion, and a rounded raised portion bounded by two approximately radial edges extending from near the circumference inward and having a striated surface, substantially as described."

The machine of this patent consists of a cylinder, at the bottom of which is mounted a rotary disk having an abrading surface providing for one or more rounded humps or raised portions which slope down from the circumference of the disk toward the main portion thereof. The function or purpose of the mounted or sloping humps is to produce agitation or circulation of the mass of vegetables whereby all of the vegetables are brought into contact with the abrading disk. If it were not for the sloping humps or raised portions, the vegetables in contact with the disk would be ground away and would not have any means of agitation and circulation of the mass. The specifications point this out. They point out that, where the flat disk is used alone, there is a tendency to set up a rotary motion of the mass, wherein each individual soon settles down to a substantially fixed position in the moving mass. This would result in a wear on certain parts of each vegetable and retard the sufficient action on other parts. This hump-shaped portion, with its abrading surface, forces the mass forward; and this, together with the movement of the disk, faster than the mass is treated, make the raised parts act to turn over the vegetables next to the bottom, so as to bring different portions of each separate individual of the mass into contact with the different abrading surfaces. It is in this it may be said to be a pioneer invention.

The inventor, in an affidavit, points this out and deposes that for more than 13 years the Robinson construction has been successful, and that until this construction there was no successful vegetable peeling machine on the market; and he declares that no machine is successful without an abrading disk having raised portions. The appellant so constructs its machine as to have a disk with humps or raised portions with an abrading surface.

A controversy is presented as to what is meant by a striated disk within the meaning of the claims. The appellee's disk has a carborundum surface, and the appellant's disk an abrading surface of cement or concrete. This is said to be such a difference in construction as to negative the claim that the appellant infringes. The specification of the patent states that the abrading surface may be made of a variety of material such as cast iron, glass, earthenware, and the inventor says that he "is not limited to any specific arrangement of the striations, and that a variety of methods of striation will be within the spirit of this invention."

In order to obtain efficient rubbing points or ridges, there is no need for any geometrical or symmetrical arrangement, nor is it needed to successfully do the work of peeling. It is plain that exactly the same purpose is accomplished in precisely the same way, if the points or ridges be set irregularly. This is true in the disk of both the appellee and appellant. A surface of carborundum or concrete is a striated surface.

Funk & Wagnalls' New Standard Dictionary defines the noun "stria" —curved, crooked, and intermittant gouges, of irregular depth and width and rough definition, of a certain rock surface, sometimes due to abrasions by icebergs. It would therefore seem that the appellant's abrading service comes within the appellee's claims. The appellant's disk, with its abrading surface, has a pair of rounded humps or raised portions so arranged as to be diametrically opposite and sloping downward from the circumference of the disk to the flat abrading surface.

We are of the opinion that the appellant's rotary disk has an impelling and abrading member in a vegetable peeling machine, which member is composed of a flat horizontal raised portion, and a raised portion extending from near the circumference inward and having two sides sloping down to the flat striated portion of the disk, thus coming within the reading of claim 1.

The appellant's disk is composed of a number of horizontally flat striated portions, separated by raised portions at intervals extending from the circumference inward. The appellant's disk, as thus striated, comes within the phrase of claim 2. The appellant's has an impelling and abrading disk composed of the horizontally flat striated or abrading portion, and has a rounded raised portion rising gradually from near the center toward the circumference, and is the kind of construction referred to in claim three. Appellant's disk has a rounded raised portion, bounded by two approximately radial edges extending from near the circumference inward and having a striated surface, thus coming within the description of claim 4.

The defense that "striated" does not mean a concrete abrading surface is not well founded. This disk, as constructed, has an abrading, impelling, and turning function. It permits of dealing successfully with a deep mass of vegetables. In other machines, but shallow layers could be dealt with. The result obtained here does not grind or bruise the vegetables, but confines its action to removing the thin outer layer of skin, and leaves the surface of the vegetable comparatively smooth, instead of pitted or hacked. Such advantages have not before been found in machines of this type, and this invention marks an advance in the art. In other words, the feature of the invention here is in the abrading surface having rounded humps or raised portions to produce the necessary agitation and circulation of the vegetables, without which a machine of this character has been found not practical.

Such a result having been obtained, we are of the opinion that the inventor is entitled to a reasonable range of equivalents, and it would be well within such range to coat the disk with carborundum. When such a coating is accomplished, striations are formed, although the lines are broken and irregular. The variety of methods and striations would permit of such construction. National Hollow Brake-Beam Co. v. Interchangeable Brake-Beam Co., 106 Fed. 693, 45 C. C. A. 544; Cimiotti Unhairing Co. v. American Unhairing Co., 115 Fed. 498, 53 C. C. A. 230; Hinman v. Visible Milker Co., 239 Fed. 896, 153 C. C. A. 24.

Nor do we find in the prior art any patent which anticipates the patent in suit.

In the Buist & Schmidt patent, No. 551,526, the patentees depend upon upright wings or partitions for agitation of the mass; but it is not the same kind of agitation produced by the humps of the patent in suit. The corrugations and abutting wings, and the other hard points in the inside of the machine, are intended to scrape the skin off the vegetables. There is no kind of agitation which causes the vegetables to circulate to change position, and thus afford different sides to the paring or abrasive surface.

In the Jaeger patent No. 524,420, the inventor depends upon spring rasps fastened to radial boards and arranged in concentric circles. It may be that the inventor's disk of rasps would impart a rolling or turning movement to the vegetables; but there is nothing to cause the necessary circulation of the mass. The rolling or turning of the vegetables is not enough; there must be circulation of the vegetables, and this, so that, as each layer is peeled, the next layer is brought against the disk and the performance continued, until finally the entire mass has circulated from top to bottom. The construction of the patent in suit accomplishes this, but the Jaeger patent does not do so.

For the same reason the French patent to Harff, No. 234,435, cannot be said to anticipate the patent in suit.

In the patent to Kiepenheuer, No. 74,399, there is disclosed no abrading disk but a contrivance of knives. A knife arrangement of this kind is expressly disclaimed in the patent in suit. It may be that it would simply cut and hack the vegetables to pieces, as claimed by the appellee. It has never been in successful operation.

We think, further, that this German patent to Kiepenheuer was intended to peel but a single layer of vegetables, as distinguished from the deep mass of vegetables. The knife blades shown in Fig. 12 in the patent are arranged and shaped differently from the sloping humps of both the appellee's and appellant's structure. The blocks extend in a circumferential direction along the edge of the disk, and slope downwardly toward and along the periphery of the disk, forming a circumferential pocket between the central and highest point of the blocks and the stationary wall. The humps of the disk of the appellee and appellant extend radially in with, and slope from, the circumference toward the center; the two sides also sloping toward the main portion of the disk. We do not think that this patent anticipated the patent in suit.

It is very significant that the appellant has copied the appellee's disk, rather than make use of the patents referred to, and which are said to constitute the art prior to the date of the patent in suit. If the appellant thinks that any of the devices or improvements or combinations are protected by any of these patents of the prior art, they may still use them, notwithstanding this patent, so that the enforcement and restraint of the injunction granted herein cannot injure them. On the other hand, the failure to enforce the injunction would deprive appellee of the benefits secured to it by this patent. Minn. Ry. Co. v. Barnett & Record Co., 257 Fed. 302, — C. C. A. —.

[2] Since the validity of the patent was sustained by many prior adjudications, it was proper for the District Judge to grant the preliminary injunction. Edison Electric Light Co. v. Beacon Vacuum etc., Co. (C. C.) 54 Fed. 678. And while it is true that the application for a preliminary injunction was addressed to the discretion of the court, still the patent was frequently sustained, and there was undoubted authority, since the infringement appeared clear. To refuse to exercise that discretion to the detriment of the patentee would have been error. Searchlight Horn Co. v. Sherman Clay & Co., 214 Fed. 99, 130 C. C. A. 575; Weber Electric Co. v. Cutler-Hammer Mfg. Co., 256 Fed. 31, — C. C. A. —.

We think the order below was properly granted, and it will be affirmed.

BALTZLEY et al. v. SPENGLER LOOMIS MFG. CO. et al.

(Circuit Court of Appeals, Second Circuit. December 10, 1919.)

No. 66.

1. PATENTS ⊜328—PAPER BINDING CLIP NOT ANTICIPATED.
The Baltzley patent, No. 1,139,627 for a paper binding clip, claims 3, 7, 12, and 14, *held* unanticipated, valid, and infringed.

2. PATENTS ⊜160—FILE WRAPPER EVIDENCE ONLY ON QUESTION OF ESTOPPEL THROUGH REJECTED CLAIM.
In considering the validity or scope of a patent the only purpose for which the file wrapper can be examined is to ascertain whether estoppel has arisen through rejected claims.

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

3. PATENTS ⟸289—LACHES BARRING RECOVERY OF PROFITS OF INFRINGEMENT MATTER OF INEQUITY.

Laches which will prevent the recovery of profits from an infringer is not a mere matter of time, but is a question of the inequity of enforcing the claim.

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

Suit by Louis E. Baltzley, as trustee, and the Cushman & Denison Manufacturing Company, against the Spengler Loomis Manufacturing Company and the Automatic Pencil Sharpener Company. Decree for defendants, and complainants appeal. Reversed.

Action is upon claims 3, 7, 12, and 14 of patent 1,139,627, May 18, 1915, to L. E. Baltzley for a "paper binding clip." This generically means a mechanical device, which, usually by spring action, controlled by finger strength, serves to temporarily keep together without tearing or piercing, papers and leaflets of the sort that accumulate in every place where clerical labor is performed. There have been many of them and the demand is large, if they are cheap enough.

The clips of both parties hereto belong to a definite subclass of such desk conveniences, wherein the gripping and holding power is obtained by forming or bending one small rectangular sheet of resilient metal, so that two opposite sides or edges thereof are set closely parallel to each other, perhaps touching. When thus formed, the bent sheet is a spring against which the gripping parallel edges can be opened to let in whatever is to be held fast, and when the opening power is released the edges close together again, against whatever has been inserted. Both these clips also, belong to a still smaller, but not unknown, class, in which the sheet of resilient metal is bent and set into a form of triangular cross-section; both therefore, must have some means—preferably affixed to the metal, which is both clip and spring—enabling the user to open or separate the parallel gripping edges.

Baltzley furnishes such means by folding back and outwardly both his gripping edges and so cutting away the tubular rolls thus formed as to leave jaws, into which are inserted the outwardly turned extremities of a hairpin spring of steel wire. When each spring, thus journaled, is turned back against that side of the triangular body which provided its jaws, the ends of the steel springs projecting beyond that side of the triangular clip which is the base (assuming the clip edge to be the apex) are levers, which, when pressed toward each other by thumb and finger pressure, enable the user to open the clip. When the papers are inserted, hand pressure is released, the grip closes, and the springs are turned forward to lie flat against the papers, or by compression of the "hairpin" can be removed, and the leaflets (e. g.) be treated like a bound book.

Of the claims in suit the third is most general and the fourteenth of the greatest particularity. They are as follows:

"3. A binder clip for loose papers, comprising a section of sheet metal having converging sides, each side provided with spaced handle receiving and retaining means located thereon, and a spring handle for each side having oppositely disposed ends journaled in said means."

"14. A binder clip comprising a section of sheet metal having converging sides, each side provided with two spaced integral handle receiving means extending outwardly therefrom, the handle receiving means of each side spaced apart, and resilient handle for each side having oppositely disposed ends tending to spread a greater distance apart than said spaced handle receiving means and journaled in said spaced means whereby said spaced handle receiving means confine said ends under spring stress and prevent free swinging movement of the handle."

The defendants' clip has the same triangular body as plaintiffs', operates on the same mechanical principle, but differs, in that the hairpin spring, instead of having its ends journaled into rolls formed on the clip edges, has said ends

inserted into what are called "retaining straps, integral" with the sides of the triangle; i. e., into straps made by appropriately slitting and punching outwardly portions of metal situated approximately in the middle of each side, adjacent to the apex of said triangular body.

Baltzley's application was filed in 1910. For defendants' device patent application was filed in 1913, and patent issued shortly after the date of plaintiffs' (Spengler 1,150,073, dated August 17, 1915). The court below decreed that plaintiffs' claims were invalid but, if deemed valid, were not infringed, and therefore dismissed the bill. Plaintiffs appealed.

Hans v. Briesen, of New York City (Fred A. Klein, of New York City, of counsel), for appellants.

D. A. Usina, of New York City, and Wilkinson & Huxley, of Chicago, Ill. (Hervey S. Knight, of Chicago, Ill., of counsel), for appellees.

Before WARD, ROGERS, and HOUGH, Circuit Judges.

HOUGH, Circuit Judge (after stating the facts as above). [1] In addition to the mechanical concept above set forth, the patentee had a secondary idea described in the specification and covered by claims not in suit. If the spring handles are moved on their journaled ends, with nothing but friction retarding motion, they may become loose like the bail of a bucket similarly journaled (see Weber, 550, 429).

To prevent this, Baltzley so inclined the edges of his tubular rolls touching the spring handles as to produce a camming effect, which (cammed surface co-operating with spring handle) produced a snap action, forcing said spring handle into the final forward or backward position, as might be desired. This subsidiary advantage does not affect this case, which, as its first query, asks whether the invention, without the camming adjunct, presents patentable novelty.

The patent of Dudley (622,610) is the nearest and best reference. It shows a clip of bent resilient metal, elliptical in cross-section, and distended by applying to each clip edge a tool of metal, which by a "tongue and groove" arrangement seizes an edge, and when laid back, like Baltzley's handles, furnishes the necessary leverage. These tools were removable, and were to be used for any number of clips; yet, if the user desired, they might be turned forward, much like Baltzley's handles, and left flat against the papers in the clip.

The merest examination of this device shows it to be cumbersome, expensive, and difficult, if not dangerous, in operation. Yet it was a machine of sorts, and when it functioned at all it did so for the same mechanical reason as does that of the patent in suit. This patentee's contribution to the art, consisted in devising a new, simple, and convenient method, not strictly of operation or function, but of co-operation. There could hardly be a better example of the truth of the remark of Lacombe, J., in Miehle, etc., Co. v. Whitlock, etc., Co., 223 Fed. 650, 139 C. C. A. 204:

"Patentable novelty is sometimes found in discovering what is the difficulty with an existing structure and what change in its elements will correct the difficulty even though the means for introducing that element into the combination are old and their adaptation to the new purpose involves no patentable novelty."

So here, whatever Baltzley's intellectual processes really were, he might well have considered Dudley, and by substituting for Dudley's clumsy and separate tools a spring wire handle, journaled externally to the clip sides, produced (as he did) an admittedly inexpensive, useful, and salable article, simply by correcting the "difficulty with the existing structure"; i. e., Dudley's, which never had (on this record) any field of practical utility. We have no doubt that patentable invention is disclosed by the foregoing.

There being no difference, mechanical or structural, between defendants' article and that of the claims in suit, other than the positioning of the steel spring handles, infringement would seem plain. Here the trial court fell into error in considering the subsidiary camming adjunct as Baltzley's single contribution to the art. This is a mistake. The invention advanced in this suit was made without any reference to a cam.

[2] The argument for noninfringement is sought to be strengthened by reference to the contents of the file wrapper. On this point our view was restated in Spalding v. Wanamaker, 256 Fed. 533, — C. C. A. —, viz. that the only purpose for which the file wrapper can be examined is to ascertain whether estoppel has arisen through rejected claims. See, also, Walker on Patents (5th Ed.) § 187a. The reason why that may be important is because the doctrine of estoppel holds "the utterer to the truth of his speech." Babbitt v. Read, 236 Fed. 45, 149 C. C. A. 252.

Having from this viewpoint examined the file wrapper, we are of opinion that the patentee's disclosure stated fully and at first facts sufficient upon which to ground the claims in suit, and such claims or their equivalents he never receded from. Many claims, first propounded, were obviously too broad; but Baltzley never "accepted limitations imposed by the rejection of broader claims" and affecting the claims in suit. The residuum is ample for the purposes of this case. See Goodwin, etc. Co. v. Eastman, etc., Co. (D. C.) 207 Fed. 357, affirmed 213 Fed. 231, 129 C. C. A. 575.

This camming effect, however, must be considered from another angle. The device of defendants' patent further attempts to differ in its mechanics from that of the patent in suit, in that its cam is transferred from the edge of the tubular jaw to the spring handle; but the triviality of any cam is proven by the style of defendants' commercial article shown as an exhibit in this court, which works well, does everything indicated by the claims in suit, and has no cam at all. Friction is enough for practical purposes.

[3] Finally, it is urged that plaintiffs' laches should forbid the remedy of accounting. On this subject there is no evidence; but a comparison of dates shows that defendants (who were infringing before Baltzley's patent issued) were not sued until something less than three years after such issuance. It is not profitable to mention decisions wherein this or that lapse of time has been held sufficient to justify this defense; for "laches is not a mere matter of time, like limitation, but is a question of the inequity of enforcing the claim." Hubbard v. Manhattan Trust Co., 87 Fed. 59, 30 C. C. A. 528 and cases cited. It is

now argued that defendants exercised great care to avoid infringing, and should therefore have been promptly sued for their own advisement. We think that, in the sense of careful studying under professional advice, and after personal warning from plaintiffs, just how near to plain copying their intended imitation might go, they were very careful. Their patent shows it; and we are quite unable to see how, if Baltzley had issued when Spengler was considered by the Office,[1] Spengler could have failed of rejection "on Baltzley of record."

Under such circumstances, there is no inequity in regarding this infringement as persistence in wrongdoing, when the light was unusually strong.

Decree reversed, with costs, and case remanded, with directions to grant plaintiffs the relief prayed for in their bill.

HOMER BROOKE GLASS CO. et al. v. HARTFORD-FAIRMONT CO.

(Circuit Court of Appeals, Second Circuit. December 10, 1919.)

No. 67.

1. PATENTS ⇐328—MACHINE FOR CUTTING MOLTEN GLASS VALID AND NOT INFRINGED.
   The Brooke patent, No. 723,983, for apparatus for cutting molten glass, construed as valid only for a mechanical device, *held* not infringed.
2. PATENTS ⇐178—LIMITATION OF RANGE OF EQUIVALENTS BY LANGUAGE OF CLAIMS.
   Whether the invention of a patent is large or small, primary or trivial, when a claim is clear and distinct, the patentee cannot go beyond the words thereof for the purpose of establishing infringement, and the range of equivalents is measured by what is both described and claimed.

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

Suit by the Homer Brooke Glass Company and the Owens Bottle Machine Company against the Hartford-Fairmont Company. Decree for defendant, and complainants appeal. Affirmed.

For opinion below, see 255 Fed. 901.

Action is upon claims 3, 4, and 5 of patent 723,983, issued March 31, 1903, to Homer Brooke, and duly conveyed to the first-named plaintiff. The claims in suit (together with Nos. 1 and 6) have been recently sustained in an opinion which renders reference to the prior art and detailed description of the subject-matter unnecessary. Schram, etc., Co. v. Homer Brooke, etc., Co., 249 Fed. 228, 161 C. C. A. 264.

The typical and most general of the claims now sued on is No. 3, which is as follows: "An automatic device for cutting or separating a flowing stream of molten material into unformed molten masses, the same comprising a cutting knife and means for moving the same, and means for discharging the said molten masses into suitable receptacles."

Claim 4 differs from claim 3 only in specifying that the separated masses shall be of "predetermined quantity," and claim 5 only by specifying a plurality of receptacles and means for intermittently moving them into position. Whether, if defendant infringed the third claim, it would also infringe Nos. 4 and 5,

[1] Spengler was allowed January 16, 1915, but did not issue for seven months, because fees were not paid until July. Baltzley was allowed April 17, 1915, and fees were paid two days later.

need not be decided, for it is clear that, if there is no infringement of claim 3, there is none of the other two.

The trial court held the claims valid on the authority of the case cited above, held that defendant's alleged infringing system was different from that of the patent in suit, in that it was founded on a different conception of the way to automatically handle glass, had been worked out by a different method of automatic molten glass delivery, and involved apparatus different in construction. The bill was therefore dismissed for noninfringement, and plaintiff appealed.

Charles Neave, Frederick P. Fish, and William G. McKnight, all of Boston, Mass., for appellants.

Thomas Ewing, John P. Bartlett, and Vernon M. Dorsey, all of New York City, for appellee.

Before WARD, ROGERS, and HOUGH, Circuit Judges.

HOUGH, Circuit Judge (after stating the facts as above). [1] The Schram Case, supra, holds the claims in suit valid for a mechanical device, and denies that what Brooke patented is in truth a method. We agree with this, and plaintiffs must therefore prove that the alleged infringing machine, not only produces the same results as does the device of Brooke, but that its operation, when in use, is substantially the same. Davis v. Perry, 120 Fed. 945, 57 C. C. A. 231.

It is not suggested that defendant has copied the various mechanical components of the device disclosed in plaintiff's specification, and the record is commendably free of expert evidence relating to any machine. Hardinge, etc., Co. v. Abbe, etc., Co., 195 Fed. 936, 940, 115 C. C. A. 624. The reason is that in this case plaintiffs are only interested in showing that Brooke conceived and disclosed in his patent (in the words of a brief)—

"the entirely original and novel idea [of operating], upon molten glass flowing continuously from the furnace and dropping in a stream—body or column—through the air, by severing or cutting that flowing stream, at a point below the outlet and distributing the cut-off portions into molds."

Brooke admittedly disclosed only one means of embodying or utilizing this conception, and defendant's means are very different in mechanical arrangement; but it is urged that Brooke was entitled (as he states in his specification)—

"to broadly cover *all means* for cutting or separating a stream of flowing molten material into unformed molten masses and discharging the cut-off portions."

Exactly what defendant does is a matter as to which much evidence has been given; but whatever difficulty exists in answering that question does not depend upon difficulty in discovering what the defendant would like to do or is trying to do, but from the fact that what is actually happening with molten glass at the edge of a spout, at a temperature of about 2,000 Fahrenheit is not easy to see with the human eye, and (judging from exhibits) quite impossible to perpetuate by photography.

What the defendant tries to do—by the calculated agitation of a paddle in a mass of molten glass resting in a container whose crest

or dam is uniformly higher than the glass level—is to propel over said crest and into a spout (which is itself slightly above said level) precalculated portions of molten glass, to the end that such portions or "gobs" of glass shall separately and individually be distributed to the molds awaiting them.

If defendant's machine could do this with accuracy, and push over the crest, into the spout, and so on to the mold, separate definite weights or volumes of melted glass, with not one of them connected with or touching another, the machine would arrive at perfection in its class. But it cannot do this; when several agitations of the paddle start the melted glass to surging, each forward paddle motion shoves glass over the crest, and each backward movement of the paddle retracts the glass body. Thus in actual operation there may be 30 surges a minute produced by the paddle, and 30 "gobs" per minute will drop from the spout; but they are connected by a thinner band, string, or line of glass, because the viscosity of the substance will not permit it to drop from any spout like a shot or marble. The visible result of the allegedly infringing apparatus is to produce from the end of the container spout, not a rope of molten glass, but (again to quote from argument) a "string of sausages" of the same material. Each sausage is a "gob," and destined for one mold; and the size—i. e., length and weight—of each can be and is measurably predetermined by the amplitude of the paddle motion.

Brooke by knives severs at predetermined intervals his continuously flowing stream of molten glass, and so produces "gobs"; there is absolutely no preformation until the knife cuts. In defendant's machine, knives cut the "sausage strings"; but "gobs" are preformed by the calculated movement of the paddle before the knife cuts. It is true that what defendant's machine discharges by surges suffers solution of continuity only by and through the knife, and the same is true of Brooke's stream; but by all the evidence the two streams look no more alike than a stream of sausages looks like a stream of sausage meat. The contest of fact in this case may be said to rage only over the size or thickness of the string that connects the sausages. It seems plain that this contest is immaterial, if there is really no more than a string connection, between masses visibly formed, and formed for use, before severance; and we agree with the court below that such is the case.

The essence of Brooke's concept or idea is that (as disclosed) he always has a "stream of flowing molten material" existing and moving by gravity alone; the contention here is that defendant's "string of sausages" is such "flowing stream." The fact that the stream said to infringe relies on gravity only after the material has been by the paddle shoved or lifted, paddleful by paddleful (so to speak), over the container's crest, makes no difference, because (as is argued), once over, gravity takes hold, and the stream is that of Brooke "substantially as described."

The argument for infringement may be thus summarized: (1) Brooke's is a pioneer patent, and (2) therefore entitled to a "favorable construction commensurate with the advance which he made." (3)

Defendant's machine is made to work on a continuous supply of molten glass, which is cut with a knife, and (4) this is arriving at the same result by "analogous means"—which is enough to constitute infringement of a pioneer patent.

The argument avoids the question suggested by Brooke's specification, viz.: Is a patentee ever entitled "to cover broadly all means" for doing a desirable thing, when he discloses but one means and suggests no substitute? Perhaps, in the light of this evidence, the question is whether, if Brooke was the first to use a severed stream of glass for filling molds, anybody else can so use such a stream, irrespective of means.

But we take the argument as made, and of course accept the description of a pioneer invention furnished by Brown, J., in Westinghouse v. Boyden, etc., Co., 170 U. S. 537, 18 Sup. Ct. 707, 42 L. Ed. 1136. It is as near a definition as we are likely to get. Auto Piano Co. v. Amphion Co., 186 Fed. 163, 108 C. C. A. 291.

Of such an invention we have said that, when it "inaugurates a new industry," courts should be "zealous so to construe the claims as to give validity to what is a meritorious invention." Auto Vacuum, etc., Co. v. Sexton Co., 239 Fed. 900, 153 C. C. A. 26. It is also true that, under restrictions not necessary to dwell upon, a patentee is entitled to the benefit of properties or functions inherent in his invention whether fully comprehended by him at the date of disclosure or not. Electric, etc., Co. v. Gould, etc., Co., 158 Fed. 610, 85 C. C. A. 432; Van Epps v. United, etc., Co., 143 Fed. 869, 75 C. C. A. 77.

Whether Mr. Brooke's invention is of such a primary nature as to merit the application of the word "pioneer" we shall assume, but not decide; for whatever the proper adjective applicable to this patent, the legal rule of construction is the same. Outlook, etc., Co. v. General, etc., Co., 239 Fed. 878, 153 C. C. A. 5, et seq. It is always necessary, even after granting the widest range of equivalents, to find as a matter of fact that what the defendant has done is the invention of the plaintiff "substantially as described." The range of decision, the limits imposed by law on the triers of the facts, are indicated by the word "substantially"; an infringer may easily substantially imitate a big thing—i. e., a deeply rooted and wide-spreading inventive thought; whereas, without "Chinese copying," imitation of a little thing is oftentimes difficult.

[2] But, whether the invention is large or small, primary or trivial, it remains true that, when a claim is clear and distinct, the patentee cannot go beyond the words thereof for the purpose of establishing infringement; the specification may be referred to for the purpose of limiting, but not of expanding, a claim, and the range of equivalents is measured by what is described *and* claimed. Westinghouse, etc., Co. v. New York, etc., Co., 119 Fed. 874, 56 C. C. A. 404; Universal, etc., Co. v. Sonn, 154 Fed. 665, 83 C. C. A. 422; Loraine, etc., Co. v. General, etc., Co., 202 Fed. 215, 120 C. C. A. 615; Fowler, etc., Co. v. McCrum, etc., Co., 215 Fed. 905, 132 C. C. A. 143.

Applying these rules, we are of opinion that defendant's apparatus does not present a flowing stream of molten material, whether we con-

sider that phrase standing alone, or ask whether it is the stream conceived by Brooke, or suggested by his patent. If the phrase be interpreted verbally, the word "stream" by universal definition conveys the idea of uniform and unbroken succession in movement; and "flowing," which indicates movement, as if in a current or stream, only emphasizes the thought. The idea of continuity, uniformity, and indeed of steadiness, is inherent in the phrase.

Much criticism of the lower court has been made, in that it declared the words to mean a *steady* discharge; yet by definition a "steady motion" means in respect of a fluid that the velocity at each point remains "constant in *magnitude* and direction." We think the word was well applied.

But if the meaning of the phrase be referred, not directly from the claim to lexicographers, but to the disclosure as illuminated by the evidence, it is clear that what Mr. Brooke desired to get away from, and did most ingeniously avoid, was the formation of "gobs" before their severance from the general molten mass. He did that by chopping up whatever fluid came by gravity out of an orifice in the container. Out of such orifice he could only get, and only wished to get, a run of material as from a spigot. Such a stream he had in mind, and he had no other; nor would any other suit what he wanted to do. The relation between defendant's and plaintiff's supplies of material is that both are continuous and both are of glass; and that is not enough.

The decree below is affirmed, with costs.

UNION TOOL CO. et al. v. UNITED STATES et al.

(Circuit Court of Appeals, Ninth Circuit. January 5, 1920.)

No. 3393.

1. PATENTS ⊂=326(4)—FINE FOR VIOLATING INJUNCTION RESTRICTED TO COMPLAINANT'S COSTS.

   A fine for violating an injunction in a patent infringement suit, where the violation was committed in good faith, should be limited to an amount sufficient to cover complainant's costs, and should not include an amount imposed for punitive purposes.

2. PATENTS ⊂=326(4)—AMOUNT OF FINE FOR VIOLATING INJUNCTION SUSTAINED BY EVIDENCE.

   Affidavits showing that complainant had been to heavy expense in collecting proofs of the violation of an injunction by defendants in a patent infringement case, but not closely calculating the exact amount of such expenses, *held* to sustain a finding that $2,500 was a reasonable portion of the expenses incurred by complainant.

3. PATENTS ⊂=326(4)—PUNISHMENT FOR VIOLATING INJUNCTION, WITHOUT SERVICE OF CONTEMPT PROCEEDINGS, INVALID.

   A contempt order, that the president of a corporation which had violated a patent infringement injunction should be committed to jail until the corporation paid a fine imposed on it, *held* erroneous, where it did not appear that the order to show cause in the contempt proceeding was ever served on the president, or that he had appeared therein.

In Error to the District Court of the United States for the Southern Division of the Southern District of California; Benjamin F. Bledsoe, Judge.

Contempt proceeding by the United States and Elihu C. Wilson against the Union Tool Company and Edward Double. From a judgment of conviction, defendants bring error. Affirmed, as modified.

This is a writ of error brought by the Union Tool Company and Edward Double, its president, to review a judgment of conviction for contempt of court in the matter of an injunction issued by the District Court, imposing a fine upon the Union Tool Company and, in the event of a failure to pay the fine within 20 days, adjudging that Double, the president of the Union Tool Company, be committed to jail until the fine is paid.

The court, after finding that the Union Tool Company had infringed upon claims 9 and 19 of letters patent No. 827,595, by making and selling underreamers like the Wilson Exhibits, defendant's reamer type D, and Complainant's Exhibit, reamer types E and F, enjoined defendant and its officers and servants from making or selling any underreamers embodying the construction or interrelation or formation of parts of either "Complainant's Exhibit, improved double reamer and cutters," or Complainant's Exhibit, defendant's reamer type D, or Exhibit type E, or Exhibit type F, and from making or selling any parts or elements calculated or intended to be combined or used as a part or feature of any underreamer in infringement of claims 9 and 19 of the patent referred to.

Wilson, defendant in error here, as complainant, sued the Union Tool Company, alleging infringement of Wilson patent, No. 827,595, for underreamers, and praying for injunction and accounting. Interlocutory decree was entered, and thereafter this court affirmed the interlocutory decree. The history of the case is in Union Tool Co. v. Wilson, 249 Fed. 736, 161 C. C. A. 646. Injunction writ was served, and thereafter, upon a showing by affidavits, the Union Tool Company and its officers were cited to show cause why it and they should not be punished for contempt in failing to comply with the injunction. After hearing, the court found that the Union Tool Company, in defiance of the injunction issued, had manufactured, offered for sale, and sold two types of underreamers, neither of which was substantially or even colorably different from the respective devices described in the injunction order of the court, the manufacture, sale, and use of which underreamers were inhibited.

Frederick S. Lyon and A. V. Andrews, both of Los Angeles, Cal., for plaintiffs in error.

G. Benton Wilson, of Los Angeles, Cal., for defendants in error.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

HUNT, Circuit Judge (after stating the facts as above). The essential question before the District Court was whether the so-called "pocket" or so-called "U" type of underreamer was within the inhibition of the injunction. The District Court evidently made a very careful examination into the construction of the devices, and concluded as a fact that there was no difference between the types made and sold and those which could not be. The question whether there was an infringement is not directly in issue in this proceeding, and we take the fact to be that the "pocket" type and the "U" type are the same as those referred to in the injunction order of the court. Walker on Patents, § 696.

The plaintiffs in error have argued that the injunction order was not violated, because in the construction of the devices involved in

this proceeding there was a return to a former construction covered by patent No. 748,054, which had been issued to the Union Tool Company, and that there had been a mere addition of some small triangular fillets of metal to the body of the infringing and enjoined device; but it was held by the District Court that the presence or elimination of these insignificant pieces of metal did not change the structure at all, and had no effect whatever upon the operative capacity of the device, or the extent or functioning of the device, and that their presence or absence could be disregarded.

It is also said that there was no invasion of the right of Wilson because of the entire shearing away of a certain lateral web structure on each side of the pocket or recess of the sides of a part of the device. The District Court rejected this contention, and said that it was the shearing away of only so much of it, as had been indicated, as sufficed to provide new and different and lower in-thrust bearings, which gave the strength and stamina to the machine that it required to do the work, and in order to compete with the device of Wilson, and in order to enable the defendant to stay in the market.

[1] It is said that there was no finding that the violation of the injunction was willful or intentional. The court at once purged counsel for the Union Tool Company of contempt, but expressed the opinion that the devices examined were infringements of an obvious and flagrant character, and that there had been a "sedulous desire and disposition" on the part of the Union Tool Company to do what could be done, and yet take advantage of the things that Wilson had patented. The court was also of opinion that the president and general manager of the corporation was knowingly a party to the violation of the injunction, but the decree adjudged the corporation alone guilty.

The court, however, after commenting upon the several features of the case, said:

"And I am saying all of this with the reservation, mentally and actually indulged in by me, that these parties are not acting in bad faith. If I thought they were acting in bad faith, and if I thought that this injunction had been willfully violated, there would be a substantial jail sentence meted out to each individual at all responsible for such violation, irrespective of his place, station, or relation to the subject-matter of the litigation. However, in spite of some very persuasive features, I am going to assume that the defendant has not done that which has been done willfully. There has been, however, a violation of this injunction in at least two material and substantial respects."

This opinion was followed by the decree wherein the court adjudged the corporation defendant guilty, in that it had, since the issuance and service of the injunction and—

"contrary to and in defiance of the commands thereof, manufactured and put out, offered for sale, and sold, a so-called pocket type of underreamer which is not substantially or even colorably different from the device particularly identified and described in said injunction, and whose manufacture, sale, or use is inhibited therein."

The corporation, "in virtue of such contempt so committed," was ordered to pay to the clerk of the court $5,000, out of which said sum and amount, when so paid to the clerk, and the costs having been otherwise met and paid in full, the clerk was authorized to pay over to

E. C. Wilson $2,500 "as a reasonable portion of the expenses incurred by the complainant" in the proceedings. Our construction of the decree is that there was an acquittal of the defendant of having acted in bad faith and of having willfully violated the injunction order, and by proceeding to a decree based upon the assumption that the acts of the defendant corporation had not been done willfully, we think the corporation was exonerated of willful and contumacious disregard of the injunction. Bessette v. Conkey, 194 U. S. 324, 24 Sup. Ct. 665, 48 L. Ed. 997.

We are therefore of the opinion that the clearly punitive portion of the decree must be reversed. But in so far as the decree imposed a fine, and directed that the sum imposed should be paid to the complainant to cover his costs, the decree must be sustained.

[2] To sustain the order for such payment, which was an adjudication in civil contempt, the court had before it a number of affidavits showing that the complainant had been to heavy expense in collecting proofs of the violation of the injunction by the defendants, and while the exact amount of such expenses does not seem to have been closely calculated, the sum of $2,500 was found to be a reasonable portion of the expenses incurred by the complainant in the "instant proceedings," and the order made accordingly should stand. Board of Trade of Chicago v. Tucker, 221 Fed. 305, 137 C. C. A. 255; Kreplik v. Couch Patents Co., 190 Fed. 565, 111 C. C. A. 381; Christiansen Engineering Co. v. Westinghouse Air Brake Co., 135 Fed. 774, 68 C. C. A. 476.

[3] It is urged that the court erred in decreeing that, in the event the fine of $5,000 was not paid into court within 20 days from a certain date, the president of the Union Tool Company, Double, should stand committed to jail, and be confined therein until the money was paid. It does not appear that the order to show cause in the contempt matter was ever served upon Edward Double, or that he was ever made a party defendant to the contempt proceeding, or that he ever appeared therein. The court expressed the opinion that he was knowingly a party to the violation of the injunction order, but under the circumstances we are not satisfied that the court had the power to direct that in the event of a failure on the part of the corporation to pay the $2,500 to the complainant that the president should stand committed to jail until the sum was paid.

The decree will therefore be modified, by striking therefrom the order that in the event of a failure to pay the fine into court the president of the corporation, Edward Double, should stand committed to jail, and be confined therein until the fine be paid; and in so far as the decree directed that $2,500 be paid to the clerk of the court as a punishment of the corporation the order is reversed.

As modified to conform to these views, the decree is affirmed.

GEORGE D. MAYO MACHINE CO. v. HEMPHILL MFG. CO.

(Circuit Court of Appeals, First Circuit. December 16, 1919.)

No. 1378.

PATENTS ⊂=328—FOR KNITTING MACHINE INVALID FOR WANT OF INVENTION.
The Mayo patent, No. 726,178, claims 23, 24, 38, 41, 43, 48, 49 and 130, for knitting machine improvements, *held* void for lack of invention.

Appeal from the District Court of the United States for the District of Rhode Island; Arthur L. Brown, Judge.

Infringement suit by the George D. Mayo Machine Company against the Hemphill Manufacturing Company. From a decree for defendant (247 Fed. 536), plaintiff appeals. Affirmed.

Hubert Howson, of New York City (Frederick P. Fish, of Boston, Mass., and Howson & Howson, of New York City, on the brief), for appellant.

Joseph C. Fraley, of Philadelphia, Pa. (James H. Thurston, of Providence, R. I., on the brief), for appellee.

Before BINGHAM, JOHNSON, and ANDERSON, Circuit Judges.

BINGHAM, Circuit Judge. This is an appeal from a decree of the District Court for Rhode Island in an equity suit charging infringement of letters patent No. 726,178, issued to George D. Mayo, April 21, 1903, for an improvement in knitting machines and now owned by the plaintiff.

The defenses are noninvention, anticipation, noninfringement, and laches.

There are eight claims in issue. Two of them, Nos. 23 and 24, relate to certain parts of knitting machines known as "sinkers and their guides," and the remainder, Nos. 38, 41, 43, 48, 49, and 130, to what is termed the "transfer means." In the court below the bill was dismissed; all the claims being held invalid for want of patentable novelty. It was also held as to claims 38, 41, 43, 48, 49, and 130, that they should be limited to the precise construction shown and, when so limited, were not infringed.

The first two claims are as follows:

"23. In a knitting machine a sinker cylinder having radially arranged sinker guideways and a holddown portion above the same, combined with sinkers arranged in said guideways and having portions overlying said holddown portion.

"24. In a knitting machine, the combination, with sinkers each having a plurality of arms, of a sinker cylinder therefor provided with guideways open at both ends for both the arms of said sinkers."

From the language used in the first claim, read in connection with the "comparative chart of sinkers and supports" shown on page 187 of the record, it is evident that the elements there called for are as

follows: (1) Sinkers with two arms, an upper and a lower; (2) a sinker cylinder; (3) radially arranged sinker guideways in the sinker cylinder for the lower arms of the sinkers; and (4) a holddown portion of the sinker cylinder above the guideways for the lower arms.

In No. 24 the elements are: (1) Sinkers, each having at least two arms; and (2) a sinker cylinder provided with guideways for both arms of the sinkers, the guideways being open at both ends. The latter claim does not call for guideways for the upper arms of the sinkers separate and distinct from the guideways for the lower arms, and in every respect reads upon the device shown in patent No. 542,311, granted to Randall in 1895. In the Randall device each sinker has two arms. The sinker cylinder located at the top of the needle cylinder is provided with guideways for both arms of the sinkers, and the guideways are open at both ends. The combination of this claim being fully disclosed in the prior art, we regard it as lacking in patentable novelty and invalid.

Claim 23 does not specify that both arms of the sinkers should be provided with guideways in the sinker cylinder and open at both ends, as does claim 24. The only guideways called for in this claim are for the lower arms of the sinkers, and these guideways are not required to be open at both ends. In the prior art devices shown in the patents granted to Eck in 1894, No. 523,111, and to Burleigh in 1895, No. 537,802, both of which are substantially alike, all of the elements called for in this claim are disclosed, with the single exception of the guideways for the lower arms of the sinkers. They do, however, disclose guideways in the sinker cylinder for the upper arms of the sinkers, so that all the plaintiff's patentee can claim to have done differing from these prior art patents is to have provided guideways in the cylinder for the lower arms of the sinkers. Therefore the question is, inasmuch as these prior art patents disclose guideways for the upper arms of the sinkers in the sinker cylinder, was it invention to extend or elongate the lower arms and provide for them slots or guideways in the sinker cylinder? This is so plainly a matter of mechanical detail that we are constrained to agree with the District Court that the claim presents no patentable conception.

In the knitting of men's stockings or half hose, the ribbed tops are ordinarily knit on a separate machine and then transferred to the needles of a stocking machine for completion. To effect the transfer it is necessary to bring all of the needles of the stocking machine to a common level. Claims 38, 41, 43, 48, 49, and 130 relate to means for leveling the needles preparatory to transferring the ribbed top to them. Claim 28 is typical of this set of claims and reads as follows:

"38. A knitting machine provided with a double-acting stitch-forming cam and means to withdraw it bodily from operative engagement with the needles."

The elements embodied in this claim are (1) a double-acting stitch or depressing cam, and (2) means to withdraw it bodily from operative engagement with the needles.

The double-acting stitch or depressing cam is brought into action in the round and round knitting of the body of the stocking and in the reciprocating knitting of the heel and toe of the stocking. In round and round knitting it operates as a single depressing cam. In reciprocating knitting its double-acting feature is brought into play. It is then double-acting, in that it depresses the butts of the needles as they are being moved forward and back in the locality of the cam.

When the machine is stopped preparatory to transfer, the cam depresses the butts of the needles with which it is in contact and interferes with their being raised, so that the knitting ends of all the needles may be leveled to receive the ribbed top. To remove this obstruction the patentee provides means for withdrawing the cam bodily and radially from engagement with the needle butts.

A double-acting stitch or depressing cam for round and round knitting and for reciprocating knitting was old. O'Neil, No. 387,251 (1888). Means for removing an obstructing cam bodily and radially to enable the needles to be leveled were also old. This is shown in the patent to Gordon, No. 438,686. But the cam employed by Gordon was a double-acting elevating cam, instead of a double-acting depressing cam. The patent to Hemphill, No. 629,503, July 25, 1898, also discloses means for radially removing an obstructing cam preparatory to transfer. The cam used in the device of that patent, however, and which obstructs the leveling of the needles, is a single-acting depressing cam. The question, therefore, is whether, in view of the disclosures of the prior art, it involved invention for Mayo to have conceived the idea of removing bodily a double-acting depressing cam from engagement with the needles; the prior art having shown how a double-acting elevating cam and a single-acting depressing cam could be removed bodily to permit the leveling of the needles.

In the plaintiff's machine the normal position of the knitting ends of the needles is above the arms of the sinkers, and, in order to knit, a machine so constructed has to be supplied with a depressing cam which will draw down the needles for the first stroke operation. Consequently Mayo adopted a double-acting depressing cam, which would depress the needles when the machine was doing round and round knitting, and also when it was doing reciprocating knitting. In the Gordon patent, which antedates Mayo, the normal position of the knitting ends of the needles was below the ends of the sinkers, and to enable the machine to knit it was necessary to provide it with an elevating cam, which would thrust the needles up for the first stroke operation. He therefore provided a double-acting elevating cam for the first stroke in round and round knitting and in reciprocating knitting. Gordon's elevating cam was in the way, and had to be removed to permit the needles to be leveled. To do this he provided means which would withdraw the cam bodily and radially from the cam cylinder. Mayo's depressing cam was in the way in his machine and had to be removed to permit the needles to be leveled, so he provided means for withdrawing it bodily and radially, which differ, so far as inventive thought is concerned, in no way from that of Gordon. The

problem of removal was the same. In each case it was necessary to remove the obstructing cam to level the needles, because it was in the way, and, in each case, it was necessary to adopt an elevating or depressing cam because of the general construction of the respective machines.

In Hemphill, 1899, two single depressing cams were employed, one of which was an obstruction and had to be removed to permit the leveling of the needles. In both Hemphill and Gordon the obstructing cam was removed radially and bodily. In view of Gordon's and Hemphill's disclosures of means for the radial and bodily withdrawal of a double-acting elevating cam and a single-acting depressing cam from operative engagement with the needles, we do not think it involved invention for Mayo to make use of like means for the radial and bodily withdrawal of a double-acting depressing cam.

The decree of the District Court is affirmed, with costs to the appellee.

CHURCHWARD INTERNATIONAL STEEL CO. v. BETHLEHEM STEEL CO. (CARNEGIE STEEL CO., Intervener).

(District Court, E. D. Pennsylvania. December 24, 1919.)

No. 1491.

1. PATENTS ⊂=222—DAMAGES FOR INFRINGEMENT NOT RECOVERABLE WHERE ARTICLE NOT MARKED.

Rev. St. § 4900 (Comp. St. § 9446), providing that patentees and all persons making or vending any patented article, who fail to mark it as therein required, may not recover damages in a suit for infringement, except on proof of notice to defendant and subsequent infringement, applies to all patentees, and is not limited to those who make or vend the patented article.

2. PATENTS ⊂=222—PROFITS FROM INFRINGEMENT MUST BE ACCOUNTED FOR, ALTHOUGH ARTICLE WAS NOT MARKED.

Rev. St. § 4900 (Comp. St. § 9446), providing that patentees, who fail to mark the patented article as therein required, shall not recover damages in a suit for infringement, except on proof of notice to defendant and subsequent infringement, does not relieve an infringer without notice from accounting for profits in equity.

In Equity. Suit by the Churchward International Steel Company against the Bethlehem Steel Company, with intervention by the Carnegie Steel Company. On settlement of decree.

See, also, 260 Fed. 962.

Charles H. Duell, Frederic P. Warfield, and Holland S. Duell, all of New York City, for plaintiff.

Fraley & Paul, of Philadelphia, Pa., and Charles Neave and Clarence D. Kerr, both of New York City, for defendant.

R. V. Lindabury, of Newark, N. J., Henry P. Brown, of Philadelphia, Pa., and D. Anthony Usina, of New York City, for intervener.

DICKINSON, District Judge. The motion now before the court relates wholly to the form of decree, which is appropriate, following

findings which were made by the court as expressed in the opinion handed down.

The question involved in the framing of this decree is whether it should be confined to the awarding of an injunction, with costs and nominal damages, or whether there should be also an accounting for profits. The position of the defendant is that R. S. § 4900 (Comp. St. § 9446), applies to plaintiff, and denies profits as well as damages. The position of the plaintiff is that R. S. § 4900, does not apply, because this plaintiff has not made and vended the patented article and further that, if the section does apply, it denies such damages as could be recovered at law, but does not deny profits for which an accounting is allowed in equity.

These suggested questions are not as simple, nor open to as easy answer, as at first sight they would seem to be. The first inquiry is whether these questions have been already authoritatively settled. Counsel for defendant relies upon the ruling made by Judge Mayer in Gibson v. American, reported (on appeal) in 234 Fed. 633, 148 C. C. A. 399. This ruling was based upon that of Judge Dallas in National v. Belcher (C. C.) 68 Fed. 665, and on appeal in 71 Fed. 876, 18 C. C. A. 375, and upon Lorain v. Switch Co., 184 Fed. 301, 106 C. C. A. 443. As these cases were before the Circuit Court of Appeals for this circuit, if the statement that they rule the present questions can be accepted, the questions are no longer open ones.

In the Belcher Case, however, there were several patents before Judge Dallas, the validity of some of which he had upheld; others he had held to be void. The assignment of error related only to this latter ruling. The decree in this respect was reversed. The ruling which he had also made, that R. S. § 4900, denied the right to profits, as well as damages, was not before the Court of Appeals, and was not mentioned.

The Lorain Case was several times before the court. It is first reported in 124 Fed. 548. There is nothing to indicate that any point was made of R. S. § 4900. The case appears again in 153 Fed. 205, on exceptions to the report of the master, who had allowed both damages and profits, notwithstanding R. S. § 4900. The only point made, however, was with respect to the fact of notice, and the case was sent back to the master to find this fact.

The only direct reference to the questions before us is the isolated, unconnected statement, based upon Lowell v. Hogg (C. C.) 70 Fed. 787, that the denial of the right to damages in R. S. § 4900, includes profits. The plaintiff by his bill had averred compliance with R. S. § 4900. When the case was back before the master he shifted his ground by saying that his averment of notice was wrong, but that R. S. § 4900, did not apply because he had never made or vended. The master supported this view, and again allowed both damages and profits. Exceptions were sustained, and neither damages nor profits allowed. The Court of Appeals in 184 Fed. 301, 106 C. C. A. 443, affirmed this decree, but placed the affirmance solely on the ground that the plaintiff was held to the issue of notice which he had raised,

and were careful to say that what the plaintiff might otherwise have recovered either by way of "damages or profits" was not decided.

This certainly means that the question of whether R. S. § 4900, applied was still open, and carries the further implication that its meaning was also an open question. This conclusion is supported by the disposition made of later cases. In Rollman v. Universal (D. C.) 207 Fed. 97 (upon which defendant relies), the questions now raised were met and ruled. The ruling was made without the previous ruling of Judge Dallas or the Lorain Case having been called to the attention of the court. No appeal was taken in the Rollman Case.

In the subsequent case of Sharpless v. Lawrence, 213 Fed. 423, 130 C. C. A. 59, however, the court had made a decree awarding damages, but saying nothing of profits. This decree was, on appeal, affirmed. When the case went back, the question arose of whether the use of the word "damages" limited the right of recovery to the meaning of damages as a legal term, and hence to compensation for injuries sustained or whether it was used as a generic word, implying the money award to which plaintiff was entitled in equity, and hence might include profits as well as damages.

The ruling of Judge Dallas, in the Belcher Case, was then relied on as authority for the proposition that damages included profits. As Judge Dallas had so ruled, and although this ruling had not been reviewed by the Court of Appeals, as it had not been reversed, the court felt bound to follow it, notwithstanding the ruling in the Rollman Case. This was because the Rollman Case would have been otherwise ruled if the Belcher Case had been cited. The plaintiff was accordingly allowed profits. This decree was reversed on the specific ground that the word "damages" was a legal term, having attached to it the meaning of compensation for injuries sustained, and could not be expanded into a generic word, covering everything for which a plaintiff might recover in equity.

It is true that R. S. § 4900, was not before the court, but inasmuch as the court held that the word "damages," when used in a decree, was limited to its meaning of the recovery allowed in actions at law, and did not include the profits which might be allowed in equity a fortiori it has that meaning as used in R. S. § 4900. This is because R. S. §§ 4900, 4919, and 4921 (Comp. St. §§ 9446, 9464, 9467), all relate to the same general subject. R. S. § 4919, recognizes the damages which may be recovered in actions at law, and allows them, and statutory damages, also; R. S. § 4921, recognizes the difference in the basis and measure of recovery allowed in equity, thus permitting profits to be recovered, and allows this, and also allows, in addition, the damages which could be recovered at law; and R. S. § 4900, denies to patentees, who have not given notice the right to recover damages, but does not deny to them the right to profits.

The inference we are prompted to draw is that the word "damages" in R. S. § 4900, means damages, and does not mean or include profits. It follows, as a consequence, that we are bound to accept the ruling in the Rollman Case and reject that in the Belcher Case.

Sharpless v. Lawrence, as we view it, ends all discussion of the

main question; but as the very capable counsel for defendant deems the question to have been ruled otherwise by the Supreme Court, and as Judge Mayer has followed the cases which do rule otherwise, we will consider the question as still an open one, at the expense of drawing out this opinion to undue length. It is to be kept in mind that Judge Mayer accepted and followed the ruling of Judge Dallas, without having the Rollman or Sharpless Case before him.

[1] The first question of the application of R. S. § 4900, may be disposed of by the statement that the statute applies to all patentees who have not given notice. This is clear from a review of the legislation. This provision began with Act Aug. 29, 1842, c. 263, 5 Stat. 543, which required all patentees who made and vended to mark the patented articles, and carried a fine penalty for not so doing. This was followed by Act March 2, 1861, c. 88, 12 Stat. 246, which contained the same requirement, and denied the right to damages unless notice was given. It is to be observed that both these acts were limited to patentees who made and vended. Then came Act July 8, 1870, c. 230, 16 Stat. 198, which extended the provision to all patentees, and to persons who made and vended, and the same phraseology is found in R. S. § 4900, as we now have it.

There are a number of cases which rule that the statute does not apply to process patents, because there is no patented article made or vended; but these cases will be found to have been so ruled before the act of 1870, or to have been ruled on the authority of these prior cases, without the change in the statute having been noted.

[2] Upon the main question we have a number of cases so large that even the listing of them is impracticable. We dismiss many to which we have been referred, with the comment, often made and as often disregarded, that judicial expressions must always be read in the light of the fact situation to which they refer. Globe v. Segal (D. C.) 239 Fed. 322, is an illustration. Obviously the quotation given us has no reference to the present question, but is merely a statement of the position of counsel that equity has no jurisdiction, when nothing is involved except the recovery of damages.

We can deal only with a few of the cited cases. Tilghman v. Proctor, 125 U. S. 136, 8 Sup. Ct. 894, 31 L. Ed. 664, has no direct bearing. It was a proceeding in equity, in which both damages and profits were allowed. R. S. § 4900, was not involved, as no question of notice was raised. The case is usually cited as authority for the distinction between the basis and measure of recovery in actions at law and in proceedings in equity.

The case of Coupe v. Royer, 155 U. S. 580, 15 Sup. Ct. 199, 39 L. Ed. 263, is of value because it reviews the whole question of damages and profits, making clear the distinction between them, and that damages only could be recovered at law while an accounting for profits might be allowed in equity. The case was, however, one at law, so that the question of whether damages included profits (as we now have it) did not nor could arise. The question of whether R. S. § 4900, applied was then (January 7, 1895) expressly stated to be still an open one, and was not decided.

Another oft-cited case is that of Rubber Co. v. Goodyear, 76 U. S. (9 Wall.) 788, 19 L. Ed. 566. It was a proceeding in equity. The accounting period is not definitely disclosed, but it was before the acts which allowed damages in addition to profits, and when what is now R. S. § 4900, was limited to patentees who made and vended. There was no averment of compliance with what is now R. S. § 4900, in the bill, no reference to it in the answer, no evidence bearing upon it, and no point made of it as a denial of the right to a decree for damages or profits. The court allowed an accounting for profits, and referred the case to a master. The master reported, and the court allowed profits. On appeal, the Supreme Court held that the defendant could not raise the question. R. S. § 4900 (or its then equivalent), was in consequence not in the case. What its effect, if in, was not decided.

Another case is Dunlap v. Schofield, 152 U. S. 244, 14 Sup. Ct. 576, 38 L. Ed. 426, also in equity. The prayer was for an injunction, and the special damages allowed by Act Feb. 4, 1887, c. 105 (Comp. St. §§ 9476, 9477). There was not only no claim for profits, but a waiver of them. There was neither averment nor proof of a compliance with R. S. § 4900. The court below awarded the special damages. This was reversed wholly on the ground of a failure to aver and prove compliance with R. S. § 4900. The distinction between damages and profits did not arise, nor could arise, because special damages only were claimed.

It is clear that the Rollman Case is not in conflict with any of these rulings, nor with any other ruling of the Supreme Court to which we have been referred. They serve to give emphasis to the distinction drawn in the Sharpless Case between damages and profits.

There are, it is true, many cases in other districts which support the defendant's position; but we are constrained to follow the cases in this circuit as binding upon us, or, if not decisive of the question, then to follow the Rollman Case as one supported by reason and authority.

If the question be considered with the mind uninfluenced by the rulings made, we may start with the propositions before stated that in actions at law damages only, in the sense of compensation for injuries sustained, can be recovered, and that in proceedings in equity an accounting for profits may be awarded. Corollary propositions are that damages may be recovered, although the infringer may have made no profits, but that no damages can be recovered, unless suffered, although the infringer may have made large profits, and that no profits can be allowed, unless made, although much damage may have flowed from the infringement.

From the standpoint of the legislation on the subject, infringement means a trespass upon the property rights of the patentee. In consequence, it is a tort, for which the tort-feasor should respond in damages, whether he has himself gained or not. If he has profited by his use of the property of the patentee, he should account for what does not belong to him as a trustee ex maleficio. Laws, however, have their policies, as well as their principles of justice. The policy of the patent laws is to encourage invention and thus "promote the progress of science and the useful arts." Such laws may, however, become an in-

tolerable nuisance, if made traps for the innocent and unwary. Notice of patent rights should, because of this, be given. Damage implies hurt, and the one who is hurt knows it, and knows when, and usually how and by whom he is hurt. He may therefore well be required to give notice, and because otherwise an innocent user may be punished and be put to a loss. An infringer, however, may be making profits without the patentee knowing of it, because he is not otherwise damaged. The fact that an infringer is an innocent infringer without notice is a reason for relieving him from the payment of damages when he has made no profits. It is no reason for permitting him to retain profits which belong to another. The fact that he is innocent does not give him title to the property of another. Damages may be well denied, but profits allowed.

The history of this legislation may be of some help. If it is traced, it will be found the distinction between damages and profits and recoveries at law and in equity has been at all times recognized. Sometimes the right of recovery has been enlarged by giving damages, both actual and statutory, with profits in addition in both actions at law and in proceedings in equity; sometimes they have been separated, and damages only allowed at law, and both in equity.

R. S. § 4919, as we now have it, goes back to the original Patent Law of April 10, 1790 (1 Stat. 109, c. 7), which gave actual damages and forfeiture of the infringing article. Skipping the intermediate legislation down to July 4, 1836 (5 Stat. 117, c. 357), that act gave actual and trebled damages. Then came Act July 8, 1870, c. 230, 16 Stat. 198, which allowed in any action or proceeding damages, actual and statutory, in addition to profits. This was followed by the revision of December 1, 1873, which gave us the separate sections, as we now have them, except for the amendment of March 3, 1897 (29 Stat. 692, c. 391). The genesis of R. S. § 4921, is included in the above, and that of R. S. § 4900, has already been given.

We restate the conclusions reached.

1. R. S. § 4900, applies to all patentees, and is not limited to those who make and vend patented articles.

2. This section relieves infringers without notice from payment of damages, but not from accounting for profits.

A decree to this effect is filed herewith.

BEITMAN v. STRATER.

(District Court, N. D. Ohio, E. D. July 31, 1917.)

No. 377.

PATENTS ⊜328—FOR WIND SHIELD CLEANER VALID AND INFRINGED.

The Beitman patent, No. 993,816, for a wind shield cleaner, limited to the precise structure described and claimed, *held* not anticipated, and, while for a combination of old elements, to disclose invention, in view of its superior utility, simplicity of operation, and its commercial adoption and success; also *held* infringed.

In Equity. Suit by Albert B. Beitman against J. Edward Strater. Decree for complainant.

Hull, Smith, Brock & West, of Cleveland, Ohio, for plaintiff.
Squire, Sanders & Dempsey, of Cleveland, Ohio, and Charles H. Wilson, of New York City, for defendant.

WESTENHAVER, District Judge. Complainant, Albert B. Beitman, in his bill alleges that he is the owner of letters patent No. 993,816, dated May 30, 1911, and charges infringement thereof by the defendant. The answer denies infringement, and avers that the construction described in complainant's patent has been described and patented in certain letters patent of the United States, a list of which is given in the answer, and also avers that, prior to the complainant's alleged invention and discovery, said invention was known to and used by certain persons, whose names and addresses are given, among them one Charles J. Heineman, to whom later letters patent were issued. The case has been fully heard on the bill, answer, and proofs.

Complainant's invention relates to an improvement in a wiper or cleaner for window panes or transparent screens, employed as wind shields on automobiles or other vehicles. It is called in the patent "a wind shield cleaner." Its purpose is to clean the outer or front side of automobile wind shields or street car windows of accumulating mist, rain, snow, or frost, and thereby afford the driver free observation while the automobile or street car is in operation. The cleaning device is an adaptation of the old squeegee principle of cleaning windows. The cleaning of the wind shield is accomplished by means of an elastic strip of rubber so adjusted as to be held and compressed against the wind shield front, which is operated by an arm or handle, connected therewith, and extending to the driver's side, thus permitting operation by the driver while the automobile is in use.

The combination of elements making up the invention consists of a depending arm or holder on the outside, to which is attached the rubber cleaning strip; a shaft attached thereto, and extending at right angles transversely across the top of the wind shield; a depending arm extending downwardly from this shaft on the inside, adapted to be used as a handle; a supporting bracket adapted to be mounted on the top edge of the wind shield, and adjusted thereto in any desired position, by means of which the shaft, the outside wiper arm, and the inside handle arm are supported, carried, and operated.

The construction is exceedingly simple and economical. It may be put on and taken off quickly, and without marring the wind shield. The shaft and both depending arms are made up of the same piece of metal. The supporting bracket is made in two pieces, adapted to go over the upper edge of the wind shield, and to be clamped thereto in the desired position by means of a bolt and nut. The bolt passes through the upper edges of the two-piece bracket; the shaft also passes through the upper edge of the bracket. The inside depending arm is equipped with a wooden or rubber wheel or button at the lower end. This wheel, by means of a spring action of the two depending arms, is

compressed against the wind shield, thereby procuring a frictional engagement of the elastic rubber strip with the front side of the wind shield. This wheel revolves as on an axle against the inside of the wind shield, and serves as a carrier for the inside handle arm. When adjusted and in position, the bracket is clamped rigidly to the wind shield frame, and the handle and cleaner are operated back and forth, describing an arc of a circle, thus cleaning the wind shield on the outside.

The foregoing describes the simple form of construction commercially developed and sold by complainant. The specifications and drawings of his patent show a more complex device. The inside depending arm is also provided with a set screw in addition to the wheel, and an additional arm fitting against the wind shield, whereby the handle arm may be rigidly locked to the other member. The supporting bracket is equipped with a thumbscrew whereby the bracket may be fastened, but not clamped rigidly to the wind shield frame. With these additional features, and with the handle arm thus locked, the cleaner was designed and adapted to operate back and forth longitudinally with the wind shield.

As already stated, however, the device as commercially developed and sold eliminates these features, and embodies only the simple elements and method of construction and of operation already described. The device thus developed and sold is, however, described in the specifications, and also, it is contended, is included within claims 1 and 6 here relied on, of complainant's patent.

Defendant's construction differs only slightly from complainant's. The shaft extending transversely across the top of the wind shield, and connecting the two depending arms, is somewhat shortened, and is bent or curved; whereas, complainant's extends at right angles straight across the top of the wind shield. The handle or inside depending arm of defendant's construction is not equipped with a wheel or button, but has an elastic rubber strip constructed and operated on the same principle as the outside rubber strip, being thereby designed to clean both sides of the wind shield at the same time. The construction of the rubber strip is exactly like complainant's. The supporting bracket is made in one piece, instead of two pieces, and is designed to be attached by its own spring action to the wind shield frame. The depending arms are bent or offset at an angle about 2 inches from the shaft, thus permitting the depending arms to lie more closely to the frame when not in operation.

If complainant's patent is valid, defendant's construction undoubtedly infringes; in fact, defendant, upon the hearing, did not seriously contend to the contrary, and I shall not, therefore, discuss further, in this opinion, the question of infringement. Complainant relies on claims 1 and 6; they are as follows:

1. A wind shield cleaner comprising a shaft arranged to extend transversely of an edge of a window pane or transparent screen; a suitably supported bracket bearing the shaft and adjustable longitudinally of the same edge; and a wiper holder having a wiper which is arranged to make contact with and extend over the outer side of the pane or screen, said wiper holder being

connected to the shaft, so as to swing the wiper over the said side of the pane or screen during an oscillation of the shaft.

6. The combination, with an upright window pane or transparent screen forming a wind shield, of a shaft arranged above and transversely of the top edge of the pane or screen, which shaft terminates at the outer side of the pane or screen in a depending arm which is spaced from the pane or screen, said shaft terminating at the inner side of the pane or screen in a downwardly projecting lever, which is spaced from the pane or screen and arranged substantially parallel with the aforesaid arms; a suitably supported bracket bearing the shaft, and a wiper arranged between the foresaid arm and the outer side of the pane or screen and extending longitudinally of and connected to the said arm.

These claims, it will be noted, embody no more than the simple construction described above, and developed and sold commercially; certainly they do not cover more, although it is contended that they cover less. In my opinion, these two claims adequately cover complainant's construction, and furnish, when considered with the drawings and accompanying description, sufficient detail and information to enable a skilled mechanic to construct and reproduce the patented article.

Defendant's main contention is that, in view of the prior art as disclosed in letters patent of the United States, complainant's patent is invalid for want of novelty or invention. In support of this contention he has pleaded and offered in evidence the following patents: B. L. Cohn, No. 694,615, dated March 4, 1902; Mary Anderson, No. 743,801, dated November 10, 1903; T. J. Short, No. 856,428, dated June 11, 1907; F. Ames, No. 866,996, dated September 24, 1907; O. Caesar, No. 887,585, dated May 12, 1908; C. E. Prickett, No. 942,743, dated December 7, 1909; T. J. Rochford, No. 944,245, dated December 21, 1909; C. A. Kelloff, No. 956,770, dated May 3, 1910; C. J. Heineman, No. 1,112,793, dated October 6, 1914. Some others were pleaded, but were not introduced in evidence, and are not relied on.

Of these letters patent, defendant asserts that the Cohn patent embodies every element of claims 1 and 6, and is a complete anticipation. I do not agree with this contention. Cohn's patent is for a window washing device, and is not designed or intended to remove snow, frost, or mist from a wind shield or a street car window. A small-sized model of it was constructed by defendant's expert, and introduced in evidence. The device is constructed so as to be clamped to the window sill or frame. The supporting member is offset from this clamp and carries two substantially parallel arms, extending upward therefrom, one on each side of the sash, thus embracing the glass. These arms are provided with rubbers at the ends, and these rubbers are, by the spring action of the carrying arms, compressed against the window frame. The operator, standing inside the room, may by shifting the window pane up and down, and moving the arms back and forth, wash both sides of the window. In order to reach the edges and corners of the window pane, the arms carrying the rubber are constructed so that the operator may lengthen the same, thereby extending the rubbers into the corners and angles.

This device is novel and discloses invention, but, in my opinion, is obviously lacking in utility. It is a clumsy, impractical device, which

the evidence does not show ever went into practical use, and an examination of the model convinces me that it disclosed nothing to Beitman or any other person desiring to construct a wind shield or street car window cleaner, designed to remove mist, snow, or frost while the car is in operation.

Some others of the patents, however, are more nearly in point, particularly the Rochford, Ames, Anderson, Short, and Heineman patents. Each of these requires consideration.

The Rochford patent is described as being adapted for use in cleaning automobile wind shields, street car windows, and the like. It has a downward depending arm on the outside, equipped with a rubber strip operating on the squeegee principle. It has a handle connected with the outside arm and extending transversely over the top of the wind shield, and downwardly on the driver's side, by means of which it is operated. It has a carriage attached to the outside of the top frame, on which the cleaner rides back and forth as on a track. The cleaner arm is permanently riveted through outwardly extending ears. In operation, the downward depending arm is moved back and forth longitudinally on the front of the wind shield. Frictional engagement or compression of the rubber strip against the wind shield is obtained by means of a spring, and not by the spring action of the two depending arms. Apparently, without modifications, the carriage could be attached only to a wooden or flat frame, and, when once attached, becomes a permanent fixture, not easily removed.

The Ames patent has a wiper bar constructed preferably of a split tube, in which is secured the wiper, which is preferably composed of a rubber tube. This wiper bar is fastened to the inside handle through a lower corner of the wind shield, or its frame, by means of a journal and a bearing. The inside handle is not an arm, and the compression is not obtained by spring action of the arm. The driver, by turning the handle, moves the wiper bar over the outside of the pane, thereby cleaning the same.

The Anderson patent is similar in construction to the Ames device. The outside cleaning bar is connected with the inside handle through the upper corner of the sash or frame. The wiper bar is preferably made in two sections. The compression or frictional engagement of the cleaner is obtained by means of spring action, not provided by the arms, but by the method of construction whereby the rubber is held in yielding contact against the glass with sufficient pressure to clean the same.

The Short patent has two similar arms, one on each side of the pane. It was designed exclusively for cleaning street car windows. Its method of construction and attachment would not seem to admit of its use on wind shields. The arms are both equipped with elastic rubber strips, and are bolted firmly to the frame or sides. The inside is equipped with a knob, and the two together serve as a handle whereby the cleaner arm may be moved back and forth over the window pane.

The Heineman patent is also relied on as a part of the prior art. It was applied for December 21, 1910, but the letters patent were not issued until October 6, 1914. The application for the Beitman pat-

ent was filed January 6, 1911, and the patent was issued May 30, 1911. It appears, therefore, that Heineman made his application first, while Beitman first obtained his patent. In my opinion, this patent is not a part of the prior art, because for prior art purposes a patent speaks only from the date of its issue. It is, however, in my opinion, relevant on the issue that Beitman was not the first inventor, but that the invention was known to and used by Heineman at an earlier date. Nothing else appearing, except the respective application dates, the one earlier in time will control, if the invention embodied in the earlier application is the same as that covered by the second application and earlier patent. The law in this respect is, I believe, correctly stated in Sundh Electric Co. v. Interborough Rapid Transit Co., 198 Fed. 94, 117 C. C. A. 280. I shall therefore consider the Heineman patent, not as a part of the prior art, but as bearing only on the issue of whether or not Beitman's invention was known to and used by Heineman at a date prior to its invention by Beitman.

The Heineman construction has a similar depending arm on the outside, also equipped with an elastic rubber squeegee strip. This arm extends transversely over the top of the wind shield, and downwardly on the inside, and is provided on the inside with a spring stud adapted to press against and ride upon the surface of the glass, thus holding the rubber strip firmly in wiping contact against the front surface as the guide arm is moved back and forth in the act of cleaning. The compression is obtained by means of this spring stud, and not by the spring action of the depending arms. These arms are not supported by an adjustable two-piece bracket, but are attached to a guiding clamp adapted to ride upon the wind shield frame. This clamp, while designed to be permanently affixed to the wind shield, is not, nevertheless, rigidly clamped thereto. It is called a "guiding clamp," and is intended to ride back and forth on the wind shield frame. In operation the wiper arm and handle do not oscillate, describing an arc of a circle, but move back and forth with the guiding clamp. The guiding clamp, when once attached, becomes a permanent fixture. It is not equipped with a simple bolt and nut, so that it may be put on and taken off readily. These are the essential differences between the Heineman and Beitman constructions.

If the foregoing patents do not anticipate, or if the exact Beitman invention is not embodied in the Heineman patent, then none of the other patents can be said to anticipate, for none of them so nearly approximate the elements of the Beitman patent. I shall not, therefore, refer further to the other patents in evidence.

From the foregoing review it is evident that this case is of that class known as "border line" cases. Whether or not invention is present is a question respecting which different minds may well come to different conclusions. Assuming, as is required by the settled rule, that Beitman, in making his invention, had before him all these prior art patents, it is obvious that his patent must be limited to the exact construction therein described and claimed. The question is whether the simple combination of old elements thus made embodies patentable invention. All of these elements are old, and while the question of

what in the combination involves invention, as distinguished from mere mechanical skill, is not free from doubt, I am of opinion, after careful reflection and a balancing of all the considerations, that actual invention is present in his patent, and that his invention is not anticipated. I shall briefly summarize the main considerations bringing my mind to this conclusion.

It appears from the evidence that Beitman in fact actually invented the construction embodied in this patent. When he conceived the idea of developing a wind shield cleaner to overcome the difficulties in driving, due to an accumulation of rain, mist, snow, and ice, he made inquiries first of all houses selling automobile supplies and accessories, and was informed that there was no cleaning device on the market. He thereupon proceeded to develop his wind shield cleaner, and, as soon as he had developed it, made his application for a patent. In the first year thereafter, namely, 1911, the sales were small (only about 100); but they have since steadily increased, and during the last preceding year the sales, the evidence shows, have been from 40,000 to 50,000. This acceptance and practical use, it is well settled law, is, in doubtful cases, entitled to great weight. It does not appear that any of the wipers or cleaners embodied in the anticipating patents were successful commercially, or went into general use. The mere fact of their failure is a circumstance indicating that Beitman was successful in overcoming defects which made them failures, and that his success was the result of invention, and not mere mechanical skill in construction or adaptation, or in advertising and selling methods.

The defendant has closely imitated complainant's construction; in fact, he has modeled his device after complainant's, endeavoring to improve slightly thereon. It is not different in any substantial respect, except that he has duplicated on the inside the outside depending arm. The two arms, however, are alike in construction and function. It was equally open to defendant to adopt a construction like that of Rochford, Ames, Anderson, Short or Heineman, or that of any of the other anticipating patents. He has paid to Beitman's patent the tribute of imitation, and he has furthermore made application for a patent on this slightly changed imitation. It ill becomes him in this situation to deny utility or invention in the device which he has so closely imitated.

In what respect, then, does Beitman's device differ from the earlier patents, and why has his device succeeded when others have failed? In my opinion, the answer is to be found in its simplicity, economy of construction, facility of adjustment, and ease of operation. His advance in this respect is so marked and different as, in my opinion, to amount to invention. He realized that a wind shield cleaner, to be successful and win public favor, must be cheap, simple, and economical; that it must be so constructed that it could be put on and taken off as desired; that it should not be attached to the glass or frame, so as to mar or injure the glass or frame; that any device which, either in attaching or operating, marred or injured the glass or frame, or made it a permanent fixture, or involved expense in constructing, attaching, or removing, would not meet the requirements of automobile owners.

All of the other patents failed in some one or another of these respects. All of them, except Heineman's, require a marring of the frame or glass, and even Heineman's is designed to be permanently attached, and it is evident that its method of operation would, in a short time, by rubbing, mar the supporting frame. Beitman overcame all these objections by a combination of simple elements. His act in this respect rises to the dignity of invention.

The principles of law are well settled; the difficulty is in applying them to the facts of the case. I shall not, therefore, cite or comment on the many cases cited by the different counsel, all of which, however, have been given careful consideration by me. I will, however, as illustrating and emphasizing the reasons which have brought me to this conclusion, cite a few pertinent extracts from unquestioned authority.

In Topliff v. Topliff, 145 U. S. 156, 164, 12 Sup. Ct. 825, 828 (36 L. Ed. 658), Mr. Justice Brown said:

"While the question of patentable novelty in this device is by no means free from doubt, we are inclined, in view of the extensive use to which these springs have been put by manufacturers of wagons, to resolve that doubt in favor of the patentees, and sustain the patent."

In Heekin v. Baker, 138 Fed. 63, 70 C. C. A. 559 (8 C. C. A.), the court said:

"None of its elements was new, and it did not produce a new result; but we think the record clearly discloses that the combination, although of old elements, was new, and that it accomplished an old result in a more facile, economical, and efficient way. This gave it patentable novelty. * * * The merits of the device consist in the simplicity and cheapness of its construction, the ease of its operation. * * * But if the questions of novelty and merit were otherwise left in doubt by the evidence, they would have to be resolved in favor of the patent, because of the immediate and general use into which the device is shown to have gone when it was put upon the market."

Complainant's device and its acceptance by the public meets these standards of patentable novelty. It may also be said of this device, as was said in Faultless Rubber Co. v. Star Rubber Co., 202 Fed. 927, at page 930, 121 C. C. A. 285, at page 288 (6 C. C. A.):

"This result, as a new and useful result, seems probable enough on inspection of the patent and the earlier patents, and observation of samples, as far as they were submitted to us, confirms this idea. In any event, the utility of the new combination is probable enough, evidenced, as it is, by extensive public adoption, so that the defendant who has copied cannot be heard to deny such utility."

It may also be said of the situation now before me, as was said by Judge Baker in Railroad Supply Co. v. Hart Steel Co., 222 Fed. 261, 274, 138 C. C. A. 23, 36:

"They [courts] should consider the patentee's equities in his business which has developed under the presumptive validity of the patent, should give heed to the place achieved by the patented article in the field of the practical art since the date of the patent, and should therefore decline to sustain the defense of noninvention and to strike down the patent and the business built upon it unless that defense has been established beyond a reasonable doubt."

Upon the whole case I am of opinion that the situation here is controlled by the Barbed Wire Patent, 143 U. S. 275, 12 Sup. Ct. 443, 450, 36 L. Ed. 154, Webster Loom Co. v. Higgins, 105 U. S. 580, 26 L. Ed. 1177, Diamond Rubber Co. v. Consolidated Tire Co., 220 U. S. 428, 31 Sup. Ct. 444, 55 L. Ed. 527, and similar cases, and not by Atlantic Works v. Brady, 107 U. S. 192, 2 Sup. Ct. 225, 27 L. Ed. 438, Railroad Supply Co. v. Elyria Iron & Steel Co., 213 Fed. 789, 130 C. C. A. 447, Id., 244 U. S. 285, 37 Sup. Ct. 502, 61 L. Ed. 1136, decided May 21, 1917, and similar cases.

A decree will be entered, sustaining the validity of claims 1 and 6 of complainant's patent, granting an injunction, and directing an accounting to be had, if complainant so desires.

Ex parte LUM YOU.

(District Court, N. D. California, First Division. September 16, 1919.)

No. 16617.

ALIENS ⊂⊃32(8)—EVIDENCE INSUFFICIENT TO AUTHORIZE EXCLUSION OF CHINESE.

In habeas corpus proceedings by a Chinese, who had been previously admitted as a son of a native-born citizen, but was excluded upon his return, after a three-year visit in China, because of discrepancies in his testimony and that of his alleged father regarding conditions in China, but not relating to the question of relationship, which was the only issue in dispute, *held*, that such discrepancies were insufficient to sustain the Department's order of exclusion.

Habeas corpus proceedings by Lum You. Demurrer to petition overruled, and writ issued.

Joseph P. Fallon, of San Francisco, Cal., for petitioner.

Annette Abbott Adams, U. S. Atty., and Ben F. Geis, Asst. U. S. Atty., both of San Francisco, Cal., for respondent.

DOOLING, District Judge. The record shows that petitioner was admitted to this country in January, 1910, as the son of a native-born citizen of this country. He was then about 12 years old. In 1916 he returned to China without a preinvestigation of his status, because the serious illness of his mother in China, whom he desired to see, did not afford him time for such preinvestigation. Returning in March, 1919, he was denied admission because of certain discrepancies between his testimony and that of his alleged father, and because of other discrepancies in the testimony of the father, given at different times, in regard to the conditions in the home village. None of these latter seem to bear at all upon the question of relationship, which is the only question in dispute.

The rights of one whose status as an American citizen has already been determined, who has lived a number of years in this country without question, should be, it seems to me, more stable than to be overturned by the evidence in the present case; much of it having nothing

at all to do with the question at issue. I do not mean that a first, or second, or third adjudication of status by the Department is final, or that it may not later be set aside; but I do mean that there should be some substantial reason for so doing. To my mind such does not appear in the present case.

The demurrer will therefore be overruled, and the writ will issue as prayed for, returnable September 20, 1919, at 10 o'clock a. m.

THE HUTTONWOOD.

(District Court, E. D. New York. November 26, 1919.)

SALVAGE ⊂=31—COMPENSATION AWARDED FOR SERVICES TO BURNING STEAMER.

Salvage awards made to different tugs for services to a steamship, which took fire in a hold loaded with drums of benzol while lying at a pier, rendered in connection with fire department boats in pumping on the fire and towing the vessel on the flats where she was sunk; the awards being made on the basis of one-half the salved value of vessel and cargo and allowing that seven-eighths of the work was done by the fire boats.

In Admiralty. In the matter of salvage claims against the steamship Huttonwood. Decree for libelants.

Burlingham, Veeder, Masten & Fearey, of New York City, for libelants Dalzell and Old Dominion S. S. Co.

Ward D. Williams, of New York City (Robinson Leech, of New York City, of counsel), for libelant Merritt & Chapman Derrick & Wrecking Co.

Carter & Carter, of New York City, for libelant Gowanus Towing Co., Inc.

Foley & Martin, of New York City, for libelants Lee and Petrie.

Kirlin, Woolsey & Hickox, of New York City, for claimant.

CHATFIELD, District Judge. The Huttonwood is a steel vessel 342 feet in length. On August 6, 1918, she was substantially loaded with a cargo which had been placed on board the vessel while lying at the north side of the pier at Thirty-First street, East River. On the afternoon of that day, with a light wind blowing from the general direction of southeast, and while the captain was absent from the vessel, an explosion occurred in the No. 1 hatch, which a gang of stevedores had filled to within six feet of the coaming. The cargo in this hatch, aside from a small quantity of wire, consisted of drums of benzol. In the No. 2 hatch and in the cross-bunker hatch, various cargo, mostly noninflammable, was stored, while in the two after hatches, lumber and metallic ware of different kinds made up the cargo, except for some 100 or 150 drums of benzol in the No. 4 hatch. The vessel had a naval gun and carried about 75 rounds of ammunition underneath the poop deck.

The first alarm of fire was the explosion in the No. 1 hatch, and at that time or shortly thereafter a number of the stevedores were injured. There was no fire under the boilers of the ship, except that sup-

plying the donkey engine, and the crew of the engine room immediately started to rig up the pump connecting with the donkey engine, so as to get a stream of water on the fire. Several minutes were consumed in this work, and in the meantime a tug, the William Rowland, which was lying at the adjoining pier, reached the side of the vessel, followed shortly thereafter by the Henry D. McCord. Neither of these boats was allowed to put a hose on board the vessel, but both of them received an intimation from some one on the vessel that it was advisable to take the boat out of the slip. They made a start to free the lines and move the boat away from the pier, the Rowland actually drawing the stern of the boat out a few feet from the pier, when they were dismissed by the officers of the vessel and told that their services were not only unnecessary, but that they would not be tolerated.

The captain of the vessel appears to have arrived about this time, and his conclusion was that outside help from boats was unnecessary. The fire department, both in the form of land companies and a fire boat, reached the vessel shortly before the captain of the ship. They immediately went to work rescuing the longshoremen from the hold and getting streams on the fire in the No. 1 hold. In the meantime the Baxter, a medium sized tug of fair power, came alongside the port bow, and either with the consent of those then on deck, or without molestation, began to play a hose into the No. 1 hatch.

Upon the arrival of the fire boat the Baxter's hose was left in the hatch, and gradually the flame and smoke seemed to be affected by the water, so that the officers of the vessel were thinking that the fire could be gotten under control, when what has been referred to as the second explosion started a large amount of flame and smoke through the hatchway, driving the firemen back, throwing loose objects into the air, and making it apparent that the inflammable materials in the No. 1 hatch, which would explode only if confined when burning, demanded more help and threatened greater destruction.

At about this time the fire chief in charge telephoned for more help. His request, which was later repeated, resulted in the dispatch of other fire boats, with a deputy chief, who reached the fire in a launch, and finally the chief of the department himself, who came just as the fire was finally brought under control. It evidently was the opinion of the officers of the fire department, as soon as the extent of the fire was seen, that the boat must be removed from the slip. Two reasons have been stated for this: (1) That the fire threatened to endanger the pier and the surrounding water front; (2) that if the fire proved stubborn, and the vessel had to be scuttled, she should not be sunk in the slip, where not only would she obstruct navigation, cause additional trouble in being raised, and be less easily filled with water to the sinking point, but also where her proximity to the piers rendered it extremely probable that, if the piers should get on fire, the vessel could not be either removed or sunk, and would become a total loss. Orders were therefore given to the Baxter, the tug hanging onto the bow, to call for help. But before this call was given by the Baxter, other boats had been attracted by the flames and the sound of the second explosion.

The tug Dalzell, also a tug of fair power and medium size, came

to the assistance of the vessel and contributed particularly in undertaking the movement of the ship away from the pier and towing her out as the hawsers were loosened. The tug Hesperus and the tug Lee, also boats of fair power and medium size, offered their assistance, which was not received with eagerness by the officers of the vessel, but was welcomed by the firemen and was apparently effective in conducting the operation of towing the vessel from the slip. The Hesperus took up her position under the port quarter, passing a line up to the deck of the Huttonwood. The Lee took her position alongside the Dalzell and joined in towing with the Dalzell's hawser. In the meantime another tug, the Victory, of about the same capacity as the Dalzell, Hesperus and Lee, had taken a position on the port bow of the vessel, where she remained, assisting in the throwing of water into the No. 1 hatch, but having nothing to do with the towing of the vessel.

The additional fire boats, as they came to the scene, put out lines to the vessel, and some of them apparently used their own power to maintain their position alongside of the vessel, but none of them took part in the towing. As the vessel was pulled out into the stream, the direction of the wind and the necessity of rounding the water front on the opposite side of the Gowanus Canal compelled the tugs to swing the stern of the Huttonwood further toward the south. As she approached the flats on the opposite side of the Red Hook channel, these tugs continued holding the stern of the vessel in such position that the smoke and flames would go over the side.

In the meantime the vessel was going down at the head from the amount of water which had been pumped into the forward hatches. After the vessel left the slip, the Merritt & Chapman boat Champion, a powerful vessel with large capacity pumps and a derrick for the lifting of cargo, was attracted as she was proceeding up New York Bay, went in and ran alongside of the steamer, and undertook, at the direction of the captain, to remove the cargo of ammunition, which the captain of the Hesperus had been unable to take off. The Champion also assisted in bringing some of the firemen to their boats, and then took her position alongside of the steamer, where she, according to the testimony of her officers, continued to pump water on the flames until the boat settled on the bottom, and then stood by during the night, at the direction of an officer of the Merritt & Chapman Company.

The boat Chapman Brothers brought this officer of the Merritt & Chapman Company from New York at about the time that the deputy chief of the fire department came down in his launch. This boat, the Chapman Brothers, reported to the captain of the Huttonwood, who, upon learning that she came from the Merritt & Chapman Company, allowed her to take a position alongside the fire boats and do all that she could in putting out the fire. She is a boat with very large pumps, and probably compared with the fire boats in the amount of assistance which she rendered in flooding the ship.

With the help of all these boats, the Huttonwood was moved toward the Red Hook flats; it being the evident purpose of every one to sink her in water enough to drown the fire, but at the same time where

the bottom would be soft enough to avoid danger to the Huttonwood, and where the depth of water would not be so great that the cargo could not be saved and the boat raised. As the boat approached the neighborhood of the flats, and apparently while being held at approximately the position in which the various ones in authority expected her to be sunk, her bow took bottom. This fixed the location where the boat was compelled to sink, and the only change thereafter would be to keep her from swinging. The amount of swing was regulated by the direction of the wind, with the result that, when the Huttonwood finally sank, her bow was in 40 feet of water and her stern in 15 feet of water, and it is argued by the Huttonwood that the berth in which she rested was sufficiently uneven to cause some damage to the hull through the resultant strain.

It is apparent, however, that as the boat filled with water at the bow, but was afloat at the stern, no damage could have resulted from the projection of the stern over the crest of the bank. The No. 3 and No. 4 hatches did not leak, except as water worked through into the No. 3 hatch from pressure upon the bulkhead separating it from the forward hatches. The Merritt & Chapman people were able to keep the stern of the Huttonwood dry until the cargo was taken off. The forward holds were finally pumped out by the Merritt & Chapman people, the cargo was taken out, and the vessel raised.

It has been stipulated that the net result was salvage of property, including boat and cargo, aggregating $420,000. This amount has not been definitely divided, but it is apparent that the cost of repairs to the vessel was large. Such benzol as was not consumed was removed in the steel drums and was not injured, presumably, but, aside from the contents of the No. 1 hatch, constituted but a small part of the cargo. The balance of the cargo would receive more damage from water than could be inflicted on these steel drums.

It also appears from the testimony that, as the boat went down, flames and explosive material or burning material was forced up from below decks, and that burning benzol was scattered around over a considerable area. All the boats in the neighborhood pulled away from the vessel to avoid this burning material, and put out the fire upon the water before going to work upon the sunken hull. Some of the tugs followed along the hull, putting out burning cargo wrappings and various articles of equipment, by which the flames were being carried over that part of the boat which was not submerged. These last services, however, were of little consequence, except in so far as they extended the time before the boats left the wreck.

The first proposition presented by these facts is that, if the boat and its cargo had been totally destroyed, there would be no valuation upon which to base a claim for salvage services. As compared with total destruction, therefore, the sum of $420,000 at least remained for the benefit of the claimants. The evidence, as has been stated, leads to the conclusion that the removal of the ship from its berth contributed largely to prevent total destruction. The benzol and the other inflammable cargo would have substantially wiped out any salvage of cargo and probably made valueless the hull of the boat, if the fire had

not been checked in any way, and if the boat had burned until she sank from the effects of the fire upon her interior. The testimony thus indicates that, if the boat had not been removed from her berth, the fire would have spread, and that total destruction of the cargo, and in all likelihood of the boat, would have accompanied any extensive fire upon the pier.

But in opposition to this we must take into account the testimony which indicates that the fire, subject to explosions from time to time, could have been confined to the No. 1 hatch, if the boat had not been in a situation where danger to surrounding property was feared. The testimony shows that the apprehension of the firemen that all of the holds contained material similar to that in hatch No. 1 was unfounded. It was extremely desirable that the fire be stopped before it reached hatch No. 4, or the ammunition at the stern, but the danger from the fire to cargo in the holds aft of the No. 1 hatch was a very different proposition from the fire which the deputy chief of the department anticipated that he would have to fight.

The next proposition that is to be taken into account is that the boat was not landed in the mud in the form in which the salvors intended. As has been said, the bow took the ground, so that the boat could not be drawn upon the shoal entirely away from the channel, and yet the vessels were compelled to sink it where there was sufficient water to drown the fire. While the damage to the steamer from lying upon the uneven bottom was presumably small in comparison with the other damage, it militates against the amount of success in the rescue as planned by the tugs.

Another proposition that must be taken into account is that most of the boats involved in the operation were in comparatively little danger for the greater part of the time. The explosions were around the bow. It was only when the vessel sank that the zone of danger spread, and the Baxter, the Chapman Brothers, and the fire boats were the only tugs which tenaciously and steadily operated close to the No. 1 hatch. Subsequent events proved that the No. 1 hatch was the only likely place from which danger to the tugs could have happened, even though it was reasonable to expect that danger at all points around the boat.

The next proposition that I wish to consider is that the creditable work of the fire department and of the tugs in removing the boat from the neighborhood of the pier and from the slip, if the vessel was to be sunk, cannot be recognized in this action, in the sense of rewarding any saving of surrounding property. The salvage must be limited to the saving of the boat and its cargo alone. The tugs which were not accepted by the officers of the steamer, as rescuers or helpers in the work of rescue, are still entitled to compensation in accordance with the ordinary rules of salvage, inasmuch as the situation justified, not only their offers, but the work which they did, and upon the testimony I find that the officers of the Huttonwood should not have resisted those entering into the undertaking. The evidence does not verify the opinion of these officers that the boat should have been left in her berth, when the Rowland and the McCord attempted first to tow her out. Nor does the testimony justify the action of the officers of the

steamer in assuming that the boat could be towed out casually, by one or two tugs, as an ordinary towing operation. On this account both the Rowland and the McCord should be recognized as salvors, in that they undertook what was an offer and actual rendering of assistance at a time when part of the loss which ultimately occurred could have been prevented, if their efforts had not been frustrated by the action of the officers of the steamer.

The amount of salvage which the Rowland and McCord can be allowed cannot be based upon the amount of property saved directly by what they did; but their position is similar to that of a vessel standing by to render needed assistance, when further danger is anticipated, and where the vessels actually engaged in the direct work of salvage are sufficient to produce the result, if the danger does not increase.

The next proposition that I wish to consider is based upon the presence and actions of the fire department and its boats. Taking the value of $420,000 as property actually saved, and figuring that from the standpoint of total loss an award of approximately one-third or one-half of the value saved might not be extravagant, it is necessary to apportion the value of the services of the fire department and its equipment in considering what should be awarded to the assisting tugs. Credit is always allowed to the fire department, but its services are not customarily estimated in dollars and cents; but in this case it is necessary to divide the whole adventure, as we are dealing with but one part, which has to do with the outside tugs.

I am of the opinion that from three-fourths to seven-eighths of the value of the services rendered should be credited to the fire department and its officers, and, assuming that one-half of the total amount salvaged should be the basis of computation, then I should consider that, remembering the noninflammable character of the greater part of the cargo which was in immedate danger, the fact that much of the inflammable material causing the explosions at the bow was actually consumed, and that the danger was growing less as the water, poured into the boat, rose in the No. 1 hatch, and considering that the sinking of the vessel upon the flats was not of itself necessary beyond the drowning of the forward hatches, and also considering that the placing of the vessel was attended with some miscalculation, due to the effect of the wind, tide, and grounding, I should assume that one-eighth of the 50 per cent., which would represent a maximum, would fairly represent the efforts of the vessels involved.

Now, taking up the proportionate shares, I should attribute to the Baxter the greatest credit and the most valuable services, from the standpoint of a rescuing vessel. She not only went most directly to the point of danger, but she rendered service through her mate and other officers of a high order of courage. The Chapman Brothers also, like the fire boats, was as close to the fire as she could be placed, and her services and her powerful pumps undoubtedly were of great value, and make her worth more than could be represented by the mere pumping of water while lying alongside of a vessel. The Champion rendered sensible and accurate service as requested, and was a powerful enough boat to be of much use, if viewed from her capacity to pump

water. I take it that it is of little consequence whether she actually did pump, or whether her pumping was small. As between the three boats, I should have been inclined to compensate the Baxter as much or more than the other two.

Counsel for the various libelants have placed the aggregate value of their services in such proportion that the total of their estimates would exceed the lump amount which they figure as the salvage prayed for. The libelants Chapman Brothers, Champion, and Baxter request an allowance in the proportions of four parts for the Chapman Brothers, three parts for the Champion, and two parts for the Baxter, out of what may be allowed for these three boats. I feel that the allowance to the Baxter should be at least as large as that to the Champion, and I will yield my original opinion that the Baxter was actually the most meritorious of the three, by giving the Baxter the greatest award in the endeavor of its services, but giving to the Chapman Brothers the greatest monetary compensation.

I consider that the Dalzell, although working at the end of a hawser, rendered services substantially as valuable in most respects as the services actually rendered by the Baxter. But the original entry of the Baxter into the situation, and the fact that the Dalzell did perform her services at a considerable length from the burning vessel, will establish the difference between the awards to the Baxter and the Dalzell. The services of the Hesperus and the Lee are substantially alike in character and in amount, and are considerably less in quantity than those of the Baxter and the Dalzell.

The services of the Rowland and the McCord can be estimated only from the standpoint of a reward for their endeavor. We must also take into account the presence of the Victory and the fact that her services represent as large a share as that of the Dalzell or of the Baxter in most of the elements to be taken into account. In fact, the Victory, from its position near the fire, would require that that vessel be taken largely into account, if it were one of the libelants in the case. I therefore will apportion this one-eighth part with which I am starting, and which amounts to substantially $26,000, so as to take off a substantial portion for the Victory.

It also appears that other tugs were in the neighborhood of the steamer when she was aground on the flats, and that some other tugs were in the slip apparently assisting or looking after the lighters from which the cargo was being placed on the steamer. Some compensation from the standpoint of total available rescuing power must be taken into account, in the presence of these tugs, and added to that which is apportioned as representing the presence of the Victory in reducing the amount to be divided.

I shall allow to the Chapman Brothers $4,000, to the Champion and the Baxter $3,700 apiece, to the Dalzell $3,200, to the Hesperus and Lee $1,750 apiece, and to the Rowland and McCord $500 apiece, and decrees may be entered accordingly.

UNITED STATES v. UNITED STATES BROKERAGE & TRADING CO. et al.

(District Court, S. D. New York. December 24, 1919.)

1. CONSPIRACY ⟸33—RIGHT OF UNITED STATES TO SELL ASTRAY FREIGHT IMMATERIAL.
   In a prosecution for conspiracy to defraud the United States by retaining more than proper share of proceeds from selling astray railroad freight, it is immaterial whether the government had the right to sell the freight, since it was at least a bailee of the goods, and entitled to possession of the proceeds as against defendants.
2. EMBEZZLEMENT ⟸10—RIGHT OF GOVERNMENT TO SELL ASTRAY RAILROAD FREIGHT IMMATERIAL.
   In a prosecution for embezzling the proceeds of astray railroad freight, it is immaterial whether the government had the right to sell such freight, since it was at least a bailee of the goods, and entitled to possession of the proceeds as against defendants.
3. EMBEZZLEMENT ⟸8, 9—LARCENY ⟸8—OWNERSHIP OF VICTIM CANNOT BE QUESTIONED.
   While embezzlement differs from larceny, in that it does not depend on a violation of possession, yet an accused, receiving possession from another as a fiduciary, will not be heard to question the ownership of the goods by his immediate victim.
4. EMBEZZLEMENT ⟸11(1)—RIGHT TO DEDUCT PART AS COMMISSION DOES NOT PRECLUDE PROSECUTION.
   The fact that accused had the right to deduct a portion of certain sums as a commission does not preclude a prosecution for embezzlement upon his converting the entire fund, or a greater portion thereof than he was entitled to, and it is immaterial whether accused had separated his commission before embezzling the balance.
5. EMBEZZLEMENT ⟸16—BAILEE TO SELL ON COMMISSIONS WITHIN FEDERAL EMBEZZLEMENT STATUTE.
   An auctioneer or bailee to sell on commissions is within the federal embezzlement statute.
6. CONSPIRACY ⟸43(10)—INDICTMENT CHARGING VIOLATION OF DIRECTOR GENERAL'S ORDER BY "DELIVERY" OF GOODS SUFFICIENT.
   An indictment that defendants conspired to violate an order of the Director General requiring railroads to sell certain unclaimed freight at public auction to the highest bidder, by delivering certain freight under a corrupt agreement and not at public auction, etc., is insufficient, since the word "delivery" need not import a final disposition, and is consistent with an agreement to sell at public auction and thereafter embezzle the proceeds.

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

Criminal prosecution by the United States against the United States Brokerage & Trading Company and others. On demurrers to the indictments. Demurrers overruled to all counts of all indictments, except one count of one indictment, and sustained as to that count.

The case comes up upon demurrers to three indictments, which, as they concern dealings with three different railroads, are referred to as the Central Vermont, the Long Island, and the Jersey Central indictments.

The Central Vermont indictment is in seven counts against only the first three defendants, of which the first alleges that the Central Vermont Railroad was under the control of the Director General; that the United States had a property interest in certain freight in its possession, which it had become

"practically impossible to deliver to the consignees thereof," being known as "astray freight"; that the Director General, through his agents, delivered to the defendants "for sale on commission" quantities of "astray freight," which they caused to be sold under an agreement with the Director General, by which they were entitled to retain the expenses of cartage and delivery and 10 per cent. commission; that the balance of the money was the property of the United States; that the defendants conspired to defraud the United States of the money realized from the sale of such freight by making fraudulent returns of the money received by them from such sales, and by retaining a large part of the money received above their expenses and agreed commission. The second count alleges that the Director General delivered 72 bags of bark, which was astray freight, to the defendants, under the circumstances set forth in the first count, and that the defendants, out of the balance due from the sale of such bark, converted the sum of $83.85. This count was under the embezzlement section of the Criminal Code. The third, fourth, fifth, sixth, and seventh counts are similar to the second, laying separate instances of embezzlement.

The Long Island Railway indictment is against the first three defendants and contains seven counts. It is precisely similar to the Central Vermont indictment, except that it lays different instances of embezzlement in the six last counts.

The Central Railroad of New Jersey indictment is against all five defendants and contains nine counts. The first count alleges: That the Director General was in control of the Jersey Central Railroad, and came into possession of certain freight which it had become impossible to deliver to the consignees, and which was known as "astray freight." That the two last defendants were clerks in the freight claim agent's office of the road; that all five defendants conspired to defraud the United States as follows: The clerk, Lowrie, would deliver to the three first-named defendants astray freight, the three first-named defendants should sell such freight, and all five should unlawfully appropriate a large part of the moneys received, which were the property of the United States. That they should remit smaller sums, representing them as full payment for the sales of such freight, and that the two clerks should receive such sums as full payment. The second count alleges a conspiracy to embezzle money of the United States by the same acts as laid in the first count. The third count lays a conspiracy to commit an offense against the United States; that is, to violate the provisions of General Order 34a of the Director General. This order, so far as material, is as follows: "Carriers subject to federal control shall sell at public auction to the highest bidder without advertisement carload and less than carload nonperishable freight, which has been refused or is unclaimed at destination by consignees after the same has been on hand sixty days." The defendants agreed to violate this order by having the two clerks "deliver by a private, secret, and corrupt agreement and not at public auction and sale" to the other three defendants, freight of the kind described in the order. The fourth, fifth, sixth, seventh, eighth, and ninth counts are for embezzlement and are similar to the counts in the other indictments.

Benjamin P. De Witt, of New York City, for the United States.
Mooney, Fitts & Rowe, of New York City, for defendant Dumont.
Isaac Levy, of New York, for other defendants.

LEARNED HAND, District Judge (after stating the facts as above). [1] The counts for conspiracy to defraud the United States are clearly good from any aspect. It is no concern of the defendants whether or not the United States had the right to sell "astray freight." It was at the least a bailee of that freight, and, though the sale were wrongful, it was entitled to the possession of the proceeds. To appropriate those proceeds was either to impede the United States in its duty of discharging its liability to the consignees, if the sale was il-

legal (Haas v. Henkel, 216 U. S. 462, 479, 480, 30 Sup. Ct. 249, 54 L. Ed. 569, 17 Ann. Cas. 1112; U. S. v. Plyler, 222 U. S. 15, 32 Sup. Ct. 6, 56 L. Ed. 70), or, if the United States had the right to sell the goods then it was a direct misappropriation of funds of the United States, because upon that hypothesis the proceeds could be truly described as a part of the operating profits of the railway; i. e., as "railway operating income," under section 1 of the Federal Control Law (Comp. St. 1918, § 3115¾a).

[2, 3] The embezzlement counts are also in my judgment good, and, if so, the count in the Jersey Central indictment for conspiracy to commit embezzlement as well. Two objections are raised to these: First, that it appeared that the property was not that of the United States; and, second, that the first three defendants could not commit embezzlement because they were part owners of the fund.

The first objection I answer as I have answered the objection to the "defrauding" counts. While embezzlement differs from larceny precisely in this, that it does not depend upon a violation of possession, nevertheless a person lawfully in possession may transfer that possession to another as a fiduciary, and the latter, having received possession in that way and betrayed the trust, will not be heard to question the ownership of the immediate victim. Rex v. Beacall, 1 Car. & P. 310, 454; Campbell v. State, 35 Ohio St. 70 (the statute reading, however, in that case "anything of value which shall come into his hands by virtue of his employment" [Act May 5, 1877 (74 Ohio Laws, p. 249) § 11]); Waterman v. State, 116 Ind. 51, 18 N. E. 63 (the prosecutor was a consignee); Meacham v. Florida, 45 Fla. 71, 33 South. 983, 110 Am. St. Rep. 61.

The second point depends upon the meaning to be attached to the word "embezzle," in the Criminal Code. As there was no such common-law crime, and as the statutes of embezzlement are various, a question arises as to just what elements enter into the crime. It has been very common to define embezzlement as the conversion of "the property of another," and under that definition many courts have excluded property owned in part by the defendant. McElroy v. People, 202 Ill. 473, 66 N. E. 1058; People v. Ehle, 273 Ill. 424, 112 N. E. 970; State v. Kent, 22 Minn. 41, 21 Am. Rep. 764; Van Etten v. State, 24 Neb. 734, 40 N. W. 289, 1 L. R. A. 669; Com. v. Libbey, 11 Metc. (Mass.) 64, 45 Am. Dec. 185 (semble); State v. Kusnick, 45 Ohio St. 535, 540, 541, 15 N. E. 481, 4 Am. St. Rep. 564.

In cases where the defendant has the right to retain as commission part of a sum of money courts have at times therefore been at some pains (Campbell v. State, 35 Ohio St. 70, 74), to inquire just where the title to the whole fund lay at the moment of conversion, and whether the defendant had any property interest in it at that time. Yet, on the whole it is the weight of the later authorities, and as I think much the better, that this inquiry is not necessary, but that the right to deduct a part of a sum of money due the prosecutor is irrelevant to the question whether the defendant has committed embezzlement in converting the whole. State v. Maines, 26 Wash. 160, 66 Pac. 431; Com. v. Fisher, 113 Ky. 491, 68 S. W. 855; Com. v. Jacobs, 126 Ky. 536, 104

S. W. 345, 13 L. R. A. (N. S.) 511, 15 Ann. Cas. 1226 (overruling Stone v. Com., 104 Ky. 220, 46 S. W. 721, 84 Am. St. Rep. 452, and re-establishing the original rule in Clark v. Com., 97 Ky. 76, 29 S. W. 973); People v. Civille, 44 Hun, 497; Territory v. Meyer, 3 Ariz. 199, 24 Pac. 183; Branderstein v. Way, 17 Wash. 293, 303, 49 Pac. 511; Wallis v. State, 54 Ark. 611, 620, 16 S. W. 821; People v. Hanaw, 107 Mich. 337, 341, 65 N. W. 231.

Com. v. Smith, 129 Mass. 104, 110, is probably not in point, and stands upon the fact that defendant was bound to turn over the whole sum without deduction. Apparently his pay was merely calculated by commission. Reg. v. Tite, 8 Cox, C. C. 458, probably must be understood in the same way. But in Hartley's Case, Ryan & R. 139, I understand the facts to be that the defendant was entitled to retain his commissions, and perhaps in Carr's Case, Ryan & R. 198, as well, though that is uncertain.

[4] The proper rule, where the defendant has an undivided interest in a chattel, which he converts, I need not consider until it arises. In the case at bar the defendants are alleged to have embezzled, not the chattels, but their proceeds, of which at most they were entitled to keep only a part. In such cases I think it is of no consequence whatever whether or not they had separated out their commission before they embezzled the balance. Having the right to retain so much as was their due of these absolutely interchangeable units, it appears to me absurd to say that they did not convert the balance. I am not sure that the allegations of the indictment do not meet the necessity, if there were one, of showing that the conversion was after separation of the fund; but I lay no stress whatever upon that. It is enough that the defendants converted a fund made up of equivalent units, a part of which they were not entitled to retain.

[5] Finally, the question arises whether a bailee to sell on commissions is within the statute. In Moore v. U. S., 160 U. S. 268, 275, 16 Sup. Ct. 294, 40 L. Ed. 422, the Supreme Court said that an indictment against an assistant postmaster, properly laid, would have been sufficient. He is scarcely a "clerk or servant." In the same case (160 U. S. 269, 272, 16 Sup. Ct. 294, 40 L. Ed. 422) the court said that it applied generally to all cases of persons intrusted with money by virtue of any fiduciary relation. I have no doubt that an auctioneer is within the statute. Therefore these counts are good.

[6] There remains only the third count of the Jersey Central indictment. I think this insufficient, regardless of the validity of Order 34a, or of the question whether it is a crime to violate it. If the count should be read as meaning that the clerks finally disposed of the chattels themselves by delivering them to the other defendants for their own, certainly it would lay a violation of the order, since the carrier would not then be selling them at public auction. All the other counts show that this was not the fact, but that the delivery was in compliance with the order and under an agreement by which the three first defendants were to sell the chattels and remit. Indeed, the very embezzlement presupposes that the order has been complied with, and not violated, since it implies a delivery to the defendants as fiduciaries.

The facts as they appear elsewhere in the indictment, therefore, contradict the only meaning which the allegations of this count can bear, which would state a violation of the order, because it is not such a violation to sell goods at public auction on behalf of the carrier, and to embezzle a part of the proceeds. The order goes no further than to lay down for the carrier one way as against all others of disposing of the chattels, which way was followed.

Strictly, of course, as the count cannot stand through aider, the demurrer may not either, and if the allegations are adequate, I ought not to read to their prejudice the other counts. Yet I own to an unwillingness, unless it be necessary to make a decision upon a putative situation which is obviously untrue, merely because there is no special demurrer for repugnance between the counts. Moreover, I think it may be quite honestly said that the count taken alone is insufficient, if I have correctly limited the scope of the order. The phrase, "deliver under a private, secret, and corrupt agreement, and not at private auction and sale," means nothing. "Delivery," standing alone, does not import a final disposition qua the carrier, and is consistent with an agreement to sell at public auction, though the delivery were not itself at public auction. The corrupt agreement may well have been to embezzle a part of the proceeds after an auction sale as fiduciary for the carrier. I hold, therefore, that the pleading is bad, if designed to lay the only facts which could constitute a violation of the order.

Therefore, in any aspect of the case, the question is altogether irrelevant whether the United States had the right to sell freight which remained unclaimed. It is irrelevant to the former counts, because the defendants are not in any position to question the title of the United States. It is irrelevant on this count, because the order was not violated. As the issue should under no circumstances be imported into any phase of the three indictments or of the trial, I decline to consider the questions of law discussed by the defendants touching it.

Demurrers overruled to all counts of all indictments, but the third count of the Jersey Central indictment. Demurrer to that count sustained.

In re KROEGER BROS. CO.

(District Court, E. D. Wisconsin. February 2, 1920.)

BANKRUPTCY ⊂=319—JUDGMENT FOR DAMAGES RENDERED AFTER BANKRUPTCY NOT PROVABLE.

A judgment for damages against a bankrupt in a state court, actually rendered after bankruptcy, but by direction of an appellate court, which reversed a judgment in bankrupt's favor, entered nunc pro tunc as of the date of the reversed judgment, which was before bankruptcy, *held* not a fixed liability at the time of bankruptcy, provable under Bankruptcy Act, § 63a(1), Comp. St. § 9647.

In Bankruptcy. In the matter of Kroeger Bros. Company, bankrupt. On review of order of referee disallowing claim of Lizzie Glatz. Affirmed.

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

The petitioner, Glatz, brought suit in the state circuit court to recover damages accruing to her upon the death of her husband through alleged negligence of the defendant (the present bankrupt) on a collision of its delivery automobile with a motor vehicle operated by him. In July, 1918, the trial of that action resulted in a special verdict in her favor; but the judge set aside one of the matters of fact found by the jury, and thereupon entered judgment against her. An appeal to the Supreme Court was promptly taken and pending, when in October, 1918, these bankruptcy proceedings were instituted. In March, 1919, the state Supreme Court reversed the judgment (168 Wis. 635, 170 N. W. 934) and directed the circuit court to enter judgment in favor of the plaintiff (petitioner) and against the defendant (bankrupt) nunc pro tunc as of July, 1918—the date when the original judgment adverse to petitioner had been entered. This was done by the trial court, whereupon petitioner filed a claim upon the judgment herein. The referee having disallowed and stricken it as not provable, this review is taken.

Joseph H. Marshutz, of Milwaukee, Wis., for trustee.
Lenicheck, Boesel & Wickhem, of Milwaukee, Wis., for claimant.

GEIGER, District Judge (after stating the facts as above). Under the provision of the Bankruptcy Act (section 63 [Comp. St. § 9647]) governing the case before us, a claim to be provable must have the dual ingredients (1) a fixed liability, as evidenced by a judgment or an instrument in writing (2) *at the time of filing the petition in bankruptcy.* It will be conceded that the bankruptcy court is bound absolutely to ascertain the facts and apply the statute according to its very terms; that it is powerless and without discretion, upon considerations of justice or otherwise, to antedate a liability or to give it a fixed character as of any time other than that prescribed in the statute. So, in the present case, if the judgment presented as the basis of the claim had been rendered in the ordinary course, after filing the petition, but upon a verdict rendered before, the court would be powerless to treat the judgment as effective on or prior to the date of filing the petition in bankruptcy. It is agreed, however, that at the time when the bankruptcy petition was filed, there was not only no judgment in favor of the petitioner herein, but in truth against her; and if the Supreme Court of Wisconsin had not directed a nunc pro tunc entry of the judgment, I believe there would be no question that the bankruptcy court would be powerless to give the judgment effect as of July, 1918. Now, if the bankruptcy court is so limited, it cannot be that any other court has greater power or any discretion in respect of the ingredients of a provable claim and the manner of evidencing them. Indeed, if such power or discretion were recognized, no good reason can be urged for denying to private parties the analogous power or right of moving back, by agreement, the effective date of an "instrument in writing"—the other evidence or test of "fixed liability."

I agree with the view expressed by the referee and in his disposition of the claim. The order is affirmed.

LYONS v. EMPIRE FUEL CO.

(Circuit Court of Appeals, Sixth Circuit. January 6, 1920.)

No. 3340.

1. JUDGMENT ⊂=744—RIGHTS UNDER CONTRACT CONCLUSIVE WHEN DETERMINED.
Where, in an action at law for breach of a written contract, in which the right to recover depended upon the construction of the contract, as to which the parties differed, defendant asked no equitable relief, as permitted by Judicial Code, § 274b (Comp. St. § 1251b), but, the court having held the contract ambiguous on its face, the question of its construction was fully heard on oral evidence of the facts and circumstances surrounding its execution, and submitted to the jury, who found for plaintiff, defendant cannot thereafter maintain a suit in equity to enjoin enforcement of the judgment and for reformation of the contract.

2. JUDGMENT ⊂=720—ADJUDICATION CONCLUSIVE AS TO FACT IN ISSUE.
A 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, even if the second suit is for a different cause of action.

3. APPEAL AND ERROR ⊂=171(3)—CONSTRUCTION OF PLEADINGS BELOW MUST BE ADHERED TO ON APPEAL.
Where the question of the construction of a contract is directly put in issue by the court, and submitted to and decided by the jury on oral evidence introduced by both parties, without objection, as to the intention of the parties, it is too late to urge that the pleadings did not raise the issue.

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

Suit in equity by the Empire Fuel Company against John E. Lyons. From an order granting a preliminary injunction, defendant appeals. Reversed, with direction to dismiss bill.

See, also, 257 Fed. 890, — C. C. A. —.

Murray Seasongood, of Cincinnati, Ohio, for appellant.

Arthur S. Dayton, of Phillipi, W. Va., and M. G. Sperry, of Clarksburg, W. Va., for appellee.

Before KNAPPEN, DENISON, and DONAHUE, Circuit Judges.

KNAPPEN, Circuit Judge. Bill in equity to restrain the enforcement of a judgment at law. The case is this:

Lyons sued the Fuel Company on the law side of the court below to recover damages for an alleged breach of a contract whereby Lyons was to transport, for the Fuel Company, coal by river barge from Hugheston, W. Va., to Pomeroy, Ohio, and there load the same into cars. The claimed right of action was based on plaintiff's contention that the contract required the Fuel Company absolutely to furnish for shipment 350 tons of coal per day during the one-year contract term. The Fuel Company contended that the contract bound it to furnish plaintiff coal for transportation only when cars could not be had for rail shipment. The trial court thought the contract ambiguous in this respect, and so submitted its construction to the jury, whose verdict necessarily involved a finding in favor of plaintiff's construc-

tion. This court affirmed the judgment, holding the contract ambiguous, and the question of construction thus properly submitted to the jury. 257 Fed. 890, — C. C. A. —, where a history of the case and of the case and of the contentions of the parties will be found.

Thereupon the Fuel Company filed its bill, on the equity side of the court below, to restrain the enforcement of the judgment at law and for a reformation of the contract according to its own construction thereof, upon the ground that when the contract was made the minds of the parties fully met in an agreement which accorded with the Fuel Company's stated construction of the written contract, but that "through the mutual mistake of the parties, and by reason of the oversight and error of the attorney acting as scrivener to reduce said oral contract to writing," there were omitted therefrom definitions and statements limiting the subject-matter to such coal only as the Fuel Company could not get cars to transport, viz. what is called in the record "surplus coal." The bill makes part thereof the record of the proceedings in the court below on the trial of the law case, as appearing in the transcript presented in this court on review of that case, together with the opinion of this court on that review. Upon the filing of this bill the court below granted an injunction restraining enforcement of the judgment at law during the pendency of the equity suit. This appeal is from that order.

[1] We think the injunction was improperly granted, for the reason that it plainly appears by the bill that the proposition of fact asserted thereby as necessary basis for relief was, by the judgment in the suit at law, conclusively determined against the Fuel Company's contention. Lyons' suit for damages was planted upon the proposition that the contract required the Fuel Company absolutely to furnish for transportation at least 350 tons of coal per day. The suit was based upon the written contract alleged in the petition to so provide, and the writing itself, which was made part of the petition, expressed Lyons' agreement to "furnish sufficient barges * * * in which to load not less than 350 tons of coal per day, and * * * to transport all such coal to Pomeroy, Ohio, * * * and to load such coal into such cars as may be furnished at" that place.

The Fuel Company thus had explicit notice, through the petition, of Lyons' construction of the contract, and was thereby given the right and opportunity, under section 274b of the Judicial Code (Act March 3, 1915, 38 Stat. 956 [Comp. St. § 1251b]), to interpose and have heard the defense that the writing did not express the actual agreement, and to ask affirmative relief by way of its reformation. That (as the company contends) the case for equitable reformation would necessarily be tried as a case in equity (Union Pacific R. R. Co. v. Syas [C. C. A. 8] 246 Fed. 561, 566, 158 C. C. A. 531; Keatley v. Trust Co. [C. C. A. 2] 249 Fed. 296, 161 C. C. A. 304; Philippine Sugar Co. v. Philippine Islands, 247 U. S. 385, 388, 389, 38 Sup. Ct. 513, 62 L. Ed. 1177, arising under the Philippine Code of Civil Procedure) is not, in the view we take of the case, important here; and we think it equally unimportant that, as held in Railroad Co. v. Syas, supra, the case for equitable relief should be disposed of before pro-

ceeding in the action at law. In any event, the action at law would be stayed pending the hearing on prayer to reform. Prudential Co. v. Miller (C. C. A. 6) 257 Fed. 418, 421, — C. C. A. —. The point is that by the action at law opportunity was given the Fuel Company to try out then and there the case for reformation, and, to all intents and purposes, in the same case, although perhaps without a common-law jury, as to the plea for reformation. The Fuel Company did not take the benefit of this statute, but contented itself with a plea denying every allegation in the petition except its West Virginia incorporation. Had it pleaded mutual mistake, and asked reformation, it clearly could not again raise the question. Werlein v. New Orleans, 177 U. S. 390, 399, 20 Sup. Ct. 682, 44 L. Ed. 817. And there is respectable authority that the result would be the same if the existing right was not availed of.

Two decisions of the Circuit Court of Appeals for the Second Circuit illustrate this proposition: In Whitcomb v. Shultz, 223 Fed. 268, 273, 274, 138 C. C. A. 510, the right to resort to equity to cancel a contract alleged to have been obtained by fraud, after judgment at law awarding recovery thereon, was sustained for the reason that the contract was under seal and so could not have been attacked by defense at law; while in Du Pont v. Gardiner, 238 Fed. 755, 757, 758, 151 C. C. A. 605, the right to so resort to equity was denied for the reason that the contract there in question was not under seal, and thus the defense of fraud in its obtaining was open in the suit at law. In the latter case it was said that the result reached was the same as it would have been had the act of March 3, 1915, here in question, been in force.

In Knox County v. Harshman, 133 U. S. 152, 154, 10 Sup. Ct. 257, 258 (33 L. Ed. 586), it was said, by way of stating the converse rule, that—

"A court of equity does not interfere with judgments at law, unless the complainant has an equitable defense of which he could not avail himself at law, or had a good defense at law which he was prevented from availing himself of by fraud or accident, unmixed with negligence of himself or his agents."

In the instant case the Fuel Company had an equitable defense of which it could avail itself in the suit at law, even if the proceedings for affirmative relief were equitable in form. More or less analogy is to be found in decisions under general equity rule No. 30 (201 Fed. v, 118 C. C. A. v), which permits a defendant in a suit in equity, without cross-bill, to "set out any set-off or counterclaim against the plaintiff which might be the subject of an independent suit in equity against him." In Caflisch v. Humble, 251 Fed. 1, 163 C. C. A. 251, we held that the defendant's claim for damages for breach of a contract of purchase and sale of lumber, on account of which plaintiff was seeking to establish an equitable lien, was a counterclaim arising out of the transaction which was the subject-matter of the suit, and one which the defendant was obliged to set up or waive; and in Knupp v. Bell (C. C. A. 4) 243 Fed. 157, 156 C. C. A. 23, where in a suit to rescind a contract for the purchase of land judgment for defendants for the amount of the purchase-money notes (on denial of relief to plaintiff)

was affirmed as on a counterclaim, doubt was expressed whether defendants would not have waived such recovery had it not been set up in the answer.[1]

In Howard v. Leete, 257 Fed. 918, 925, — C. C. A. —, we found it unnecessary to decide whether the defense there presented would have been waived by failing to present it; so here we find it unnecessary to determine whether or not the Fuel Company lost its right to be heard upon the now asserted claim for reformation through failure to claim such relief by plea in the suit at law, for we think it clear that the proposition of fact here raised by the Fuel Company, and imperatively necessary to its relief, was distinctly put in issue on the trial of the suit at law, and was there directly determined against the company's contention.

Lyons' testimony tended to show that the parties intended by the contract that he was to have absolutely 350 tons of coal per day. After introducing the writing, he testified that before it was drafted he had a talk with the Fuel Company's manager about it; that the only difference between them was the price per ton for transportation; that on the day the contract was written the manager agreed to Lyons' terms of $1 per ton; that Lyons was then taken to a lawyer's office, where a contract was drafted; that the first draft failed to specify "the amount of coal I was to boat, and * * * that they were to furnish billing and * * * that they were to be responsible for my boats for a reasonable time until I came after them"; that he told them "he would not sign a contract like that, that he had to know what he was going to do and how many tons he was to get per day, so he would know how much work he had for his boats and barges"; that at that time he stated that he had understood from the manager that "the car supply was 32 per cent.," and that the latter said "that was about right"; that the lawyer "took the original draft, and interlined it and changed it, so it specified 350 tons and the billing, and also that he would be responsible for the safe-keeping of the barges." He further testified that the preparation of the second draft was hurried to enable the witness to catch a train. On cross-examination he denied having admitted to another party that under his contract he "was only to get surplus coal from the mine."

The Fuel Company's testimony was addressed even more specifically to the proposition that the oral contract which the writing was intended to cover applied only to surplus coal, and that the writing was intended, and was understood by all concerned, to state such agreement. The attorney who drafted it testified that he dictated it from information furnished him by Lyons and the Fuel Company's manager and mine superintendent, and "upon a statement of facts furnished by all of them"; that when the final draft was brought in, and just before it was signed, Lyons said, "Now, you have not agreed to give me any

[1] Cases such as Northern Assurance Co. v. Grand View Bldg. Ass'n, 203 U. S. 106, 27 Sup. Ct. 27, 51 L. Ed. 109; Lumber Underwriters v. Rife, 237 U. S. 605, 35 Sup. Ct. 717, 59 L. Ed. 1140, and Prudential Casualty Co. v. Miller, supra, are not helpful on the question of adjudication, for the contracts involved in those cases were not on their face ambiguous.

specific amount of coal whatever"; that the attorney then stated his understanding to be that "the basis of this contract is to provide for the loading of coal at such times as coal cars cannot be procured from the railroad; that the only coal that Mr. Lyons is entitled to is the coal which is actually run over the Coal Company's river tipple, and as no coal is ever run over the * * * river tipple while there are railroad cars to be filled, it would be impossible to provide in the contract for specifying any certain amount of coal to be delivered on any day or at any time; the purpose of it is to provide some means to keep this mine in operation when the railroad cars cannot be procured"; that thereupon the Fuel Company's mine superintendent and manager each made some explanations on their own behalf, and that Lyons then signed the contract.

The company's mine superintendent, as well as its manager, corroborated the attorney in all important particulars, including Lyons' objection that the contract did not "provide any certain tonnage," the superintendent saying that he replied, "Absolutely none; * * * we could not afford to give you any tonnage at the river whenever we get the railroad cars placed;" and that the manager explained that he "could not afford to ship coal by barge when cars were available." The superintendent testified expressly "that Mr. Lyons understood it and signed the contract." The manager stated that at the conversation previous to the day the writing was drafted he told Lyons that he "wanted him [Lyons] to transport their coal—such tons as we could not have railroad cars to load"; also that "all the terms of the contract were agreed upon at this meeting." After stating what occurred when the contract was signed, including the statement above narrated, he added, "It was plainly understood by all parties at that time." Another witness for the defendant testified that Lyons told him of the existence of his contract, saying:

"Whenever they have got cars at the mine, why I can't get the coal; but after that, when they have no cars there, then they will load the coal in my boats."

The Fuel Company's testimony was thus plainly addressed directly to the proposition that, when the contract was written, the minds of the parties had fully met in an agreement which accorded with the company's present construction of the writing, and that the latter was intended to express that agreement. This necessarily implied that, if the contract was to be held ambiguous, it could only be because of mutual mistake of the parties, and through error or oversight of the person charged with the duty of writing it, in not clearly stating the alleged specific limitation to surplus coal. The charge to the jury made this issue plain. The court said:

"The parties differ widely as to whether the defendant was obliged under the contract to furnish the plaintiff with the 350 tons of coal per day, or only the surplus that remained after shipments were made by rail. The plaintiff claims that the defendant was bound to supply his barges with 350 tons per day for each available working day of the year. The defendant denies that, and says it was obliged to furnish him for carriage only such coal as it did not ship by rail."

After stating the conflicting testimony respecting the occurrences at the attorney's office, the court said:

"It is for you jurors to say what occurred there, and if you cannot reconcile that evidence, then it will be for you to say whom you believe—whether you accept the statements of Lyons or of the other three parties."

And again:

"If you find from the evidence that at and before the signing of the contract it was interpreted to mean and was understood to mean that Lyons was to transport only the excess of coal over and above what was shipped by rail, and that he signed the contract with that understanding, he is bound by that interpretation, and he cannot say, if you so find, that he was entitled to a specific amount of coal per day."

And yet again, after discussing the testimony bearing upon the general issue, including the reasonableness of the differing constructions of the parties:

"What would reasonably prudent men, situated as the plaintiff and as the defendant's representatives were, naturally have done under the circumstances which surrounded them and of which they had knowledge at the time the contract was executed?"

The jury was asked:

"Did the plaintiff have a contract for a specific amount of 350 tons of coal a day, or was it simply for what remained and went over that river tipple after the car supply had been exhausted, after as much as the cars would take, and did these parties or not put a construction on that contract after it was executed? If they did (referring evidently to the later construction), they are bound by it; at least, it is a matter entitled to great consideration. *When you have decided what the contract is*, you will then have to say: Did the defendant break it?"

From this it seems equally plain that there was submitted the question, What was the contract on which the minds of the parties met? and that the verdict necessarily involved a finding that Lyons' construction of what the parties orally agreed (and what they intended) was right, and that the company's construction of what that oral contract was (and what the parties intended) was wrong. Indeed, the present bill expressly charges that Lyons could have obtained no judgment whatever in the suit at law, had the written contract "embodied the true intent and agreement of the parties at the time of its execution, as hereinbefore set out."

[2] It is fundamental that a 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, even if the second suit is for a different cause of action. So. Pacific R. R. Co. v. United States, 168 U. S. 1, 48–55, 18 Sup. Ct. 18, 42 L. Ed. 355. This principle, in our opinion, controls this case. The ultimate points of controversy in the two cases are the same, and there is thus "identity in the thing sued for." We find nothing to the contrary in Lyon v. Perin, 125 U. S. 698, 700, 8 Sup. Ct. 1024, 31 L. Ed. 839. That case called for no definition of "identity." The principal question was whether the dismissal of the bill for lack of prosecution worked a final adjudication against the relief claimed un-

der the bill. The discussion of the authorities contained in the opinion in So. Pacific R. R. Co. v. United States, supra, plainly establishes the identity of the point in controversy in the respective suits.

It is not enough to say that the interpretation in the suit at law of the written contract was "merely secondary and collateral to the main issue," which was whether Lyons could recover damages. This, indeed, is the issue to which the reformation here proposed is ultimately directed. So the determination in the suit at law that the actual contract was as Lyons claimed it to be was made necessary to recovery.

We see no force in the argument that in the suit at law the validity of the contract as written was not attacked, while by the bill in equity its validity is assailed, "so far as it fails to express the true meeting of the minds of the parties," and that—

"The jury merely found what the contract as written meant. In the equity case the court would find what the parties meant in fact."

This, to our minds, is but to "stick in the bark," for identity of issue is not obscured by the fact that in the suit at law it was decided by a jury, because the writing was held ambiguous, while a court of equity is now asked to decide it because the writing is asserted to be unambiguously wrong. In each case the intention would be found by a consideration of both the writing and the oral testimony.

Were the Fuel Company's bill to be sustained, the result would be merely an appeal from the verdict of the jury to the opinion of the judge. As said in So. Pacific R. R. Co. v. United States, supra (168 U. S. 49, 18 Sup. Ct. 27, 42 L. Ed. 355): The general rule (as to the conclusiveness of judgments in subsequent suits between the same parties, even where the suit is for a different cause of action)—

"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 person and property, if, as between parties and their privies, conclusiveness did not attend the judgments of such tribunals in respect of all matters properly put in issue and actually determined by them."

[3] We see no merit in the contention that the point in controversy was not raised by pleading or upon the record. That it appears upon the record has been sufficiently shown.[2] In view of the state of the pleadings already referred to, and (a subject later referred to) the introduction without objection, of oral testimony concerning the intention of the parties, it is too late to urge that the pleadings did not raise the issue. In any event, the trial court put the question directly in issue, and this court has finally determined that the action was right, It is thus not vitally material whether or not the Fuel Company voluntarily submitted that issue. But we are the better content with the

[2] Indeed, the Fuel Company's brief in this court on review of the judgment in the suit at law expressly states that at the trial Lyons "based his suit entirely upon his theory of the construction of the contract, to wit, that it required [the Fuel Company] to furnish to [Lyons] in his barges the sum of 350 tons of coal per day."

conclusion that the company has had its day in court because of the way in which the crucial question was treated by it on the trial of the suit at law. It made no objection whatever to Lyons' testimony, whose manifest object was to show the intention of the parties in making the contract. The objection to the introduction of the written contract (no ground being stated) had no tendency to suggest objection to parol testimony of the actual agreement; and it was already clear from Lyons' petition how he construed the contract.

The Fuel Company produced four witnesses, and went into the subject fully. The first two of its requests to charge were addressed to a construction by the jury of the contract. The third was on the theory that the contract was clear and unambiguous.[3] Lyons asked instruction that the contract unambiguously meant what he claims was intended, and asked for the jury's interpretation only in case the contract was held ambiguous. To the charge as given the Fuel Company took no effective exception, stating, on the contrary, that it would file a mere formal exception to it, in so far as it fails to include all of the material elements in the charges requested by the Fuel Company, "if there is any such failure," coupled with the statement that counsel was not certain that every material part of the charges requested was not embodied, and that if, on opportunity to examine the charge, he found that all were included, even that exception would be withdrawn. This attitude was persisted in, in the face of suggestion that it was ineffective. The natural construction of the company's attitude is that it believed, from the nature of the court's charge, and from the nature of the testimony, and the number of its own witnesses, that the jury would find with it, and that it was not unwilling to have the issue so submitted.

We may assume, for the purposes of this opinion, that had the question of intention not been submitted to the jury, or had such submission not been sustained on review, or had the Fuel Company been refused opportunity by plea to ask reformation when Lyons' testimony of intention came in, a mere mistake of law in construing the writing as unambiguous (as was probably the reason the plea took the form it did) would not have precluded the Fuel Company from asking reformation in equity. It is enough to say that no such situation is presented.

A party cannot be permitted to speculate upon the chance of success, in substantial effect acquiesce in the submission of an issue to the jury, and then urge that, as it did not invite that issue, it was not bound thereby.

The order of the District Court is accordingly reversed; and inasmuch as the question involved is one of law, determining the ultimate rights of the parties, and is fully presented by the record, the court below is directed to enter decree dismissing the bill of complaint. Harriman v. Northern Securities Co., 197 U. S. 244, 287, 25 Sup. Ct. 493, 49 L. Ed. 739.

[3] The point was saved by exception to the refusal to give the Fuel Company's requested charges "except as the same are given in the general charge," and there had been motion to direct verdict at the close of the testimony, no statement of reason therefor appearing in the record.

PURPURA v. UNITED STATES.

(Circuit Court of Appeals, Fourth Circuit. November 13, 1919.)

No. 1740.

CRIMINAL LAW ⊂=519(3)—CONFESSION MADE WHILE UNDER DETENTION INADMISSIBLE.

Where defendant, charged with stealing a package from the post office, where he was employed, was taken in charge by five inspectors and held 24 hours, without being permitted to communicate with friends or procure counsel, being compelled to sleep in the room with one of them, and being told that they believed him guilty and had evidence which made it look bad for him, a confession, written by the inspectors, but signed by him at the end of that time, *held* not voluntary, and not admissible against him.

In Error to the District Court of the United States for the Eastern District of Virginia, at Norfolk; Edmund Waddill, Jr., Judge.

Criminal prosecution by the United States against Santo S. Purpura. Judgment of conviction, and defendant brings error. Reversed.

The plaintiff in error, who will be referred to as defendant (such being the position he occupied in the court below), was indicted in the United States District Court for the Eastern District of Virginia upon the charge that, while in the postal service of the United States as a clerk in the Norfolk post office, he did unlawfully and feloniously steal a certain package addressed to Seaboard National Bank, Norfolk, Va., which package had come into his possession by virtue of his employment, said package containing the sum of $3,500. He was placed on trial, and upon his pleading not guilty, after a hearing before a jury, he was found guilty and sentenced to a term of five years in the penitentiary. The case comes here on writ of error for review.

Statement of Facts.

The facts may be epitomized as follows:

It appears that the defendant entered the Post Office Department as a substitute clerk in the year 1914, and remained so employed at a constantly increasing salary until the year 1918, when he was employed in the registry division of said office, and he so remained with the department until he was dismissed from the service of the government on the 17th day of January, 1919.

The charge against the defendant grows out of the alleged loss of a registered package containing $3,500 in bills, which was sent from the United States post office at Rocky Mount, N. C., addressed to Seaboard National Bank, Norfolk, Va. This package left the Rocky Mount post office on June 19, 1918, and was received at the Norfolk post office on June 20, 1918, about 11:10 a. m. of that day.

Witness R. J. Whitehead testified that he last saw this package in the Norfolk office at 4:15 p. m. on June 20th, and that he then placed a notice of the receipt of the same in the post office lock box of the Seaboard National Bank; that he went off duty and left the post office at 4:15 p. m. of that day, and in his testimony he gives the names of the employés having access to the package, who were on duty at that time, but states that Purpura was not then on duty. This witness is corroborated by C. M. Wolfe. This latter witness was chief clerk in the registry division of the Norfolk office, and states that the package was last seen at 4:15 p. m. on June 20th. He also gives the names of the employés who were on duty at that time, the defendant not being one of them. He further states that from 5:30 a. m. to 9:30 a. m. on June 21st, the following employés were on duty, with access to such package, if the same was there, namely: Wolfe, Swift, Purpura, Whitehead, and Clement.

M. E. Edson, an employé in the registry division of the Norfolk office, testifying on behalf of the government, states that he was on duty from 1 p. m. to 10:30 p. m. on June 20th, and that it was his duty, when so employed, to see that the registered packages were put in the office safe; that he did not count or check these packages, and that he could only tell that all packages had been placed in the safe by not finding any remaining out; and that he does not recall the package in question at all. All of the above witnesses testified on behalf of the government, and their testimony was the only direct evidence offered by the government as to what actually became of the package on June 20th. This is substantially all the evidence offered by the government as to the physical handling of the package.

However, another investigation was instituted about October 18th, by G. G. Himmelwright, James B. Robertson, John S. Lemen, W. Chambers, and W. D. Kahn. These were well-trained inspectors of long experience. On the morning of the 18th, just as the defendant was entering the post office building in Norfolk, Inspector Kahn, one of the five named, requested Purpura to accompany him to the office of Inspector Himmelwright about 11 o'clock Friday morning, October 18th, and was detained continuously in the presence of these inspectors until the following day at or about the same time. Mr. Himmelwright, testifying for the government, says:

"Q. So for 24 hours he was in charge of post office inspectors? A. I do not know the number of hours, but approximately, yes. I would say from between 11 and 12 o'clock on the morning of the 18th until about the same time the next day. Q. And spent the night with them? A. Yes; with Post Office Inspector Kahn, I think." Inspector Robertson, testifying on behalf of the government, states: "I recollect that distinctly, some time during the afternoon, the boy remarked that he had not had anything to eat; I think he said he had not had his breakfast."

It appears that, in the course of the interview between the inspectors and the defendant on the 18th of October, he made a written statement denying the knowledge of the package, but after making this statement he was not permitted to return home; the reason assigned by the inspectors being that they desired to interview Mr. Casper and his daughter, whose names had been mentioned in the affidavit the defendant had made before the inspectors on the 18th, and that they did not desire him to depart until they could be interviewed. On the early morning of the 19th of October, while the defendant was dressing in the room with Inspector Kahn, which room they had both occupied at the Neddo Hotel, the subject of the package was again brought up by Mr. Kahn, who testified as follows: "In the room, before I left, while we were dressing, I said to Purpura: 'Miss Casper has contradicted every statement practically which you have made in your affidavit to-day, and which puts you in a pretty bad light. While you have denied any gift to her, she has stated to us that you had bought her a ring, a plush dress, suit, and trunk, and various articles of clothing.'"

This conversation took place before breakfast on the morning of the 19th, and the same witness proceeds to testify as follows to the subsequent occurrences: "Q. You had her written statement denying the statements Purpura had made to you? A. Yes, sir. That was about all that was said; that it looks pretty bad; and when we got him in the room we sat possibly 15 minutes, not much more than that. Robertson, Himmelwright, and he and I were there. He asked me to step outside. I stepped out of the door, and a little to the side of the door, and we talked. He first said, 'Can I withdraw that statement I made yesterday?' I said, 'No; you cannot withdraw it, but you can make any additional statement you wish to make.' That was the affidavit he had made before Lemen and Robertson on the 18th. I told him that I was convinced that he had stolen this package, and about this way, and he said, 'Yes; I know I did it; I hate like the devil to admit it.'"

The defendant and the witness then returned to Mr. Himmelwright's office, and the statement which was relied upon by the government was then written out by Inspector Chambers, with various suggestions from Inspector Kahn. Inspector Kahn, in testifying, said: "He showed no objection whatever to writing the statement. He resented nothing that we did." Thus it appears

that the government's case rests upon a statement, not written by the defendant, but by Inspector Chambers, containing suggestions of Inspector Kahn, signed by the defendant, after being detained 24 hours surrounded at all times by one or the other of the inspectors, who were well trained, and was told that it looked very bad for him. He was given to understand by one of the inspectors that he believed he had stolen the package, and the inspector with whom he had to remain during the night had in his pocket a warrant for the defendant's arrest at a convenient time. It is insisted that after an experience of this kind that it was but natural that the young man should succumb to the importunity of these officials.

The defendant himself went on the stand, and went fully into the details and circumstances under which the paper, relied on by the government, was signed by him. It is insisted that in many respects the defendant's testimony is corroborated by that of the government's witnesses. For instance, he states the circumstances under which he went to Mr. Himmelwright's office, the length of time that he remained there, his physical condition owing to lack of food and rest, and the fact that he was required to spend the night in a room with Inspector Kahn, a perfect stranger to him. It is further insisted that he was given no rest during this period, and that the inspectors relentlessly pursued their investigation, and that he endeavored to communicate with his friends for the purpose of employing counsel; that his spending the night at the Neddo Hotel was against his protest; that during this time these inspectors, and especially Inspector Kahn, with whom he spent the night, were continuously telling him that it was best for him to confess to taking the package; that they were confident he had taken it, and that they would be much more lenient with him in the event that he admitted taking the same.

J. L. Broudy and Tazewell Taylor, both of Norfolk, Va., for plaintiff in error.

Hiram M. Smith, U. S. Atty., of Richmond, Va., for the United States.

Before PRITCHARD, KNAPP, and WOODS, Circuit Judges.

PRITCHARD, Circuit Judge. It is insisted by the first assignment of error that the court erred in permitting the introduction of the alleged confession. The introduction of this paper was objected to by counsel for defendant, upon the ground that the same was obtained by promises, threats, and coercion, and that it was not voluntary. This assignment presents squarely the question as to whether the alleged confession was competent, in view of the objections urged against the introduction of the same.

It is well settled that, to render a confession admissible, it must clearly appear that it was free and voluntary, and that the witness was not influenced by threats, violence, or by any implied or direct promises—in other words, it should clearly appear that the confession was not due to any improper influence by those seeking to obtain the same. That portion of the Fifth Amendment of the Constitution, which provides that "no person * * * shall be compelled in any criminal case to be a witness against himself," is a safeguard thrown around one who is called upon to answer a criminal charge. When one is arraigned on a criminal charge, the law presumes that he is innocent until the contrary is shown by evidence sufficient to convince the jury beyond a reasonable doubt as to his guilt. Therefore it is highly important in a case like the one at bar that this right should be preserved, and that only confessions should be admitted

where it clearly appears that it was the free act of the defendant, without any inducement, threat or other influence.

In 2 Hawkins, Pleas of the Crown (8th Ed.) p. 595, § 34, there is an admirable statement of the law upon this subject, which is as follows:

"And as the human mind under the pressure of calamity is easily seduced, and liable, in the alarm of danger, to acknowledge indiscriminately a falsehood or a truth, as different agitations may prevail, a confession, whether made upon an official examination or in discourse with private persons, which is obtained from a defendant either by the flattery of hope, or by the impressions of fear, however slightly the emotions may be implanted, is not admissible evidence; for the law will not suffer a prisoner to be made the deluded instrument of his own conviction."

The following from 3 Russell on Crimes (6th Ed.) 478, we think is a clear statement of the record:

"But a confession, in order to be admissible, must be free and voluntary; that is, must not be extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence. * * * A confession can never be received in evidence where the prisoner has been influenced by any threat or promise; for the law cannot measure the force of the influence used, or decide upon its effect upon the mind of the prisoner, and therefore excludes the declaration if any degree of influence has been exerted."

The case of Bram v. United States, 168 U. S. 532, 18 Sup. Ct. 183, 42 L. Ed. 568, is very much in point—indeed, we think it is practically on all fours with the case at bar. There it appears that the defendant, who was the first officer of the ship of which the deceased was the captain, was charged with the murder of the captain on the high seas. The alleged confession was supposed to have been made to a detective at a time when the defendant was under arrest. The detective testified that no threats were made or any inducements held out to him. On this point the witness was interrogated by the court, and testified as follows:

"Q. You say there was no inducement to him in the way of promise or expectation of advantage? A. Not any, your honor.

"Q. Held out? A. Not any, your honor.

"Q. Nor anything said, in the way of suggestion to him that he might suffer if he did not—that it might be worse for him? A. No, sir; not any.

"Q. So far as you were concerned, it was entirely voluntary? A. Voluntary, indeed.

"Q. No influence on your part exerted to persuade him one way or the other? A. None whatever, sir; none whatever."

Thereafter the witness on cross-examination answered the following question, "What did you say to him, and he to you?" to which the witness answered as follows:

"When Mr. Bram came into my office, I said to him: 'Bram, we are trying to unravel this horrible mystery.' I said: 'Your position is rather an awkward one. I have had Brown in this office, and he made a statement that he saw you do the murder.' He said: 'He could not have seen me; where was he?' I said: 'He states he was at the wheel.' 'Well,' he said, 'he could not see me from there.' I said: 'Now, look here, Bram; I am satisfied that you killed the captain from all I have heard from Mr. Brown. But,' I said, 'some of us here think you could not have done all that crime alone. If you had an accomplice, you should say so, and not have the blame of this horrible crime

on your own shoulders.' He said: 'Well, I think, and many others on board the ship think, that Brown is the murderer; but I don't know anything about it.' He was rather short in his replies.

"Q. Anything further said by either of you? A. No; there was nothing further said on that occasion."

In that case the Supreme Court said:

" 'The law cannot measure the force of the influence used or decide upon its effect upon the mind of the prisoner, and therefore excludes the declaration if any degree of influence has been exerted.' In the case before us we find that an influence was exerted, and as any doubt as to whether the confession was voluntary must be determined in favor of the accused, we cannot escape the conclusion that error was committed by the trial court in admitting the confession under the circumstances disclosed by the record."

In the case of Sorenson et al. v. United States, 143 Fed. 820–824, 74 C. C. A. 468, 472, the court said:

"The confessions in the case before this court were made to an inspector while the defendants were prisoners under his control. He stated to one of them that he had an absolutely good case against him, and to both that the thing for them to do was to plead guilty and to throw themselves on the mercy of the court, and the matter would probably be overlooked in the state court. Tried by the decision of the Supreme Court in Bram's Case, either of these statements was 'legally sufficient to engender in the mind of the accused hope or fear in respect of the crime charged,' and each of them rendered the subsequent confession involuntary and inadmissible in evidence."

In this instance, as we have stated, the testimony shows that defendant for a period of almost 24 hours, excluding the time he was asleep, was continuously plied with questions by these five inspectors and all manner of questions propounded to him about the circumstances under which the package in question was lost. It further appears that he was given no rest during this period, except when asleep; that he endeavored to communicate with friends for the purpose of employing counsel, and that he spent the night at the hotel under protest.

Under the circumstances, according to the testimony of the inspectors, we think this alleged confession is clearly inadmissible. This is true, independent of the testimony of the defendant; but in many respects, as we have said, the defendant's testimony is corroborated by that of the inspectors. In view of what we have said, the court below was in error in admitting this alleged confession, and therefore the judgment of the lower court should be reversed.

Reversed.

MAYNARD et al. v. UNITED THACKER COAL CO.

(Circuit Court of Appeals, Fourth Circuit. October 7, 1919.)

No. 1728.

DEEDS ⟨⟩124(1)—TITLE IN FEE SIMPLE CONVEYED ON PAYMENT OF PRICE.

A deed executed pursuant to a plan of grantor to divide his lands among his sons, conveying certain land to a son in consideration of his payment of stated sums to his sisters, for which a lien was reserved, "to have and to hold the same during his natural life, and then to descend to the heirs of his body," with the right, however, to sell to either of his brothers or sisters, the grantor and wife then granting and relinquishing to grantee "all their right, title, and interest in the foregoing named lands, to have and to hold the same forever, upon the fulfillment of the contract, and payment of the sums stipulated," *held*, on payment of the consideration named, to vest grantee with title in fee simple.

Woods, Circuit Judge, dissenting.

Appeal from the District Court of the United States for the Southern District of West Virginia, at Huntington; Benjamin F. Keller, Judge.

Suit in equity by William Maynard and others against the United Thacker Coal Company. Decree for defendant, and complainants appeal. Affirmed.

Certiorari denied 40 Sup. Ct. 119.

Ed. Noonchester, of Williamson, W. Va., for appellants.

Malcolm Jackson, of Charleston, W. Va. (Edward C. Lyon, of New York City, Cary N. Davis, of Huntington, W. Va., Buford C. Tynes, of Huntington, W. Va., Brown, Jackson & Knight, of Charleston, W. Va., and Campbell, Brown & Davis, of Huntington, W. Va., on the brief), for appellee.

Before PRITCHARD, KNAPP, and WOODS, Circuit Judges.

PRITCHARD, Circuit Judge. This is a suit instituted in the District Court of the United States for the Southern District of West Virginia, by the plaintiffs against the defendant, who seek to quiet their title to certain lands hereinafter referred to. The facts in this case may be epitomized as follows:

In the year 1870 Richard Maynard, his wife, Charlotte, uniting, in furtherance of a scheme for partitioning his landed estate among his numerous sons, conveyed to his son John B. Maynard the tract of land in the bill of complaint set out and described, by a deed, the construction of which is the subject of controversy in this suit. The appellants' contention is that the said deed vested the said John B. Maynard with a life estate only in the tract of land therein described. The appellee's contention is that the said deed vested the said John B. Maynard with a fee simple absolute title in said tract of land; the minerals and incidental rights and privileges pertaining to which passed by mesne conveyances unto, and are now claimed in fee simple absolute by, the appellee.

The deed upon which appellee relies is in the following language:

"This deed made this the 30th day of September, 1870, between Richard Maynor and Charlotty Maynor his wife of the first part and John B. Maynor of the second part both of the county of Logan and state of West Virginia witnesseth that the parties of the first part hath this day bargained and sold and by these presents doth grant bargain and sell unto the party of the second for and in consideration of the sum of fifty dollars to be paid to Parlee Stepp wife of Aaron Stepp by the first day of June 1871 and twenty five dollars to be paid by the first day of June 1871 to Sarah Ann Stepp wife of Hiram Stepp all the following named lands to wit lying and being in the county of Logan & State of West Virginia on Lick creek a tributary of the Tug fork of Sandy river and bounded as follows to wit—[here follows description] To have and to hold the same during his natural life and then to descend to the heirs of his body but the party of the first part grants to the party of the second part the right to sell the foregoing lands to either of his brothers or sisters the parties of the first part hereby reserves a line upon the lands for purchase money stipulated the said Richard Maynor & wife Charlotta Maynor hereby grants and relinquishes to the said John B. Maynor all their right, title and interest in the foregoing named lands to have and to hold the same *forever* upon the fulfillment of the contract & payment of the sums stipulated. Given under our hands and seals day and date mentioned."

The appellants, in their bill of complaint, pleaded all the facts pertaining to the aforesaid scheme of division of the landed estate of the said Richard Maynard among his children, filing therewith numerous exhibits, constituting both their own and the chain of title of the appellee. Thereupon the appellee moved to dismiss the appellants' bill of complaint, and the said motion was sustained by the court. Whereupon appellants filed a petition for a rehearing, to which were appended as exhibits numerous deeds from the said Richard Maynard and Charlotte, his wife, to their other sons, all made as a part of the general scheme of the said Richard Maynard for dividing his landed estate among his sons as aforesaid. The court having overruled appellants' petition for a rehearing, they now prosecute this appeal.

In order that we may properly interpret the provisions of the deed in question, we must, if possible, ascertain the intention of the grantor at the time the deed was executed. Therefore it is necessary to consider the situation, the circumstances surrounding the transaction, and the purpose of the grantor; in other words, the situation which confronted the grantor and his wife (who, no doubt, were well advanced in years), and what it was they wished to accomplish when they executed this deed, as well as the deeds to the other six sons. Why were the peculiar and somewhat inconsistent terms of this deed employed? There must have been some substantial reason prompting the grantor to draft the deed in the manner he did.

It appears that prior to the year 1870 Richard Maynard was the owner in fee simple absolute of a large contiguous body of land, aggregating about 1,100 acres, situated on Lick creek, a tributary of the Tug fork of Sandy river, then known as Logan county, W. Va. It further appears that he was the father of ten children, seven of whom were sons and three daughters, the daughters being Harriett Maynard, Sarah Ann Stepp (wife of Hiram Stepp), and Parlee Stepp (wife of Aaron Stepp).

The facts and circumstances clearly show that the father for some reason was of opinion that it would be best to convey the real estate to the sons, and it further appears that it was his desire to provide for his daughters; hence the requirement that his sons pay to each of his daughters such amounts as would in the aggregate be equivalent in value to the share of land they would have received, had the land been apportioned equally among all the sons and daughters. That this was the grantor's purpose in partitioning his lands is evidenced by the fact that he undertook to retain liens on the various tracts until the sons should pay to the three daughters the respective amounts therein provided.

It must be admitted that the deed was inartificially drawn and is somewhat contradictory in its terms; but, while this is true, the provisions are such as to warrant us in assuming that it was his intention not only to convey the land to his sons, but at the same time secure such amounts as were to be paid to the daughters. Instead of conveying the land outright to his sons and then requiring them in turn to execute to him deeds of trust on the lands in question to secure the payment of the notes to his daughters, he undertook in a simple way to charge the same with a lien for the several amounts which he exacted of them to be paid as a condition precedent to investing them with the fee simple title to this property.

After restricting the right of alienation, except as to the brothers and sisters, the grantor then undertook to reserve a lien upon the lands, as we have said, for the purchase money stipulated to be paid to the daughters, which is as follows:

"* * * The said Richard Maynor and wife Charlotta Maynor hereby grants and relinquishes to the said John B. Maynor all their right title and interest in the foregoing named lands to have and to hold the same *forever* upon the fulfillment of the contract & payment of the sums stipulated."

The next question is as to whether the grantees complied with the stipulation which required that they should pay to the daughters the respective sums fixed by the grantor. The learned judge who tried this case in the court below, in referring to this phase of the case, said:

"It is conceded that the purchase price mentioned in the deed has been fully paid."

Therefore there has been a literal fulfillment of the requirements of the grantor as a condition precedent to the grantees becoming invested with fee simple titles for these lands. It would be contrary to all rules of construction to ignore the concluding clause of the deed, wherein the grantors relinquished to the grantee all their right, title, and interest in these lands, which provides that the grantee *shall hold the same forever*. The learned judge, in construing this deed, among other things, said:

"After a careful study of the context of this deed, it seems clear to me that Richard Maynard, desiring to divide his property among his children, intended to convey to John B. Maynard the property herein involved in fee, upon the compliance by him with the terms and conditions therein set out. In other words, a life estate only (and that subject to the lien retained) was to vest in the grantee in the event of his failure to fulfill the conditions therein

imposed, viz. the payment of the consideration mentioned to the grantee's sisters, which evidently constituted, or was to constitute, a portion of their division of the property; and upon the payment of the consideration set out, a fee simple estate should vest. In determining the intention of the grantor, courts look not only at the words used, but to the situation, and circumstances of the parties as well. The modern rule governing construction leans toward the intention of the maker, overriding mere form and technical words, and now it may be said that the intention must govern and rule the construction in deed as well as in wills. Moreover, under the rules governing the construction of deeds, where the context is susceptible of two constructions, that which is more unfavorable to the grantor is accepted, and restrictions contained in such instruments are construed most strongly against the maker [Williams v. South Penn Oil Co.] 52 W. Va. 181 [43 S. E. 214, 60 L. R. A. 795], [Deer Creek Lumber Co. et al. v. Sheets et al.] 75 W. Va. 21 [83 S. E. 81]. In the case of Railway Company v. Honaker, 66 W. Va. 149 [66 S. E. 104, 27 L. R. A. (N. S.) 388], the court held that when a deed contains a restraint upon alienation, but is an attempted grant in fee, that conditions or restrictions absolutely restraining alienation when repugnant to the estate created, are void as against public policy."

The deed contains provisions in the habendum clause which, upon a casual consideration, might cause one to think that it was the intention of the grantor to provide only for a life estate and then by descent to limit it to the first taker. Such would be true, were it not for the fact that later on in the deed is to be found a provision which clearly shows that, upon compliance on the part of the grantee with certain stipulations contained therein, he would immediately become invested with a fee-simple title to the premises in question.

In the case of Mauzy et al. v. Mauzy et al., 79 Va. 537, wherein the principle involved in this controversy was passed upon, the court, among other things, said:

"At common law, in case of repugnancy between the premises and the habendum in deeds to natural persons, the latter gave way to the former; but as in this case the deed conveys the fee only by virtue of the statute (Code 1873, c. 112, § 8), which provides that when real estate is conveyed the entire interest of the grantor shall be construed to be conveyed, unless a contrary intention appears by the conveyance, the whole deed must be looked to, in order to ascertain and give effect to the intention of the parties. * * * Looking, then, to the whole deed and the surrounding circumstances, we think the conveyance was to Mrs. Mauzy, absolutely and exclusively. * * * The consideration flowed from her alone, and, her husband being insolvent, the burden of maintaining the family was cast upon her. The language of the habendum of the deed already quoted merely indicates the motive for the conveyance to her, which was to provide a home and a means of support for herself and children, free from the control of her husband, and secure from the claims of his creditors."

The following cases are in point: Higgins v. Round Bottom Coal Co., 63 W. Va. 218, 59 S. E. 1064; Morgan v. Morgan, 60 W. Va. 327, 55 S. E. 389, 9 Ann. Cas. 943; Culpeper National Bank v. Wrenn, 115 Va. 55, 78 S. E. 620; Uhl v. Railroad Co., 51 W. Va. 106, 41 S. E. 340; Williams v. South Penn Oil Co., 52 W. Va. 181, 43 S. E. 214, 60 L. R. A. 795; Weekley v. Weekley, 75 W. Va. 281, 83 S. E. 1005.

To hold that only a life estate was intended to be granted would be to ignore the plain provisions of the deed and the facts and circumstances surrounding its execution; in other words, to do this, we would

be compelled to ignore the plain rules of construction applying to suits like the one at bar.

We have read and carefully considered the cases relied upon by appellants, but are of opinion that they do not apply to the suit at bar. Therefore we are impelled to the conclusion that the rulings of the court below are highly proper, and that the decree should be

Affirmed.

WOODS, Circuit Judge (dissenting). United Thacker Coal Company claims the minerals in the land in dispute under successive conveyances from John B. Maynard, deceased. The plaintiffs, alleging that John B. Maynard had only a life estate, with remainder at his death to them as the heirs of his body, ask that the claim of the defendant be declared a cloud upon their title. The issue depends upon the meaning of a conveyance from Richard Maynard to John B. Maynard. The District Court and a majority of this court hold, on a motion to dismiss the bill, that upon payment by him of the purchase money mentioned in the deed John B. Maynard took a fee simple absolute, and that therefore the defendant has good title to the minerals. I cannot resist the conclusion that under the deed he took only a life estate, with remainder to the heirs of his body, and that the plaintiffs, heirs of his body, are entitled to the relief of removal of defendant's claim as a cloud on their title. Omitting the description of the land the deed was as follows:

"This deed made this the 30th day of September 1870 between Richard Maynor and Charlotty Maynor his wife of the first part and John B. Maynor of the second part both of the county of Logan and state of West Virginia witnesseth that the parties of the first part hath this day bargained and sold and by these presents doth grant bargain and sell unto the party of the second for and in consideration of the sum of fifty dollars to be paid to Parlee Stepp wife of Aaron Stepp by the first day of June 1871 and twenty-five dollars to be paid by the first day of June 1871 to Sarah Ann Stepp wife of Hiram Stepp all the following named lands to wit * * * To have and to hold the same during his natural life and then to descend to the heirs of his body but the party of the first part grants to the party of the second part the right to sell the foregoing lands to either of his brothers or sisters the parties of the first part hereby reserves a lien upon the lands for purchase money stipulated. The said Richard Maynor & wife Charlotta Maynor hereby grants and relinquishes to the said John B. Maynor all their right title and interest in the foregoing named lands to have and to hold the same forever upon the fulfillment of the contract & payment of the sums stipulated."

This was one of five deeds similar in language by which Richard Maynard divided a large body of land among his sons, providing that they should pay as consideration the sums mentioned therein to their sisters. Virginia and West Virginia abolished the rule in Shelley's Case by this statute:

"Where any estate, real or personal, is given by deed or will to any person for his life, and after his death to his heirs, or to the heirs of his body, the conveyance shall be construed to vest an estate for life only in such person, and a remainder in fee simple in his heirs or the heirs of his body." Code Va. 1860, c. 116; Code W. Va. § 3749.

As was conceded at the argument, if we leave out of view the last sentence, the deed clearly meant: (1) That John B. Maynard should

have a life estate only; (2) that at his death the heirs of his body should have the remainder in fee simple; (3) that John B. could convey the entire fee in the land to any of his brothers or sisters, but to them only; (4) that the life estate of John B. and the remainder in the heirs of his body, and the title in any brother or sister to whom John B. might convey, should be subject to the lien for the purchase money in favor of the grantor for the benefit of his daughters; (5) that the remainder to the heirs of the body of John B. could be defeated only by his conveyance to brothers or sisters, or by sale under the lien for the purchase money; (6) that upon payment of the lien by John B. or the remaindermen the interest of John B. would still be only a life estate, coupled with the right to convey to his brothers or sisters the fee. Thus the life estate of John B. and the interest of the heirs of his body was explicitly fixed by language too plain for doubt, without the least implication of an intention that the remaindermen should take only in case John B. should fail to pay the purchase money. As an incident of this interest of the remaindermen, they as well as John B. had the right to pay the purchase money and discharge the lien. But obviously John B. could not defeat the interest of the remaindermen by paying the purchase money, any more than they could defeat his life estate by paying it. The only effect of the payment of either would have been the right of contribution.

It is said, however, that this carefully and clearly expressed scheme of the grantor, and the interests and rights so clearly and carefully conferred on the remaindermen, the grantor immediately turned upon and destroyed by the last sentence of the deed—that by this last sentence he cut out the remainder he had just put in. The contention is that the express grant to John B. of a life estate was enlarged to a fee simple, and the express grant of the remainder to the heirs of his body defeated, because in the closing sentence of the deed the grantors say they—

"grants and relinquishes to the said John B. Maynor all their right title and interest in the foregoing lands to have and to hold the same forever upon the fulfillment of the contract and payment of the sum stipulated."

There is the strongest presumption against the intention of the grantor to destroy the remainder so explicitly created. The grantor gave a life estate to John B., subject to the payment of the purchase money; he could not have intended in the next sentence of the same instrument to give him a fee simple, subject to the payment of the purchase money. The only natural construction is that the grantor in the preceding clause of the deed, relating to the estate and interest to be conferred, fixed the quality and quantity of the estate that should pass to John B. and the heirs of his body, and the lien upon it. Having said plainly all that could be said on that subject to make his intention perefectly clear, his mind leaves it and adverts to the complete relinquishment of his own interest on payment of the purchase money, and he then leaves out repetition of the limitation of John B.'s interest to his own life.

This conclusion is strongly supported by the deeds of the same date of Richard Maynard to four other sons, filed with the petition for

rehearing in the District Court. The deeds show on their face an intention to treat all the sons alike, and to convey a life estate to each, with remainder to the heirs of his body. The language is slightly varied, doubtless because the draftsman, after writing the first deed, relied on his memory for the language. For example, this language is used in the deed to his son, Allen Maynard:

"To have and to hold the same his natural life then to descend to the heirs of his body. But the parties of the first part hereby grant unto the parties of the second part the privilege of selling the same to any of his brothers or sisters & making a good and lawful title to the lands named in the foregoing the party of the first part reserves a vendors lien on the said lands for the payment of the amount named above and for the support stipulated the parties of the first part hereby relinquishes to the parties of the second part all their right title and interest in the said lands to have and to hold the same forever upon the condition above named and stipulated."

It would hardly be contended for a moment that "the condition above named and stipulated" referred only to the payment of the purchase money, and that under this deed Allen could have defeated the interest of the remaindermen by paying off the lien. Any difference in the construction of the several deeds must rest on shadowy verbal distinctions applied to deeds drawn by a plain untutored man.

Reducing the matter to its simplest form, in the first clause and the last the grantor used general words of grant to each son, without pausing to express the limitation for his life and then to the heirs of his body, for the reason that in the intervening clauses he had so clearly set out the limitation of the son's interest to his life and to the heirs of his body after his death, subject to the lien for the purchase money, that it could not be misunderstood.

This conclusion is entirely consistent with the canons of construction and the principles of law. The common-sense rule that in deeds as well as wills the intention of the parties, ascertained by consideration of the whole instrument and the surroundings, must be given effect, is nowhere more distinctly stated and consistently maintained than in the Supreme Court of West Virginia. In Uhl v. Ohio R. R. Co., 51 W. Va. 106, 41 S. E. 340, and Weekley v. Weekley, 75 W. Va. 281, 83 S. E. 1005, the rule was stated and applied to deeds very similar in expression to that before us. I am unable to find anything in the cases cited by defendant's counsel supporting the contention that John B. Maynard took more than a life estate. The rules relied on in the opinion of the District Court and the majority of this court, that unless a contrary intention appears a deed should be construed to convey the entire estate, and that a deed is to be construed most strongly against the grantor, have no application, for there is no dispute that under any construction the grantor parted with his entire estate, subject to the lien for the purchase money.

BALTIMORE DRY DOCKS & SHIP BUILDING CO. v. NEW YORK & P. R. S. S. CO. et al.

THE ISABELA.

(Circuit Court of Appeals, Fourth Circuit. November 6, 1919.)

No. 1748.

WHARVES ⇐16—RESERVATION OF FREE USE FOR "VESSELS BELONGING TO UNITED STATES."

Under a conveyance from the United States of a site for a dry dock, without other consideration than "the right to the use forever of said dry dock at any time for the prompt examination and repair of vessels belonging to the United States free from charge for docking," a privately owned vessel, requisitioned by the government for war purposes, taken over under a "bare boat" charter, and manned and operated by the Navy Department as an army transport, *held*, while in such use, to "belong" to the United States, and entitled to free docking.

Appeal from the District Court of the United States for the District of Maryland, at Baltimore; John C. Rose, Judge.

Suit in admiralty by the Baltimore Dry Docks & Shipbuilding Company against the Steamship Isabela, the New York & Porto Rico Steamship Company, claimant, and the United States, intervener. From the decree (258 Fed. 934), libelant appeals. Affirmed.

Certiorari denied 251 U. S. —, 40 Sup. Ct. 178, 64 L. Ed. —.

This was a suit in admiralty, instituted in the District Court of the United States for the District of Maryland for libel of the steamship Isabela. The appellant, libelant below, is a corporation owning a dry docking and shipbuilding plant in the city of Baltimore, Md., consisting, among other property and structures, of two docks known as "Simpson Dry Docks," one of which is situated on property conveyed by the United States through the Secretary of War, under authority of an act of Congress approved June 19, 1878 (20 Stat. 167), entitled "An act granting a site for a dry dock in the city of Baltimore upon certain conditions." The other, which is the larger dock, is situated on property acquired from private owners. The conditions under which the ground for the first-mentioned dry dock was conveyed to the predecessor in title of appellant are set out in a deed from the Secretary of War, dated March 26, 1879, and are as follows:

"The consideration of this conveyance and the condition upon which same is being made being that the said Baltimore Dry Dock Company of Baltimore City is required to construct upon the land hereby conveyed within two years from the date of this conveyance an efficient Simpson improved dry dock 450 feet in length, and to accord to the United States the right to the use forever of the said dry dock at any time for the prompt examination, and repair of vessels belonging to the United States, free from charge for docking * * *."

This dock will be called for convenience the Ft. McHenry dock, and the larger dock of the appellant company, referred to, will be spoken of as the cross-street dock. Among other things, it appears: That the steamship Isabela, a vessel of 3,063 tons gross register, pursuant to the authority and directions embodied in the executive order of July 11, 1917, was requisitioned by the President, acting through the United States Shipping Board, for national uses and purposes. That after said requisition, the New York & Porto Rico Steamship Company, her chartered owners, executed the government's standard form of requisition charter. Said steamship was first taken over on the time basis, the terms thereof being contained under the form entitled

"time form" on pages 2, 3, and 4 of said requisition charter, but that on April 9, 1918, pursuant to the terms of the requisition, the steamship was taken over on the bare boat basis, the terms of which are defined under the title "bare boat" on pages 5 and 6 of said requisition charter. That on February 4, 1918, the said steamship was assigned for service of the War Department, and thereafter used as an army transport, and that on and after April 9, 1918, until the time of her redelivery to the chartered owners, she was employed in such service, and during said period, was manned by the United States through its Navy Department, with the officers and enlisted personnel of the navy, and said steamship, at the time of the rendering of the services mentioned in the libel, was in such service and so manned.

In the month of January, 1919, it appears that the appellant company received a letter from the Coast Inspector of the Naval Overseas Transportation Service, in which that officer states that he had deducted from bills rendered by the appellant company to the Naval Overseas Transportation Service for dry dock on three steamers, namely, the Soestdijk, the Norlina, and the Corozal, amounting to $3,960.85, on the ground that the dry dock located on the appellant's lower plant, which is the Ft. McHenry dock, could at any time be used for the prompt examination and repair of vessels belonging to the United States, free from charge for docking, and on the theory that the said vessels were "vessels belonging to the United States."

The appellant company at once protested against the deduction on the ground that these vessels did not belong to the United States, and the question was thereupon referred by the Naval Overseas Transportation Service to the Navy Department, and an opinion of the Solicitor of the Navy Department, dated January 21, 1919, was received in reply, the material parts of which opinion are: "That where vessels are under charter upon a bare boat basis for the sole use and benefit of the United States, either by the Shipping Board or any other department of the government, the equitable title therein is in the United States, the government having a special limited ownership in the vessels, and therefore such chartered vessels have the same free use of the lower dock of this company as other vessels of the United States."

In pursuance of this opinion, the said vessels being vessels under a bare boat charter to the Shipping Board, the Cost Inspector of the Navy refused to reinstate the charges. The earlier part of the Solicitor's opinion was concerned with the contention that vessels owned by the United States Shipping Board Emergency Fleet Corporation (although the learned Solicitor fails to distinguish between the Shipping Board and the Fleet Corporation, but evidently means the latter) could not be said to belong to the United States, and he proves to his own satisfaction that, as the United States owns 100 per cent. stock of said corporation, the United States has the sole use and benefit of said vessels, and they are, equitably at least, and under the provisions of the act of 1878, "vessels belonging to the United States." The appellant company in its letter of February 5, 1919, did not insist at the time on any exception it might have taken to the opinion on this point, but distinctly raised the further point that vessels under charter to the government, either through the Shipping Board or any other governmental agency, are not "vessels belonging to the United States," and are not entitled to free dockage.

The appellant company then requested that it be informed by the district supervisor of the Naval Overseas Transportation Service whenever an order was received to dry-dock a vessel, whether the vessel was a chartered vessel or one owned by the government. The district supervisor, Capt. Abele, accordingly on February 5, 1919, wrote to the appellant as follows: "Subject: Drydocking U. S. S. Isabela. I have to inform you that the Isabela is a government owned vessel under the ruling of the Solicitor of the Navy Department, dated 21st January, 1919. Title of ownership of this vessel rests with the Porto Rican Steamship Company" (sic?).

On receipt of this information the appellant on February 6, 1919, wrote a lengthy communication to Capt. Abele, in which they say, among other things: "We hereby refuse the free use of our dock for this privately owned

vessel and other privately owned vessels. We wish to emphasize that we are now willing, as we have always been, to carry out fully the use of the dock for vessels belonging to the United States. If the Navy Department desires this vessel docked, and orders us to do so, we shall, under protest, furnish the necessary facilities to dock the vessel, and for this service we claim the usual docking charges. If these charges are not paid by the Navy Department, we shall hold the ship and the owners of the ship responsible, and shall notify the owners to this effect." The letter contains, in addition, a measured protest against the threat on the part of he Navy Department therein referred to, to "commandeer" the dry dock, and undertook to suggest methods by which the controversy be determined promptly by the United States courts.

On February 7, 1919, Capt. Abele replied as follows: "The Baltimore Dry Docks & Shipbuilding Company, Baltimore, Maryland—Gentlemen: Subject: Dry-docking of U. S. S. Isabela. Reference: Your letter February 6th, relative docking of U. S. S. Isabela. It is hereby directed that the U. S. S. Isabela be docked in the lower dry dock of your company. This is to be considered an order for dry-docking in accordance with reference. Yours very truly, C. A. Abele, Captain, U. S. N."

Prior to receipt of the above order from Capt. Abele, the appellant company had written on February 6, 1919, to the New York & Porto Rico Steamship Company, New York City, inclosing a copy of their letter of the same date to Capt. Abele heretofore quoted. The day following receipt of order, to wit, February 8, 1919, they admitted the vessel to the dry dock, where she remained five days, incurring the dry-docking charge of 12 cents a ton for the first day and 10 cents each for the remaining four days, amounting altogether to $1,592.76. The bill for these charges was disapproved by the Cost Inspector of the United States Navy, as shown in his letter of February 13, 1919. The vessel was placed in dry dock by the government for the purpose of having her bottom scraped and being otherwise put in order for redelivery to her owner, the New York & Porto Rico Steamship Company, which redelivery took place on February 14, 1919, and the same day, she being then in the possession of private parties, the vessel was attached by the United States marshal on the order of the libelant, the appellant in this case.

The court below entered a decree dismissing the libel, from which decree libelant appealed to this court.

George Weems Williams, of Baltimore, Md. (Marbury, Gosnell & Williams, of Baltimore, Md., on the brief), for appellant.

George Forbes, of Baltimore, Md. (Ray Rood Allen, Fred A. Whitney, and Burlingham, Veeder, Masten & Fearey, all of New York City, on the brief), for appellee New York & Porto Rico S. S. Co.

Samuel K. Dennis, U. S. Atty., of Baltimore, Md., for the United States.

Before PRITCHARD, KNAPP, and WOODS, Circuit Judges.

PRITCHARD, Circuit Judge (after stating the facts as above). The questions involved in this controversy are within a narrow compass; the main question being the proper interpretation to be given to the words "belonging to the United States." In order to correctly interpret the meaning of these words in the connection in which they are used, it becomes important to consider the circumstances which induced the government to make the grant it did. It must be admitted that, when this land was granted by the government for the purpose of dry-docking, the government's only compensation therefor consisted in the use of the dry dock, free of charge; and it is but fair to assume that it was the purpose of the representatives of the government to at

least secure the free use of these dry docks for all ships being operated under its exclusive control.

As we have already stated, the Isabela was requisitioned by the government, assigned for the service of the War Department, and used as an army transport until her redelivery to her chartered owners. Its movements were controlled by the United States, through its Navy Department, under the supervision of its officers. Thus it will be seen that for the period in question, the Isabela was as much under the control and subject to the orders of the government as if it were actually owned by the government. These circumstances are material, and should be considered in ascertaining the correct interpretation to be given to the words "belonging to the United States."

The words "owned by" mean an absolute and unqualified title. The use of the words "belonging to" does not import that the whole title to the property or the thing is meant, because it frequently occurs in ordinary transactions that things may "belong to" one who has less than an unqualified and absolute title. Numerous instances in the ordinary transactions of life may be cited where this is true; for instance, where collateral is owned by the debtor and belongs to the creditor until the debt is paid. Also, premises occupied by the mortgagor until default; there the legal title is in the mortgagee, but the land "belongs to" the debtor until default. Bouvier's Law Dictionary contains the following definition of the word "belongs":

"To appertain to; to be the property of. Property belonging to a person has two general meanings: (1) Ownership; (2) the absolute right of user. A road may be said with perfect propriety to belong to a man who has the right to use it as of right, although the soil does not belong to him."

In the case of People v. Chicago Theological Seminary, 174 Ill. at page 182, 51 N. E. at page 199, the court said:

"We think this position is based upon a too limited meaning of the words 'belonging or appertaining' as here used. Of course, if the language of section five had been that the property, of whatever kind or description, owned by the Seminary shall be forever free from all taxation, etc., or if, as counsel seem to assume, the words 'belonging or appertaining' here necessarily meant ownership of the property, then there would be force in this argument of counsel. It is undoubtedly true that the word 'belonging' may mean ownership and very often does. But that is not its only meaning. * * *"

Counsel seem to have been unable to discover any admiralty cases in this country analogous to the one at bar. However, the courts of England have passed upon this point frequently. In the case of The Master, Wardens and Assistants of the Trinity Church v. Clark, 4 Maule & Selwyn's (1815–16) King's Bench Reports, 288, the court, speaking through Lord Ellenborough, said:

"Where defendant chartered his ship to the Commissioners of the transport service on behalf of the crown, to be employed as a transport, and the ship in the course of such employment made several voyages from Deptford to foreign ports and back, held that the terms of the charter party, coupled with the nature of the service, a temporary ownership passed to the crown, so that defendant during the time of such service, was not to be considered as owner within the charters granted to the Trinity House, which impose lighthouse duties, and for buoyage and the beaconage, on the masters and owners of ships."

After an elaborate discussion of the facts, the court, in concluding its judgments, said:

"The only question is, who is to be considered as owner of the vessel within the charters under which the plaintiffs claim, during the time she was in the service of the crown under this charter-party. We are of the opinion that from the terms of the contract, and from the nature of the service to be performed, the crown is to be so considered, and that a nonsuit must be entered."

The following English cases are also very much in point: The Sarpen, [1916] Probate Division, Law Reports, 306; The Carrie, [1917] L. R. Probate Division, 224; Admiralty Commissioners v. Page and others, [1918] 2 Law Reports, King's Bench Div. 299; The Hopper No. 66, decision of Bargrave Deane, J., [1907] P. 34, and of Court of Appeals, 524; The Matti, [1918] Law Reports, Probate Division, ——.

Therefore we are of the opinion that the court below was correct when it said:

"The word 'belonging' is not a technical one; its meaning depends to a large extent upon the circumstances under which it is used. In common speech and understanding, something may well 'belong' to one, although he has less than an absolute and unqualified ownership of it."

In view of what we have said, we do not deem it necessary to enter into a discussion of the other points involved, feeling, as we do, that the decree of the court below was proper, and should be affirmed.

Affirmed.

DORRANCE et al. v. BARBER & CO., Inc.

(Circuit Court of Appeals, Second Circuit. December 10, 1919.)

No. 65.

1. SHIPPING ⊜108—MEANING ATTACHED TO WORDS IN CONTRACT OF CARRIAGE AT TIME THEY WERE WRITTEN CONTROLLING; "MERCANTILE CONTRACT."
   A contract between a shipper and carrier for the carriage of a stated quantity of cotton on one of the carrier's ships *held* a "mercantile contract," to be construed in accordance with the meaning attached to the words at the time they were written.
2. SHIPPING ⊜108—WORDS "JANUARY SHIPMENT FROM GALVESTON" A WARRANTY.
   In a contract for carriage by respondent from New York on one of its ships of a quantity of cotton, "January shipment from Galveston," the words quoted *held* to be a warranty, and respondent *held* not required to accept cotton not shipped in January from Galveston.
3. CONTRACTS ⊜294—"SUBSTANTIAL PERFORMANCE."
   "Substantial performance" means not doing the exact thing promised, but doing something else that is just as good, or good enough for both obligor and obligee.

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

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

Suit by John M. Dorrance and others, trading as Dorrance & Co., against Barber & Co., Incorporated. Decree for respondent, and libelants appeal. Affirmed.

Respondent corporation owns and operates a line of freight steamers. A contract was made by it with libelant, expressed in a broker's note, of which the following is the material portion:

"Engaged for account of Messrs. Dorrance & Co. (shipper).

"Destination—Vladivostock; Steamer—Barber Line. With Barber & Co., Agents. 1,000 bales compressed cotton at $2.25 net per 100 lbs. freight prepaid. January shipment from Galveston."

This agreement was made January 5, 1916, and it is admitted that the last phrase quoted from the broker's note means that the cotton to be carried by the Barber Line was to be shipped from Galveston, Tex., in the month of January.

The reason for the clause as proved is that it enabled the carrier to book freight coming from Galveston with a reasonable expectation of its delivery in New York in not over two weeks from shipment in Galveston, so that this consignment could reasonably be expected to get out of New York during the first half of February.

It is further admitted that respondent was not bound to carry by any particular vessel. On February 9th it did "declare" the "Bolton Castle"; i. e., notified libelants to deliver their cotton. Accordingly on February 12th Dorrance sent a lighter with approximately the contract quantity of cotton on board to Barber's pier, and the lighterman delivered to respondent's agent the usual papers evidencing title and right to ship, but Barber & Co. never physically received or receipted for the cotton; that, according to custom as proved, would have occurred when the goods were either on board or on respondent's pier. Meanwhile the Bolton Castle was loading other cargo, of a kind that would naturally be stowed below the cotton, and the cotton-laden lighter lay near by. On February 16th a fire broke out which greatly injured respondent's pier and the steamship, but completely destroyed the cotton on the lighter.

The Bolton Castle required repairs, which prevented her use for about three months; at the expiration of that time she started for Vladivostock. On or about February 20th Dorrance tendered to Barber other cotton in attempted fulfillment of the contract stated, but it was not "January shipment from Galveston"; cotton so shipped being impossible to obtain. Thereupon Barber refused to receive the same, on the sole ground that it had not been shipped as per contract. Dorrance, who had sold that quantity of cotton to arrive in Siberia, thereupon shipped at a much higher rate by other carriers, and brought this suit to recover as damages for breach of contract the excess paid. The District Court dismissed the libel.

Harrington, Bigham & Englar, of New York City (Oscar R. Houston, of New York City, and Geo. S. Brengle, of San Juan, P. R., of counsel), for appellants.

Hunt, Hill & Betts, of New York City (Geo. Whitefield Betts, Jr., and Robert McLeod Jackson, both of New York City, of counsel), for appellee.

Before WARD, ROGERS and HOUGH, Circuit Judges.

HOUGH, Circuit Judge (after stating the facts as above). [1] The agreement herein involved is accurately described as a contract for freight, if not strictly a contract of affreightment, and for present purposes there is no difference between the phrases. The contest before us is shortly, but sufficiently, stated by inquiring whether such a contract is a "mercantile contract," as those words have been used in a long line of decisions of controlling authority.

Charter parties are mercantile contracts (Lowber v. Bangs, 2 Wall. 728, 17 L. Ed. 768), and so are contracts for the sale of chattels (Norrington v. Wright, 115 U. S. 188, 6 Sup. Ct. 12, 29 L. Ed. 366). If Dorrance, instead of hiring room in a large ship for 1,000 bales of cotton, had chartered a small one to carry the same, the transaction would have been absolutely governed by the cases cited. We perceive no difference in principle between hiring a whole ship for the carriage of freight, and engaging room for a little freight in the same ship; both acts are the natural fruit of the same activities, normally pursued by men of the same environment and education, for the same purposes. Every reason assigned by Swayne, J., in the Lowber Case for putting charters in the class of mercantile contracts, and construing such contracts in the manner there authoritatively done, applies with equal force here, and we unhesitatingly hold this a mercantile contract.

Such contracts are to be construed according to the intention of the parties, but that intention, when it comes to labeling or defining any particular stipulation as a warranty, or a condition precedent, or a representation, or an independent covenant, must be discovered from the instrument itself. This rule may at times involve plain men using hard words in some difficulty, but it insures that plain men using plain words will have their language enforced according to the meaning attaching to the words at the time they were written. The construction is to be irrespective of after-occurring events (Davison v. Von Lingen, 113 U. S. 40, 5 Sup. Ct. 346, 28 L. Ed. 885), and if the parties by plain words make that fundamentally important, which courts and juries subsequently deem immaterial and would like to disregard, it is not for them to substitute the wisdom of their hindsight for what they may regard as the folly of the parties (National Surety Co. v. Long, 125 Fed. 887, 60 C. C. A. 623, and cases cited).

[2] It is not denied nor doubted that, when these parties wrote "January shipment from Galveston," they meant that what Barber was to carry was cotton that had started on its journey in January. It is shown by evidence that the reason for this stipulation was to enable Barber to rely on arrivals in New York. We think the fact immaterial, if the phrase is both comprehensible without explanatory evidence, and to be regarded as a condition precedent or a warranty.

That it is such condition or warranty we feel assured, because it may be regarded either as a stipulation in respect of time which is of the essence in contracts mercantile (Connell, etc., Co. v. Diederichsen & Co., 213 Fed. 737, 130 C. C. A. 251, and cases cited), or as a descriptive statement intended to be a substantive part of the contract, which is a warranty (Behn v. Burness, 3 B. & S. 751). The truth of this last interpretation is tested by asking whether, if no fire had occurred (the normal expectation), Dorrance would have dared to tender to Barber cotton that did not leave Galveston in January? That he would not is, we think, admitted, and is obvious at all events.

Argument for appellant, as to construction of contract, really disregards the rule of Davison v. Von Lingen, supra, and relies on after-occurring accidents to control construction. The Bolton Castle did not and could not sail as contemplated, and long before her delayed de-

parture other cotton was tendered; and, to quote from a witness, "cotton is cotton," and this new tender would weigh as much and pay as much as if it had come from Galveston in January, instead of from some other equally celebrated cotton center. The judgment, and especially the words of Lord Blackburn in Bowes v. Shand, 2 App. Cas. 455, disposes of a similar argument, if rice be substituted for cotton.

The sum of the matter is that libelant warranted to respondent cotton of a particular description, that the description is in terms of time is accidental, and when (though without fault on his part) Dorrance failed to deliver the warranted article, he failed to fulfill the contract he had made.

The doctrines of substantial performance and waiver have no application to this case. Waiver is always a voluntary act or the necessary legal result thereof, and is mainly a question of intention. Frankfurt-Barnett Co. v. Prym, Co., 237 Fed. 21, 150 C. C. A. 223, L. R. A. 1918A, 602, and cases cited. Nothing but the fire is suggested as evidencing a waiver by Barber, and that certainly was neither intentional nor voluntary.

[3] Substantial performance, as that phrase is correctly used, means not doing the exact thing promised, but doing something else that is just as good, or good enough for both obligor and obligee; and courts and juries say what is good enough or just as good. The object (or one important purpose) of warranties and precedent conditions is to prevent (e. g.) our doing any such thing in this case.

Decree affirmed, with costs.

AMERICAN MERCANTILE CORPORATION v. SPIELBERG.

(Circuit Court of Appeals, Second Circuit. December 2, 1919.)

No. 11.

1. BROKERS ⟹60—WHERE DEAL FAILED WITHOUT FAULT OF PRINCIPAL THERE IS NO RIGHT TO COMMISSIONS UNDER CONTRACT CALLING FOR PAYMENT FROM FINAL PAYMENT BY PURCHASER.

   Under a contract by defendant to pay plaintiff as broker a commission on the sale of a ship, if his offer was accepted "and the deal consummated, * * * when the full purchase price is paid to me, from the final payment," defendant *held* not liable for commission where, although a contract of sale was entered into, through no fault of defendant it could not be carried out, and was afterward canceled by the parties.

2. APPEAL AND ERROR ⟹997(3)—FINDINGS ON MOTIONS BY BOTH PARTIES FOR DIRECTED VERDICT CONCLUSIVE.

   In an action at law, where at the end of the trial both parties move for a directed verdict, both are concluded by the findings of the court on all issues of fact.

Ward, Circuit Judge, dissenting.

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

Action by the American Mercantile Corporation against Harold Spielberg. Judgment for defendant, and plaintiff brings error. Affirmed.

The American Mercantile Corporation is a corporation organized under the laws of the state of Delaware. The defendant, Spielberg, is a citizen of the state of New York, residing in the Southern district of that state.

The defendant was the owner of an undivided half interest in the American steamship Fordonian, subject to said vessel being security to the Equitable Trust Company for a loan amounting to approximately $310,000; the owner of the other half interest being A. W. Duckett & Co., Incorporated, which company was in the hands of a receiver appointed by the United States District Court in the Southern District of New York. The defendant's half interest in the Fordonian had been secured by obtaining the loan above mentioned from the Equitable Trust Company, which was made upon the note of A. W. Duckett & Co., Incorporated, indorsed personally by A. W. Duckett and by defendant, and secured by a bill of sale of the vessel to Arthur A. Miller, nominee of the Equitable Trust Company. The loan became due December 27, 1917, at which time notice of its nonpayment was given to defendant by the Equitable Trust Company; and on January 7th notice was sent to defendant that if the note was not paid on or before January 10, 1918, legal proceedings would be brought against him immediately for its collection. These facts become important in explaining why it was that the contract of sale, subsequently referred to, could not be consummated.

The complaint alleges that on January 8, 1918, the defendant, who represented himself to have in charge for sale as owner or otherwise the steamship Fordonian, requested plaintiff, as broker, to produce a purchaser for said property for the sum of $540,000 and the defendant agreed to pay to the plaintiff for services as a broker in said transaction 5 per cent. of the said purchase price or the sum of $27,000.

It appears that on January 8, 1918, the defendant wrote to the plaintiff as follows:

"I am informed that you have some people who are interested, or may become interested, in the purchase of the steamship Fordonian, in which I have an undivided half interest, and the sale of the entire boat I am in a position to control. I am willing to sell that boat for the sum of five hundred and forty thousand dollars ($540,000), in cash, free and clear from all liens, mortgages, or incumbrances of any kind or description whatsoever.

"Said boat is to be delivered subject to a bare boat form charter between the present owners of the boat and the United States government. The boat is 3,800 tons dead weight, paying at the rate of $15,770 a month. I will deliver that boat, rated A-1, British corporation, will deliver a certificate of seaworthiness, and in the shape and condition, as required by the United States government, bare boat form charter.

"If you accept my offer, I will ask you to deposit 10 per cent. at the Metropolitan Trust Company of the City of New York, and will undertake to deliver title within one week from to-day. This option is good until 5 p. m. January 8, 1918."

On the same day the plaintiff communicated defendant's offer to the Metropolitan Trust Company. The latter company on the same day addressed a letter to the defendant, in which it said:

"We hereby beg to accept your offer, subject to the verification by an inspection of the representations regarding the boat made in your offer, and your additional representations made over the telephone to our representative this afternoon, viz. the vessel's guaranteed fuel capacity to be not less than 203 tons of fuel oil, consumption of fuel not to exceed 4 tons of fuel oil per 24 hours based on a speed of 9 to 10 knots in fair weather; also, subject to the compliance on the part of the present owners of all terms and conditions of the bare boat form charter, which we understand you are now about to enter into for this vessel with the United States government or their agents; and it is understood that said vessel is to be delivered to us, subject to this charter,

fully complied with, by the present owners, and subject to the approval of the United States to this sale.

"We are informed by you that the vessel is now lying at Bordeaux, France, where she is available for our inspection. If this is correct, we will cable at once and arrange for immediate inspection at that port, to be completed and confirmed by cable advices to us within six days from this date. If said inspection confirms the representations you have made to us as outlined in your offer and hereinabove, you are to deliver title of the boat to us within 24 hours thereafter, upon payment to you or your order of the purchase price, $540,000.

"The 10 per cent. deposit referred to in your offer, to wit, $54,000, has been made and is now held by us in escrow, subject to the terms of this agreement, to be paid to you upon the completion of the purchase under the terms herein above stated."

On the same day defendant wrote to the plaintiff a letter which read as follows:

"Gentlemen: If my offer given this day to your corporation, is accepted by 5 o'clock this afternoon, and the deal consummated, I agree to pay you 5 per cent. commission, the amount to be paid over to you when the full amount of the purchase price is paid over to me, from the final payment."

It is alleged that the plaintiff procured a responsible purchaser, the Metropolitan Trust Company of the City of New York, which was acting for the Cosmopolitan Shipping Company, and that said purchaser was ready and willing and anxious to purchase the boat in accordance with terms agreed upon, yet the defendant failed to carry out the conditions he had agreed to perform, and voluntarily released by an instrument in writing the Metropolitan Trust Company from its obligation to purchase. It is also alleged that the release of the Metropolitan Trust Company from its agreement was due solely to the inability or failure of defendant to perform the agreements upon his part to be performed, and not to any fault or defect upon the part of the purchaser so obtained by the plaintiff. The complaint stated that the plaintiff was entitled by reason of the facts aforesaid to recover from defendant his commission in the sum of $25,000, and he demanded judgment in that amount, with interest thereon from January 18, 1918.

The defendant represented and agreed that the vessel was at Bordeaux, France, and was there available for inspection, and that he would deliver the vessel, free and clear of all liens, subject to a bare boat form charter to the United States government, and in the shape and conditions as required by the United States government bare boat form charter, and would deliver a certificate of seaworthiness. After this agreement was made it was ascertained that the boat was not at Bordeaux, and during the six-day period above mentioned the vessel was not available for inspection. Thereafter the Metropolitan Trust Company was ready to accept the boat and carry out the conditions of the contract, waiving the inspection, upon satisfactory assurance that the boat was in the shape and condition as required by the United States government bare boat form charter, and upon delivery of certificate of seaworthiness; but it is alleged that defendant refused to carry out the terms and conditions he had agreed to perform.

The purchaser wanted the vessel, and negotiations were continued between defendant and the proposed purchaser, until late in the afternoon of January 17th, when, upon the refusal of defendant to extend the time to permit inspection or to accept any substitute therefor, defendant and the purchaser canceled the agreement of sale and purchase without the plaintiff's consent. The circumstance which prevented the extension of time asked for was that the note given to the Equitable Trust Company, already referred to, and for which that company held a bill of sale of the vessel, was past due, and notice had been given by that company that, if the note was not paid by January 10, 1918, legal proceedings would be taken immediately for its collection. The defendant could not give any extension of time to the would-be purchaser, inasmuch as the Equitable Trust Company refused to give defendant any extension of time in connection with the payment to it of his note, although the defendant and the would-be purchaser united in applying for it, so that an inspection of the boat might be had, which inspection had been made impossi-

ble, according to the terms of the original agreement, by the fact that the boat was not at Bordeaux, as all the parties concerned had believed at the time the original agreement was made.

William Dewey Loucks, of New York City (Dorman T. Connet, of New York City, on the brief), for plaintiff in error.

Hunt, Hill & Betts, of New York City (George C. Sprague, of New York City, of counsel), for defendant in error.

Before WARD, ROGERS, and HOUGH, Circuit Judges.

ROGERS, Circuit Judge (after stating the facts as above). [1] The general rule is well established that, if by the contract of employment a broker is simply to find a customer who is able, ready, and willing to enter into a transaction with the principal on the terms prescribed by him, the broker is entitled to compensation on performing that service, whether or not the principal completes the transaction. Kock v. Emmerling, 22 How. 69, 16 L. Ed. 292; Handley v. Shaffer, 177 Ala. 636, 651, 59 South. 286; Blakeslee v. Peabody, 180 Mich. 408, 147 N. W. 570; Beougher v. Clark, 81 Kan. 250, 106 Pac. 39, 27 L. R. A. (N. S.) 198; 9 C. J. 591. That proposition seems to be recognized by all the courts. It certainly is not questioned in this court. In many cases, however, the right of a broker to his commission depends on the final consummation of the transaction which he was employed to negotiate.

This court had the matter under consideration in Hammond v. Crawford, 66 Fed. 425, 14 C. C. A. 109. A paper signed by the broker stated that his understanding was that, in case he effected a sale or deal of certain mines, he was to have a certain compensation. The broker's intervention did not result either in a completed sale or in an enforceable agreement for sale. This court held that the broker was not entitled to his commission.

In Holton v. Job Iron & Steel Co., 204 Fed. 947, 123 C. C. A. 269, the defendant agreed to pay to plaintiff a specified commission "if this deal is put through." The Circuit Court of Appeals in the Sixth Circuit held that the term "put through" meant to carry or conduct to a successful termination, and that, the plaintiff's engagement being, not merely to obtain a party able and willing to enter into a given contract, but to bring the transaction about, and not having done so, he was not entitled to recover.

In Hale v. Kumler, 85 Fed. 161, 29 C. C. A. 67, the same court denied in a like case the right of the broker to his commissions. In that case the court held that where a broker was to become entitled to commissions only upon bringing about a completed agreement between his principal and a third party, he could not recover upon proof of a preliminary and tentative agreement upon certain elements of the proposed agreement which were afterwards abandoned by the principal and without fault. "The condition," said Judge Lurton, "upon which Kumler is entitled to recover compensation has not been fulfilled, and, as he has not been prevented from its performance by the wrongful conduct of Hale, the latter is entitled to rely upon the nonperformance of the condition."

The instant case is not distinguishable in principle from the cases just above cited. In the present case the agreement between plaintiff and defendant reads as follows:

"If my offer given this date to your corporation is accepted by 5 o'clock this afternoon, and the deal consummated, I agree to pay you 5 per cent. commission, the amount to be paid over to you when the full amount of the purchase price is paid over to me, from the final payment."

There can be no doubt as to the meaning of this agreement. It is clear and unequivocal. "Consummate," according to the Century Dictionary, means:

"To finish by completing what was intended; perfect; bring or carry to the utmost point or degree; carry or bring to completion; complete; achieve."

The agreement contemplated the actual sale of the vessel and the payment of the purchase money to the defendant as a condition precedent to the right of the plaintiff to any commissions; and as the broker's services did not effect either a completed sale or an enforceable agreement for sale, he is not entitled to the commission offered him in the letter of January 8th, already quoted.

If it appeared that consummation of the agreement was prevented by the wrongful conduct of the principal we should be obliged to hold that the broker was entitled to his commissions. Counsel for the plaintiff in his brief and argument in this court has laid great stress upon an agreement which the defendant made on January 16, 1918, with other parties for the sale of the vessel for $550,000 or $10,000 more than the price which defendant offered to sell the boat for in his letter of January 8, 1918. The agreement of January 16th mentions the agreement of January 8th, and states that the second agreement is only to become effective in case the first agreement is not carried out. We have given this second agreement full consideration in all of its aspects and have examined carefully the circumstances under which it was made, and we fully agree that no blame attaches to the defendant for entering into it. The situation as it existed at the time it was made, and which we do not need to go into at length, fully justified its making.

The defendant acted in entire good faith throughout the whole of the negotiations, and the testimony not only shows beyond doubt that this was the case, but it shows, also, that the officers of the Cosmopolitan Shipping Company believed that there was entire good faith. The testimony of the vice president of that company disposes of the matter, as the following excerpt shows:

"Q. Now, Mr. Munez, did Mr. Spielberg, at any time, throw any obstacle in your way of consummating the sale of this ship? A. Not as far as I could see; no.

"Q. Did he, so far as you know, do everything that he could to have the sale consummated? A. As far as I know he did; yes."

The attorney for the purchaser who prepared the letter of January 8th and gave advice throughout the negotiations, and who did not in any way represent the defendant, gave the following testimony:

"Q. And did he [the defendant], so far as you know, do everything in his power to bring about the consummation of the sale of this ship? A. That was my impression, sir."

[2] However, even if we did not agree with the findings of the court below on this question of the defendant's good faith, we should nevertheless be concluded by those findings. The plaintiff and defendant both moved for the direction of a verdict at the end of the trial, and so both parties are concluded by the findings on all issues of fact; this being neither an admiralty nor an equity suit. Beuttell v. Magone, 157 U. S. 154, 15 Sup. Ct. 566, 39 L. Ed. 654; United States v. Two Baskets, 205 Fed. 37, 123 C. C. A. 310.

Judgment affirmed.

WARD, Circuit Judge (dissenting). In this case the plaintiff, as broker, not only produced a purchaser ready, willing, and able to buy the steamer Fordonian for $540,000, but a contract by correspondence was entered into by him with the defendant January 8, 1918, expressing all the terms of sale, and the purchaser deposited $54,000 of the purchase money in escrow.

The defendant owned only one-half the steamer, but was under contract to purchase the other half. The second letter of January 8th, quoted in the opinion of the court, was accepted in writing by the defendant. One of its terms was the defendant's statement that the steamer was at Bordeaux, where the purchaser could have her inspected for the purpose of confirming the defendant's representations in respect to her within 6 days thereafter. Within 24 hours thereafter, if the inspection confirmed the representations, the defendant covenanted to deliver a bill of sale, and the purchaser covenanted to pay the purchase price. In a commercial contract like this, the representation that the steamer was at Bordeaux was a warranty. See our decision in Dorrance v. Barber, 262 Fed. 489, — C. C. A. —. In point of fact, the steamer was not at Bordeaux, and could not be inspected within six days, and because of this breach of warranty the purchaser could have withdrawn from the contract. Being, however, very anxious to carry it out, the purchaser offered to extend the time for inspection. The defendant could not do so, because he had, for want of funds, failed to complete his purchase of the other half of the steamer. It will thus be seen that, while the defendant had no contract which he could enforce, his purchaser had an enforceable contract for damages against him. The sale was not consummated because of the defendant's default. The fact that the parties to it subsequently exchanged mutual releases, and that the defendant was not guilty of bad faith, cannot affect in any way the plaintiff's right to its commission under its independent contract with the defendant. If the purchaser, instead of releasing, had sued the defendant for breach of contract, and had recovered judgment, the contract could not be said to have been consummated, and the defendant would not have received the final payment out of which the commission was to come; but I think no one would deny the plaintiff's right to his commission.

I think the court should have directed a verdict for the plaintiff.

INTERNATIONAL HARVESTER CO. OF AMERICA v. LANGERMANN.

(Circuit Court of Appeals, Eighth Circuit. December 24, 1919.)

No. 5198.

1. PRINCIPAL AND AGENT ⊂=104(2)—IMPLIED AUTHORITY OF AGENT TO WARRANT SAFETY OF MACHINE.
Where the manufacturer of a corn shredder had complied with all requirements of a state statute as to safety appliances and warning notices, as certified by a state inspector, who inspected the machine, a sales agent *held* without implied authority to give an additional oral warranty as to its safety of operation.

2. NEGLIGENCE ⊂=66(2)—CONTRIBUTORY NEGLIGENCE IN HANDLING MACHINE.
The act of plaintiff in reaching his hand into a space three inches wide between the feed rolls and snapping rolls of a corn shredder while in motion, where it was caught and was injured, *held* so obviously dangerous as to constitute contributory negligence.

3. TRIAL ⊂=174—MOTION FOR DIRECTED VERDICT SUFFICIENT.
Motion for direction of verdict "because it does not appear that Mr. C., the sales agent in this case, had any authority to make a warranty or contract or representation appearing in the evidence," *held* sufficient.

In Error to the District Court of the United States for the District of Minnesota; Wilbur F. Booth, Judge.

Action by Alphonse Langermann against the International Harvester Company of America. Judgment for plaintiff, and defendant brings error. Reversed.

Guy Chase, of St. Paul, Minn., and George W. Morgan, of Duluth, Minn. (Davis, Severance & Olds and P. J. McLaughlin, all of St. Paul, Minn., on the brief), for plaintiff in error.

Stan D. Donnelly, of St. Paul, Minn. (Stan J. Donnelly, of St. Paul, Minn., on the brief), for defendant in error.

Before HOOK, Circuit Judge, and AMIDON, District Judge.

AMIDON, District Judge. Langermann brought this action against the International Harvester Company to recover damages for personal injuries. The trial resulted in a verdict and judgment in his favor, and the Harvester Company brings error.

[1] The case arose out of the following facts: Plaintiff and his brother purchased a corn husker and shredder of the defendant. The sales agent through whom it was sold had some negotiations with them about a secondhand machine. He pointed out that that machine was made upon an old model; that it did not comply with the requirements of the statute of Minnesota, and urged plaintiff and his brother to buy a new machine. His representations as to the safety features of the new machine are an important point in the case. It is claimed that he stated orally substantially as follows:

"This new machine, we guarantee it perfectly safe, so that you cannot come to any harm or any injuries by this new machine, because the law stands back of it; you cannot come to any harm. You buy this new machine, and we will send up an expert with the machine to set it up, to help unload it and set it

up, and to put it together for you, show you how to operate it, show you all dangerous parts about the machine. Boys, that is worth a whole lot, to be safe and know you are working around a machine that is safe, that you need not come to any injuries or harm."

Plaintiff claims he bought the machine on these oral warranties, and that he was injured because it failed to measure up to them in its safety features.

[2] The accident happened in this way: The corn husker clogged. Plaintiff, while it was in motion, climbed up onto the feed apron, reached over into the space, about three inches wide, between the feed rolls and the snapping rolls. He first pulled out a handful of the clogged cornstalks. He then undertook to spread out the rest of them, so that the snapping rolls would engage them and pull them through the machine. His hand was drawn into the snapping rolls and seriously injured.

Plaintiff claims that the machine failed to measure up to the warranties in these particulars: First, the opening was not protected by any guard; second, that there was no warning against putting the hands into the machine at this point; third, there were numerous specific warnings of that kind at other points of danger on the machine. He had been running the shredder only a few hours when the accident happened. The expert who brought it out to his place explained it, but did not give specific warning in regard to the particular point or danger. Because plaintiff's engine was out of repair, they were unable to start up the shredder, and run it, and give the advice along with the dangers in the actual operating of the machine. Plaintiff, however, signed a written exoneration excusing the expert from giving him such instructions, because the engine was not working; so that is not a feature of defendant's liability.

The case presents these questions: First, Had a mere sales agent implied authority to make oral warranties as to the safety of the machine? Second. A state inspector had inspected the machine, and given his certificate that the machine had all the safety appliances and warnings required by the state statute. Could an agent impose liabilities upon the defendant by special warranties that were broader than the law and the judgment of the inspector? Third. Was the machine in fact defective, in that it failed to contain any safety appliance or warning such as plaintiff relies on? Fourth. Was not the plaintiff clearly guilty of contributory negligence?

The corn husker and shredder was made in conformity with the state law and was marked with the warnings which the public authorities charged with the administration of the law required to be placed upon it. So there was no failure on the part of defendant to fully comply with the state law and the requirements of the officers of the state charged with its administration. Second. It was not practical to put any guard or covering to protect an operative against injury when he was attempting to do what the plaintiff tried to do while the machine was in motion. It was an act so manifestly reckless and dangerous that it could not be anticipated that any reasonable man would attempt to do it. Accidents had happened so frequently in re-

gard to corn shredders, by the hands of the feeder being drawn into the first or feed cylinder, that the statute of Minnesota was passed to compel makers and sellers of such machines to build them in such a way as to safeguard against that danger and to warn purchasers. This statute was never intended to warn purchasers against the dangers of such an act as the plaintiff was attempting to do, because, as we have said, it was such a foolhardy act that no lawmaker or manufacturer could anticipate that an operator of a machine would undertake to do it while the machine was in motion. So, in our judgment, the sales agent of defendant had no implied authority to impose liability upon it in respect to such an act. Third. We think the plaintiff was guilty of reckless negligence.

For these reasons the case ought not to have been submitted to the jury.

[3] There is one other point of practice. There was a motion for a directed verdict at the conclusion of the evidence. As to the contributory negligence of plaintiff, the motion is entirely satisfactory and clear. As to the authority of the sales agent, the language of the motion is:

"And because it does not appear that Mr. Corcoran, the sales agent in this case, had any authority to make a warranty or contract or representation appearing in the evidence."

The motion was denied, and an exception saved. We think it was sufficient.

The judgment is reversed, with directions to grant a new trial.

In re HUGHES.

Appeal of DOCTOR et al.

(Circuit Court of Appeals, Second Circuit. December 10, 1919.)

No. 59.

1. BANKRUPTCY ⟸22—ADMINISTRATIVE PROCEDURE NOT GOVERNED BY EQUITY RULES.

The equity rules of the Supreme Court are not rules of court, affecting administrative work of bankruptcy.

2. BANKRUPTCY ⟸415(2)—FORMAL EXCEPTIONS TO MASTER'S REPORT ON APPLICATION FOR DISCHARGE NOT REQUIRED.

The matter of granting discharges is by the Bankruptcy Act committed to the judge of the District Court, the findings of a commissioner or master, to whom an application is referred, being advisory only, and compliance with formal equity rules in filing exceptions to his report is not required.

3. BANKRUPTCY ⟸408(3)—OMISSION OF WORTHLESS ASSETS NOT GROUND FOR REFUSING DISCHARGE.

Omission from a bankrupt's schedules of corporate stock having no possible value *held* not a concealment of assets which defeats the right to discharge.

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4. BANKRUPTCY ⊜408(3)—CONCEALMENT MUST BE OF REAL ASSETS TO DEFEAT DISCHARGE.

Omission from bankrupt's schedules, although with intent to conceal, of a right in property which bankrupt supposed he owned, but in fact did not, is not a concealment of assets which defeats the right to discharge.

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

In the matter of Elizabeth L. Hughes, bankrupt. From an order granting a discharge, Augusta Doctor and another appeal. Affirmed.

See, also, 257 Fed. 986.

Certain creditors (appellants here) objected to bankrupt's discharge on various grounds of which two only need be mentioned: (1) She concealed, by omitting from her sworn schedules, certain shares of stock in an incorporated company; (2) she similarly concealed an interest in property created by a transfer by her still living father to a trustee, and of such a nature as to be "real estate," as those words are defined by statute in the state of New York.

These objections were referred for consideration to a "special commissioner," who recommended denial of discharge. Bankrupt, within 60 days of report filed, moved for an order setting it aside and granting discharge, and shortly after expiration of the 60-day period filed exceptions, in apparently intended compliance with equity rule 66 (198 Fed. xxxvii, 115 C. C. A. xxxvii).

The District Judge disapproved the report and granted discharge; this appeal followed, and it is assigned for error, not only that the objections were overruled, but that the court failed to confirm the report as matter of course, for lack of timely exceptions thereto.

Mark G. Holstein, of New York City, for appellants.

Lee & Wadsworth, of New York City (Joseph Day Lee, of New York City, of counsel), for bankrupt.

Before ROGERS, HOUGH, and MANTON, Circuit Judges.

HOUGH, Circuit Judge. [1, 2] The administration of bankruptcy is so largely a matter of business that any and every formality in the court of first instance, additional to those prescribed by statute, is to be avoided as far as possible. The matter of discharges is by the act a duty laid on the judge holding the District Court, and commissioners or masters are merely his advisory assistants. We approve of the decision in International Harvester Co. v. Carlson, 217 Fed. 736, 133 C. C. A. 430, and hold that the equity rules of the Supreme Court are not rules of court affecting the administrative work of bankruptcy. This case was fairly and with fair expedition presented to the District Judge, and that was enough.

[3] The corporate stock omitted from the schedules was not only worthless, but it utterly lost whatever value it ever possessed by and through the actions of these objecting creditors, when long before bankruptcy they "sold out" the issuing corporation, by foreclosing a mortgage on its property. Our decision in Re McCrea, 161 Fed. 246, 88 C. C. A. 282, 20 L. R. A. (N. S.) 246, is applicable, and overrules the creditors' first objection.

[4] The so-called realty also omitted from schedules has a long history that may be best stated in legal effect rather than in detail.

When Mrs. Hughes verified her schedules, she had long before conveyed this interest to her husband. We assume (but do not find) that such conveyance was a mere cover, and that the husband was but a trustee for the bankrupt. We may also assume, without finding, that Mrs. Hughes' intent in making the transfer was to hinder, delay, or defraud her creditors. These assumptions are rather violent on this record, but they are certainly all the creditors could ask.

Contemporaneous with this discharge proceeding, however, was a suit in the courts of New York, to determine what, if any, right or interest Mrs. Hughes ever had in said real estate, and before discharge granted the New York Court of Appeals decided that she never had any interest at all; her conveyance to her husband was a nullity, because there was not, and never had been, anything whereon it could operate. Doctor v. Hughes, 225 N. Y. 305, 122 N. E. 221.

It follows that this bankrupt concealed nothing, because there was nothing to conceal; yet when she swore to her schedules she thought the property value existed. She had (we may assume) "intent" as fully as if her intended act could either help her or harm her creditors. She had the emotion of concealment, but all about nothing.

It is a mistake, and a widespread one, to regard a discharge in bankruptcy as a reward of virtue, or its denial as a punishment for general moral turpitude. Discharge is a legal right attaching to the status of bankrupt, which right the statute requires the court to recognize, unless it be affirmatively shown that the applicant has done one or more of the acts enumerated specifically or by reference in section 14 of the statute (Comp. St. § 9598). The mental operation of thinking property is owned, and desiring to conceal it, when in fact no such property exists, does not fall within any of the prohibitions of that section, which, when speaking of concealed or transferred property, always means something that is or ought to be (in common parlance) "assets of the estate." Cf. In re Dauchy, 130 Fed. 532, 65 C. C. A. 78. There was no error in overruling this objection.

Order affirmed, with costs.

GILL v. UNITED STATES.

(Circuit Court of Appeals, Second Circuit. December 10, 1919.)

No. 43.

CONTEMPT ⇐66(2)—REVIEW OF ORDER OF COMMITMENT.

An order of a District Court committing a witness to jail for contempt for refusal to answer questions before a grand jury is final, and reviewable on writ of error taken within six months; but an order denying a motion to vacate such order is interlocutory, and not subject to review by writ of error.

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

John Gill brings error to review an order of the District Court denying a motion to vacate an order of commitment for contempt. Dismissed.

Santiago P. Cahill, of New York City (S. P. Cahill, of New York City, of counsel), for plaintiff in error.

Francis G. Caffey, U. S. Atty., of New York City, and George Winship Taylor, Asst. U. S. Atty., of Baltimore, Md.

Before ROGERS, HOUGH, and MANTON, Circuit Judges.

ROGERS, Circuit Judge. The defendant was committed on July 3, 1918, for contempt of court. On that day he was before a grand jury in the Southern district of New York and declined to answer certain questions which were put to him. He claimed no privilege, but merely refused to answer. He was taken before District Judge Augustus N. Hand, who directed him to be again taken before the grand jury and instructed him to answer the questions. He was accordingly again taken before the grand jury, and he again declined to answer. The grand jury thereupon presented the facts to the court, and the court, finding that he willfully and contumaciously refused to answer and was without any legal excuse therefor, entered an order committing him to the custody of the United States marshal, to be detained in Ludlow Street Jail until he should signify a willingness to answer the questions or otherwise purge himself of the contempt.

That the order committing for contempt was a final order cannot be questioned. Whether an order committing one for contempt is final, or whether it is interlocutory, depends upon its character. If the order is remedial, it is merely interlocutory, and reviewable only upon an appeal from the final decree. If, however, the order is punitive, it is a final judgment, criminal in its nature, and reviewable upon a writ of error without awaiting the final decree. And the order is deemed punitive when its purpose is to vindicate the authority of the court by punishing the act of disobedience as a public wrong. In re Merchants' Stock & Grain Co., 223 U. S. 639, 32 Sup. Ct. 339, 56 L. Ed. 584. And it cannot be questioned that the conduct complained of, being against the dignity and authority of the court and in a criminal proceeding, is a criminal contempt. The Supreme Court holds that judgments in criminal contempt proceedings are reviewable only by writ of error (Grant v. United States, 227 U. S. 74, 33 Sup. Ct. 190, 57 L. Ed. 423), and that judgments in civil contempt proceedings are reviewable by appeal only (In re Merchants' Stock & Grain Co., supra).

The order in question, being a final order, might have been reviewed in this court by writ of error, if the writ had been sued out within six months after the entry of the order. 26 Stat. 829, § 11 (Comp. St. § 1647). Instead of suing out a writ of error within the six months, nothing was done until seven months elapsed, when defendant petitioned the court to enter an order declaring the original order of commitment null and void, on the ground, among others, that it did not recite at length the questions which were put to defendant before the grand jury, and which he refused to answer, so as to show the exact grounds of his alleged contempt. For this reason defendant asked that he be discharged from custody. The court thereupon amended its record nunc pro tunc, and denied the motion to vacate the original

order and to discharge the defendant from custody. Thereupon a writ of error was sued out, bringing here, not the original order, but the decision of the District Court denying the motion to vacate that order.

Judicial Code, § 128 (Comp. St. § 1120) gives appellate jurisdiction only when decisions of the District Courts are final; and the only final decision in this matter was the original order of commitment. The decision of the court denying the motion to vacate is one which may be renewed at any time, and is not final. Therefore it is not subject to review upon writ of error.

While the defendant, if advised by his counsel that his detention in custody is illegal, may have the original proceedings reviewed, he may —not now by writ of error; still by means of a writ of habeas corpus—have the legality of his detention inquired into, and procure his release in case it appears that he is illegally in custody.

In Ex parte William F. Hudgings, 249 U. S. 378, 39 Sup. Ct. 337, 63 L. Ed. 656, the Supreme Court of the United States upon a petition for habeas corpus ordered the petitioner, who was held in custody under a commitment for contempt, discharged on the ground that the District Court had exceeded its jurisdiction and proceeded in violation of due process of law. In that case relief was obtained by resort to the original jurisdiction of the court. We do not mean to intimate any opinion, however, whether the circumstances in this case are of such an exceptional character as would be likely to induce that court to exercise its original jurisdiction as it did in the Hudgings Case, or whether the circumstances indicate any illegality in what the District Court has done.

The writ of error is dismissed.

A. SCHRADER'S SON, Inc., v. DILL MFG. CO.

(Circuit Court of Appeals, Sixth Circuit. January 6, 1920.)

No. 3315.

1. PATENTS ⟸328—CLAMPING DEVICE FOR PNEUMATIC TIRES VOID FOR LACK OF INVENTION.
   The Schweinert & Kraft patent, No. 783,469, for clamping device for pneumatic tires, *held* void for lack of invention, in view of the prior art.
2. PATENTS ⟸328—DUST CAP FOR TIRE VALVES VOID FOR LACK OF INVENTION.
   The Burke patent, No. 1,253,573, for dust cap for tire valves, *held* void for lack of invention, in view of the prior art.

Appeal from the District Court of the United States for the Northern District of Ohio; D. C. Westenhaver, Judge.

Suit by A. Schrader's Son, Incorporated, against the Dill Manufacturing Company. Decree for defendant, and complainant appeals. Affirmed.

Arthur C. Fraser, of New York City, for appellant.

Arthur J. Hudson, of Cleveland, Ohio, for appellee.

Before KNAPPEN, DENISON, and DONAHUE, Circuit Judges.

PER CURIAM. Suit for infringement of claim 3 of United States patent No. 783,469, February 28, 1905, to Schweinert & Kraft, for clamping device for pneumatic tires (the specific feature being a protective casing or cap for stay bolt extension, applicable also to tire valve stem casings), and claims 1 and 2 of United States patent No. 1,253,573, January 15, 1918, to Burke, for dust cap for valves (such as tire valve stems).

On hearing upon pleadings and proofs, the District Court found both patents invalid—that to Schweinert & Kraft for lack of invention, in view of the prior art; that to Burke for two reasons: First, that Burke was not the real inventor of the device of the patent; and, second, that the claims in suit did not involve invention in view of the prior art.

We not only are satisfied that the claims of the respective patents in suit are invalid for lack of invention over the prior art, but are content to affirm the decree of the District Court upon the general line and reasoning of the opinion of Judge Westenhaver, who presided below, except that as to the proposition that Burke was not the real inventor of the subject-matter of the patent issued to him we find it unnecessary to express an opinion. We print below Judge Westenhaver's opinion, omitting therefrom the part relating to the above-excepted proposition. In our opinion the case as to each of the claims in suit falls within the principle of cases such as Railroad Supply Co. v. Elyria Iron Co., 244 U. S. 285, 293, 37 Sup. Ct. 502, 61 L. Ed. 1136; Package Mach. Co. v. Johnson Automatic Sealer Co. (C. C. A. 6) 246 Fed. 598, 601, 158 C. C. A. 568; Huebner-Toledo Brew. Co. v. Matthews Gravity Carrier Co. (C. C. A. 6) 253 Fed. 435, 447, 165 C. C. A. 177.

The decree of the District Court is affirmed.

The following is the opinion of Westenhaver, District Judge:

Complainant's bill charges infringement by defendant of two United States letters patent, No. 783,469, issued February 28, 1905, to M. C. Schweinert and H. P. Kraft, and No. 1,253,573, issued January 15, 1918, to Wilbur B. Burke. No issue is made as to complainant's title thereto. The defenses are invalidity in view of the prior art, for lack of invention, and for lack of novelty; and, also, as to the second patent, invalidity because Burke was not the sole original inventor of the device covered by his patent application. Defendant's answer also sets up a counterclaim, charging complainant with infringing United States letters patent No. 1,094,164, issued April 21, 1914, to S. E. Nold. No issue is made as to defendant's ownership thereof, but the defense thereto is that Nold's patent is, in view of the prior art, invalid for lack of invention and lack of novelty, and noninfringement.

Schweinert & Kraft Patent No. 783,469.

[1] The alleged invention of this patent relates to clamping devices for pneumatic tires for automobiles or other heavy vehicles. Claim 3 thereof is the only one in issue. It is as follows:

"3. In a clamping device, the combination of a nut proper having an elongated extension secured thereto, said extension being formed of sheet metal and having an internal diameter greater than that of said nut, whereby said extension is adapted to form a protecting casing for a bolt."

The patent application was filed June 3, 1904. In the early days of the automobile industry, and before the development of the clincher tire, automobile tires were held to the rim by clamping devices disposed at intervals

around the rim. A part of these devices consisted of bolts fastened at one end of the tire casing, passing through the rim, and clamped thereto on the inside of the rim with a nut. They were usually six or eight in number, and were called "stay" bolts. At present, and for many years past, excepting on racing cars, the bolt and nut have decreased in number to one which is fastened with a spreader plate or bridge, and other devices, to the inner tube of the tire, passes through the rim and is clamped on the inside with a nut. This bolt is screw-threaded, and carries the valve by means of which the tire is inflated, and is now more commonly known as a valve stem. The clamping nut performs with respect to the stay bolt and to this valve stem the same function. The difficulties of adjusting a tire to the rim require a stay bolt or valve stem of considerable length, so that it can be engaged by the clamping nut and the latter used as a sort of handle to pull down the retaining plate to its clamping position. In its final position a considerable part of the stay bolt or valve stem projects inwardly beyond the rim, and it is very desirable that the part thus exposed should be protected from dust or injury to the threads.

Complainant's contention is that, prior to this invention, combined stay bolts and caps and combined valve nuts and dust caps were made exclusively of a single piece of metal; that the method commonly employed in making combined nuts and caps was to cut the same from a hexagonal rod; that, owing to the desired length of the combined nut and cap, this, it is contended, caused a great waste of metal; and that, inasmuch as the metal then commonly used was brass, this waste resulted in a substantial loss. A further contention is that the bore of the nut must either be screw-threaded its full length, which is a disadvantage, or that it must be enlarged with an expanding tool beyond the screw-threaded section of the nut proper. This is said to be an expensive operation. The invention was designed to overcome these disadvantages, and is said to accomplish that purpose.

Complainant and its witnesses unduly exaggerate, it seems to me, the problems involved. Threaded bolts and nuts as clamping devices are simple and old in the art. They are designed for use in many situations, and are common to all arts in which threaded bolts and screw-threaded nuts need to be used as clamping devices. There is nothing unusual or out of the ordinary in the use of a bolt and nut as a device to clamp a tire to a rim. No invention, it seems to me, can be predicated upon the adaptation of nuts and bolts to this use. The invention, if any is present, in claim 3, is said to reside and must be found in the combination of a nut proper having an elongated extension secured thereto, and the formation of this extension from sheet metal with an internal diameter greater than that of the nut. Such, in brief, is complainant's contention.

Complainant's witnesses, Kraft and Volckhausen, in their testimony state that, prior to complainant's invention, screw-threaded bolts with nuts were in common use for holding pneumatic tires to automobile vehicles. The nuts were in various forms, including solid nuts, wing nuts, and a nut with a sleeve or cap made integrally from one piece of metal, as has already been stated. More pertinent to this issue, their testimony shows that nuts in combination with a separate cap or sleeve, fitting over the exposed end of the bolt or valve stem are also commonly used. This cap or sleeve, formed separately from the nut, was drawn from sheet metal, with the lower end screw-threaded on its interior side to the same diameter as that of the nut. Complainant's Exhibit No. 22 shows various forms of separate sleeves or dust caps thus used. The earliest form is that numbered 835, which had been used and was being used at and before the date of this alleged invention.

In view of this art, the inventor's problem was merely to unite this sleeve or dust cap to the nut proper. Claim 3 does not prescribe any method for making this union. The problem manifestly could be solved by removing the interior screw threads of dust cap No. 835 and connecting it with the nut by any efficient mechanical method. Unless invention is present in conceiving the idea of uniting these two, then claim 3 is invalid, otherwise it is not.

Before answering this question, the art of record should be briefly stated. United States letters patent No. 621,971, issued March 28, 1899, to Charles G.

Page, discloses a combined nut and cap used as a means of clamping a tire to a rim. The drawings show the cap, as distinguished from the nut, having a diameter greater than the diameter of the nut proper. The specifications say that, in order to conceal the stem—that is, the screw-threaded end of the bolt or valve on the inside of the rim—a cap may be arranged over the exposed end thereof, preferably formed with or secured to the nut. This is the precise idea embodied in claim 3. It distinctly says that the cap may be formed separately and secured to the nut, which is the main element of claim 3. The exact method of securing the cap to the nut disclosed in United States letters patent No. 787,578, issued April 18, 1905, to Frank Lambert, on an application filed June 21, 1902, is that used by complainant in manufacturing under its patent its later commercial device. A circular groove is provided in the top of the nut adapted to receive the lower rim of the cap, and, when the cap is inserted therein, the metal of the nut is compressed around the cap, so as to hold it permanently to the nut. This is complainant's exact way of constructing its commercial device.

All the problems with which it is contended Schweinert & Kraft were confronted and succeeded in solving are fully set up and disclosed in Lambert's specifications. Lambert points out the desirability of protecting the end of the bolt projecting through the nut from injury by corrosion or otherwise; that the cost of production may be cheapened by making the nut of metal, such as brass or steel, and the cap of another metal; that the common cap nut, if made in one piece, is very difficult to thread the full length, or to enlarge with an expanding tool beyond the screw-threaded section of the nut proper. This is complainant's contention on the basis of which invention is claimed to be present. Lambert's cap nut, it is true, was designed primarily for use in connection with water meters, but the specifications and teachings of his patent are not so limited. The cap also, as the drawings show, is spherical and circular, and not elongated; but Lambert points out therein that his invention is easily available for use with caps of other shapes. The elongation or extension of Lambert's cap would be a mere change of form, shape, or proportion, and was clearly within his contemplation and within the teachings of his patent.

Other prior art patents are cited, which I deem it unnecessary to review. Answering the exact question presented of whether or not, in view of the art shown, claim 3 involves invention, I am clearly of the opinion that it does not. Screw-threaded bolts and nuts performing the same function and used in the same connection were old clamping devices commonly used for holding tires to rims. Sleeves or caps drawn from sheet metal and used in connection therewith, but not secured thereto, were also admittedly old. The only problem was securing the elongated extension or dust cap to the nut proper. Claim 3 does not disclose or claim any mechanical means of accomplishing this use. Many means of so doing, it seems to me, would suggest themselves naturally to any skilled mechanic. Furthermore, the idea of combining a nut and cap and a means for so doing are fully disclosed in the Page and Lambert patents. The only modification required of Lambert's patent was to elongate the cap and draw the same of sheet metal in order to meet precisely the letter of the language of claim 3. The length of the dust cap or of this elongated extension is not an act of invention, but is determined by the length of the screw-threaded stay bolt or valve stem; in point of fact, Volckhausen, complainant's witness, testifies that it was determined by taking the longest bolt and the thinnest rim, and making the cap of sufficient length to inclose the projecting end.

No invention is involved in substituting one material for another. This is a matter of judgment only in selecting suitable materials. No invention is involved in changing the size, degree, or proportion of an article or device. Walker on Patents (5th Ed.) §§ 31, 41, and 41a. Securing together by common mechanical method an existing nut and an existing cap, which thereafter performed together in precisely the same way the same function previously performed by both separately, is not invention. The lead pencil case of Reckendorfer v. Faber, 92 U. S. 357, 23 L. Ed. 719, is almost an exact parallel. More inventive faculty was required to combine the India rubber eraser to the lead pencil in that case than was required to omit from the dust cap of the prior art the interior screw threads at the lower end and secure this cap

to the nut by mechanical means, and this is all the advance that claim 3 covers over the pre-existing art.

My conclusion is that claim 3 of the Schweinert & Kraft patent, No. 783,469, is invalid for lack of invention, and for lack of novelty.

Burke Patent No. 1,253,573.

[2] The invention of this patent is said by the inventor to be one for a dust cap for valves. Claims 1 and 2 only are in issue; no contention being made that claims 3 and 4 are infringed by defendant's device. Claim 1 is as follows:

"1. A dust cap for tire valves or the like, comprising a cap portion having a polygonal foot portion with an internal shoulder above it, and having means for connecting it to a threaded valve casing or the like, said means comprising a polygonal bushing of different metal from the cap portion entering and lying within and substantially inclosed by the foot portion, and said foot portion being permanently connected to the bushing by over-lying parts of the foot portion; the article constituting a unitary structure, whereby when the cap is rotated the bushing is forced to rotate with it."

Claim 2 is precisely the same, except that it omits the feature or element that the nut or bushing inclosed in the cap portion is made of different metal from that of the cap. Claims 3 and 4 differ from claims 1 and 2 only in that the bushing or nut is formed of a plurality of parts, the exact details of which need not be stated. The defenses are: (1) That Burke was not the sole and original inventor. (2) That, in view of the prior art, this patent is invalid for lack of invention and lack of novelty.

(1) Claims 1 and 2, in view of the prior art already stated, and as clearly appears from an examination of the file wrapper history of this patent, were allowed only because of the supposedly novel method of constructing the dust cap by forming a footing with an internal shoulder above the bushing and securing the bushing therein by crimping the lower edges of the cap over the bushing. Complainant claims for this cap that its polygonal form above the foot portion is a distinct advantage, permitting the grasping thereof by hand or wrench for the purpose of securing it home. This feature, it will be noted, is not an element of claims 1 and 2, and, in view of the many forms of dust cap previously made and sold, introduced in evidence as Exhibit No. 22, it could not well be claimed as novel, nor that invention can be predicated on the mere form or shape of the dust cap. Furthermore, Burke himself, the evidence shows, had made and sold more than two years prior thereto an unpatentable dust cap of which the part above the nut was of this shape or form. * * *

(2) I am of opinion also that claims 1 and 2 are invalid in view of the prior art of combining nuts and dust caps, which, except as it relates to crimping the edges of the footing over the inclosed nut or bushing, has already been sufficiently reviewed. United States letters patent No. 692,812, issued to A. G. Anderson, shows a cap with an enlarged foot portion, polygonal in form and with an internal shoulder formed above it. It is compressed against the nut so that the cap and nut constitute a unitary structure whereby, when the cap is rotated, the bushing is forced to rotate with it. It does not, however, show the lower edges of the footing crimped around the bushing or nut. Anderson's cap nut, it is true, is dome-shaped instead of elongated, but Anderson points out that the shape of this cap may be varied as desired, and used for many purposes, and that the hole in the top thereof may, if desired, be omitted. The art already reviewed shows many elongated specimens of dust caps other than Burke's. The prior art, combined with Anderson's, leaves nothing of claims 1 and 2, except the crimping over of the lower edges of the footing.

This expedient of crimping or pressing the metal of the footing around the nut or bushing to hold it in place is a very old one in the prior art. It is shown in the following United States letters patent: Matthews, No. 212,962; Tweed, No. 319,644; Andrews, No. 376,502; Palmer, No. 796,671; and Abel, No. 949,108. Furthermore, on this hearing, a polygonal nut with an enlarged footing having a shoulder above the nut and the edges of the footing crimped around it to hold it in place was clearly proved to have been designed and used in large quantities by the Bronson-Walton Company. See testimony of witnesses Bronson, DeLloyd, and Phillips. Witnesses Thatcher and Phillips,

both skilled mechanics of long experience in the art of metal drawing and stamping, testify that it is an old and well-known expedient to insert a nut within a tube and crimp the metal around the nut to hold it in place.

The only remaining supposedly new element of claim 1 is that of making the bushing of different metal from the cap. No element of invention is involved in substituting one metal for another, but only a question of judgment in the selecting of materials, and even this expedient is shown to be old in the patent art.

Lambert's patent, No. 787,578, specifically discloses the conception of using one metal for the cap and another for the nut. Ryle patent, No. 400,414, shows a brass bushing in an iron cap. Complainant's counsel urge that, inasmuch as his cap was in the water hydrant art, it is so remote from the art under consideration as not to deprive Burke's use of the idea of patentable novelty. This contention was strenuously urged in the Patent Office, when the Ryle patent was cited against the Burke application, and was there held unsound, and that no feature of patentable novelty could be based on the use of a bushing of different metal. See paper 22, Burke patent file wrapper. An appeal was taken from this decision of the Examiners in Chief to the Commissioner, who affirmed the ruling on the authority of In re Morgan, 179 O. G. 292, quoting therefrom as applicable the ruling following: "Certain devices are common to the art as a whole because they are adapted for use in many situations." Burke acquiesced in this ruling, and accepted the patent thus modified, and is now bound thereby.

In view of this holding, the good or bad faith of defendant in making a dust cap which may be an imitation of Burke's is immaterial. It is, however, worthy of note that in February, 1915, nearly one year after Burke is said to have created his invention, he adjusted with defendant a controversy respecting the manufacture by it of dust caps, at which time the only contention was that his design patent, No. 44,082, was being infringed. He seemed then to be wholly unconscious that he had made any other invention, or was entitled to any other patent. His application, filed March 26, 1915, seems to have been made in his behalf by the complainant as an assignee.

In conclusion it may be noted that arguments other than those herein discussed have been urged upon me. They have all been fully considered, but none of them call for a different conclusion or require specific comment. Commercial success is urged in support of the validity of each of these patents. It is true all have been sold in substantial, if not in large, quantities. The question of validity being doubtful, this evidence might be of weight if it appeared that this commercial success was due to the new elements of the invention; but I am convinced that such sales as were made were the result of other considerations than the alleged invention. Business methods and license agreements have played a large part; but, more important still, the growth and development of the automobile industry, creating a wide demand, is the chief contributing factor. As to all three patents, they are examples of patents devoid of invention, for the reasons stated by Mr. Justice Bradley in Atlantic Works v. Brady, 107 U. S. 192, 2 Sup. Ct. 225, 27 L. Ed. 438, recently approved and reaffirmed by Mr. Justice Clarke in Elyria Iron & Steel Co. v. Railway Supply Co., 242 U. S. 609, 37 Sup. Ct. 16, 61 L. Ed. 525, as follows:

"The process of development in manufactures creates a constant demand for new appliances, which the skill of ordinary head workmen and engineers is generally adequate to devise, and which, indeed, are the natural and proper outgrowth of such development. Each step forward prepares the way for the next, and each is usually taken by spontaneous trials and attempts in a hundred different places. To grant to a single party a monopoly of every slight advance made, except where the exercise of invention, somewhat above ordinary mechanical or engineering skill, is distinctly shown, is unjust in principle and injurious in its consequences.

"The design of the patent laws is to reward those who make some substantial discovery or invention, which adds to our knowledge and makes a step in advance in the useful arts. Such inventors are worthy of all favor. It was never the object of those laws to grant a monopoly for every trifling device,

every shadow of a shade of an idea, which would naturally and spontaneously occur to any skilled mechanic or operator in the ordinary progress of manufactures. Such an indiscriminate creation of exclusive privileges tends rather to obstruct than to stimulate invention. It creates a class of speculative schemers who make it their business to watch the advancing wave of improvement, and gather its foam in the form of patented monopolies, which enable them to lay a heavy tax upon the industry of the country, without contributing anything to the real advancement of the arts. It embarrasses the honest pursuit of business with fears and apprehensions of concealed liens and unknown liabilities to lawsuits and vexatious accountings for profits in good faith."

A decree will be entered, dismissing complainant's bill, and also denying defendant any relief on its counterclaim. A proper proportion of the costs due to the introduction of defendant's counterclaim will be paid by it. The clerk will ascertain that proportion. All the remaining costs will be paid by complainant.

TOLEDO PLATE & WINDOW GLASS CO. v. KAWNEER MFG. CO.

(Circuit Court of Appeals, Sixth Circuit. January 6, 1920.)

No. 3305.

1. PATENTS ⟸306, 307—BOND MAY BE REQUIRED OF PLAINTIFF IN GRANTING PRELIMINARY INJUNCTION OR FROM DEFENDANT IN REFUSING IT.

In patent infringement cases, the trial court may require a bond, either from plaintiff as a condition of granting a preliminary injunction, or from defendant in lieu of such injunction.

2. PATENTS ⟸306—BOND MAY BE REQUIRED OF DEFENDANT FOR STIPULATED DAMAGES ON REFUSAL OF INJUNCTION.

In patent infringement cases, the trial court may, in view of the difficulty frequently found in proving actual damages, require defendant to stipulate the amount of future damages, and give a bond to cover that amount, as a condition of refusing a preliminary injunction.

3. PATENTS ⟸306—BOND GIVEN TO AVOID INJUNCTION COVERS STIPULATED PROSPECTIVE DAMAGES ONLY.

In a patent infringement case, a bond given by defendant to cover stipulated damages, so as to avoid an injunction, was prospective only, and did not cover damages suffered from infringements prior to the date of the order.

4. PATENTS ⟸306—BOND FROM DEFENDANT TO COVER STIPULATED DAMAGES FOR PRIOR INFRINGEMENT CANNOT BE REQUIRED ON REFUSAL OF INJUNCTION.

In patent infringement cases, the trial court cannot, as a condition of refusing a preliminary injunction, require defendant to furnish a bond to pay stipulated damages for infringements occurring prior to the order, nor does the fact that defendant was given the choice between an injunction and such a bond render the bond voluntary.

5. PATENTS ⟸306—RIGHT TO COMPLAIN OF BOND FOR STIPULATED DAMAGES NOT WAIVED.

Defendant's appeal from and the affirmance of an interlocutory decree in a patent infringement case, which required defendant to account and for issuance of an injunction, did not waive defendant's right to contest on the final hearing an order requiring it to give bond covering stipulated damages, since the validity of that order was not decided on the appeal from the interlocutory decree.

6. PATENTS ⟸306—ORDER REQUIRING BOND COVERING STIPULATED DAMAGES NOT ACQUIESCED IN.

In a patent infringement case, a stipulation extending defendant's time for putting in testimony and continuing for a similar period an order requiring defendant to give a bond to cover stipulated damages was not an acquiescence in a later interpretation of the order which construed it to cover infringements occurring before the order was made.

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7. PATENTS ⊂=319(1)—DAMAGES FOR INFRINGEMENT MAY EXCEED DEFENDANT'S PROFITS.

In a patent infringement suit, plaintiff's damages may exceed defendant's profits, where plaintiff was a manufacturer of the article installed by defendant, and might itself have made the sales which defendant made, had the latter not bought from a rival manufacturer.

8. PATENTS ⊂=306—STIPULATED DAMAGES INAPPLICABLE WHERE INFRINGEMENT ONLY PARTLY SUSTAINED.

Where defendant gave a bond to pay certain stipulated monthly damages in a patent infringement case, in which plaintiff claimed that two kinds of construction infringed, and it was later determined that only one of such constructions did infringe, *held*, that the stipulated damages could not be recovered, since the stipulated sum was fixed on the theory that both kinds of construction infringed.

Appeal from the District Court of the United States for the Eastern District of Michigan; Arthur J. Tuttle, Judge.

Patent infringement suit by the Kawneer Manufacturing Company against the Toledo Plate & Window Glass Company. From a decree for plaintiff, defendant appeals. Appellee's motion to strike certain matter from the record denied, decree reversed in part, and remanded, with directions.

See, also, 240 Fed. 737.

Wilber Owen, of Toledo, Ohio, and Livingston Gifford, of New York City, for appellant.

Wallace R. Lane, of Chicago, Ill., for appellee.

Before KNAPPEN, DENISON, and DONAHUE, Circuit Judges.

KNAPPEN, Circuit Judge. This is an appeal from the final decree of the District Court on the accounting ordered by its interlocutory decree (which was affirmed by this court, 237 Fed. 364, 150 C. C. A. 378), adjudging infringement of patent No. 852,450 to Plym, for store front construction.

On May 25, 1914, the day the answer to the bill of complaint was filed, the District Court, on plaintiff's motion for preliminary injunction, required defendant Glass Company to give a bond for the payment to the plaintiff Kawneer Company, in the event of decree for infringement, of $500 per month as liquidated damages from that date until the District Court's decision on final hearing, but without prejudice to the recovery of damages and profits in excess of that amount. The bond was given two days later to avoid injunction, which was ordered to issue in default of bond.

It appeared on the former review in this court that before suit was begun defendant was making two types of bracket, known respectively as the "scant" and the "full." The infringement found by the District Court was limited to the scant bracket; that is to say, brackets too short to come into contact with the outer web of the gutter, and so permitting gutter resiliency (which was an element of each of the claims in suit), and thus effecting infringement. Defendant claims that since the order in question it has used only "full" brackets; that is, of such

length as to come into actual or substantial contact with the gutter, thus making it nonresilient, and so noninfringing. At the original hearing below on the merits, defendant asked the court to determine, by its interlocutory decree, whether the full bracket construction infringed. The request was refused, on the ground that such construction was not within the issues, and this court approved that refusal. 237 Fed. 369, 150 C. C. A. 378.

The final decree on accounting, now before us, awarded to plaintiff, first, $246.26 for profits made by defendant upon sales by it prior to May 25, 1914 (the date of the injunction order); and, second, $6,966.67 (plus interest since the date of the master's report), as liquidated damages at the rate of $500 per month from May 25, 1914, to the date of the decision below on the merits, viz. July 23, 1915. There was no finding of infringement since the date of the injunction order referred to, or of any actual damages for prior infringement. The award of profits for prior infringement was based upon defendant's report of sales and profits, and is not subject to criticism. The real issue arises over defendant's contention that the decree for liquidated damages is wholly unauthorized and unsustainable.

[1, 2] Defendant assails, not only the construction of the bond as applicable to prior infringement, but the authority of the court below to require the bond. A trial court has undoubted power to require a bond, either from a plaintiff as condition of granting a preliminary injunction, or from a defendant in lieu of such injunction; and in view of the difficulty frequently found in proving actual damage, the requirement that the damages be stipulated is, under proper circumstances, permissible. In Commercial Co. v. Acme Co. (C. C.) 188 Fed. 89, Judge Denison required from plaintiff a bond for stipulated damages, where it was fairly evident that the injunction would result in closing down an existing business, and that the ordinary bond would furnish inadequate protection to defendant. The order was approved by this court. 192 Fed. 321, 112 C. C. A. 573. In Grand Rapids v. Warren Bros. Co., 196 Fed. 892, 116 C. C. A. 454, we approved an order denying an injunction on condition that defendant give bond for liquidated damages, and providing, in the alternative, that if such bond were not given the injunction should issue, on the giving of a similar bond by plaintiff. And in Coca-Cola Co. v. Nashville Syrup Co. (D. C.) 200 Fed. 153, Judge Sanford required the plaintiff to give a bond for liquidated damages, where the wrongful allowance of injunction bade fair to cause a damage to defendant wholly or largely incapable of proof. In each of these cases it satisfactorily appeared that the trial judge had carefully considered the situation, and had made the order in question in the full exercise of judicial discretion, and upon due consideration of the elements involved.

[3, 4] In the instant case the order requiring the bond opens with this recital:

"This cause being brought on for hearing on motion for preliminary injunction, the court not having time to hear the motion on its merits, orders that defendant within two days file a bond"

—with the condition we have already stated. Except as involved in the recital already quoted, and in the fact that the bond was required, there is nothing in the order itself or in the record to show that inquiry and consideration were had of what would be a proper liquidation of damages in view of the existing situation, or of the apparent necessity for injunction. Whether in view of such recital, and in the absence of further evidence on the subject, we should presume, in the absence of contrary showing, that judicial discretion, after inquiry and due consideration, was exercised, we find it unnecessary to determine; for, in our opinion, the order is not fairly susceptible of construction as requiring payment of stipulated damages for infringements prior to its making, and, if so construed, would be invalid.

The bond plainly looked only to the future. The provision for payment by the month could bear no reasonable relation to past infringements, for the simple reason that damages suffered for prior infringement were complete at the date of the order in question, and could not be made greater by the lapse of time; and if (as there is no reason to think) the stipulated damages were intended as mere compensation for delay in making payment on account of damages for prior infringement, the requirement would be clearly invalid as having no relation to actual compensation or actual damages, and thus a mere penalty. Gay v. Camp (C. C. A. 4) 65 Fed. 794, 799, 13 C. C. A. 137; Fellows v. National Can Co. (C. C. A. 6) 257 Fed. 970, 972, — C. C. A. —. It is no answer to say that defendant cannot be heard to complain of the order because of its insistence that an injunction would cause it irreparable damage, and that it was given its choice between such injunction and giving a bond. These facts alone conferred no authority to require a bond stipulating damages for past infringements, to be computed by so unreasonable a measure as the mere lapse of time before decree should be made on the merits. Such a bond would be none the less given under compulsion.

[5] We see no force in the suggestion that the right to complain of the order has been waived by the fact that the appeal from the interlocutory decree carried an assignment of error addressed to the order requiring the bond, and to the refusal to set it aside, as requested by defendant following the announcement of the decision below finding infringement only by the scant bracket construction. Apart from the fact that the bond cannot be construed to cover past infringements —it is enough to say the decree of this court was confined to affirmance of the interlocutory decree that defendant account and for injunction. There was no occasion to consider the other question, and it was not done.

[6] Nor are we impressed by the suggestion that defendant acquiesced in the order requiring the bond by its stipulations extending the time for putting in its testimony, and in connection therewith consenting to the continuance of the order of May 25, 1914. Defendant was not bound to anticipate that an attempt would be made to construe the bond as relating to infringement before the injunction order was made.

[7] It results that the decree for accounting must be reversed and set aside, so far as it relates to recovery of stipulated damages for infringement prior to the date of the order. The decree will accordingly be remanded to the district court, with directions, however, to grant plaintiff, if it shall so ask, an accounting upon the basis of actual damages. In this connection, we deem it proper to say that plaintiff's damages are not necessarily no greater than defendant's profits, inasmuch as plaintiff is itself a manufacturer of the kind of construction installed by defendant, and might itself have made the sales which defendant made had the latter not bought from a rival manufacturer.

[8] As proof of infringement by the scant bracket construction since the injunction order may present a question of liability under the bond therefor, we are constrained to say that as this record stands such sales would not, in our opinion, be subject to stipulated damages. It appears from the record now here that when the bond was given plaintiff was insisting that both the scant and full bracket construction were infringements, and defendant was denying that either construction infringed. The natural inference would be that the stipulated damages were intended to cover liability for both kinds of infringement. If so, it would be inequitable to allow recovery, on account of infringement by one kind of construction, of damages stipulated on a theory that both structures were the subject of suit, and thus of possible liability for damages on account of both.

Appellee's motion to strike from the record the narrative statement contained therein, or, in the alternative, certain specified matter, is denied.

Appellant will recover its costs of this court. The question of costs of the accounting already had below is addressed to the District Court.

UNITED STATES v. MORRIS et al.

(District Court, D. Colorado. December 16, 1918.)

No. 6833.

1. COURTS ⟸480(1)—FEDERAL COURT HAS NO JURISDICTION OF ACTION AGAINST OFFICER OF STATE COURT.

   A federal court is without power to entertain a suit against a sheriff, to require him to disregard the orders of a state court as to execution of its process, having no relation to any matter pending in the federal court.

2. COURTS ⟸478—MONEY COLLECTED ON PROCESS FROM STATE COURT PASSES OUT OF ITS CUSTODY WHEN PAID OVER.

   Money collected on process from a state court, when paid over to the plaintiff, passes out of the jurisdiction of the court, and a federal court may entertain a suit to require such plaintiff to hold the money subject to the rights of an intervener in the state suit, whose claim to an interest in the fund has not yet been finally adjudicated.

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3. UNITED STATES ⊂=67(3)—GOVERNMENT NOT ENTITLED TO SHARE IN INTEREST ON PENALTY OF BOND OF CONTRACTOR FOR PUBLIC WORK.

The right of the United States to share pro rata in a judgment recovered by laborers and materialmen on the bond of a contractor for public work, given under Act Aug. 13, 1894 (Comp. St. § 6923, note), where the judgment is for the amount of the penalty of the bond, with interest on their claims, does not extend to such interest.

In Equity. Suit by the United States against Ernest Morris and others. On motions to dismiss and to strike. Sustained in part.

Harry B. Tedrow, U. S. Dist. Atty., of Boulder, Colo., and Frank Hall, Asst. Atty. Gen., for the United States.

S. S. Sherman and E. M. Sherman, both of Montrose, Colo., for defendant Sherman.

Ernest Morris, of Denver, Colo., pro se.

James A. Marsh and Norton Montgomery, both of Denver, Colo., for defendant Bailey.

Bartels & Blood, of Denver, Colo., for defendants McPhee & McGinnity.

Catlin & Blake, of Montrose, Colo., for defendant McClelland.

LEWIS, District Judge. A proper understanding of the purpose of the bill may be more readily obtained by a statement of the material facts involved in the controversy. In 1904 the Taylor-Moore Construction Company, a corporation, made a contract with the plaintiff to construct to completion the Gunnison Tunnel, which was to be a part of the plaintiff's Uncompahgre Valley irrigation project, in Montrose county. On the making of the contract the plaintiff took from the Construction Company a bond, conditioned in accordance with the terms of the Act of August 13, 1894 (28 Stat. 278). The bond, however, was executed in seven like parts to accommodate the sureties, and the sureties obligated themselves, respectively, in different amounts. The Taylor-Moore Company were not able to execute their contract, and turned the work over to the plaintiff a few months after they begun. The plaintiff thereupon completed the construction, and charged the cost to the contractor, as it had a right under the contract to do. In 1905 suit was brought on the bond against some of the sureties, in the State court in Montrose County, by a number of persons and corporations, who had furnished labor and material to the Taylor-Moore Construction Company, who had not been paid. They recovered judgment. The case was appealed by the bondsmen to the State Supreme Court, and is found in McPhee v. U. S., 174 Pac. 808. Prior to the trial of the case the plaintiff, having completed the work, intervened in that case, and it, too asked judgment on the bond for the amount that it had expended in completing the tunnel, over and above the contract price with Taylor-Moore. The trial court denied that relief to the plaintiff, and it also appeared as one of the appellants in the Supreme Court. That court reversed the action of the trial court in denying judgment in favor of the plaintiff as intervenor. When the

case went back on mandate the plaintiffs proceeded to take out executions on their judgments, and considerable sums were collected on the writs. Thereupon this plaintiff again appeared in the State court and asked that court for an order directing the holding of those funds in the registry of that court until it could obtain its judgment, asserting that all sums realized, and that thereafter might be realized, on the bond, was a trust fund in which it would be entitled to share. The motion was denied, and the officer who had executed the writs theretofore issued and realized sums thereon, was directed to turn the money over to the attorneys of the plaintiffs who had recovered the judgments, and to likewise turn over to them any further sums that might be realized. Thereupon the plaintiff filed this bill against the attorneys who had received the moneys, their clients, all other judgment creditors in the State court, and against the sheriff and his deputies. The bill sets up the foregoing facts, and gives in detail the amount of each judgment and by whom recovered, and it asks, among other things, "that said defendants and each of them may be required to account and pay to the United States of America its proportionate part of the funds derived from said executions," and "that the plaintiff may have such other and further relief as to the court may seem equitable." Motions to dismiss, and motions to strike parts of the complaint, have been filed by some of the defendants.

The motion of S. S. Sherman, E. M. Sherman, and Henry W. Catlin to strike a part of paragraph 7 of the bill is sustained.

The motion of defendant Morris to strike a part of the bill is overruled.

[1] The motion of Dewey C. Bailey, sheriff, and F. S. Boyer, his deputy, to dismiss as to them is sustained. The motion of these two officers is sustained because any attempt on the part of this court to control their actions as officers of the State court, or to give them any directions as to their duties as such, would be unwarranted interference with the State court and the execution of its process.

[2] The chief argument in support of the other motions to dismiss the entire bill has been based upon the contention that to maintain it and give the relief above noted would be to interfere with the State court and the execution of its judgments. An examination of the authorities cited in the briefs on both sides leads to the conclusion that this contention is not sound. Having ordered that the bill be dismissed as against the officers of the State court, there has been taken out of the bill any claim for a basis on which that contention could rest. The judgment creditors are now as free as they heretofore have been to take any steps they wish in the collection of those judgments. The relief which the bill seeks as against them is to restrain them from disposing of the money so collected, or distributing it among the other judgment creditors, until the plaintiff can be heard on its claim that all moneys recovered on the bond must be treated in equity as a trust fund, and distributed pro rata among all judgment creditors, including the plaintiff, when it shall have obtained its judgment. As soon as writs issue on those judgments heretofore obtained, and the money

realized has been turned over to any of the plaintiffs, or their counsel, the jurisdiction of the State court over that fund has been exhausted, and its powers are then at an end.

[3] But the amount recovered in the State court against the sureties who were there sued was in each instance far in excess of the amount that each surety bound himself for in the bond. To illustrate: T. B. Townsend bound himself for only $10,000.00, whereas the judgment entered against him on July 7, 1914, was for $17,050.00. The excess was by way of interest from the time of the breach, which was approved by the Supreme Court, and that court cites a case from Maine in which the added interest is characterized as "damages for detaining the damages which they (sureties) bound themselves to pay at a prior date." A very large part of the amount thus far collected is composed not only of that interest but also of interest that has accrued on those judgments from the time they were rendered up to the time payment was made under the executions. This is not the time for a final determination of the question as to whether the penal sum named in the bond should be treated as a trust fund and pro-rated between the plaintiff and material-men and laborers upon the works. Some authority so holding has been cited by plaintiff's counsel, and none directly to the contrary by defendants. Circuit Judge Putnam so held in Surety Co. v. Cement Co. (C. C.) 96 Fed. 25, and entered a decree in accordance with that holding in U. S. v. Surety Co. (C. C.) 126 Fed. 814, which decree was affirmed by the Court of Appeals, 135 Fed. 78, 67 C. C. A. 552, and there is strong intimation from the Supreme Court in support. Fidelity & Guaranty Co. v. Struthers Wells Co., 209 U. S. 306, 28 Sup. Ct. 537, 52 L. Ed. 804. But I do not think that the principle announced by Judge Putnam can be carried to the extent of including the interest collected by the judgment creditors as a part of the trust fund, if it should finally be decided that there must be an equitable pro-rating.

The motions of the several defendants to dismiss the bill will be overruled, and the defendants, and each of them, will be enjoined from distributing, or otherwise disposing, of any and all amounts heretofore realized, and hereafter to be realized, on their executions, or otherwise received from their judgment debtors, except interest collected by them on said judgments. The injunction will extend only to the principal of the amount received from the respective sureties.

A motion was submitted on behalf of the plaintiff to require the defendants who have any of said funds in hands to deposit the same in the registry of this court until the amount of plaintiff's damage can be ascertained in the State court, so that it would be on hand when the question of prorating was finally settled, if a decree to that effect shall be obtained. But there is no allegation in the bill that the defendant or defendants who now hold the funds is or are insolvent, or that there is any other cause to suspect that the fund will not be forthcoming if the plaintiff is successful in this suit. The present order will therefore go no further than above noted, but the plaintiff may at any time hereafter ask for such further orders in respect thereto as it may be advised to be necessary in its interest, after the answers come in.

The defendant Morris also filed a motion to show cause why counsel for complainant should not be punished for contempt on account of certain language objected to in the bill. That motion is likewise overruled.

The defendants may have time and until January 6th next to answer.

UNITED STATES v. WOOLLEY et al.

(District Court, D. Oregon. January 5, 1920.)

No. 6499.

1. PUBLIC LANDS ⟸120—EVIDENCE SUFFICIENT TO CANCEL HOMESTEAD PATENTS.
   Evidence regarding the circumstances under which an uncle assisted three nieces to make homestead entries, paying the entry fees, erecting cabins, in which they lived not to exceed two months, and then purchasing the land from them upon final proofs being made, etc., *held* to establish fraudulent entry and proof, authorizing cancellation of patents.
2. PUBLIC LANDS ⟸120—EVIDENCE REQUIRED TO CANCEL HOMESTEAD PATENTS FOR FRAUD.
   In suits to set aside homestead patents for deceit and fraud, the government has the burden of establishing the deceit and fraud by clear and convincing proof.
3. PUBLIC LANDS ⟸120—EVIDENCE INSUFFICIENT TO ESTABLISH FRAUD IN SECURING HOMESTEAD PATENT.
   Evidence tending to show that a homestead patentee had lived almost continuously upon his homestead, except when working for his brother-in-law, who purchased the claim from him some four months after issuance of final receipt, etc., *held* not to establish fraud or deceit authorizing cancellation of the patent, although various witnesses testified that the patentee had seldom been seen on the homestead.
4. PUBLIC LANDS ⟸120—EVIDENCE INSUFFICIENT TO SHOW PURCHASER WITHOUT KNOWLEDGE OF PATENTEE'S FRAUD.
   Evidence regarding the circumstances under which an uncle assisted three nieces in securing homesteads, which he purchased from them upon final proof being made, *held* insufficient to establish that he was an innocent purchaser for value, without notice of their failure to comply with the homestead requirements.
5. LIMITATION OF ACTIONS ⟸100(10)—RIGHT OF ACTION TO CANCEL HOMESTEAD PATENT FOR FRAUD ACCRUES ON DISCOVERY OF FRAUD.
   Where the government first learned of fraud practiced in securing homestead entries through a special agent's report dated July 28, 1908, and received in General Land Office August 31, 1908, a suit to cancel the patents, instituted August 22, 1914, was not barred by the six-year statute of limitations.
6. LIMITATION OF ACTIONS ⟸104(1)—STATUTE DOES NOT RUN UNTIL DISCOVERY OF CONCEALED FRAUD.
   A fraud concealed, or committed in such a way as to conceal itself, will toll the limitation statute until discovery of the fraud.

In Equity. Suit by United States against Nancy C. Woolley, Eva E. Woolley, Anna L. Traylor, George C. Woolley, and Stephen Harrer. Homestead patents issued to the first three named defendants set aside, and patent to George C. Woolley confirmed in the last-named defendant.

Lester W. Humphreys, U. S. Atty., of Portland, Or., Elton Watkins, Asst. U. S. Atty., of Portland, Or., for the United States.

Errett Hicks, of Canyon City, Or., and Davis & Farrell, of Portland, Or., for defendants.

WOLVERTON, District Judge. This is a suit by the government to set aside certain patents issued to the Woolleys covering lands which they acquired through commuted homestead entries. The suit is predicated upon fraud which it is alleged the patentees practiced in procuring their patents. Harrer purchased from the Woolleys, and, it is claimed, with knowledge of and participation in the fraud.

The proofs in the land office show that the Woolleys all made application for their respective homestead entries on August 15, 1900; that Nancy C. established actual residence upon her homestead on July 2, 1901, Eva E. July 23, 1901, and Anna L. (now Mrs. Traylor) July 25, 1901, and that George C. commenced living on his land May 6, 1900, first lived in a tent, and when his house was built established residence thereon November 10th of that year. George C. filed his commutation affidavit November 1, 1901, and received his final certificate November 6th of that year. His patent was issued to him August 12, 1902. He conveyed to Harrer March 13, 1902. The other three Woolleys applied for commutation September 5, 1902, and received their final certificates September 13, 1902. Each of them conveyed to Harrer September 30, 1902. Their patents were issued to them January 28, 1904.

The record herein further shows that George C. Woolley is a brother-in-law of the defendant Stephen J. Harrer, having married Harrer's sister, and that the other defendants Woolley are the daughters of George C., being nieces of Harrer. Harrer assisted all the parties in locating their lands for making application for homestead, and, as it respects the Woolley daughters, he constructed their houses for them, such as were constructed, upon their respective homesteads, went with them to the land office, and paid their filing fees for them. George C. Woolley was present at the same time, and made his filing; but it does not appear that Harrer paid the filing fee for him. When the daughters made their final proofs and commutation, Harrer again accompanied them to the land office, and paid for each of them the commutation price of $200. The final proof witnesses are the same in all the cases.

The fraud imputed to the defendants Woolley by the bill of complaint is in effect that the testimony and proofs submitted by them for procuring their patents were attended with deceit and misrepresentation, and were false and fraudulent, in that none of them established actual or any residence upon their respective claims, nor maintained residence thereon, but elsewhere, that the houses constructed upon such claims were not at any time abodes fit for habitation, nor did the entryman ever live in them; that none of them acted in good faith in filing upon and making proof of their respective homesteads, and that each of them well knew at the time that the proofs so made were false and fraudulent, and in fact were so made

for the purpose of deceiving the officers of the land department; and that such officers relied thereon and were deceived, and were thus induced to issue the patents in question.

[1] A brief narrative as to what was done respecting these claims will suffice for an understanding of the situation, so as to fix responsibility or not, as the case may be, for fraud practiced by the several homestead claimants.

Woolley, who was a laborer, his wife, and three daughters were residing at Drain early in 1900. Grant Harrer, a brother of Stephen, visited them there, and when he returned to Grant county, in which the land in dispute is situated, Woolley went with him. Later, in March or April, 1900, probably the later date, Mrs. Woolley and the three daughters also went to Grant county, and were met at Heppner by Stephen Harrer, who took them out to his place in that county, which was near the lands in dispute, perhaps four or five miles distant. The family stayed with Stephen Harrer until he rebuilt a house belonging to him. Thereupon they rented the house from him, and thereafter lived there separate and apart from Stephen. As is shown by the proofs, the daughters, as well as the father, made settlement upon their respective homesteads August 20, 1900. The houses were not built for the daughters, however, until in January, 1901, and they did not, as they say in their proofs, establish actual residence until in July, 1901. The father and the daughters, as we have seen, all located at the same time, and all went to the land office together to make their filings; Stephen Harrer accompanying them. Their houses or cabins were constructed of logs, and those of the daughters were built for them by Harrer; some of them without windows, and all without doors, except openings to admit of ingress and egress; possibly one of them was provided with a hinged door to close the opening. None of them had floors, except as the soil was used for the purpose. These houses are described by some of the witnesses as sheep cabins, such as are used in that country to provide shelter for sheep, and it is claimed by the government that they were in reality cabins or sheds extemporized for temporary habitation for the purpose of simulating residence for the requisite period to obtain patent.

The mother and the daughters returned to Drain in August or early September of 1901. They intended to go back to Grant county that fall, but did not do so. They remained in Drain until the spring of 1902, and the daughters thought that by being away so long they had lost their homesteads. Their uncle Stephen came to Drain, and persuaded them that they had not forfeited their homesteads, and the daughters returned with him to Grant county in March, 1902, where Eva and Nancy remained until after they made final proof September 5th. Anna stayed until June, 1902, when she went back to Drain, and there remained until August. She then returned to Grant county, and lived there until after she made final proof. All of the daughters later in the month of September left Grant county again for Drain. Their uncle Stephen accompanied them to Heppner, where he purchased their claims, paying them $200 each. The

deeds were executed September 30, 1902, and were filed for record in Grant county July 20, 1903.

[2, 3] The daughters made some attempt to live upon the land. They took with them a meager supply of furniture, but none of them occupied their supposed habitat alone. They stayed together, first awhile at one cabin and then at another, thus rotating from cabin to cabin. But, even with this nomadic way of occupation, it is not probable that they resided in their cabins or upon their homesteads more than a month all told, certainly not more than two months at the outside, and it is quite apparent that their final proofs as to actual residence were largely simulated, and not real. While they intended no fraud upon the government, and undoubtedly believed they were actually within the law, yet what they did operated as a fraud upon the law, and they cannot be permitted to hold their homesteads against the claim of the government for the cancellation of their patents. McGoldrick Lumber Co. v. Kinsolving et al., 221 Fed. 819, 137 C. C. A. 377.

The claim of Woolley stands in a different light. He was not called as a witness at the trial. His final proofs, however, show that his wife would not live with him upon the land, but that he lived practically continuously on his homestead up to the time he made such proofs; that he was away for short periods only. The testimony on the trial shows that he worked for Stephen Harrer while away from his cabin. There has been no testimony adequately to dispute this. Several witnesses have testified for the government that they were frequently in the vicinity of these homesteads, including Woolley's, and that they never saw any one occupying the cabins. To this general statement there is perhaps one exception: One of the witnesses, as I remember, did see Woolley or some one at one time at one of the cabins. This testimony is far from satisfactory or convincing. It must be remembered that this is a suit to set aside patents for alleged deceit and fraud, and this puts upon the government the burden of establishing the deceit and fraud by clear and convincing proof; otherwise the solemn act of the government in issuing the patents must stand. The proposition is so elementary as to need the citation of no authorities to support it. In this respect there is no distinction between causes instituted in a strictly private capacity and suits by the government to annul conveyances of title on account of alleged fraud and deception. The sale to Harrer of Woolley's claim, although only a little over four months after the issuance of the final receipt, appears to have been regular, and the filing of the deed for record was less than a month thereafter, and it has not been adequately shown that Woolley and Harrer, or either of them, have been guilty of any concealed fraud respecting this claim.

[4] The defendant Harrer's further defense is that he purchased these homesteads from the patentees in good faith and for valuable consideration, without knowledge of any fraud perpetrated by them in the acquirement of their patents. This can hardly be claimed by him as it respects the daughters, because from his own testimony he was quite as familiar with their transactions as they were themselves,

and was personally cognizant of practically all they did, from the time of making their entries to the time of presenting their final proofs, including what they did in the way of living upon their homesteads, all of which is preclusive of his plea of an innocent purchaser for value.

As it pertains to the George C. Woolley claim, while it may be that Harrer did advance the money at the time that Woolley made his final proof to enable him to pay the price of his commutation, it appears that Woolley was probably indebted to Harrer for advances made to enable him to provide for his family and for other purposes. It is not otherwise shown that Harrer bore the same intimate relation toward Woolley as he did toward the daughters. In reality, the daughters and Woolley's wife were in large measure objects of charity with Harrer, and what he did with reference to their homesteads was to relieve them in part from dire necessities thrust upon them.

[5, 6] The next question presented relates to the statute of limitations. The patents were issued, as we have seen, the one to George C. Woolley August 12, 1902, and those to the daughters January 28, 1904. The first information that the government had of any fraud practiced with reference to these homesteads was through Andrew Kennedy, a special agent of the General Land Office, by a report bearing date July 28, 1908. This report was received in the General Land Office August 31, 1908. This suit was instituted August 22, 1914, and has since been pending in court. This was in time by a few days to save the running of the statute of limitations of six years against the government after the discovery of the fraud. A fraud concealed, or committed in such a way as to conceal itself, will toll the statute, and it will not begin to run until after the discovery of such fraud. Exploration Co. v. United States, 247 U. S. 435, 38 Sup. Ct. 571, 62 L. Ed. 1200. The facts here fall within the principle, and the statute did not begin to run until August 31, 1908.

The decree of the court will be that the patents issued to Anna L., Eva E., and Nancy C. Woolley will be set aside and held for naught, but that, as to the George C. Woolley patent, the title will be confirmed in Stephen Harrer, and that neither party to the suit shall recover costs.

In re STANDARD SHIPYARD CO.

(District Court, D. Maine. January 8, 1920.)

No. 396.

1. BANKRUPTCY ⇐61—ADMISSION OF INSOLVENCY NOT ACT OF BANKRUPTCY.
A letter written by the clerk of a corporation by authority of its directors, stating its inability to pay its debts in full and that the only course open to nonattaching creditors was to bring involuntary proceedings in bankruptcy, in which case the company would admit insolvency and its willingness to be adjudicated bankrupt, *held* not such an unqualified admission as to constitute an act of bankruptcy, under Bankruptcy Act, § 3a (5), Comp. St. § 9587.

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

2. BANKRUPTCY ⊂⊃63—RATIFICATION BY CORPORATION OF UNAUTHORIZED ACT OF BANKRUPTCY INEFFECTUAL.

Under Rev. St. Me. c. 51, § 60, providing that no corporation shall part with any of its property or corporate rights essential to the conduct of the corporate business, otherwise than in the ordinary and usual course of its business, except with the consent of its stockholders at a meeting the call for which shall give notice of the proposed action, a business corporation is without power to commit the act of bankruptcy specified in Bankruptcy Act, § 3a (5), Comp. St. § 9587, except by a vote of the stockholders at a meeting duly called for the purpose, and ratification of such an act of the directors by the stockholders after filing of a petition against the corporation cannot relate back, so as to cut off the rights of objecting creditors.

In Bankruptcy. In the matter of petition in involuntary bankruptcy against the Standard Shipyard Company. Petition dismissed.

Carl M. P. Larrabee, of Wiscasset, Me., for petitioning creditors.

Irving E. Vernon, of Portland, Me., for alleged bankrupt.

Williamson, Burleigh & McLean, of Augusta, Me., for answering creditor.

Clement F. Robinson, of Portland, Me., for an intervener.

HALE, District Judge. This case comes before the court on the question of adjudication. It is alleged by the petitioning creditors that the Standard Shipyard Company committed an act of bankruptcy on the 6th day of June, A. D. 1919, by a letter to its creditors admitting in writing its inability to pay its debts, and its willingness to be adjudged a bankrupt on this ground.

Have the petitioning creditors alleged sufficient facts to bring them within the fifth act of bankruptcy? They contend that they have introduced such evidence, first, by proof of acts committed prior to the filing of the petition in bankruptcy; and, second, by proof of acts committed after such filing.

[1] 1. A letter has been offered in evidence, written by Mr. Vernon, the clerk of the corporation, as follows:

"June 6, 1919.

"Carl Larrabee—Dear Brother Larrabee: Replying to your inquiry over the phone of this morning, as I understand the situation the Standard Shipyard Company owes some $17,000 or more direct liabilities, besides some contingent claims under power contract and lease.

"The company has not sufficient funds with which to satisfy their creditors, and the value of the property in the shipyard at Wiscasset is not sufficient to satisfy the creditors in full. The only course open to the nonattaching creditors is to bring involuntary proceedings in bankruptcy, and the company will admit its insolvency, and its willingness to be adjudged bankrupt on that ground.

"Very truly yours."

The record of a resolution passed at a meeting of the directors of the corporation, held on September 4, 1919, is offered as authority for the above letter. That resolution confirms the—

"instructions given to the clerk of the corporation to admit the inability of the corporation to pay its debts, and its willingness to be adjudged a bankrupt on that ground."

The resolution then proceeds to admit its liability to pay its debts and its willingness to be adjudged bankrupt, and authorizes the clerk to file answer or answers—

"in any court wherein there is now pending, or may be pending, any petition praying that said corporation be adjudged bankrupt."

There is further evidence tending to show the authority of the clerk to write the above letter, and to take all the action which he took for the corporation in the premises. I assume, for the purposes of the case, that the clerk had such authority, although this is denied by the objecting creditors. It is not contended that the clerk, at the time he wrote the letter, had such authority by a vote of the stockholders themselves.

In the Baker-Ricketson Case (in the Massachusetts District, 1899), 97 Fed. 489, the directors—

"voted, that E. B. Ricketson be authorized in behalf of the Baker-Ricketson Company to appear on behalf of said company in the United States court in Boston in the event of an involuntary petition in bankruptcy being filed against said company, and on behalf of the company to admit in writing its inability to pay its debts, and its willingness to be adjudged a bankrupt on that ground."

It was held that such vote was not in itself a written admission, but merely authorized one of the officers of the company to make the admission, if a petition in bankruptcy should be filed; that it was, therefore, not such an unqualified admission as is required by the statute, to prove the commission of the fifth act of bankruptcy.

Collier says:

"Where an officer of a corporation was deputized to execute such a writing (as an admission in bankruptcy) provided a petition should be filed against it, it is not an act of bankruptcy." Collier on Bankruptcy (11th Ed.) p. 127.

In the case before me, the letter itself advises that the only course open to creditors is to bring involuntary proceedings in bankruptcy, and that, if such proceedings are brought, the company will admit its insolvency, and its willingness to be adjudged bankrupt on that ground. It seems clear to me that this letter is not such an unqualified admission as is required by law to prove the commission of the fifth act of bankruptcy.

[2] 2. Are the acts in evidence after the filing of the petition in bankruptcy sufficient to prove the commission of the fifth act of bankruptcy?

On November 6, 1919, some time after the filing of the petition in bankruptcy, the stockholders of the Standard Shipyard Company held a meeting and voted to ratify the action of the board of directors taken at their meeting of September 4, 1919, and at other meetings—

"with reference to authorizing the clerk of the corporation to admit the insolvency of the corporation in the matter of the involuntary petition in bankruptcy now pending against the company, and with reference to the admission on the part of the directors, and the corporation, of its inability to pay its debts in full, and its willingness to be adjudged bankrupt on that ground, and its willingness to surrender its property for the benefit of its creditors, and with reference to authorizing the clerk, as attorney for the corporation, to file answer or answers," etc.

Further votes were passed, as follows:

"Resolved, that the stockholders hereby ratify and confirm the instructions heretofore given by the directors to the clerk to admit the inability of the corporation to pay its debts and its willingness to be adjudged a bankrupt on that ground, and hereby admit that said bank-inability to pay and willingness to be adjudged a bankrupt on that ground has continued at all times since January 28, 1919, to this date."

"Resolved, that the stockholders hereby admit the inability of this corporation to pay its debts and its willingness to be adjudged a bankrupt on that ground, and authorize the clerk, as the attorney for the corporation, to file answer or answers in any court or courts wherein is now pending, or may be pending, any petition praying that the corporation be adjudged bankrupt."

"Resolved, that the corporation hereby appoints the clerk as its attorney to act for it in the United States District Court for the Southern Division of Maine, in the matter of the involuntary petition of bankruptcy heretofore brought and now pending therein against the corporation, and, as such attorney, does authorize him to file all necessary papers, and take all necessary steps for expediting in every way possible the said bankruptcy proceedings to the end that the property of the corporation may, through the bankruptcy courts, be made available pro rata for the creditors of the corporation, and the officers and directors of the corporation are hereby empowered and directed to execute all necessary instruments, documents, pleas, motions and agreements to and to take all action necessary for securing the purposes of these resolutions."

On examination of these votes, and from all the testimony, it is evident that the intention of the stockholders was to ratify whatever action had been taken by the directors and by the clerk under the votes of the directors. The letter of the clerk, already referred to, is the only expression of the action of the directors in the premises. That was all, then, that there was for the stockholders to ratify. I have already held that such letter is not such an unqualified admission as is required to prove the commission of the fifth act of bankruptcy. It is clear that the ratification by the stockholders does not add anything to this letter, or make it an "unqualified admission." This ratification on the part of the stockholders, then, cannot constitute the letter of June 6th such an admission as is called for by the statute; and it follows that no competent testimony has been brought before me to prove the commission of the fifth act of bankruptcy.

In considering the power of directors in the premises, and the effect of a ratifying vote by the stockholders, passed after the filing of the petition, it is my duty to refer to the decisions of the federal courts, especially in this circuit. In the Bates Machine Co. Case (January, 1899) 91 Fed. 625, Judge Lowell held that, under the laws of Massachusetts, in a case where the directors of a corporation, exceeding their statutory authority, made a written admission of its insolvency and its willingness to be adjudged a bankrupt on that ground, and thereupon a petition in bankruptcy against it was filed by certain creditors; but where certain other creditors objected to the adjudication thereon, a subsequent vote of the stockholders, ratifying the action of the directors, will not relate back, so as to cut off the rights of objecting creditors. In that case, unlike the case at bar, the directors had made an unqualified admission of the inability of the corporation to pay its debts, and of its willingness to be adjudged bankrupt on that ground.

In his opinion, Judge Lowell points out that the directors of a busi-

ness or manufacturing corporation have no authority to make such admission; that, if they had such power, they would be able to make a complete transfer of all the property of the corporation, in violation of the statute of Massachusetts, which provides:

That "no conveyance or mortgage of its real estate, or lease thereof for more than one year, shall be made, unless authorized by a vote of the stockholders at a meeting called for the purpose." Pub. St. Mass. 1882, c. 106, § 23.

He shows that directors cannot derive such power from a by-law, which gives them authority to do the ordinary business of the corporation; for it can be no part of the ordinary business of a corporation, organized for business or manufacturing purposes, to go into bankruptcy. In re Quartz Gold Mining Co. (District Court of Oregon) 157 Fed. 243, affirmed in 158 Fed. 1022, 85 C. C. A. 547, under the name of Van Emon et al. v. Veal; Burbank Co. Case (D. C.) 168 Fed. 719 (opinion by Judge Aldrich).

In the case at bar the question whether the directors of a Maine corporation have power to admit its willingness to be adjudged a bankrupt depends somewhat upon our state statutes. Section 60 of chapter 51 of the Revised Statutes of Maine provides:

"No corporation shall sell, lease, consolidate or in any manner part with its franchises, or its entire property, or any of its property, corporate rights or privileges essential to the conduct of its corporate business and purposes, otherwise than in the ordinary and usual course of its business, except with the consent of its stockholders at an annual or special meeting, the call for which shall give notice of the proposed sale, lease or consolidation."

This prohibition is positive. It forbids a corporation to part with any of its franchises, or anything essential to the conduct of its corporate business, "otherwise than in the ordinary and usual course of its business."

It cannot be said that it is a part of the usual course of business of a manufacturing corporation to go into bankruptcy. It is clear that it would be no part of the duty of a board of directors, under the foregoing statute, to put a corporation into bankruptcy by admitting its inability to pay its debts and its willingness to be adjudged a bankrupt. In Rollins v. Clay, 33 Me. 132, our Maine court held that:

"The directors of a corporation are authorized, by virtue of their office, to transact its ordinary and customary business, unless the charter and by-laws otherwise determine. But they are not authorized, without some special authority, to make sale of that portion of its estate or property essentially necessary to be retained to enable it to transact its customary business."

Although corporation law has deepened and broadened since 1851, I do not find that the rule relating to a Maine corporation, then announced by Chief Justice Shepley, in speaking for the court, has been substantially changed.

I cannot extend the scope of corporate power beyond the limit imposed by our Maine statutes. I am of the opinion that a business corporation has no power to commit the fifth act of bankruptcy, except by vote of its stockholders, and that such act can be authorized only by such vote at a meeting duly called for the purpose; that the ratification of such action of directors of a corporation, by vote of the

stockholders, after the filing of the petition in bankruptcy, cannot relate back, so as to cut off the rights of the objecting creditors.

The petitioning creditors present many reasons to induce the court to proceed, in a liberal spirit, to view their rights, urging that it is unconscionable that a single attaching creditor shall be allowed to absorb an estate against the interests of many general creditors. If it were merely a question of allowing a lame petition to be made whole, or if it were in the power of the court to say that, under all the circumstances, the corporation ought to be in bankruptcy, and that, therefore, a petition having been filed, the court might proceed upon vague and general grounds to order adjudication, in disregard of vital objections inhering in the case, then there would be great force in the petitioners' suggestions and in their citation of law. But I do not find that cases referred to by their counsel assist me in determining the precise questions now before me. In re Yaryan Naval Stores Co., 214 Fed. 563, 131 C. C. A. 15; In re Veler, 249 Fed. 633, 161 C. C. A. 543; Brinkley v. Smithwick (D. C.) 126 Fed. 686.

It is insisted, also, by the learned counsel for the petitioning creditors that the reasoning of the Bates Machine Co. Case should not be applied, since the act of 1910 (Act June 25, 1910, c. 412, 36 Stat. 838), which permits voluntary corporate bankruptcy, and that this suggestion is emphasized by the query of Judge Lowell in the latter paragraphs of his opinion. I agree with counsel that, since the passage of the act of 1910, courts have adopted, so far as possible, a liberal policy with reference to this subject. But no policy, however liberal, permits me to find in the proofs before me, any competent evidence that the respondent committed the fifth act of bankruptcy, before the filing of the petition.

The result is that I am forced to order that the petition for adjudication be dismissed. A decree consistent with this opinion may be presented.

In re BRINN et al.

In re MASON et al.

(District Court, N. D. Georgia. December 17, 1919.)

1. BANKRUPTCY ⊂⊃9(2), 214—ACT CREATING BANKRUPTCY COURT SUPERSEDES STATE INSOLVENCY LAWS.

As the Bankruptcy Act (Comp. St. §§ 9585–9656) was passed under a specific grant of power in the federal Constitution, it is a part of the supreme law of the land, and the bankruptcy courts established for its administration are necessarily paramount; the act superseding all state insolvency laws, and the power of state courts to enforce liens invalidated by the act ending with bankruptcy.

2. BANKRUPTCY ⊂⊃214—CONCURRENT JURISDICTION OF STATE AND BANKRUPTCY COURTS TO ENFORCE LIENS NOT INVALIDATED BY ACT.

Notwithstanding the paramount character of the Bankruptcy Act (Comp. St. §§ 9585–9656), the state courts remain courts of concurrent jurisdiction for the enforcement of liens not invalidated by the act, and in cases in which proceedings for their enforcement are instituted in the state

courts prior to bankruptcy, the rules of comity between state and federal courts as courts of concurrent jurisdiction remain in full force.

3. BANKRUPTCY ⟸200(4)—ENFORCEMENT OF JUDGMENT RECOVERED MORE THAN FOUR MONTHS BEFORE WILL NOT BE ENJOINED.
Enforcement by execution of a judgment recovered against the bankrupt more than four months before bankruptcy will not be enjoined, even though there be an excess of value in the property sought to be levied on over the amount of the execution.

4. EXECUTION ⟸134—LEVY ON LAND BY ENTRY ON PROCESS WITH NOTICE.
A levy on land in Georgia consists, not in seizure, but in an entry on the process describing the realty seized, with notice to the owner or person in possession.

5. EXECUTION ⟸140—ENTRY OF LEVY ON TELEPHONE SWITCHBOARDS VOID FOR UNCERTAIN DESCRIPTION; "REALTY."
As easements for telephone lines constitute "realty," under Civ. Code Ga. 1910, § 3617, a sheriff's entry of levy of execution, describing the property as switchboards and all wires, lines, etc., is void for uncertainty of description, in so far as it relates to the easements or interests in lands.
[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Real Property.]

6. EXECUTION ⟸129—MODE OF LEVY ON PERSONALTY.
Under Civ. Code Ga. 1910, § 6057, a levy in case of personalty consists in an actual or constructive seizure, and the officer must do some act for which he could be successfully prosecuted as a trespasser, were it not for the protection afforded him by the writ.

7. EXECUTION ⟸140—RECITAL OF LEVY ON TELEPHONE SWITCHBOARDS NOT A SUFFICIENT SEIZURE OF PERSONAL PROPERTY.
The sheriff's entry of levy of execution, describing the property, which was used for a telephone system, as switchboards, etc., is not a sufficient seizure, under Civ. Code Ga. 1910, § 6057, to amount to a valid levy on personalty.

8. BANKRUPTCY ⟸116—APPOINTMENT OF RECEIVER AND DENIAL OF PETITION OF SHERIFF, WHO HAD LEVIED ON PART OF THE PROPERTY, FOR DELIVERY OF SAME, HELD PROPER.
Where the sheriff's levy of execution on judgments rendered against the bankrupts more than four months before bankruptcy was insufficient, and the sheriff was attempting to sell property other than that subject to a purchase-money lien in favor of one of the judgment creditors, *held* that, as the property subject to the lien was not identified, it was proper for the bankruptcy court to refuse an order for delivery of any property to the sheriff, and instead to allow a receiver appointed to retain possession of all the property, which as a whole constituted a telephone system.

In Bankruptcy. In the matter of the bankruptcy of Mrs. S. E. Brinn and Mrs. S. L. Wheless, doing business as the City Telephone Company, a firm. Petition by W. C. Mason and others to review an order of the referee directing a receiver appointed not to deliver property of the bankrupts to the sheriff, etc. Affirmed.

J. H. & Emmett A. Skelton, of Hartwell, Ga., and Erwin, Erwin & Nix, of Athens, Ga., for the sheriff and Mason.
Wolver M. Smith, of Athens, Ga., for J. H. Nottis.
Alex C. Johnson, of Athens, Ga., for petitioners.

SIBLEY, District Judge. J. A. Norris, Mrs. Rhetta Norris, and C. J. Wheless petitioned for bankruptcy adjudication against Mrs. S. E. Brinn and Mrs. S. L. Wheless on March 31, 1919, and concurrently

sought an injunction against a levy and sale of certain telephone property by J. W. Wansley, sheriff of Franklin county, under judgments in favor of W. C. Mason and W. B. Richardson, averring the judgments to have been obtained within four months, and the lien of them to be void under the Bankruptcy Law; also that the property was worth more than the judgments, and asking a receiver for the estates of the bankrupts.

This petition was referred to the referee, and was answered by the sheriff and the plaintiffs in fi. fa.—they averring that Mason's judgment was for the purchase money of the property levied upon; that its lien was in enforcement of a retention of title thereto, and dated from said retention of title; that the judgment itself had been rendered more than four months prior to the bankruptcy; and that Richardson's judgment had likewise been rendered more than four months. It was claimed that the levy by the sheriff antedated the bankruptcy, and that possession should remain with the sheriff to execute his levy, and a prayer to this effect was made.

Upon the hearing, the referee, having appointed a temporary receiver, who had gone into possession of all the property of the bankrupts, including that claimed to have been levied on, refused an injunction against the sheriff of the state court, but directed his receiver to retain possession of the property. The latter ruling of the referee is now under review, at the instance of the sheriff and plaintiffs in fi. fa. Their answer is not sworn to; the proceedings in the state court do not appear in the record, nor any of the documents relied upon to show the lien of Mason. The only evidence touches the existence of a surplus value above the fi. fas. in the sheriff's hands, and whether or not the sheriff had actually seized the property claimed to have been levied on, to reduce it to his possession, prior to the bankruptcy.

[1, 2] While the decision must rest upon narrow grounds, it will be profitable to state some of the broader principles upon which counsel have differed. The Bankruptcy Act (Act July 1, 1898, c. 541, 30 Stat. 544 [Comp. St. §§ 9585–9656]), passed by Congress under a specific grant of power in the Constitution, is, by the Constitution, a part of the supreme law of the land. The courts of bankruptcy, established for its administration, are necessarily paramount in authority. This is recognized by section 265 of the Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1162 [Comp. St. § 1242]), which prohibits federal courts from enjoining state courts, "except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy." The state insolvency laws are suspended by the Bankruptcy Law, and the power of the state courts to enforce liens which are invalidated by that law ends with the bankruptcy of the defendant. But the state courts remain courts of concurrent jurisdiction for the enforcement of liens not so invalidated, and in cases in which proceedings for their enforcement are instituted in the state courts prior to bankruptcy, the rules of comity between state and federal courts of concurrent jurisdiction remain of full force. This is established by an unbroken line of decisions of the Supreme Court of the United States (Peck v. Jenness, 7 How. 625, 12 L. Ed. 841; Eyster v. Gaff, 91 U. S. 521, 23 L. Ed. 403;

In re Watts, 190 U. S. 1, 23 Sup. Ct. 718, 47 L. Ed. 933; Farmers Trust Co. v. Lake Street Co., 177 U. S. 51, 20 Sup. Ct. 564, 44 L. Ed. 667; Metcalf v. Barker, 187 U. S. 165, 23 Sup. Ct. 67, 47 L. Ed. 122; Pickens v. Roy, 187 U. S. 177, 23 Sup. Ct. 78, 47 L. Ed. 128; Hebert v. Crawford, 228 U. S. 204, 33 Sup. Ct. 484, 57 L. Ed. 800), and by the Circuit Court of Appeals for the Fifth Circuit (Wilcox v. Sheriff, 105 Fed. 910, 45 C. C. A. 117; Carling v. Seymour Co., 113 Fed. 483, 51 C. C. A. 1; White v. Thompson, 119 Fed. 868, 56 C. C. A. 398; Sample v. Beasley, 158 Fed. 607, 85 C. C. A. 429; Roger v. Levert, 237 Fed. 737, 150 C. C. A. 491). See, also, the well-considered decision of the District Court for the Southern District of Georgia, in Broach v. Mullis, 228 Fed. 551. In such cases the bankruptcy court will not ordinarily interfere by injunction, whether before or after actual levy, though in exceptional cases, such, for instance, as might authorize the interference of a court of equity where bankruptcy had not occurred, the bankruptcy court may properly intervene.

[3] 1. The referee properly refused an injunction, if for no better reason than because the ground on which it was sought, to wit, that the judgments in question had been rendered within four months prior to the petition in bankruptcy, was not in fact true. The conclusion reached by him that there was an excess of value in the property sought to be levied upon over the amount of the fi. fas. in the sheriff's hands would not, by itself, justify an interference by injunction. While this ruling of the referee is not excepted to, it being merely advisory to the court, it is affirmed.

[4-8] 2. The direction to the receiver appointed by the referee to retain possession of the property, which is excepted to as being virtually equivalent to an injunction against sale by the sheriff, was also proper. The telephone system appears to have been a going concern. Had the sheriff levied upon it in its entirety, he could not have operated it, nor authorized its operation. A receiver alone could properly maintain its value by keeping it going, but it is not clear that the sheriff levied upon it in its entirety. On the contrary, the referee's conclusion that he had actually levied on nothing seems to be justified. A levy upon land in Georgia consists, not in seizure, but in an entry upon the process describing the realty seized, with notice to the owner or person in possession. Isam v. Hooks, 46 Ga. 309; Keaton v. Farkas, 136 Ga. 189, 70 S. E. 1110, subheadnote 6.

Evidently from the exhibits in the sheriff's unsworn answer, as well as the necessities of the case, the telephone property included easements over the streets of the towns involved and the land between the towns, with which the poles and telephone wires were connected. These constitute realty in Georgia. Code of 1910, § 3617. The sheriff's entry of levy contains no sufficient description of any such realty, it being in the following words:

"One switchboard located in Lavonia, Ga.; also one switchboard located in Canon, Ga.; also one switchboard located at Carnesville, Ga.; and all wires, lines, instruments, equipments of every kind."

For want of sufficient description this levy was void for uncertainty so far as it relates to land. Bird v. Burgsteiner, 100 Ga. 486, 28 S. E. 219; Walden v. Walden, 128 Ga. 126, 57 S. E. 323.

In the case of personalty, a levy in Georgia consists in an actual or constructive seizure. Code of Georgia 1910, § 6057; Ayers v. State, 3 Ga. App. 305, 59 S. E. 924:

"The mere declaration of an officer of an intent to seize personal property does not constitute a levy. The officer must do some act for which he could be successfully prosecuted as a trespasser, if it were not for the protection afforded him by the writ." Dean v. State, 9 Ga. App. 303, 71 S. E. 597.

The referee correctly found that the sheriff had seized no personal property within the meaning of this rule, and consequently that no valid levy existed with reference thereto. A comparison, moreover, of the property seized by the sheriff with the description of that sold by Mason, given in his bond for title, indicated that the sheriff was attempting to sell other property than that described in the bond. If the sheriff, under the rules of comity, ought not to be interfered with in the enforcement of the lien against the specific property sold, supposing the state court proceedings to amount to such an enforcement, still the other property would not be within the rule (Carling v. Seymour Lumber Co., 113 Fed. 483, 51 C. C. A. 1), and the evidence in this case does not serve to distinguish the property. For lack of sufficient showing as to the nature of the proceedings the sheriff was seeking to enforce, for want of sufficient proof of any valid levy by him, and for want of identification of the property as to which he claims a specific lien existed, the referee correctly refused the prayer of the sheriff that any property be turned over to him.

Whether the sheriff should be permitted now to identify any property to foreclose the lien on which the proceedings in the state court were directed, and to levy upon and sell the same, is not for decision. It would seem, however, considering the nature of the property, the fact that there would be few buyers for it, and they difficult to secure, and that a sheriff's sale, when begun, must be consummated to the highest then bidder, that there is likely to be a sacrifice of the property at a sheriff's sale, and especially if it must be dismembered to separate it into parts which the sheriff may and may not sell. It would be for the best interests of all concerned that the bankrupt court sell it as an entirety; the rights of those interested in the state court proceeding being fully and equitably guarded in the matter of expenses and costs.

Upon the question now for decision, the judgment of the referee is in all respects affirmed.

UNITED STATES ex rel. GRAU v. UHL, Acting Commissioner of Immigration.

(District Court, S. D. New York. December 8, 1919.)

1. HABEAS CORPUS ⟸54—VAGUE ALLEGATIONS AGAINST OFFICIALS WHO ORDERED PETITIONER'S DEPORTATION NOT CONSIDERED.
   Allegations in an application for writ of habeas corpus by an alien seaman arrested, and held by the immigration authorities for deportation, setting out in an illusive, vague manner that he had been informed that he was to be deported on the ground that he was likely to become a public charge, but that there was no evidence on which to base such finding, and that in reality he was to be deported because he was a member of the Industrial Workers of the World, and that various officials of the Department of Labor had stated he was too clever to afford actual grounds for deportation, are too vague to be considered by the courts.
2. HABEAS CORPUS ⟸53—APPLICATION MUST SHOW CAUSE FOR ALLOWANCE.
   Under Rev. St. §§ 754, 755 (Comp. St. §§ 1282, 1283), relating to habeas corpus, writ of habeas corpus will not be issued as a matter of course, but it must preliminarily appear that there was cause for its allowance, and if the application shows there is no ground for allowance such application must be denied.
3. HABEAS CORPUS ⟸4—COURTS CANNOT INTERFERE IN DEPORTATION PROCEEDINGS UNTIL ALIEN HAS APPEALED TO SECRETARY OF LABOR.
   Where a question of fact is involved, the courts will not interfere in behalf of the alien ordered to be deported, who had not appealed from the decision of the immigration authorities to the Secretary of Labor, as authorized by Act Feb. 5, 1917, § 17 (Comp. St. 1918, § 4289¼ii.)

Habeas Corpus. Application by the United States, on the relation of Jose Grau, for writ of habeas corpus to be directed to Byron H. Uhl, as Acting Commissioner of Immigration at the Port of New York. Application denied.

Chas. Recht, of New York City, for relator.
David V. Cahill, of New York City, for the United States.

MAYER, District Judge. The petition alleges that after certain proceedings, this court (per Knox, D. J.) held that relator, being a seaman, "was entitled to the benefit of provisions of section 34 of Act Feb. 5, 1917, c. 29, 39 Stat. 896 (Comp. St. 1918, § 4289¼s) namely, to be brought before a board of special inquiry for examination as to his qualifications for admission to the United States." The petition then continues:

"Subsequently, and on the 20th day of November, 1919, relator was brought before a board of special inquiry for hearing as to his right to enter the United States. That for more than two hours said board questioned relator as to his political and industrial views, laying special stress on his membership and affiliation in the Industrial Workers of the World. At the conclusion of said hearing relator was informed that he was to be excluded on the ground that he was likely to become a public charge.

"There is absolutely no evidence on which to base said finding, inasmuch as relator has never had any difficulty in procuring employment, and has always been able to earn sufficient money to maintain himself comfortably. That the conduct of the Department of Immigration and of the members of said board before whom said hearing was held was in manifest abuse of the discretion

of said board, and the ruling of said board to the effect that alien was likely to become a public charge was in abuse of their discretion and in violation of the constitutional and statutory rights of the relator.

"That the relator was originally arrested on the 26th day of May, 1919, on certain false and malicious information which the government has not been able to prove, and which it has repudiated. That your petitioner is a seaman by profession and wishes to continue to pursue his calling. That your petitioner is informed that it will be a long time before the immigration authorities will be able to effect his deportation, and that therefore your petitioner sues out this writ to obtain relief from the unlawful restraint which is now being imposed upon him, and so that he may obtain employment. Should the Immigration Department be able to effect your relator's deportation speedily, your petitioner will be willing to drop all proceedings under this writ. Petitioner feels, however, in view of his continued confinement since May, 1919, under charges which the immigration authorities afterwards dismissed, that he has suffered great injustice and irreparable injury, and that his continued confinement is merely a persecution on the part of said authorities. Your petitioner therefore feels that there is no evidence on which a charge that relator is likely to become a public charge can possibly be based, and that the ends of justice will be met by the granting of this writ.

"Your petitioner prays for this writ on the further ground that an appeal to the Department of Labor would be futile, in view of the continued persecution of said relator, and in view of the fact that petitioner is informed and believes that the records of the latest hearing before the board of special inquiry have been submitted to the authorities in Washington, that all the facts in regard to this case have been before the officials of the Department of Labor several times, and that petitioner has been informed and believes that the statement has been made by various of the officials that they consider the petitioner a dangerous man and although there is no evidence upon which they seem to be able to effect his deportation, that he should nevertheless be deported. Furthermore, that upon information and belief petitioner has been informed that various officials of the Department of Labor have made statements to the effect that your petitioner is really too clever to be able to afford them some ground upon which to exclude him, and that they nevertheless felt, in spite of the lack of evidence, that they would be doing the proper thing by deporting him. Your petitioner respectfully says that there is no basis for such statements, and that they are made merely to carry to a victorious conclusion the original efforts made to deport deponent."

[1] The foregoing extract is set forth in full in order to point out the loose allegations as to unnamed officials of the Department of Labor and the reprehensible nature of the petition in setting forth that an appeal to an administrative department charged by law with performing certain duties "would be futile." If the allegations set forth in the petition are true or have any basis of fact, then the petitioner must state what he knows on knowledge or what he has been informed and believes and must set forth the grounds and sources of his information and belief. In calling attention to the character of this petition, it may be observed that the court is of opinion that hereafter counsel will be held responsible for submitting petitions containing loose general allegations as to the conduct of unnamed officials. If officials have acted unlawfully or wrongfully, they should be named, and the good repute of any department of government or of any officials should not be indefinitely and vaguely assailed. The attorney for a petitioner must be willing that names, facts, and incidents shall be set forth in order to enable the particular officials concerned to answer any allegations. Petitions such as this should not be countenanced nor sponsored by members of the bar.

[2, 3] The impression seems to have become current that the court must allow a writ of habeas corpus as matter of course, no matter what the petition may set forth or fail to set forth. The writ is one of the great safeguards of the liberty of the individual; but, in order to prevent its abuse, it must preliminarily appear that there is cause for its allowance. Thus it is provided in sections 754 and 755 of the United States Revised Statutes (Comp. St. §§ 1282, 1283) as follows:

"Application for writ of habeas corpus shall be made to the court, or justice, or judge authorized to issue the same, by complaint in writing, signed by the person for whose relief it is intended, setting forth the facts concerning the detention of the party restrained, in whose custody he is detained, and by virtue of what claim or authority, if known. The facts set forth in the complaint shall be verified by the oath of the person making the application."

"The court, or justice, or judge to whom such application is made shall forthwith award a writ of habeas corpus, unless it appears from the petition itself that the party is not entitled thereto. The writ shall be directed to the person in whose custody the party is detained."

Briefly stated, what this petition comes down to is that a board of special inquiry has found, as a fact, that relator is likely to become a public charge. This conclusion relator is entitled to attack. But the procedure preliminary to such attack is clear.

Section 17 of the Act of February 5, 1917 (Comp. St. 1918, § 4289¼ii), provides as follows:

"Boards of special inquiry shall be appointed * * * for the prompt determination of all cases of immigrants detained at such ports under the provisions of the law. * * * Such boards shall have authority to determine whether an alien who has been duly held shall be allowed to land or shall be deported. * * * Such boards shall keep a complete permanent record of their proceedings and of all such testimony as may be produced before them; and the decisions of any two members of the board shall prevail, but either the alien or any dissenting member of the said board may appeal through the commissioner of immigration at the port of arrival and the Commissioner General of Immigration to the Secretary of Labor, and the taking of such appeal shall operate to stay any action in regard to the final disposal of any alien whose case is so appealed until the receipt by the commissioner of immigration at the port of arrival of such decision which shall be rendered solely upon the evidence adduced before the board of special inquiry. In every case where an alien is excluded from admission into the United States, under any law or treaty now existing or hereafter made, the decision of a board of special inquiry adverse to the admission of such alien shall be final, unless reversed on appeal to the Secretary of Labor. * * *"

In United States v. Tuck, 194 U. S. 161, at pages 167 et seq., 24 Sup. Ct. 621, at page 622 et seq. (48 L. Ed. 917), the court discussing the Chinese Exclusion Act, stated:

"But if the act is valid, even if ineffectual on this single point, then it points out a mode of procedure which must be followed before there can be a resort to the courts. In order to act at all the executive officer must decide upon the question of citizenship. If his jurisdiction is subject to being upset, still it is necessary that he should proceed if he decides that it exists. An appeal is provided by the statute. The first mode of attacking his decision is by taking that appeal. If the appeal fails it then is time enough to consider whether upon a petition showing reasonable cause there ought to be a further trial upon habeas corpus.

"We perfectly appreciate, while we neither countenance nor discountenance, the argument drawn from the alleged want of jurisdiction. But while the

consequence of that argument if sound is that both executive officers and Secretary of Commerce and Labor are acting without authority, it is one of the necessities of the administration of justice that even fundamental questions should be determined in an orderly way. If the allegations of a petition for habeas corpus setting up want of jurisdiction, whether of an executive officer or of an ordinary court, are true, the petitioner theoretically is entitled to his liberty at once. Yet a summary interruption of the regular order of proceedings, by means of the writ, is not always a matter of right. A familiar illustration is that of a person imprisoned upon criminal process by a state court under a state law alleged to be unconstitutional. If the law is unconstitutional the prisoner is wrongfully held. Yet except under exceptional circumstances the courts of the United States do not interfere by habeas corpus. The prisoner must in the first place take his case to the highest court of the state to which he can go, and after that he generally is left to the remedy by writ of error if he wishes to bring the case here. Minnesota v. Brundage, 180 U. S. 499 [21 Sup. Ct. 455, 45 L. Ed. 639]; Baker v. Grice, 169 U. S. 284 [18 Sup. Ct. 323, 42 L. Ed. 748]. * * *

"Considerations similar to those which we have suggested lead to a further conclusion. Whatever may be the ultimate rights of a person seeking to enter the country and alleging that he is a citizen, it is within the power of Congress to provide at least for a preliminary investigation by an inspector, and for a detention of the person until he has established his citizenship in some reasonable way. If the person satisfies the inspector, he is allowed to enter the country without further trial. Now, when these Chinese, having that opportunity, saw fit to refuse it, we think an additional reason was given for not allowing a habeas corpus at that stage. The detention during the time necessary for investigation was not unlawful, even if all of these parties were citizens of the United States and were not attempting to upset the inspection machinery by a transparent device. Wong Wing v. United States, 163 U. S. 228, 235 [16 Sup. Ct. 977, 41 L. Ed. 140]. They were offered a way to prove their alleged citizenship and to be set at large, which would be sufficient for most people who had a case and which would relieve the courts. If they saw fit to refuse that way, they properly were held down strictly to their technical rights."

Where, therefore, a question of fact is involved, the statutory remedies and appeals must first be exhausted before this court will entertain an application for a writ of habeas corpus.

As the petition shows on its face that petitioner has not taken his appeal to the Secretary of Labor, as provided by section 17, the application is denied.

In re ST. JOSEPH–CHICAGO S. S. CO.

THE EASTLAND.

(District Court, N. D. Illinois, E. D. December 23, 1919.)

No. 32231.

1. SALVAGE ⇐14—LIFE SALVORS WHO DID NOTHING TO AID VESSEL CANNOT SHARE IN SALVAGE AWARD TO ONE WHO RAISED VESSEL.

Where a vessel loaded with excursionists overturned in a narrow river and sank, life salvors, who performed their main services at the time of the accident, are not, under Act Aug. 1, 1912, § 3 (Comp. St. § 7992), known as the Salvage Act, entitled to share in the sums paid a wrecking company for raising and refloating the vessel; the work of the latter company being performed a considerable time after all services by the life salvors had been rendered, and the statute contemplating a divided service where

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

both lives and property were simultaneously imperiled and both are rescued about the same time.

2. SALVAGE ⊂⊃40—LAST SALVOR HAS PREFERENCE OVER FORMER SALVORS.
It is a well-recognized rule of maritime law that the last salvor is entitled to preference over former salvors.

3. SALVAGE ⊂⊃40—SALVOR OF VESSEL HAS PRIORITY OVER CLAIMS OF LIFE SALVORS.
A vessel loaded with excursionists capsized and sank, many persons being lost. Thereafter, under contract with the owners, it was righted and refloated; such services being performed a considerable time after the accident, and after life salvors had ceased to render any services. *Held* that, notwithstanding Act Aug. 1, 1912, § 3 (Comp. St. § 7992), relating to claims of salvors, the salvor of the vessel, having performed its services last, takes priority over claims of life salvors.

4. SALVAGE ⊂⊃40—SALVOR OF GEAR OF VESSEL HAS PRIORITY OVER LIFE SALVORS.
One who salvaged gear and other property of vessel, which had capsized and sunk with great loss of life, which gear and property was sold with the vessel, which was also salvaged and sold, has priority to the extent of his service over the claims of life salvors, who rendered their services at the time of the accident; the salvage of the vessel and gear occurring thereafter.

5. SALVAGE ⊂⊃45½, New, Vol. 9A Key-No. Series—NECESSITY OF PRESENTING CLAIMS FOR LIFE SALVAGE WITHIN TWO YEARS.
Under Salvage Act, § 4 (Comp. St. § 7993), providing that suit for remuneration for rendering assistance or salvage services cannot be maintainable, if brought later than two years from the date when such assistance, etc., shall have been rendered, life salvors cannot recover compensation for services rendered out of the fund resulting from the sale of the vessel, which, after having capsized, was righted and refloated, where they did not present their claims within two years after the time of rendering services, for the section creates a new right, and unless the claim is presented within the time fixed the right is lost.

6. SALVAGE ⊂⊃50—JUDGMENT IN FAVOR OF SALVOR AGAINST REPRESENTATIVES OF THOSE LOSING LIFE NOT CONCLUSIVE AGAINST CLAIMS OF LIFE SALVORS.
A judgment entered on a decision of the Circuit Court of Appeals, sustaining as a preferred lien the claim of the salvor of a vessel as against the claims of personal representatives of those who lost their lives in the accident, is not a conclusive adjudication against the claims of life salvors, who saved life at the time of the accident.

In Admiralty. In the matter of the petition of the St. Joseph-Chicago Steamship Company, owner of the steamer Eastland, for limitation of liability. On exceptions of the Great Lakes Towing Company to the amended claims of life salvors. Exceptions in part sustained, and in part overruled.

Goulder, White & Garry, of Cleveland, Ohio, and Wilkerson, Cassels, Potter & Gilbert, of Chicago, Ill., for Great Lakes Towing Co.
Edward Maher and Justus Chancellor, both of Chicago, Ill. (Charles S. Thornton, of Chicago, Ill., of counsel), for life salvors.

CARPENTER, District Judge. The steamer Eastland, heavily laden with excusionists, sank at its dock in the Chicago river on July 24, 1915. The loss of life was appalling. Through the magnificent and heroic efforts of the life salvors, intervening in this petition, the

lives of many men, women, and children were saved. The Eastland was fast to the dock at the time of the disaster, and for lack of proper ballasting turned over on her side, settled, and sank in 20 feet of water on the bottom of the Chicago river. As she lay on her side, a considerable part of the steamer was above the surface of the water, and she constituted an obstruction to the free navigation of the Chicago river; indeed, a menace to safe navigation.

It became the duty of the owners, under the law, promptly to raise and remove her. To this end, on July 27, 1915, the owner of the vessel entered into a contract with the Great Lakes Towing Company "to raise and deliver said steamer, righted and pumped out, to a dock in the vicinity where she lay sunk, for the sum of $34,500, no cure no pay." Under this contract the towing company began the work of raising the steamer on August 4, 1915, completed the work, and turned the steamer over to her owners on August 16, 1915.

On August 17, 1915, limitation proceedings were begun in this court by the owners of the steamer. The steamer was conveyed to a trustee appointed by the court, and on August 27, 1915, a monition issued, returnable the following December, requiring all persons having claims against the steamer Eastland, or her owners, arising out of the disaster of July 24, 1915, to file such claims on the return day of the monition. On September 1, 1915, the Great Lakes Towing Company filed its petition in this court setting up its contract for raising the steamer, the performance of the contract, and praying that it be paid $34,500, the price agreed upon. On December 15, 1915, the trustee of the court sold the vessel at public auction for $46,000, and that sum was paid into the registry of the court.

Many claims were filed in this proceeding by administrators of estates of people who lost their lives when the vessel capsized, and by other persons who suffered personal injuries or lost property at the same time. On behalf of these claimants objection was made to the payment of the claim of the Great Lakes Towing Company, and the District Court, on November 3, 1916, entered an order denying the payment of the claim of the Great Lakes Towing Company as a preferred lien claimant. On July 23, 1918, the Circuit Court of Appeals handed down an opinion, reversing the order of the District Court and remanding the cause, with directions to allow the towing company's claim, stating in the opinion:

"Since it affirmatively appears that appellant's claim is the only one of the preferred class, there is no reason for delaying payment."

On November 25, 1918, and March 24, 1919, applications for writs of certiorari in the Supreme Court of the United States to review the action of the Circuit Court of Appeals were denied. On March 29, 1919, the present claimants, the salvors of human life, so called, made an application to the District Court for leave to file an intervening petition in this proceeding, claiming a fair share of the remuneration allowed to the towing company for its service in raising and righting the steamer. On April 24, 1919, leave was given to the life salvors to file their claims.

On May 5, 1919, the District Court denied a motion of the Great Lakes Towing Company for a decree and immediate payment, on the ground that the mandate of the Court of Appeals merely directed it to allow the claim for raising the boat, together with interest and costs, but did not direct its allowance as a preferred claim against the life salvors. Exceptions were filed by the towing company to the amended intervening petitions of the life salvors, and the question presented here is whether the life salvors, performing their services on July 24, 25, and 26, 1915, may participate in the contract salvage allowance made to the Great Lakes Towing Company for raising the Eastland between August 4 and August 16, 1915, under the contract of July 27, 1915.

[1] The amended claims admit that all of the services rendered by the life salvors were performed on or before July 27, 1915. They make their claims under section 3 of the act of August 1, 1912 (37 Stat. 242), known as the Salvage Act (U. S. Comp. Stat. §§ 7990–7994 [9 Fed. Stat. Ann. (2d Ed.) 121]):

"Chapter 268. An act to harmonize the national law of salvage with the provisions of the international convention for the unification of certain rules with respect to assistance and salvage at sea, and for other purposes.

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that the right of remuneration for assistance or salvage services shall not be affected by common ownership of the vessels rendering and receiving such assistance or salvage services.

"Sec. 2. That the master or person in charge of a vessel shall, so far as he can do so without serious danger to his own vessel, crew, or passengers, render assistance to every person who is found at sea in danger of being lost; and if he fails to do so, he shall, upon conviction, be liable to a penalty of not exceeding one thousand dollars or imprisonment for a term not exceeding two years, or both.

"Sec. 3. That salvors of human life, who have taken part in the services rendered on the occasion of the accident giving rise to salvage, are entitled to a fair share of the remuneration awarded to the salvors of the vessel, her cargo, and accessories.

"Sec. 4. That a suit for the recovery of remuneration for rendering assistance or salvage services shall not be maintainable if brought later than two years from the date when such assistance or salvage was rendered, unless the court in which the suit is brought shall be satisfied that during such period there had not been any reasonable opportunity of arresting the assisted or salved vessel within the jurisdiction of the court or within the territorial waters of the country in which the libelant resides or has his principal place of business.

"Sec. 5. That nothing in this act shall be construed as applying to ships of war or to government ships appropriated exclusively to a public service.

"Sec. 6. That this act shall take effect and be in force on and after July first, nineteen hundred and twelve."

The life salvors claim that they "are entitled to a fair share of the remuneration awarded to the salvors of the vessel, her cargo, and accessories," and that therefore the claim of the Great Lakes Towing Company ought not to be paid in full to their prejudice. The exceptions of the towing company are as follows:

"I. Said amended claim of Sherwood S. Mattocks for himself and others, and the other like claims, do not state a cause of action.

"II. It appears on the face of said claims as amended that the alleged services were rendered entirely disassociated from, independent of, and were prior

in time to the services of the Great Lakes Towing Company, and were in no manner connected with or related to the services rendered by said Great Lakes Towing Company.

"III. It appears on the face of said claims as amended that any such services alleged in said amended claims were of an entirely different character to, were prior in time to, and constituted no part of the services of the Great Lakes Towing Company, under its contract set forth in its petition in this cause and referred to in the libel and petition of the St. Joseph-Chicago Steamship Company, and likewise heretofore passed upon and adjudicated by the Circuit Court of Appeals in this cause, which said services of Great Lakes Towing Company are also referred to in said amended life salvors' claims.

"IV. It appears from said amended claims that the services of said life salvors, and all and each of them, were performed more than two years prior to the making or filing of any such claim, and no sufficient excuse or reason, under the statute, for said delay is given.

"V. The matters set up in said amended claims in behalf of said life salvors are foreclosed and made res adjudicata by the decision and decree of the Circuit Court of Appeals in this cause.

"VI. There is no substantial or material difference in the amended claims now filed from the original life salvors' claims filed by said Sherwood S. Mattocks and others, to which exceptions made by Great Lakes Towing Company have recently been sustained, so all matters and things set forth in these claims are res adjudicata by decision and order of this court.

"VII. There is palpable and manifest misstatement of fact in the amended claims as filed, of which this court will take notice from the files on record in this case, and from general knowledge of such matters, to wit: In the original claims of said Sherwood S. Mattocks and others, as life salvors, it was alleged on oath that the life salvors' services were performed on the day the said steamer Eastland tipped over and sank, to wit, on July 24, 1915, and this court will take judicial knowledge of the fact that any services rendered in the saving of human life connected with the sinking of the steamer Eastland would have to be rendered within a few minutes, or at most within a few hours, of the time said steamer tipped over and sank.

"VIII. There is an effort in the amended claims to ask for an award in favor of said claimants on account of the salvage of property, as to which the claimants have no standing in this court, both by reason of the decree and opinion of the Court of Appeals, and also by reason of former orders of this court."

First. It is admitted that the life salvors have no claim against the steamer, or the towing company, or the fund, save under the statute heretofore quoted. The Eastland, immediately after the catastrophe, while lying on her side on the bottom of the Chicago river, was in no further danger of destruction by the elements; that is to say, where she sank she was in a position to be raised without danger to the salvors. No effort was made at the time of the accident to save or protect the boat. When the services of the life salvors were rendered, the steamer had already safely settled in the mud at the bottom of the river in about 20 feet of water. The efforts of the life salvors were directed solely to saving from drowning the passengers and crew of the steamer. There was nothing to distract those salvors from their humane purpose. The statute, I think, presupposed possibly a divided interest, and probably a sordid interest, in the average salvor. It imposed penalties of fine or imprisonment, or both, upon the master or person in charge of a vessel who failed, so far as he could do so without serious danger to his own vessel, crew, or passengers, to render assistance to any person who was found at sea in danger of being lost. It also aimed to stimulate, or excite, at least as much effort

to save human life as ordinarily would be spent in saving vessel or cargo. The statute, however, presupposed an emergency where both lives and goods were at hazard, and aimed to encourage the saving of life. It is a sad reflection to contemplate this law. However, we may not inquire into the wisdom of Congress in its passage. Suffice it to say, the circumstances of this case do not bring it within the law. These life salvors were put to no choice between passengers and crew and cargo. They had no chance to hesitate in determining whether it was more profitable to save the ship, or the men, women, and children on board. What they did was inspired by the spirit which since Christendom has been the foundation of the great brotherhood of mankind. Their work was done, and well done. Their reward they have; it never can be taken from them, and it is measured by a standard greater than money. They would not have done less for great promises.

At the time the life salvors were performing their heroic deeds, no effort was made to save the steamer or its appurtenances. There was no time for that. The steamer could not have been saved, because she was then practically lost. All of the efforts of the life salvors would not have saved her. The purpose of the statute being to engage the interest of the life salvors at least equally between human lives and property, it can have no effect in a case where there was no association of effort or co-operation between those saving lives and those saving ship or cargo. The lives were saved before the contract was made to raise the boat; certainly before work was begun under that contract.

After all the lives possible were saved, the steamer was still lying at the bottom of the river a worthless wreck, an obstruction, a menace to navigation, which had to be removed. The boat at the bottom of the river was of no value, and a reading of the statute here involved shows clearly that it was intended to apply only to cases which might be termed "pure salvage"; that is, cases where the service was rendered voluntarily at the time of risk, and not under contract after the emergency had passed. The service here rendered was a wrecking service in the nature of a salvage service, but not in any sense "salvage," as understood in the statute. The Elfrida, 172 U. S. 186, 19 Sup. Ct. 146, 43 L. Ed. 413; The Annie, 6 Aspinall (N. S.) 117.

The statute in question was intended only to apply to cases where the vessel and cargo, together with her crew, including also passengers, were exposed to a common danger threatening their destruction and loss; to cases where service is rendered by a volunteer adventurer, and such service is successful in saving lives and property, consisting either of the cargo, the vessel, or both. The services rendered in the saving of lives were to be considered when remuneration for salvage was awarded, so that they might participate in and be given a part of any sum paid for saving the vessel or other property. In such a case, the life salvor, by virtue of his service rendered at the time that the property was saved, became a cosalvor, with a right to recover compensation for a service, when, under the general maritime law, he would get nothing. It was for the purpose of enabling such a salvor to recover for his services that the statute was passed. It was

not intended that, as between different sets of salvors, the life salvor was to participate in awards which might be made for services rendered months, and even years, after the life-saving service had been performed.

The salvage service in saving life, to be compensated for under this statute, must have been performed substantially at the time and while both lives and property were in distress and danger of loss; not, of course, at the same instant of time, but during the period of peril. The life salvors, therefore, are not entitled, under the statute, to any part of the contract price awarded to the towing company for raising and righting the Eastland.

[2, 3] Second. The claim and lien of the towing company, being for services last in point of time, is paramount and preferred over all others, including those of the life salvors. The life salvors rendered their services on the day of the disaster and the two days following, and we may assume that those services were fully accomplished some days before any attempt was made to raise the steamer. We have, then, this situation: All of the lives saved that could be, and the steamer lying on the bottom of the Chicago river, an obstruction to navigation, and of no value to any one as she lay there. The towing company entered into its contract to raise the boat on July 27, 1915; began work on August 4, 1915; completed the contract and turned the ship over to the owners on August 16th of that same year. The services, therefore, of the towing company were subsequent in point of time to those of the life salvors. There was no connection between the services of the towing company and those of the life salvors. The life salvors had no claim for their services against anybody at the time they were rendered. The towing company was engaged in the wrecking business on the Great Lakes, and was under no obligation, legal or moral, to raise the steamer; and if it had not done the work successfully under its contract there would have been no property to sell, and no fund, or at least a very small one, for distribution. Nothing that the life salvors did contributed to the success of the subsequent service rendered by the towing company.

It is a well-known rule of the maritime law of the United States that the last salvor is entitled to preference over the first or former salvors. The two services, namely, life-saving service and wrecking service, were rendered at different times, and were not allied in any way. The first service in no way helped the second service, or preserved any of the property that was finally salved by the towing company. As priority, in point of logic, depends upon the rank of benefits conferred, so, therefore, must the towing company's claim be preferred to the claims of the life salvors. As the Court of Appeals said in this case (Great Lakes Towing Co. v. St. Joseph-Chicago Steamship Co., 253 Fed. 638, 165 C. C. A. 264):

"But, after all, it is unnecessary that appellant's service be defined as salvage. Maritime liens arise from many kinds of acts and services, and priority is determined by rank of benefits conferred. The John G. Stevens, 170 U. S. 113, 18 Sup. Ct. 544, 42 L. Ed. 969. Appellees' liens, if any they have, attached to the Eastland as she lay on the bottom of the river at the end of

her voyage. Appellees, as well as the owner, were benefited by appellant's service, and their claims are therefore subordinate."

See, also, Hughes on Admiralty, p. 331; Kennedy on the Law of Civil Salvage, p. 8; The Veritas, 9 Aspinall (N. S.) 237.

The life salvors' claims, like the death and accident claims, under consideration in Great Lakes Towing Co. v. St. Joseph-Chicago Steamship Co., supra, attached to the Eastland as she lay on the bottom of the river. As she thus lay, she was subject to claims of various kinds, and among those who were entitled to a fair share of the remuneration awarded to the salvors of the vessel were the life salvors. But the Eastland, lying at the bottom of the river, could not pay. To make her valuable she had to be raised, pumped out, and righted. To secure that value, the contract with the Great Lakes Towing Company was made; and if the well-recognized principle of maritime law, which the courts have announced, that priority among various claimants depends upon the order in which the services are rendered, were not the law, no one could have been secured to raise the Eastland. Men were employed, materials were purchased, time and effort were spent, in order to raise that boat, and it cannot be that the company which did that work at its convenience, under contract, and safely delivered the boat at the dock for the benefit of all concerned, is not entitled to its outlay and fair compensation for its services—in this case, the contract price. If this work had not been done, there would have been nothing available for claimants of any class. Clearly section 3 of the Salvage Act does not affect the priority of claims as settled in the Maritime Law. The life salvors were entitled only "to a fair share of the remuneration awarded to salvors" of the same rank, and not as to salvors whose claims were entitled to priority.

[4] Suggestion is made that some part of the fund derived from the sale of the Eastland should be withheld from contributing to the claim of the Great Lakes Towing Company because one Capt. Walter Scott saved some $8,000 worth of property, which was sold as a part of the vessel, and for which he was allowed $500 as salvage. It appears that, beginning with August 4th, and up to August 16th, long after the accident, Capt. Scott picked up in the Chicago river various parts of the equipment of the Eastland. That equipment was returned to the boat, and when the boat was sold was disposed of with it. At the most Capt. Scott and the towing company were cosalvors; the one raising the wreck, and the other saving certain goods which got loose and floated down the river. It cannot for a moment be argued that they were cosalvors with those who saved human lives. Inasmuch as the boat and its apparel were sold together, there is no way of determining what the part of the property saved by Capt. Scott was sold for, and what the property saved by the towing company brought. The District Court awarded Scott what it thought was reasonable for the service he performed for the benefit of the steamer Eastland, and this sum was paid to him out of the proceeds of the sale. No objection was made by any one interested; no application was made to sell separately the property saved by Capt. Scott. The services rendered were treated as services for the benefit of the whole steamer, which in-

cluded the hull and all the different parts of the ship, boats, tackle, apparel, and furniture.

Capt. Scott had a lien not only upon what he actually saved, but upon the whole vessel, which included what he saved. The towing company rendered its service in saving the Eastland, and that included everything that belonged to her and had always been a part of her. The life salvors have no more claim against the property saved by Scott than they have against the property saved by the towing company.

[5] Third. It is provided by section 4 of the act, upon which the life salvors base their claim:

"That a suit for the recovery of remuneration for rendering assistance or salvage services shall not be maintainable if brought later than two years from the date when such assistance or salvage was rendered."

Under this statute the time for filing claims against the Eastland expired on July 25, 1917. The steamer practically came into the custody of the court on the 16th day of August, 1915, and after the sale in December, 1915, the proceeds were placed in the registry of this court, where they still remain. The towing company filed its claim on September 1, 1915. The monition advised the world of the pendency of proceedings. The life salvors, or at least most of them, resided in Chicago, and had ample opportunity to file their claims at any time, and were given every right to do so. They took no part in the trial of the case of the towing company to recover its claim in the District Court. They took no part in the hearing of the case in the Circuit Court of Appeals, and they were heard of for the first time, so far as this court is concerned, on March 29, 1919, more than three years after their services were rendered, and more than three years after the towing company had filed its claim, and more than two years after the hearing of the towing company's case in this court. They are therefore not within the two years provided by the statute.

The act of Congress under which these life salvors proceed created a new cause of action. "A statute which in itself creates a new liability, gives an action to enforce it unknown to the common law, and fixes the time within which that action may be commenced, is not a statute of limitations. It is a statute of creation, and the commencement of the action within the time it fixes is an indispensable condition of the liability and of the action which it permits. Such a statute is an offer of an action on condition that it be commenced within the specified time. If the offer is not accepted in the only way in which it can be accepted, by a commencement of the action within the specified time, the action and the right of action no longer exist, and the defendant is exempt from liability." Partee v. St. Louis & S. F. R. Co., 204 Fed. 970, 123 C. C. A. 292, 51 L. R. A. (N. S.) 721, and cases cited.

It is, however, now contended that inasmuch as no claim is made against the steamer or her proceeds directly, but only against the amount awarded to the towing company, that the two-year limitation in the statute does not apply until after the award to the towing company had been established, and it is argued that until the decision of the

Court of Appeals on July 23, 1918, the right of the towing company to recover for its services had not been determined, and that therefore the life salvors had until July 23, 1920, to file their claims for a fair share of the remuneration awarded to the towing company.

The language of the statute is plain, and not in any degree ambiguous or doubtful. On the day their services were rendered the life salvors had some sort of claim, present, contingent, inchoate, or otherwise, and they were bound, under the law, to present that claim to this court where the limitation proceedings were pending. They have not brought themselves within the exception noted in section 4, and no explanation is made of the reason why they were late in asking for relief. Indeed, I am of the opinion that, inasmuch as the fundamental law required the claims to be filed within a certain time, no explanation would excuse the delay. The court is powerless, under the language of the act, to grant an extension of time beyond the two years, except as provided by the statute, and this case does not come within that exception.

This argument of the life salvors is very seductive for the moment, but an analysis of the statute must demonstrate that it is unsound. It is conceded it was the purpose of Congress to grant some compensation to the salvors of human life. It cannot for a moment be supposed that it was put in the power of the salvors of the vessel or the cargo to defeat the claim of the life salvors. Those saving the vessel or the cargo might make a private settlement with the owner with reference to salvage. Clearly that ought not to defeat any claim of those who saved lives. A reasonable construction of the statute would permit the salvors of human life, in the absence of the salvors of the vessel and the cargo, to appear in the District Court having jurisdiction over the vessel or its proceeds, stating in their petition that salvage services were rendered the vessel and the cargo on the occasion of the accident, and ask that the owners or claimants of the vessel be required to pay to them a fair share of the remuneration which was earned, or ought to be paid to the salvors of the vessel and the cargo. The vessel and cargo salvors could be made respondents, and cited into court to show cause why, as cosalvors, those saving human lives should not participate in the total remuneration for services rendered. Indeed, such a petition filed would prevent private settlement by the owner and the vessel salvors, or would permit it at the owner's risk of making fair compensation to the life salvors in addition to the private settlement.

In any event, the statute created a new liability, gave a new cause of action, and it cannot be presumed that it was intended that the liability or right of action should be dependent upon the conduct of others. Of course, if there were no other salvage services rendered than the saving of human lives, no remuneration could be recovered under the statute; but, granting that in the emergency on the occasion of the accident services were rendered which resulted in the saving of the vessel or cargo, the salvors of human life, acting during the same peril, were entitled to compensation, to remuneration, at least to some extent, and their right to claim it in this court is clear. This being my construction of the statute, it follows necessarily that under section

4 the claimants here have failed to comply with the conditions prescribed by Congress under which they were permitted to be compensated for their services.

[6] Those exceptions to the libel which amount to a general demurrer to the claim of the life salvors, and the exceptions raising the point that the claims were not filed in time, are sustained. The exceptions involving res adjudicata are overruled.

J. W. RINGROSE CO. v. W. & J. SLOANE.

(District Court, E. D. Pennsylvania. December 22, 1919.)

No. 5672.

1. EVIDENCE ⟸71—RECEIPT OF LETTER EVIDENCED BY MAILING.
   The mailing to a defendant of a properly addressed and stamped envelope containing a letter, and the production of the letter by defendant at the trial, are both evidence of its receipt.
2. EVIDENCE ⟸378(3)—LETTER OF CORPORATION ADMISSIBLE WITHOUT PROOF OF AUTHORITY OF SIGNER.
   In an action on a contract alleged to have been made by correspondence, a letter purporting to be signed by defendant corporation, and to accept the terms proposed in a letter received from plaintiff and in evidence, *held* admissible as prima facie that of defendant, without proof that the person signing it had authority to make the contract.
3. SALES ⟸94—CONTRACT REVOCABLE AT WILL DETERMINES RIGHTS PRIOR TO REVOCATION.
   A contract to buy or sell goods at a price, although revocable at will, determines the rights of the parties respecting the transactions executed thereunder before revocation.
4. PRINCIPAL AND AGENT ⟸41—INSTRUCTION SUBMITTING KIND OF CONTRACT MADE MISLEADING, WHERE JURY WAS GIVEN NO MEASURE OF DAMAGES THEREFOR.
   Where, in an action on a sales contract, court instructed that if jury found a commission contract damages would be a stated amount, and if they found a protection contract to simply find for defendant, it was misleading to submit the question whether contract was a reference contract —that is, to refer buyers to plaintiff—which would carry a different measure of damages.

At Law. Action by the J. W. Ringrose Company against W. & J. Sloane, a corporation. On motion by defendant for a new trial. Granted.

Paxton Deeter and Murdock Kendrick, both of Philadelphia, Pa., for plaintiff.

Selden Bacon, of New York City, and F. B. Bracken, of Philadelphia, Pa., for defendant.

DICKINSON, District Judge. The findings of any tribunal in any cause are facilitated by the determination (1) of what the questions are upon which the decision of the cause turns, and (2) the proper answers to be made to these questions. This first step is always of importance, and usually is a long step toward the final conclusion reached. A third help is not to have these questions too numerous. The fable

of the fagots does not apply to defenses in litigated cases. Many defenses, no matter how bundled, are often of less strength than one, and very many are sometimes weaker than none.

The real difference these parties have is over the arrangement made between them. The plaintiff asserts that it was a contract to pay him a 10 per cent. commission on all sales made of a certain fabric. The defendant asserts it was an agreement to sell to the plaintiff at a certain price, and not to sell to others at less than a 10 per cent. advance on this price. The former is known to this record as a commission contract; the latter, as a protection contract.

The real question involved is what was the contract; a subsidiary question of law is whether the contract is to be found by the jury from all the evidence, or found by the court to be embraced in the part of the evidence which is in writing and construed as a written contract.

A number of defenses were advanced by the defendant at the trial, and are now reurged in support of the present motion. In deference to the insistence and urgency of counsel, we will take up a number of them for consideration seriatim.

(1) No oral contract was made on behalf of the defendant by the salesman, Gardner, as averred by plaintiff.

(2) If such a contract was made, the salesman, Gardner, by whom it was made, had no authority to bind the defendant.

This defense, as the first, has no present value, for the reason that it depends upon what the contract was. If it was as asserted by the plaintiff, the trial judge ruled that it was unauthorized; if it was as asserted by the defendant, the jury was instructed that the contract had not been breached; and, further, the contract asserted was not a contract made by Gardner, but one suggested and outlined by him, and submitted to the defendant itself, who then made the contract, or, if the expression be preferred, ratified it.

(3) The defendant itself made no contract.

The real meaning of this is that there was no evidence from which a contract could be found, and will be so considered.

[1] (4) There was no evidence that defendant received the letter of March 13, 1918, setting forth the contract.

The mailing of a properly addressed and stamped envelope, containing the letter, is in itself evidence of its receipt by the defendant. Whitmore v. Ins. Co., 148 Pa. 405, 23 Atl. 1131, 33 Am. St. Rep. 838. The production of the letter by defendant at the trial on call is also evidence of its receipt.

[2] (5) There was no evidence that the reply letter of March 14, 1918, accepting the contract set forth in the letter of March 13, 1919, was the letter of defendant, or written by its authority.

For this proposition the case of Penna. Taximeter Co. v. Cressy, 191 Fed. 337, 112 C. C. A. 81, is cited. Under the broad facts of that case it might well be relied upon as ruling the instant case, because there was there, as here, a letter mailed to the defendant and answered. It is to be observed, however, that for some reason the cause of action there was not based, as it is here, upon the contract of the defendant appearing (inter alia) by letters to and from the defendant, but upon a

contract made by one George W. Close, by which the defendant was averred to be bound upon the double ground (1) that Close had been held out by the defendant to be its agent with authority to make the contract, and (2) the defendant by its "course of dealing subsequent to the date" of the contract by which it had accepted and acted upon it "had effectually ratified and affirmed" it.

The trial judge submitted these two questions to the jury, who found for plaintiff. The Court of Appeals (as was then the practice) entered judgment for defendant n. o. v., holding that there was no evidence of any "course of dealing" from which either precedent authority to make the contract or subsequent ratification of it could be found. Judge Gray was careful to point out that the ruling was made wholly upon the point of the absence of evidence of any "course of dealing," as it was an admitted fact in the case that there was no other basis of support for the judgment.

In the instant case, it is to be observed that the cause of action is not put upon the ground of precedent authority in Gardner to make the contract, or of ratification in any real sense by the defendant. On the contrary, the cause of action is based upon a contract made by the defendant itself. Gardner's connection with it was merely to fix its scope and terms. It was then submitted to the defendant, and became defendant's contract, because defendant made it such. It was a ratification of Gardner's act only in the sense that the defendant made a contract, the terms of which had been talked over and approved by Gardner before it was submitted to the defendant. It did not become a contract because Gardner had first made it, and the defendant had afterwards sanctioned it by accepting it and benefiting by it, but it became a contract, as has been said, wholly because defendant made it. The question is not whether there was any evidence of the ratification of an unauthorized contract, but whether there was any evidence that the defendant had made the contract. There was no evidence to warrant the finding of a contract, unless the letters of March 13 and March 14, 1918, were properly admitted in evidence.

We have already ruled the letter of March 13th to be evidential. Is the letter of March 14th? The question is brought down to this: Plaintiff, having offered in evidence the letter of March 13th, follows it with the offer of the reply letter of March 14th, which purports to bear the signature of the defendant. No proof of signature was required, but the letter was objected to on the ground that the defendant, being a corporation, could sign a letter only by the hand of some natural person, and that the authority of the person who signed the letter to make a contract should be shown before the letter (although the letter of the defendant) could go in evidence.

The question presented will be determined upon the assumption that the only evidence upon the question of authority to receive and answer letters was that the organization of the defendant's office for business was by the appointment of a mail clerk, who received all letters and distributed them to different persons in the office to be answered, and that this letter had been referred to and answered by (as the letter itself showed) the same Mr. Gardner, with whom the plain-

tiff had conferred before the letters were written. We adhere to the view before expressed that the letters were properly admitted in evidence as prima facie letters received and answered by defendant. Roe v. Insurance Co., 149 Pa. 94, 23 Atl. 718, 34 Am. St. Rep. 595.

The question subsequently lost all trial value, for the reason that the defendant proved by the witness Gardner that the defendant made, in the usual course of its business, what he terms "protection contracts," and his authority to make contracts of this character, so that the real question became, not one of whether the defendant had made the contract, or of Gardner's authority, but what the contract, which was made, was.

(6) The contract, if made, was nudum pactum.

This is mere assertion. The consideration was that the plaintiff should create a market for the fabric and buy it of the defendant at a price.

(7) There was no mutuality of obligation.

This is the same point in another form.

(8) The contract was so vague and indefinite in its terms as to be unenforceable.

This depends altogether upon what the contract was. The point has, however, a bearing which will be later discussed.

(9) The contract was void, because against public policy.

This point was so presented as to suggest danger that it would arouse only prejudice. The illegality of the contract turned wholly upon what it was. The point presented asked the trial judge to charge that it was illegal, because it was a conspiracy to raise the price of the fabric to the government. The contract expressly excluded transactions in which the government was concerned. The point in consequence had no application, because, if the government was concerned, there was no contract, and whether lawful or not was of no moment.

(10) There was no evidence to establish the contract set up.

This is involved in the points already discussed.

[3] (11) The contract was revocable at will, and because of this no contract at all.

So far as this point is not involved in that of indefiniteness, it depends upon whether the contract is executory or executed. So far as executory by its very terms neither party could be compelled to continue it. An agreement to buy or sell at a price, however, although revocable at will, will determine the rights of the parties respecting any transaction within the contract which the parties have had before revocation.

(12) The letter of May 4, 1918, was a revocation of the contract.

No point was made of this at the trial, and it does not support a motion for a new trial. It remains in the case for whatever it may be worth.

(13) No breach of contract was shown.

This, also, depends altogether upon what the contract was. If the contract was as construed by defendant, the jury was instructed there was no breach, and directed to find for defendant. If the contract was as construed by plaintiff, the breach was manifest.

[4] (14) The numerous complaints of error in the exclusion or admission of evidence need not now be considered, nor the question of whether the contract was for the court or the jury to find and construe. All these questions remain in the case.

There was in the case and defense but one question, which, if there was any jury question, it was worth while to submit to the jury, and that was the question of what the contract was—whether it was a contract to refer all purchasers to plaintiff, so that it might make the sales, otherwise to allow plaintiff 5¼ cents per yard on sales made by defendant, or whether it was a contract not to sell at less than a 5¼-cent advance on the price to plaintiff. If the contract was the first, the measure of damage was the 5¼ cents. If the contract was the second, there was no breach. The charge so left the cause with the jury. At the close of the charge the trial judge was asked to submit to the jury to find whether the contract was one to simply refer purchasers to the plaintiff. This was done, but for the moment the effect of this instruction was overlooked. The effect was this: The jury had been charged in effect that, if they found for the plaintiff, the damages should be assessed at 5¼ cents per yard; if they found a protection contract, the verdict should be simply for the defendant. They were not instructed upon the measure of damages, because there was no need of a measure. When, however, they were charged they might find a reference contract, the natural inference was that the measure of damages was still 5¼ cents per yard. This inference was an error, and, although the error in the charge was an inadvertence, it was none the less error. If the jury found a commission contract, the measure of damages given them was correct. If they found a reference contract, that measure was clearly wrong. The present difficulty is that we do not know which contract they found. The attention of counsel was called to this, and the suggestion made that the jury be reinstructed; but counsel for plaintiff thought the instruction was sufficiently clear.

We have examined the charge, and do not find it so. For this reason, the case must be retried. This is to be regretted, because it is a distasteful duty to interfere with a verdict fairly won.

The same thing must be said as to the answer to the plaintiff's fifth point. This point was misread. It was read at the time as referring to the distinction between a contract made by an agent without authority, and the same contract subsequently submitted to and made by the principal. A re-reading, however, discloses the point to be broader, or at least different from this. It means that if, after an unauthorized contract is made, the parties subsequently accept it by acting upon it, this ratifies and confirms it. The proposition is true enough, but it was error to submit it to the jury, because there was no evidence in the case of such ratification.

The case of the plaintiff, if it has any, as presented, rests upon the proposition that a contract negotiated by the agent was submitted to and accepted by the defendant itself. If the evidence of a contract is wholly in writing, so that a contract may be found from the writings alone, it is to be construed and its meaning found by the court; if facts are to be found before the contract can be known, it necessarily

must go to the jury. This question is still in the case, but there was no evidence upon which defendant's point 5 could be based. The point, and unfortunately the answer, also, ignores the distinction between a contract negotiated by an unauthorized person and submitted to and made by the principal, who thus makes it his contract, and an agreement made with the same unauthorized person, which the principal afterwards, by his course of dealing and acts, is held to have adopted as his own, and thereby ratified it through having accepted the benefits of it. Each proposition is sound, but the respective principles upon which each is based are wholly different, and the evidence supporting each is likewise different.

The letters of March 13th and 14th, having been admitted as the letters of defendant, were evidence that the defendant made the contract; there was no evidence that the defendant, with knowledge that Gardner had assumed authority to make the contract, had acted upon it by performance or accepting performance, so as to be estopped from denying it.

The rule for a new trial is made absolute.

EVANS, District Judge, v. GORE, Deputy and Acting Collector of Internal Revenue.

(District Court, W. D. Kentucky. December 23, 1919.)

No. 557.

INTERNAL REVENUE ⊂⊃7—PROVISION FOR INCOME TAX ON SALARIES OF FEDERAL JUDGES NOT UNCONSTITUTIONAL.

The provision of Income Tax Act, § 213,[1] which, in requiring salaries generally to be included in gross income returns, specifies, among others, salaries of federal judges, *held* not in violation of Const. art. 3, § 1, which provides that the compensation of judges of the Supreme and inferior courts "shall not be diminished during their continuance in office."

At Law. Action by Walter Evans, United States District Judge for the Western District of Kentucky, against J. Roger Gore, Deputy and Acting Collector of Internal Revenue. On demurrer to petition. Demurrer sustained.

Walter Evans, of Louisville, Ky., pro se (Frank P. Straus, Howard B. Lee, Helm Bruce, William Marshall Bullitt, and Edmund F. Trabue, all of Louisville, Ky., of counsel), for plaintiff.

W. V. Gregory, U. S. Atty., and S. M. Russell, Asst. U. S. Atty., both of Louisville, Ky., for defendant.

PECK, District Judge (for the Southern District of Ohio, sitting by designation in the Western District of Kentucky, for the purposes of the above-entitled cause). Heard upon demurrer to the petition.

From the petition demurred to the following facts appear: The plaintiff is, and was before the passage of the Income Tax Law of 1919 (Acts Feb. 24, 1919, c. 18, 40 Stat. 1057), a judge of a District Court of the United States. In March, 1919, as required by the terms of that act, he made his income tax return, including therein, under

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

[1] Comp. St. Ann. Supp. 1919, § 6336½ff.

protest, his judicial salary for the preceding year. He thereafter paid the deputy collector his income tax thereon, under protest, with notice of his intention to sue to recover it. He subsequently made the necessary application and appeal to the Commissioner of Internal Revenue for refunder thereof, which were overruled and refused, and accordingly he now sues the deputy collector for the return of the tax.

No question is made as to the regularity of the steps taken preliminary to bringing the suit, and the case turns wholly on the merits. The sole question is whether section 213 of the act of February 24, 1919 (40 Stat. 1065), in so far as it requires the compensation received by judges of the Supreme and inferior courts of the United States to be included within the gross income returned, is contrary to article 3, section 1, of the Constitution of the United States. That section is as follows:

"The judicial Power of the United States, shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the Supreme and inferior Courts, shall hold their Offices during good behavior, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office."

The definition contained in section 213 of the act states that the term "gross income"—

"includes gains, profits, and income derived from salaries, wages, or compensation for personal service (including in the case of the President of the United States, the judges of the Supreme and inferior courts of the United States, and all other officers and employés, whether elected or appointed, of the United States, Alaska, Hawaii, or any political subdivision thereof, or the District of Columbia, the compensation received as such), of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever."

The gross income so required to be returned is subject to certain exemptions and deductions, and the net income thus arrived at is taxed on a graduated scale.

Section 1 of article 3, above quoted, was not affected by the Sixteenth Amendment, declaring that:

"The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several states, and without regard to any census or enumeration"

—because this amendment has been determined not to extend the power of taxation of incomes to subjects previously exempt, but only to remove the necessity for apportionment with reference to income taxes. Peck v. Lowe, 247 U. S. 165, 172, 38 Sup. Ct. 432, 62 L. Ed. 1049; Brushaber v. Union Pacific R. R., 240 U. S. 1, 36 Sup. Ct. 236, 60 L. Ed. 493, L. R. A. 1917D, 414, Ann. Cas. 1917B, 713; Stanton v. Baltic Mining Co., 240 U. S. 103, 36 Sup. Ct. 278, 60 L. Ed. 546. Not only is the presumption in favor of the validity of the act, but the question must be free from reasonable doubt to justify

holding to the contrary. Nicol v. Ames, 173 U. S. 509, 19 Sup. Ct. 522, 43 L. Ed. 786.

The constitutional provision referred to (section 1 of article 3) does not exempt the judges from taxation, generally speaking. They are subject to the taxing power equally with other citizens. Indeed, their salaries, in so far as used to defray their living expenses, or otherwise consumed by them, have been laid under indirect taxation by duties, imposts, and excises since the beginning of the government, and if the revenue now exacted by income tax had been raised by the familiar indirect means, the judicial salary would have been, without question, subject thereto in its expenditure, as in the past. Therefore a tax is not invalid merely because it may operate indirectly or incidentally to require repayment to the government of some part of the money paid out as judicial salary.

Since the judge is, as others, subject to taxation, it may be stated that he owes the government his fair share of the burden which the United States is obliged to impose upon its citizens for its support. On the other hand, the government owes to him an undiminished compensation. But these are two independent accounts; neither may be justly said to impair the other.

If a tax were directly laid upon judicial salary, as such, and "because of its source or in a discriminative way" (Peck v. Lowe, 247 U. S. 172, 38 Sup. Ct. 432, 62 L. Ed. 1049), it might, perhaps, fairly be claimed to be a diminution of compensation. But a tax laid upon incomes generally, including judicial salary, without discrimination, at a uniform rate, seems to be nothing other than the requiring of the judge his fair share of the burden aforesaid, measured by his income. His salary is not thereby diminished; his income is merely used as the fairest measure of his tax. The tax is, in effect, imposed upon the citizen in proportion to income.

It is said that Congress is bound by no general rule of equality in the laying of the income tax, that it may classify persons for taxation at pleasure, and that the judges may be put in a class by themselves or in an unfavored class and their salaries taxed, to the destruction of that judicial independence the Constitution unquestionably sought to protect. Federalist, No. 79; 2 Story, Const. § 1628 et seq.; 1 Kent, Com. 293. But there seems to be an inherent, fundamental distinction between equal participation in the general burden of a uniform income tax, and subjection to a discriminative salary tax. The one appears not to be directed against salaries, as such, but to fall only incidentally thereon, and therefore not to be a diminution thereof within the constitutional phrase. The other, merely seeking by classification to reclaim part of that paid out in compensation, might, without injustice, be regarded as a diminution of the salary under the guise of taxation. For the purpose of deciding upon its validity, a tax should be regarded in its actual and practical, rather than in its theoretical, results. Nicol v. Ames (supra) 173 U. S. at page 516, 19 Sup. Ct. 522, 43 L. Ed. 786.

There appears to be no adjudication of this point by any court of the United States. It was, however, the subject of a letter from

Chief Justice Taney to Hon. Salmon P. Chase, Secretary of the Treasury, condemning as invalid a similar tax. 157 U. S. 701.

That a general income tax would fall upon judicial salaries was likewise assigned by Mr. Justice Field as an additional reason for the unconstitutionality of the income tax of 1894, in a separate concurring opinion, in the case of Pollock v. Farmers' Loan & Trust Co., 157 U. S. 429, 604, 15 Sup. Ct. 673, 39 L. Ed. 759; but the point was not touched by the opinion of the court, and the unconstitutionality of that act was placed thereby upon entirely different grounds.

There is also an opinion by Attorney General Hoar, addressed to Hon. George S. Boutwell, Secretary of the Treasury, October 23, 1869 (13 Op. Attys. Gen. 161), upon the constitutionality of the act of 1867, taxing salaries of all civil officers of the United States, and concluding that no income tax may be lawfully assessed and collected upon the salaries of the President or any of the judges who were in office at the time the statute imposing the tax was passed.

A similar conclusion was reached by the Attorney General of North Carolina, in a letter to Hon. David M. Furches, Chief Justice for that state, dated December 16, 1902. In re Taxation of Salaries of Judges, 131 N. C. 693, 42 S. E. 970.

The present Attorney General of the United States has, upon full consideration, concluded in favor of the validity of the tax. Opinion of Mr. Attorney General A. Mitchell Palmer to the Secretary of the Treasury, May 6, 1919, 31 Op. Atty. Gen. 475.

It cannot be denied that the foregoing opinions, although not bringing the point under the rule of stare decisis, are entitled to great weight.

In Commonwealth ex rel. v. Mann, 5 Watts & S. 403, the Supreme Court of Pennsylvania determined that an act which assessed upon the salaries of judges a tax of 2 per cent., which the state treasurer, by the provisions of the law, was directed to retain, was contrary to a provision of the state Constitution forbidding diminution of judicial compensation. The terms of the act are to be found on page 415. The tax was not general, but was specifically directed against the salaries of offices held in Pennsylvania, and the court, at page 417, uses this significant language:

"Taxation is an incident of sovereign power, which acknowledges no limits except the discretion of those who use it, unless it be those objects of taxation which for wise reasons have been withdrawn from these general powers. The property of a judge, his income, whether derived from this or any other source, we admit is a proper subject of taxation. His security will then consist in being placed on the same footing with other citizens, and an abuse of them by any will be speedily corrected. Of this the relator does not complain; but he does complain that he, with others, is selected as a special object of taxation, contrary to the charter which he has solemnly sworn to support."

Thus, clearly, this decision was placed upon the discriminative feature of the tax, and the opinion specifically affirms the validity of a tax such as that now under consideration.

In Commissioners v. Chapman, 2 Rawle, 73, the Supreme Court of the same state had previously held that a tax levied upon the defendant for his office as President Judge of a judicial district of

Pennsylvania, by the laws for raising county rates and levies, was not unconstitutional, and the court say (page 77):

"The object of the Legislature was to apportion the public burden according to the ratio of property, and to produce in detail a result approaching as near as possible to that of an income tax—a measure of assessment more equable in the abstract than any other that could be proposed. * * * The Legislature could not constitutionally retrench a part of a judge's salary under the pretext of assessing a tax on it; but, for the bona fide purpose of contribution, a reasonable portion of it, like any other part of his property, may be applied to the public exigencies."

There is nothing irreconcilable in these two decisions. The one, condemning a special tax on salaries, admits the propriety of a general tax on incomes, including the judicial salary; the other upholds the latter form of taxation. The distinction between these two cases would seem to define clearly the boundary line between diminution of salary by special taxation and the taxing of incomes generally, including such salaries.

In State v. Nygaard, 159 Wis. 396, 150 N. W. 513, Ann. Cas. 1917A, 1065, as against a similar constitutional provision, the statute levying an income tax by uniform rule, which fell upon the salaries of judges as upon others, was upheld; but the case was put principally upon an amendment of the Constitution of that state adopted in 1908, authorizing generally the laying of income taxes, from which the court could find no reason for excepting judicial salaries.

In New Orleans v. Lea, 14 La. Ann. 197, an attempted tax by the city of New Orleans upon the salary of a Justice of the Supreme Court of that state, was held void, as contravening a similar constitutional provision. The decision was based upon McCulloch v. Maryland, 4 Wheat. 316, 4 L. Ed. 579; but the decision there obviously turns upon a different principle, to wit, the power of the state to tax an instrumentality of the government of the United States, and it is worth noticing that the decision went no further than was necessary to protect from taxation the sovereign powers of the United States, and was specifically restricted so as not to extend to a tax paid by the real property of the bank in common with other real property within the state, nor to a tax imposed on the interest which the citizens of Maryland might hold in the institution, in common with other property of the same description throughout the state.

Dobbins v. Commissioners, 16 Pet. 435, 10 L. Ed. 1022, and Collector v. Day, 11 Wall. 113, 20 L. Ed. 122, proceed upon the same principle, or its converse, the immunity of the instrumentalities of the state government from federal taxation, and cannot be said to be a guide in the solution of the question presented in this case.

That income may be taxable, although derived from sources in themselves exempt from taxation, is demonstrated by the decisions in Peck v. Lowe, supra, holding that income derived from the export trade is taxable, and U. S. Glue Co. v. Oak Creek, 247 U. S. 321, 38 Sup. Ct. 499, 62 L. Ed. 1135, Ann. Cas. 1918E, 748, holding that a state may lay a general income tax including corporate profits derived from interstate commerce. In the latter case (247 U. S. at

page 328, 38 Sup. Ct. 501, 62 L. Ed. 1135, Ann. Cas. 1918E, 748) the court say:

"The correct line of distinction is so well illustrated in two cases decided at the present term that we hardly need go further. In Crew, Levick Co. v. Pennsylvania, 245 U. S. 292, 38 Sup. Ct. 126, 62 L. Ed. 295, we held that a state tax upon the business of selling goods in foreign commerce, measured by a certain percentage of the gross transactions in such commerce, was by its necessary effect a tax upon the commerce, and at the same time a duty upon exports, contrary to sections 8 and 10 of article 1 of the Constitution, since it operated to lay a direct burden upon every transaction by withholding for the use of the state a part of every dollar received. On the other hand, in Peck & Co. v. Lowe, ante [247 U. S. 165, 38 Sup. Ct. 432, 62 L. Ed. 1049], we held that the Income Tax Act of October 3, 1913, c. 16, § 2, 38 Stat. 166, 172, when carried into effect by imposing an assessment upon the entire net income of a corporation, approximately three-fourths of which was derived from the export of goods to foreign countries, did not amount to laying a tax or duty on articles exported within the meaning of article 1, § 9, cl. 5, of the Constitution. The distinction between a direct and an indirect burden by way of tax or duty was developed, and it was shown that an income tax laid generally on net incomes, not on income from exportation because of its source or in the way of discrimination, but just as it was laid on other income, and affecting only the net receipts from exportation after all expenses were paid and losses adjusted and the recipient of the income was free to use it as he chose, was only an indirect burden."

It seems, therefore, that the tax which the plaintiff now sues to recover is at most but an indirect or incidental burden upon judicial compensation, resulting from a uniform and general income tax, and is therefore not a diminution of such compensation within the meaning of the Constitution.

The demurrer to the petition must accordingly be sustained.

ATLANTIC STEEL CO. v. R. O. CAMPBELL COAL CO.

(District Court, N. D. Georgia. December 4, 1919.)

No. 393.

1. SALES ⟸85(2), 411—PROVISION OF CONTRACT CREATING CONDITIONS SUBSEQUENT.

A provision of a contract for sale and purchase of coal, with equal monthly deliveries, that if the mines were unable to operate, or their output was curtailed, by causes beyond seller's control, it should not be liable for resulting failure to deliver, *held* to create conditions subsequent, which, under Civ. Code Ga. 1910, §§ 4223, 4224, were matters of defense, to be set up by defendant, rather than anticipated by plaintiff's pleading, in an action by the purchaser for failure of deliveries.

2. SALES ⟸62, 172—CONTRACT FOR SALE OF COAL A SEVERABLE, AND NOT ENTIRE, CONTRACT.

A contract for sale and purchase of 12,000 tons of coal per year for three years, 1,000 tons to be delivered each month and paid for the succeeding month, and further providing that, if the mines were unable to operate, or their output was curtailed, from causes beyond seller's control, it should not be liable for failure to make shipments "during such periods," *held* severable as to each month's deliveries; and under Civ. Code Ga. 1910, § 4228, inability of seller to make deliveries during the time its mines were in control of the federal Fuel Administration *held* to discharge it from its obligation to make such deliveries, but not from its obligation

to continue monthly deliveries after such control ceased, to the end of the contract term.

3. SALES ⊜71(1)—CONSTRUCTION OF CONTRACT FOR SALE OF COAL AS REQUIRING INCREASED SHIPMENTS.

A contract for sale of coal, to be delivered in equal monthly installments, which recited that purchaser had another contract for its requirements of coal above the quantity covered by the present contract, and providing that seller should increase or decrease its shipment on request to conform to the proportionate increase or decrease of shipments by the other contractor, construed, and *held* not to require seller to increase shipments because of decreased shipments by the other contractor, but to mean that, should purchaser's requirements prove greater or less than estimated, shipments by both contractors should be increased or decreased proportionately.

At Law. Action by the Atlantic Steel Company against the R. O. Campbell Coal Company. On demurrers to petition and amended petition. Sustained in part.

Chas. T. & L. C. Hopkins, of Atlanta, Ga., for plaintiff.
Robert C. & Phil. H. Alston, of Atlanta, Ga., for defendant.

SIBLEY, District Judge. This is a suit for damages for the breach of a contract dated June 1, 1916, the material portion of which follows:

"In consideration of the price hereinafter agreed upon, subject to the terms and conditions hereof, the party of the first part agrees to sell, and the party of the second part agrees to buy, f. o. b. mines, 12,000 tons per annum of coal, for gas and reheating purposes, shipments to be made at the rate of 1,000 tons per month, or one car per day. The coal is to be what is known as the party of the first part's 'Westburn Gas Coal,' and mined at Westburn, Kentucky. * * * The price for the same shall be $1.35 per ton. * * *

"If the mines from which this coal is to be shipped are unable to operate by reason of mining troubles, or on account of other causes beyond their immediate control, the first party shall not be liable for failure to make shipments during such period; and if for the same reason the output of such mines is curtailed, shipments may be distributed pro rata on their existing orders and contracts during such periods.

"If the party of the second part is unable to operate its plant by reason of strikes or other causes beyond its immediate control, it shall not be liable for failure to receive shipments during such period; and if for the same reason the operation of the plant of the party of the second part is curtailed, it shall receive only such shipments as are necessary for its operation.

"Mine weights shall govern all settlements, and payments for all coal shipped shall be made by the fifteenth (15th) of the month immediately following the month of shipment, and all past-due accounts shall bear interest from maturity until paid.

"The party of the second part has a contract with Southern Coal & Coke Company for its requirements of coal, of approximately 50,000 tons per annum, in excess of the 12,000 tons per annum purchased from the said party of the first part, and the said party of the first part hereby agrees to increase or decrease its shipments of coal to conform to the proportionate increase or decrease in shipments to be made by the Southern Coal & Coke Company, upon request of the party of the second part, said increase, however, not to be in excess of twenty (20%) per cent."

Pertinent to the last paragraph, this letter is exhibited:

"January 31, 1917.

"The R. O. Campbell Coal Company, Atlanta, Georgia—Gentlemen: With reference to our contract with you of June 1, 1916, covering the delivery of

coal to us, beg to say that under this contract we were entitled to the fixed delivery of 1,000 tons of coal per month. * * *

"Under the contract, we are entitled to increase the 1,000 tons per month to the extent of 20 per cent., and our business is in such condition as that it will be necessary for us to obtain the benefit of this increase; and you will please consider this communication as being a formal demand, under the contract and covering the future, not only for the delivery of 1,000 tons per month, but the additional 20 per cent."

Generally stated, the petition avers a partial failure to deliver the coal contracted for each month from June 1, 1916, to August, 1917, a total failure from August, 1917, to December 15, 1918, and a partial failure from that date to the termination of the contract; that each month plaintiff purchased the deficit in the open market at stated losses, for which, excluding the period from August 1, 1917, to December 15, 1918, damages in the aggregate sum of $23,698.93 are sought. During the last-named period the original petition states:

"The federal Fuel Administration took possession of the coal mines and their output. * * * Petitioner was forced to purchase its entire supply of coal necessary to the operation of its plant from companies other than the defendant. It received no shipments from the defendant company between the two dates mentioned. This suit does not include any failure upon defendant's part to deliver the stipulated coal during this period."

By amendment it is alleged:

"During the time the federal Fuel Administration controlled the output of said mines, the defendant received from the government $3.10 per ton for the coal which the defendant had contracted to sell plaintiff at $1.35 per ton, and which represented a legal obligation on the part of defendant to deliver said coal to the plaintiff at the prior price stipulated for in the contract. * * * The profit represented by the difference between the price which plaintiff was to pay, of $1.35 per ton, and the price received by the defendant, $3.10 per ton, was a profit received by the defendant for and in behalf of the plaintiff, and represents a sum which belongs to, and is the property of, the plaintiff, and for which it is entitled to recover in this cause" an aggregate sum of $21,768.

With reference to the subject-matter of the letter quoted above, the amendment further alleges:

"At the time that Exhibit B to the original petition was written, and subsequently thereto, and during the continuance of the contract between the plaintiff and the Southern Coal & Coke Company, the latter company delivered less than 75 per cent. of the contractual 50,000 tons per annum. This failure to deliver upon the part of the Southern Coal & Coke Company gave plaintiff the right to exercise its option under its contract with the defendant, and increase the shipments from 1,000 tons per month to 1,200 tons per month."

Damages are claimed for the failure to deliver the increase. The amendment also alleges that the shipments from December 15, 1918, to June 1, 1919, were made under the terms of the written contract, covered by its provisions, accepted by the plaintiff as a partial compliance, and paid for by the plaintiff under the contract.

Demurrers to the petition and amendment raise questions which will now be disposed of.

[1] First. The defendant contends that its obligation to deliver was conditional, and that the petition is deficient in not alleging that the conditions named in the contract occurred; that is, that defendant operated its mine and that its production was not curtailed, or, if curtailed, that the plaintiff did not receive its pro rata of coal shipped. The contract was made and to be performed in Georgia, and is governed by Georgia law. The liability to deliver is doubtless conditional, and if the conditions are precedent their occurrence must be averred and proved by the plaintiff, in order to show a right to recover. If subsequent, their occurrence is a matter of defense, to be set up by the defendant. Code Georgia 1910, §§ 4223, 4224. Section 3717, dealing with similar conditions, declares:

"The law inclines to construe conditions to be subsequent rather than precedent, and to be remediable by damages rather than by forfeiture."

It is plain that the purpose of these parties was to make a present contract for the delivery of 12,000 tons of coal per year, at the rate of 1,000 tons per month, for three years. The liability to deliver was not to arise on the occurrence of some event, but existed and was to continue unless and until certain possible things should happen. If these things did occur, they were conditions subsequent, and are to be set up by the defendant. This is true, except as to the condition relating to the right to demand an increase above 1,000 tons per month. The increase was to be demandable only upon the occurrence of the matters stated in the last paragraph of the contract. This condition was precedent, and it devolves upon the plaintiff to sufficiently aver the occurrence of the condition.

[2] Second. The petition and amendment affirmatively disclose that during the period from August, 1917, to December 15, 1918, the mine, or the output thereof, from which alone the contract coal was to be shipped, was taken over and controlled by the federal Fuel Administration. The plaintiff contends that this contract was entire, for 36,000 tons of coal, to be delivered in three years, and that if the delivery was interrupted in any manner it did not operate to defeat their right finally to have the coal contracted for, or damages for its nondelivery. The defendant contends that the contract was divisible, and that each month's shipment and payment therefor was independent of the other months, and that the effect of the legislation of Congress and the action of the President thereunder, and of the federal Fuel Administration, with regard to this mine, prevented delivery during the existence of the federal control, and excused delivery, not only for that period, but for the remainder of the contract. Code Georgia 1910, § 4228, declares:

"A contract may be either entire or severable. In the former, the whole contract stands or falls together. In the latter, the failure of a distinct part does not void the remainder. The character of the contract in such case is determined by the intention of the parties."

And see 9 Cyc. 648.

That the consideration is severable, as well as the articles to be delivered, is a strong circumstance to support the severable character

of the promise. This contract was intended by the parties to be severable as to each month's deliveries. The plaintiff so declares in the letter of January 31, 1917. Each month's delivery was to be paid for after the end of the month, and the plaintiff, in dealing with the matter, acted each month in buying in coal to supply the deficiency and in charging the loss to the defendant. The condition as to the discharge of either party on the nonoperation of its mine or plant, or for other cause beyond its control, provided, not that delivery or acceptance should be delayed, but that the failure should be excused. They evidently intended that there should be no accumulation of obligation from month to month, but that each month's business should stand for itself. Moreover, time, as is usual in mercantile contracts, was for the same reason evidently of the essence of this contract. Neither party desired its business to become involved and embarrassed by a postponement of the obligations assumed under this agreement. Waterman v. Banks, 144 U. S. 394, 12 Sup. Ct. 646, 36 L. Ed. 479; Cheney v. Libby, 134 U. S. 68, 10 Sup. Ct. 498, 33 L. Ed. 818; Bearden Mercantile Co. v. Madison Oil Co., 128 Ga. 695, 58 S. E. 200.

The act of Congress of August 10, 1917 (40 Stat. 279, c. 53 [Comp. St. 1918, §§ 3115⅛e to 3115⅛r]), provided in section 12 (Comp. St. 1918, § 3115⅛jj) that the President might take over for use and operation by the government, any mine and operate the same, returning it to the owners when he should determine it no longer essential for the national security, and paying a reasonable compensation for the use thereof, with power to regulate the operation, the disposition of the products, and the employment and compensation of employés. In section 25 (Comp. St. 1918, § 3115⅛q) a similar power was given the President to fix the price of coal and to require the producers of coal, or those in any special area, to sell their product only to the United States through an agency to be designated by the President, which might regulate the resale of such coal, the methods of production, shipment, distribution, and apportionment thereof; the act making it unlawful for the producer thereafter to make shipments of his product on his own account, and requiring shipment to be made only on the authority of the agency designated by the President, the price to be fixed by the Federal Trade Commission.

Under the allegations of the petition and amendment it is uncertain whether the defendant's mine was operated by the government, or its output simply taken over and controlled by it; but in either event the regulation of production and distribution was wholly in the hands of the government agency, and in neither case could the defendant lawfully make shipments upon its own orders taken prior to such control. Was the effect of this action of the government simply to postpone performance of the contract, or to discharge the contractor in part or in whole? It is true that impossibility of performance arising after the making of the contract, which might have been foreseen and guarded against by a stipulation of the contract, is ordinarily no defense to an absolute obligation. Jacksonville Railway v. Hooper, 160 U. S. 515, 16 Sup. Ct. 379, 40 L. Ed. 515; Chicago, Milwaukee & St. Paul

Ry. v. Hoyt, 149 U. S. 1, 13 Sup. Ct. 779, 37 L. Ed. 625. The rule is thus stated by Mr. Justice Swayne, in Dermott v. Jones, 2 Wall. at page 7, 17 L. Ed. 762:

"It is a well-settled rule of law that, if a party by his contract charge himself with an obligation possible to be performed, he must make it good, unless its performance is rendered impossible by the act of God, the law, or the other party. Unforeseen difficulties, however great, will not excuse him."

In this case, however, it was the law that subsequently rendered performance impossible.

"To the general rule that a party to a contract is not discharged by subsequent impossibility of performance, there is an exception where the performance becomes impossible by law, either by reason of, first, a change in the law; or, second, of some action by or under the authority of the government. In such case, the promisor is discharged. * * * In like manner, any prohibitory action taken by the public authorities will discharge the promise." 9 Cyc. 630.

That the defendant in this case, when called upon to surrender the use and control of its property to the public need, should thereby become liable to damages for failure to perform a civil obligation, is unthinkable. That its performance should be only temporarily excused would be less harsh, and, if time were not of the essence of the contract, it might be thought that no hardship would result in a mere postponement. To apply the rule of postponement, however, to the many contracts that were indefinitely arrested by government action, both in coal mines and manufacturing establishments, during the war, would perhaps result in an accumulation of obligations to make deliveries or to receive and pay for goods that would be ruinous to the persons involved. It would seem to be a much more practical rule to establish that, when the performance became due, whether time was strictly of the essence or not, if performance could not be made because of government action then forbidding, the duration of which obstacle was indefinite and unascertainable, the obligation was thereby canceled and the contract discharged, and that the parties should each be at liberty and under the duty to save themselves as best they might by other contracts and arrangements. This, in principle, seems to be settled by the rulings as to embargoes on ships releasing their owners from their contracts to carry, in the cases of Allanwilde Transport Corporation v. Vacuum Oil Co., 248 U. S. 377, 39 Sup. Ct. 147, 63 L. Ed. 312, and Standard Varnish Works v. Steamship Bris, 248 U. S. 392, 39 Sup. Ct. 150, 63 L. Ed. 321. And see L. & N. R. R. Co. v. Mottley, 219 U. S. 467, 31 Sup. Ct. 265, 55 L. Ed. 297, 34 L. R. A. (N. S.) 671.

The same conclusion may fairly be reached by a consideration of the contract that these parties actually made. While the occurrence of the exact conditions that did arise was, of course, not anticipated by them, still the contract provided:

"If the mines from which this coal is to be shipped are unable to operate by reason of mining troubles, or on account of other causes beyond their immediate control, the first party is not to be liable for failure to make shipments during said period."

While in a certain sense the mines did operate, they did not operate under the control of the defendant, nor was it able to avail itself of their operation in the discharge of its contracts. It may fairly be said that within the meaning of these parties, on account of causes beyond defendant's control, it could not operate its mine for the purpose of meeting the shipments due during the period of federal control, and that the stipulation that it should not be liable for the failure to make shipments is to be applied. In either view the defendant ought not to be liable for defaults during such period.

The theory of the amendment, however, is not to sue for failure to deliver under the ordinary rule of damages, but to assert a quasi equitable right to sue as for money had and received, or for an accounting for profits actually made by the defendant on account of deliveries to the government of this coal, instead of delivering it to the plaintiff. At first thought there seems to be, waiving any question of the appropriateness of joining such an action in the present suit, considerable justice in the idea; but it could not be practically applied and followed to its consequences. The plaintiff by this contract got title to no specific property, so as to own its proceeds. It got only an executory promise that so much coal should be produced and delivered to it, for which it gave only its executory promise to pay. Since the regulation of the production of the coal fell under the government agency, including the right to fix wages and hours of labor, the coal was produced under very different conditions from those that would have existed aside from government control, and it is not certain but that coal which might have been produced prior to such control at a profit at $1.35 per ton may actually have been produced at no greater profit at $3.10 per ton under such control. The effort to do justice by causing an accounting to be made of the actual profits received would have to go deeper than the mere comparison of the contract price with the price paid by the government.

Nor would it be good policy to hamper, during a time of war, response to the demands of the government on these mines with a liability over to others under pre-existent contracts. A similar scrutiny would have to be applied to the plaintiff, also, whose plant, the petition discloses, was a steel plant, which continued in operation during the war, doubtless under the same governmental control. Its products were sold, no doubt, at a price fixed by the government under the same law, based upon a profit with coal at $3.10 per ton, which it alleges it had to purchase during this period. Having been allowed, in this way, an expense item of $3.10 for coal, it ought not to be allowed to make an additional profit of the difference between that price and its old contract price. It will be readily seen that to follow an adjustment of the sort suggested in the amendment throughout the devious course that it might take in passing on a profit or loss under war conditions, to others affected by it, would be a wholly impractical job for the courts. The simplest and best rule, and the one most consonant with good policy, is that suggested first above, that the action of the government, in so far as it directly interfered with and prevented

the fulfillment of contracts, should be considered as a final discharge from their obligation.

Third. The defendant, however, contends that the effect of the government control was to annul the contract entirely, and to render it inoperative for the period succeeding government control until its expiration. This effect was attributed to it by neither party, for, under the averments in the petition, the defendant thereafter delivered coal in pursuance of the contract, which the plaintiff received and paid for at the contract price. The contract says:

"The first party is not to be liable for failure to make shipments during such period."

That both regarded the contract as of force afterwards is evident, nor does any good reason occur why it should not be treated as of force. It may be that costs of production had increased, and that the delivery was at a loss to the defendant; but it might equally have happened that the reverse should have occurred. The compulsion which prevented delivery during government control thereafter ceased to exist, and nothing having intervened to render the contract in its remaining provisions illegal, or even impossible of performance, there can be no good reason why each party should not be held to perform thereunder. No question has arisen as to time necessary after cessation of government control to prepare to resume deliveries. For such failures in these latter months as may be proved against the defendant it should be held liable in damages.

[3] Fourth. There remains to consider whether the plaintiff is justified in its claim to increased damages by reason of the failure of the defendant to increase its deliveries to 1,200 tons per month after the request of January 31, 1917. The petition fails to show a liability in this regard. A close reading of the language of the agreement discloses that the contract with Southern Coal & Coke Company was for plaintiff's requirements of coal, estimated at 50,000 tons per annum, in excess of 12,000 tons purchased of defendant, and that what the parties intended was that, if plaintiff's requirements proved more or less than 62,000 tons per year, so that Southern Coal & Coke Company had to increase or decrease its shipments, defendant might be called on to share with Southern Coal & Coke Company such increase or decrease in the ratio of 12,000 to 50,000; the increase, however, not to exceed 20 per cent. This construction gives literal effect to the words used, is intelligible and reasonable, but under it no liability appears in the pleadings, because the Southern Coal & Coke Company did not increase, but decreased, its shipments.

Plaintiff, however, contends the agreement means the reverse; that if the Southern Coal & Coke Company decreased its shipments below 50,000 tons per annum, the defendant was bound to increase its shipments to make good the deficiency. That the Southern Coal & Coke Company should at any time and for any period, for any reason, or for no reason, by simply refusing to deliver coal, impose on the defendant the duty of delivering it, no matter what the market price, could hardly have been intended by intelligent business men. More-

over, what would the word "proportionate" then mean? While increase or decrease may be proportioned to each other, it is difficult to understand how an increase can be proportioned to a decrease, and if the contract means what the plaintiff contends, could plaintiff on January 31, 1917, "covering the future," demand an increase of 20 per cent. of defendant before the default of Southern Coal & Coke Company occurred?

Yet, further, the request made upon defendant by plaintiff would not seem to be a reasonable compliance with the contract stipulation, for it utterly fails to indicate to the defendant that the circumstances had arisen on which the request would be justified. The ground of the request stated is simply:

"Our business is in such condition as that it will be necessary for us to obtain the benefit of this increase."

A request based merely upon this ground might justly be disregarded by the defendant. A case for recovery upon this item is not shown.

Fifth. Special demurrers complain that certain paragraphs of the petition aver mere conclusions of the pleader, or irrelevant facts. Some of the paragraphs do appear liable to this criticism in part; but the conclusions are harmless, and the irrelevant facts blended with other facts, that either aid in the construction of the contract or go to show the breach thereof. No sufficient reason appears for striking entirely any paragraph of the petition demurred to for this cause.

Let judgments upon the demurrers be taken accordingly.

Ex parte DILLON.

(District Court, N. D. California, First Division. January 27, 1920.)

No. 16763.

1. CONSTITUTIONAL LAW ⊂⊃22—AMENDMENT TO FEDERAL CONSTITUTION TAKES EFFECT ON RATIFICATION BY REQUISITE NUMBER OF STATES.
   An amendment to the Constitution of the United States takes effect and becomes a part of the Constitution on its ratification by the requisite number of states, and not from the date of its promulgation by the Secretary of State, under Rev. St. § 205 (Comp. St. § 303).

2. CONSTITUTIONAL LAW ⊂⊃10—RATIFICATION OF AMENDMENT TO BE BY MODE PRESCRIBED BY CONSTITUTION.
   The provision of article 5 of the federal Constitution that, when that method is proposed by Congress, ratification of a proposed amendment shall be by the Legislatures of the several states, in case of such proposal, excludes all other modes of ratification, and a state is without power to prescribe a different method, as by popular vote.

3. CONSTITUTIONAL LAW ⊂⊃10—EIGHTEENTH AMENDMENT HELD VALID.
   The Eighteenth Amendment to the Constitution *held* constitutionally adopted and valid.

Petition of J. J. Dillon for writ of habeas corpus. Denied.

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

Theodore A. Bell, of San Francisco, Cal., for petitioner.

Annette Abbott Adams, U. S. Atty., and E. M. Leonard, Asst. U. S. Atty., both of San Francisco, Cal., for the United States.

RUDKIN, District Judge. Article 5 of the Constitution of the United States provides as follows:

"The Congress, whenever two-thirds of both houses shall deem it necessary, shall propose amendments to this Constitution, or, on the application of the Legislatures of two-thirds of the several states, shall call a convention for proposing amendments, which, in either case, shall be valid to all intents and purposes, as part of this Constitution, when ratified by the Legislatures of three-fourths of the several states, or by conventions in three-fourths thereof, as the one or the other mode of ratification may be proposed by the Congress: Provided that no amendment which may be made prior to the year one thousand eight hundred and eight shall in any manner affect the first and fourth clauses in the ninth section of the first article, and that no state, without its consent, shall be deprived of its equal suffrage in the Senate."

Section 205 of the Revised Statutes (Comp. St. § 303) provides:

"Whenever official notice is received at the Department of State that any amendment proposed to the Constitution of the United States has been adopted, according to the provisions of the Constitution, the Secretary of State shall forthwith cause the amendment to be published in the newspapers authorized to promulgate the laws, with his certificate, specifying the states by which the same may have been adopted, and that the same has become valid, to all intents and purposes, as a part of the Constitution of the United States."

On the 19th day of December, 1917, Congress proposed the Eighteenth Amendment to the Constitution of the United States. Section 1 of the amendment prohibits the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from, the United States and all territory subject to the jurisdiction thereof, for beverage purposes, after one year from date of ratification. Section 3 provides that the article shall be inoperative unless ratified as an amendment to the Constitution by the Legislatures of the several states as provided in the Constitution within seven years from the date of the submission to the states by Congress. On the 29th day of January, 1919, the Department of State promulgated the amendment as required by section 205 of the Revised Statutes, certifying the names of the states by which the same had been ratified, 36 in number. Among the states thus certified were Washington and Ohio. The last section of the National Prohibition Act of October 28, 1919, c. 85, provides that certain provisions of the act shall take effect and be in force from and after the date when the Eighteenth Amendment to the Constitution of the United States goes into effect.

The petitioner is now in custody charged with a violation of one of those provisions of the last-mentioned act, which did not take effect, as already stated, until the same date as the Eighteenth Amendment. The crime is alleged to have been committed on the 17th day of January of the present year. The petitioner claims that his restraint is illegal, first, because the Eighteenth Amendment, and consequently the provision of the National Prohibition Act, were not in force or effect on that date; and, second, because the Eighteenth Amendment itself

is null and void. The claim that the Eighteenth Amendment and the act of Congress were not in force and effect on the 17th day of January of this year is based on two grounds: First, because, as already stated, the Department of State did not promulgate the amendment until the 29th of January, 1918, or less than one year ago; and, second, because the states of Ohio and Washington had not in fact ratified the amendment as certified by the Department of State.

[1] The claim that the amendment was not ratified until the Department of State caused the publication and made the certificate prescribed by section 205 of the Revised Statutes is not in my opinion well founded. What was meant by publishing the amendment in the newspapers authorized to promulgate the laws can only be ascertained by referring back to the preceding section. The preceding section provides that the Secretary of State shall cause every law, order, resolution, and vote to be published in at least three of the public newspapers printed within the United States, and shall also cause one printed copy to be delivered to each Senator and Representative of the United States, and two printed copies, duly authenticated, to be sent to the executive authority of each state. The promulgation of a constitutional amendment under section 205 is no more essential to its validity than is the promulgation of an act of Congress under the preceding section, and the former is no more the beginning of the amendment than the latter is the beginning of the law; for, notwithstanding the requirement for promulgation, it is universally recognized that an act of Congress takes effect and is in force from the date of its passage and approval, and a constitutional amendment is likewise in full force and effect from and after its ratification by the requisite number of states. In other words, the promulgation by the Department of State only affords prima facie evidence of ratification, and the promulgation, when made, relates back to the last necessary vote by a state Legislature. Congress might perhaps provide that the Department of State should ascertain and determine the fact of ratification, and that an amendment should not take effect until due promulgation of that determination by proclamation or otherwise; but Congress has not so provided.

[2] The second objection urged would seem easy of solution, were it not for the conflicting decisions in the state courts. Thus, in State v. Howell (Wash.) 181 Pac. 920, it was held that the resolution ratifying the Eighteenth Amendment was subject to the referendum provisions of the Constitution of the state, and that the resolution, therefore, did not become final until after the expiration of the time allowed for filing a referendum petition, and, in case such a petition was filed, not until the final vote of the people thereon. No sufficient petition was filed, however, and no further action was taken. In the state of Ohio a similar ruling was made in Hawke v. Smith, 126 N. E. 400, decided September 30, 1919; but in that state a referendum petition was filed, and the resolution ratifying the amendment was voted down by the people at the next general election. In so far as these decisions construe the Constitution of the respective states, they are, of course, binding upon this court; but in so far as they construe the Fifth Amend-

ment to the Constitution of the United States a federal question is involved, and the decisions are not controlling here. I regret my inability to follow the decisions of the highest court in those states, for in my opinion the correct rule is announced by the Supreme Judicial Court of Maine, in Re Opinion of the Justices, 107 Atl. 673. The court there said:

"As there are two methods of proposal, so there are two methods of ratification. Whether an amendment is proposed by joint resolution or by a national constitutional convention, it must be ratified in one of two ways: First, by the Legislatures of three-fourths of the several states; or, second, by constitutional conventions held in three-fourths thereof, and Congress is given the power to prescribe which mode of ratification shall be followed.

"Hitherto Congress has prescribed only the former method, and all amendments heretofore adopted have been ratified solely by the approving action of the Legislature in three-fourths of the states. That is the mode of ratification prescribed by Congress in case of the amendment now under consideration, and it was in pursuance of that prescribed mode that this ratifying resolve was passed by the Legislature of Maine. Here, again, the state Legislature in ratifying the amendment, as Congress in proposing it, is not, strictly speaking, acting in the discharge of legislative duties and functions as a law-making body, but is acting in behalf of and as representative of the people as a ratifying body, under the power expressly conferred upon it by article 5. The people, through their Constitution, might have clothed the Senate alone, or the House alone, or the Governor's Council, or the Governor, with the power of ratification, or might have reserved that power to themselves to be exercised by popular vote. But they did not. They retained no power of ratification in themselves, but conferred it completely upon the two houses of the Legislature; that is, the legislative assembly."

The requirement of the Fifth Amendment that proposed amendments shall be ratified by the Legislatures of three-fourths of the states or by conventions in three-fourths thereof, as one or the other mode of ratification may be proposed by Congress, would seem to me to preclude ratification by direct vote of the people; and the intention of the framers of the Constitution that amendments should be ratified by the *representatives* of the people, either in Legislature or in Convention, and not by the people themselves seems manifest. Had the resolution in this case provided that the amendment should be ratified by the people of the several states by direct vote, such provision would be clearly in derogation of the Constitution and void, and what Congress could not do it is needless to say the several states cannot do, because full power over the matter is conferred upon the former and denied to the latter. No more in my opinion can the people of a state to-day ratify an amendment to the Constitution of the United States by direct vote than could they elect a United States Senator by direct vote prior to the recent amendment.

The term Legislature does not necessarily mean or imply the same thing at all times or in all parts of the Constitution. Thus, when the Legislature of a state is referred to simply as the lawmaking body, the term may well be construed to embrace the entire lawmaking machinery of the state including a vote of the people where authorized by the local Constitution, as in Davis v. Ohio, 241 U. S. 565, 36 Sup. Ct. 708, 60 L. Ed. 1172. But where the Legislature is designated as a mere agency to discharge some duty of a nonlegislative character, such as the election of a United States Senator, or the ratification of a pro-

posed amendment to the Constitution, the legislative body alone in its representative capacity may act, just as a sheriff who is designated to discharge some unofficial duty, such as jury commissioner, must act in person, and may not act by deputy. State v. Payne, 6 Wash. 563, 34 Pac. 317. For these reasons I am of opinion that the Eighteenth Amendment and the statute charged to have been violated were both in full force and effect on the 17th day of January of this year.

[3] The claim that the Eighteenth Amendment itself is unconstitutional and void is based upon two grounds: First, because the amendment is in derogation of the Constitution, and not an amendment at all; and, second, because Congress was without power or authority to submit a conditional amendment, or an amendment limiting the time within which it must be ratified. The length of this opinion and the limited time at my disposal forbid an extended discussion of these objections, if, indeed, such a discussion be called for by this court. After receiving the approval of two-thirds of the membership of both houses of Congress and after ratification by the Legislatures of more than three-fourths of the states, the defects in a constitutional amendment must be plain indeed before a court of inferior jurisdiction will be justified in declaring it null and void. No such case is presented here. Briefly stated the contention of the petitioner is this:

> An amendment "implies such an addition or change within the lines of the original instrument as will effect an improvement, or better carry out the purpose for which it was framed." Livermore v. Waite, 102 Cal. 118, 36 Pac. 426, 25 L. R. A. 312.

And from this it is argued that inasmuch as the original Constitution was silent on the question of the manufacture and sale of intoxicating liquors there is nothing to be amended or to amend by and therefore the amendment itself is void. The term "amend," as defined by Webster, means:

> "To change or alter, as a law, bill, motion, or constitutional provision, by the will of a legislative body, or by competent authority; as to amend a charter."

That the amendment in question changes the original Constitution does not admit of question, and while it does not change any provision relating to this particular matter it does change the instrument as a whole. The Constitution is a mere grant of power to the federal government by the several states and any amendment which adds to or in any manner changes the powers thus granted comes within the legal and even within the technical definition of that term. The Thirteenth Amendment, abolishing and prohibiting slavery within the states, has been recognized as a part of the Constitution for upwards of half a century. The amendment in question does no more, only the prohibition extends to a different subject-matter. It seems to me therefore that the objections are without substantial merit. Again it is urged that the Constitution does not authorize the submission of conditional amendments. This is no doubt true, but it is equally true that the Constitution does not forbid them. The framers of the Constitution could not foresee the form or character of amendments which might become necessary in the future and wisely left all such questions in the hands

of those who might be charged with official duty when the necessity for the change and the character of the change to be made became apparent.

For these reasons I am of opinion that the amendment in form and substance was entirely within competency of Congress and the several states to propose and ratify and that both the amendment and the National Prohibition Act were in full force and effect on the day in question.

The petition is accordingly denied.

ANZOLOTTI v. McADOO, Director General of Railroads.

(District Court, S. D. New York. December 19, 1919.)

1. MASTER AND SERVANT ⟸203(1), 227(1)—ASSUMPTION OF RISK DISTINGUISHED FROM CONTRIBUTORY NEGLIGENCE.
   The distinction between contributory negligence and assumption of risk depends on whether the servant has made a careless choice between safe and unsafe ways of discharging his duties, or whether he has failed to take some precaution outside of the discharge of those duties.
2. MASTER AND SERVANT ⟸213(1)—RISKS ASSUMED BY SERVANT.
   A longshoreman, wheeling bags of flour from a car down an inclined plank and through a short gangway between piled bags on the side of a pier, and along a central fairway used by trucks, who, gaining speed with his heavy load going down the plank, on turning into the fairway struck a truck and was injured, *held* not chargeable with assumption of the risk.

At Law. Action by Pasquale Anzolotti against William G. McAdoo Director General of Railroads (Lehigh Valley Railroad Company). On motion to set aside a verdict for the plaintiff in an action to recover damages under the Employers' Liability Act (Comp. St. §§ 8657–8665). Denied.

The plaintiff was a longshoreman employed by the Lehigh Valley Railroad Company at a pier in the East River, New York. On the day in question he was engaged in carrying four bags of flour on a hand truck from a car on a car float alongside one of the piers in the river to the deck of the pier. Planks about 18 feet long ran from the floor of the car to the deck of the pier, the difference in level between the two being about 3 feet. Bags of flour were piled upon the pier about 9 or 10 feet high, making a gangway from the side of the pier towards the center, through which the plank ran. Through the middle of the pier and at right angles with this gangway ran a passage or fairway, in which trucks and carts went to and fro, taking freight on and off the pier, and this fairway the gangway connected with the edge of the pier. The flour, piled as it was, made a wall on either side of the gangway, so that no part of the fairway, except where the two met, could be seen from the edge of the pier or the floor of the car.

On the day in question the plaintiff took four bags of flour, weighing, together with the truck, some 700 pounds, and started down the plank through the gangway, meaning to turn to the left into the fairway and pile the flour further down. Owing to the weight of the load and the slope of the plank, he was obliged to take the plank upon the run, and, as the edge of the plank was only 4 feet from the turn into the fairway, he was on the run at the turn as well. In so doing he came into collision with a truck slowly moving up the fairway, and not visible to him at the time he started from the car.

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

Upon the trial the case was left to the jury upon the question of the defendant's negligence in failing to provide the plaintiff with a safe place to work, and upon the plaintiff's contributory negligence in taking so large a load as to cause him to run, and in failing to ascertain before taking the load whether anything was coming up the fairway. The defendant asked for a dismissal of the complaint on the ground that the plaintiff had assumed the risk and that the question of assumption of risk should be left to the jury, both of which requests were refused. The exceptions taken to this refusal are the basis of this motion.

William H. Wack, of New York City, for plaintiff.
Clifton P. Williamson, of New York City, for defendant.

LEARNED HAND, District Judge (after stating the facts as above). My refusal to dismiss the complaint because of the plaintiff's assumption of risk, or at any rate to leave that question to the jury, can, of course, be supported only upon the theory that the evidence presented no question of the assumption of risk, but only a question of contributory negligence. If I am wrong in that, obviously the verdict should not stand. The Employers' Liability Act, in establishing a distinction between these two defenses, makes it necessary more carefully to discriminate between them than was the case before, for contributory negligence is no longer a defense, but only goes in mitigation, while assumption of risk remains, as before, a bar. It must be confessed, however, that the line of distinction is not wholly clear in the books.

Both defenses presuppose that the injury has in fact arisen through some fault of the master; that is, some act, or some inaction, where action is required, which would ordinarily result in injury to the servant. Both presuppose also that the servant could have avoided the result, had he chosen sufficiently to regard his own safety, and that, therefore, he has joined in causing the injury, at least to this extent, that he voluntarily places himself in a position where to his knowledge he is exposed to the results of the master's fault. The differences can best be understood by considering the divergent approaches to the general question of the servant's part in the eventual injury, which each notion involves. The idea of an assumption of risk started in the servant's supposed acceptance of the dangers, when he took the job with knowledge of them. He remained exposed to them, whether he was careful or careless in his own work. Thomas v. Quartermaine, L. R. 18 Q. B. D. 685; Schlemmer v. Buffalo, etc., Ry., 205 U. S. 1, 11, 12, 20, 27 Sup. Ct. 407, 51 L. Ed. 681. It makes no difference whether or not one imputes to him an agreement, as is sometimes done. Narramore v. Cleveland, etc., Ry., 96 Fed. 298, 301, 37 C. C. A. 499, 48 L. R. A. 68; St. Louis Cordage Co. v. Miller, 126 Fed. 495, 502, 61 C. C. A. 477, 63 L. R. A. 551. The idea of contributory negligence, on the other hand, started with those cases where the servant, having the choice of safe and unsafe ways of discharging his duties, chooses wrong; the choice being imposed upon him through the master's fault. Schlemmer v. Buffalo, etc., Ry., 220 U. S. 590, 596, 31 Sup. Ct. 561, 55 L. Ed. 596; Erie R. R. v. Purucker, 244 U. S. 320, 324,

325, 37 Sup. Ct. 629, 61 L. Ed. 1166; Maloney v. Cunard S. S. Co., 217 N. Y. 278, 283, 111 N. E. 835.

Now these two approaches themselves converge. The Supreme Court has expressly declined to commit itself upon whether a servant who continues in the presence of imminent danger assumes a risk, or negligently contributes to his injuries. Seaboard Air Line v. Horton, 239 U. S. 595, 601, 36 Sup. Ct. 180, 60 L. Ed. 458. In face of this reserve it must be owned that it is hazardous to take sides, nor is it necessary in the case at bar, for I may concede for argument that in such cases the servant assumes the risk.

[1] Further, I may assume that in order to establish an assumption of risk the servant need not be faced with a choice between throwing up the work or losing all right of recovery. If a remedy for the danger is at hand, and he fails to use it, his inaction may be evidence of assumption. Seaboard Air Line v. Horton, 233 U. S. 492, 34 Sup. Ct. 635, 58 L. Ed. 1062, L. R. A. 1915C, 1, Ann. Cas. 1915B, 475; Id., 239 U. S. 595, 36 Sup. Ct. 180, 60 L. Ed. 458. Yet, if the doctrine of contributory negligence is to remain at all, I think we must interpret language like that of Mr. Justice Day in Schlemmer v. Buffalo, etc., Ry., 220 U. S. 590, 596, 31 Sup. Ct. 561, 55 L. Ed. 596, as meaning that the precautions which the servant omits when he contributes negligently to the injury are choices required of him only in the discharge of the duties imposed upon him, and not precautions which call upon him to do something outside. At any rate, without attempting any exhaustive definition, it appears to me quite safe to say that when the injury arises from a failure to choose correctly between two ways of discharging those duties, one of which is safe and the other hazardous, the servant has not assumed the risk, but has negligently contributed to the injury. This may not be the final line between the notions; but, if not, I believe it safely excludes all cases of assumption of risk, unless that idea is to absorb the other altogether.

Jacobs v. Southern R. R., 241 U. S. 229, 36 Sup. Ct. 588, 60 L. Ed. 970, may be thought to look the other way, since the servant might have waited till the locomotive stopped. As the crew was only shifting cars, this would hardly seem to have involved an abandonment of the work. I own I should have supposed it a case of contributory negligence, and possibly the decision ought to stand against the distinction I have attempted. However, it is to be observed that the court did not discuss the present question at all, but assumed that the important point was whether section 4 of the Employers' Liability Act (Comp. St. § 8660) covered more than omissions by the master of statutory requirements. I cannot agree that the case stands for a decision that the servant assumes the risk when he selects a dangerous way of discharging his duties, instead of a safe way, which is open.

[2] Coming now to the case at bar, it seems to me quite plain that the defendant did not prove a case which called for the submission to the jury of the plaintiff's assumption of any risk. It did not appear that the plaintiff had no way in the discharge of his duties to avoid turning the corner on a run. Several possibilities suggest themselves; for example, it would have been perfectly possible for the plaintiff to

let the feet of the truck slide on the plank for the earlier part of the decline, thus acting as a partial brake. By so doing he could have diminished the momentum at the turn. Nor does it appear that, if the plaintiff had explained the facts and asked that he be allowed to take three bags, he would have been refused. Nor does it appear that the planks had no skids, such as are in common use, which the plaintiff could have used as a brake upon his wheel.

Now the defense is a bar, and must be proved as well as pleaded. If, as I think, it arises only when the servant has discharged the duties imposed upon him with proper heed, that must be shown. The defendant must show that the dangers arise either from any continued discharge of the work at all, or from an omission to do something which was not a part of the discharge of his duties.

Finally, if the test be one of degree, as is suggested in Schlemmer v. Buffalo, etc., Ry., 205 U. S. 1, 12, 27 Sup. Ct. 407, 51 L. Ed. 681, it is clear that the immediate cause of the plaintiff's injury was not any pre-existing defect in the appliances or conditions, but because he had no warning of the cart coming in the fairway. His failure to inform himself whether there was one or not, being the immediate cause of his injury, was in this view contributory negligence. While I prefer to regard that failure in the other light, it appears to me that the defendant is in the dilemma of accepting one interpretation or the other. Certainly the statute has left some scope for the doctrine of contributory negligence.

The motion is denied.

BRIGHAM et al. v. JOHN F. SCHMADEKE, Inc., et al.

(District Court, E. D. New York. November 14, 1919.)

1. WHARVES ⊂=20(1)—OWNER NOT LIABLE FOR INJURY TO MOORED VESSEL FROM COLLISION.
   Owner of property on Gowanus Canal, which maintained a berth for boats on its front, which was known to users of the canal, *held* not liable for injury to a barge moored there from collision with a passing boat, although the barge, where it lay, was necessarily an obstruction to navigation.

2. COLLISION ⊂=71(2)—PASSING BOAT LIABLE FOR INJURY TO MOORED VESSEL.
   One moving a boat up Gowanus Canal, with knowledge of other boats berthed on the side of the canal, *held* responsible for injury by collision to a barge so moored.

In Admiralty. Suit by Henry R. Brigham and William H. Brigham, trading as Brigham Bros., against John F. Schmadeke, Incorporated, with John Morton's Sons Company impleaded. Decree for libelants against John F. Schmadeke, Incorporated, and dismissed as against Morton's Sons Company.

Harrington, Bigham & Englar, of New York City, for libelants.

Hyland & Zabriskie, of New York City, for John F. Schmadeke, Inc.

George W. Titcomb, of Brooklyn, N. Y., for John Morton's Sons Co.

CHATFIELD, District Judge. The accident occurred on the 19th of August, 1918, and all the important occurrences were before dark. The brick barge Brigham came up the Gowanus Canal with the flood tide, and with the acquiescence of the Morton Company took the lower of the three berths in front of their property, being moored in such a position that the stern of the Brigham cleared the Carroll street abutment by some 50 feet. The angle of the Carroll street draw is such that a boat coming straight through the draw up the canal would come in contact with a boat lying in the berth in which the Brigham was placed, unless pulled away by a tug or by lines.

According to the testimony, the tide was flood between 6 and 7 p. m. After the tide turned, the current continued to run up the canal, because the city pump, used to flush the canal, was working and creating a strong draft. The captain of the Brigham had left his boat apparently moored in a proper way to avoid injury as the tide went down. There is a distinct slope, both to the side of the prism of the canal and in from the abutment of the bridge at this corner, which is used only for receiving the stream of a small street sewer or drain, shown in the picture as emptying from Carroll street.

The Brigham, when breasted out, projected so that no boat could pass up through the draw. Shortly after the Brigham's arrival, the Gowanus Towing Company took through a coal barge to the Schmadeke yard. According to the testimony of several of the witnesses, this barge actually came in contact with the Brigham; but the passage was possible at that time because at high tide the Brigham was still in close to the bulkhead.

Immediately after this boat had gone through, the captain of the Brigham ate his supper and then breasted his boat off. In the meantime the Josephine, which had been brought to the southerly side of the Carroll street draw, attempted the passage. It appears that the Josephine had been left at this southerly side of the draw by the tug bringing her there, either because the day's work of the tug was over, or because the tug captain did not wish to make an attempt to put the boat through. He apparently arrived at this point at just 5 o'clock, and testifies that he told the captain of the Josephine and the foreman of the Schmadeke Company that he could not put the boat through under the conditions at that state of the tide. If he gave this warning, it merely added to the responsibility of those undertaking to move the boats, and in no way brings the Gowanus Towing Company into the situation.

Owing to the demand for coal, the Schmadeke Company undertook to do by hand what the Gowanus Towing Company had not undertaken to do, and drew the Josephine by lines throught the draw. According to the custom in the Gowanus Canal, the brick boat, which was then breasted off from the bulkhead, was to be moved in order to allow the Josephine to pass through. There seems to be no rule of law or private right which prohibits the moving of a boat under such circumstances. Conditions in the canal require that the captain in charge of the boat, or the owner providing the berth, anticipate and provide for craft when in their charge, in order to meet the responsibility

which is presented if use of the canal requires the moving of the boats.

In this situation the Schmadeke men provided that two of their number should go on the Brigham, so as to take out the forward and aft props, which had been used by the captain to breast the boat away from the bulkhead. These men apparently did remove both of the props, or, at any rate, the stern prop. The forward prop was removed, or was not in place, and the Brigham was free. She was then drawn in toward the bulkhead, when the Josephine (passing through the draw with the current of the pump dragging her toward the side where the Brigham was lying) failed to clear the Brigham, striking her about a foot from the starboard after corner, and then jamming in that position. At this point the captain of the Josephine, who had been absent when the Schmadeke men started to take the boat through, came back to his boat and immediately endeavored to warp her out, by lines which he led to the other side of the canal. Failing in the attempt to draw her back, he carried the line forward, had the men man the capstan, and then drew the Josephine into the clear water of the canal by pulling her forward in contact with the side of the Brigham. The apparent result of the original collision, and this squeezing of the Brigham as the Josephine passed through, forced the Brigham toward the shore and grounded her so firmly that the man who, according to the respondent's testimony, was left on the Brigham to breast her out again, was unable to move her. He evidently reported this to his foreman, and about an hour later the foreman, with the gang of men, having acted about as speedily as he could under the circumstances, found that she was hard aground, and in a position where she remained for several days, until unloaded.

There is some evidence that the parties discussed the advisability of and responsibility for an attempt to pump out the Brigham immediately. There is nothing to indicate that she could have been floated by such pumping, or that her condition was made worse by her being allowed to lie there until unloaded. I think, therefore, that collateral dispute was immaterial.

[1] As I see the situation, the berth maintained by the Morton Company is a disagreeable feature of navigation in the canal; but it is not a nuisance, such that the mere existence of that kind of a berth will render them liable for all damage. The condition, size, and arrangement of the channel in the Gowanus Canal is such that responsibility for accident cannot be placed on those who permanently maintain a location or yard which is more or less of an obstruction to navigation, where that obstruction is obvious and notorious, and actually expected by those using the canal. The Morton Company could not be charged with blocking the draw under conditions shown in this case, unless they deliberately and knowingly created some new condition, which would mislead and cause likelihood of injury to those using the canal in a proper way, from the standpoint of their previous knowledge.

[2] So that the question in this case comes down to whether the Schmadeke Company, using the canal in the condition in which they knew it was, and meeting the circumstances which they would expect under those conditions of the tide, are responsible for what happened

to the Brigham through acts of their employés which are equivalent to negligence. The Schmadeke Company undertook to conduct the navigation of the Josephine by hand, and their need of the coal was such that they did this rather than to wait for the next day, or to put responsibility on the towing company, by getting them to bring the boat up at night. Under such circumstances they must assume responsibility for the manner in which the work was conducted. That responsibility would include choice of methods for taking the boat through the drawbridge, and would include the determination of how far the Brigham could be safely moved out of the way, or could be transferred in order to clear the draw. The testimony shows that there was a cement boat of much less beam immediately ahead of the Brigham, and if, under the circumstances, it was necessary to shift these boats, the responsibility would rest upon the persons undertaking the maneuver, namely, the Schmadeke Company, and not the captain of the Brigham.

As I see the issue, the petition against the Morton Company must be dismissed, and the libelant is entitled to a decree against the Schmadeke Company.

In re SULLIVAN.

(District Court, N. D. New York. January 12, 1920.)

BANKRUPTCY ⇐421(1)—NONSUPPORT BOND TO SECURE PAYMENTS BY HUSBAND CREATED PROVABLE AND DISCHARGEABLE DEBT.

A bond executed by bankrupt, securing the making of semimonthly payments by a brother for 10 years for the support of the brother's wife, *held* to create a debt provable and dischargeable in the bankruptcy proceeding; Bankruptcy Act, § 17(2), Comp. St. § 9601, not applying.

In Bankruptcy. In the matter of Peter Sullivan, bankrupt. On motion to vacate stay of suit against bankrupt. Denied.

P. H. Fitzgerald, of Utica, N. Y., for petitioner.
D. H. O'Brien, of Port Leyden, N. Y., for bankrupt.

CHATFIELD, District Judge. The bankrupt executed a bond in the penal sum of $100 as security for the payment by the bankrupt's brother of the sum of $10 every two weeks for 10 years to his wife, who had caused his arrest for nonsupport. But one payment was made thereon, and the wife then brought suit against her husband, as principal, and the bankrupt, as surety, upon this bond, upon September 23, 1919. The bankrupt filed his petition, reciting this bond of $100 as his only debt upon the 16th of October, 1919, and has obtained from the referee in bankruptcy in this district a stay pending further order of this court. The present application is to vacate this stay.

The parties raised no issue as to the general facts of the case. The bankrupt alleges, upon the present motion, that his brother has allowed his wife to obtain a divorce and they are in collusion in allowing the wife to collect the amount of this bond from her brother-in-law. The wife, on the other hand, claims that the bond is not dischargeable, in-

asmuch as the debt was incurred for the support of a wife and child, and that the discharge of such obligations in bankruptcy proceedings is against public policy and cannot be allowed, unless plainly included within the scope of the bankruptcy statute. This latter claim is based upon a well-known proposition and must be divided into two parts. In the first place, a doctrine of law which is contrary to public policy cannot be upheld; but, if this doctrine of law, through changed conditions, becomes enacted into statute, the statute cannot be held void if the legislating body has power to determine what the law shall be without reference to matters of public policy, or to establish by the enactment of this legislation what shall be the policy in that particular regard.

The Bankruptcy Law (Comp. St., §§ 9585–9656) is a statute of this sort. Congress had the power to legislate so as to relieve a debtor from an obligation that might have been required of him under the public policy of the state. But where public policy requires certain obligations, and a statute is passed to relieve from or limit those obligations, the statute should be construed strictly. The limitation should not be extended beyond the clear statement of the statute. In the case at bar the language of the statute is as follows:

Section 17: "A discharge in bankruptcy shall release a bankrupt from all of his provable debts except such as * * * (2) are liabilities * * * for maintenance or support of wife or child. * * *" Comp. St. § 9601.

Subdivision (2) was added by the amendment of 1903, after the decisions of In re Hubbard (D. C.) 98 Fed. 710, and Dunbar v. Dunbar, 190 U. S. 345, 23 Sup. Ct. 757, 47 L. Ed. 1084. This evidently refers to the bankrupt's wife or child, and such debts are now not dischargeable, whether provable or not. But in the case at bar the form of the bond and the fact that it was given as security to a private party shows that the debt is not for breach of public duty, but for failure to meet a contract of guaranty.

It must be held that section 17 of this statute is not broad enough in language to expressly include in the exceptions a debt such as that now under consideration, if no other part of the statute prohibits that result. Debts due the United States or due a municipality have priority. Taxes are not dischargeable. An obligation upon a bail bond to produce a defendant in court would, if reduced to judgment or treated as a liquidated debt, be dischargeable in bankruptcy; but the United States or the state would have priority in distribution in so far as the assets might be available therefor. Public policy merely requires that the sovereign shall be protected, it does not provide or require that debts to the public, except taxes, shall be nondischargeable. It is for this reason that taxes are made liens upon property.

Under these circumstances it would seem that a penalty provided for in a bond to secure a private individual must be treated as a debt, when the condition of the bond has been met so that the obligation is payable. Unless the bond is so worded as to give the sovereign priority, it is of no higher rank than an obligation to pay an annuity or any other item which is necessary for the support of an individual. In the case at bar the support of the wife and child may have been re-

quired so as to protect the public, but the public could not collect upon this bond, or sue therefor, except in the name of the mother (the plaintiff in the action), to whom the bond ran. The possibility that the mother or child might become a public charge would be a sufficient motive for excepting such debt from the bankruptcy statute, if that motive so appealed to Congress; but the present bankruptcy statute does not in terms so provide, and a debt of this sort must be held provable, and therefore dischargeable.

The motion to vacate the stay will be denied, pending application for a discharge and determination thereon, or the expiration of the period to apply for such discharge.

YALE & TOWNE MFG. CO. v. TRAVIS, State Comptroller of New York. *

(District Court, S. D. New York. August 6, 1919.)

No. E16–153.

1. CONSTITUTIONAL LAW ⊂=207(4)—TAXATION ⊂=545—DENIAL OF PRIVILEGES AND IMMUNITIES—INCOME TAX—NONRESIDENTS.

Where a state has power to impose an income tax upon both resident and nonresident employés, a provision requiring employers of nonresidents to withhold their tax is merely a regulation respecting collection, and does not render a statute unconstitutional as denying to nonresidents the privileges and immunities of citizens.

2. CONSTITUTIONAL LAW ⊂=206(1)—TAXATION ⊂=193—VALIDITY OF STATE STATUTE—INCOME TAX LAW—IMMUNITIES OF CITIZENS OF UNITED STATES.

The amendment of the New York Tax Law by Act May 14, 1919 (Laws 1919, c. 627) adding article 16 relating to tax of incomes, in its provisions imposing taxes upon nonresidents who are citizens of other states without giving them the benefit of the exemptions given to residents of the state, *held* unconstitutional and void as abridging the privileges and immunities of citizens of the United States.

In Equity. Suit by the Yale & Towne Manufacturing Company against Eugene M. Travis, Comptroller of the State of New York. On motion to dismiss bill. Denied.

Decree affirmed 251 U. S. ——, 40 Sup. Ct. 228, 64 L. Ed. ——.

The complainant, a Connecticut corporation, has its plant and principal business place at Stamford, Conn. It is authorized to do business in this state, where it maintains an office, owns property, and employs numerous residents of other states, to wit, of New Jersey and Connecticut, who are occupied in whole or in part in the complainant's business within this state. A number of complainant's employés, who are nonresidents of New York, perform substantially all of their services at the New York office, and their salaries are paid at stipulated times in the city of New York from funds of the complainant within the state. Still other employés similarly situated have their salaries paid to them by checks sent by mail from the home office to such employes in New York. Still other nonresident employés are occupied in services which are rendered partly in Connecticut and partly in New York, some spending relatively little time in Connecticut and vice versa, the amount of time spent in each place depending upon circumstances. The complainant also employs certain nonresidents as traveling salesmen, who spend their time in New York and in traveling through other states.

The number of employés occupied as above set forth, whose salaries are in excess of $1,000 per annum, exceed 50 in number, and their total salaries are in excess of $200,000.

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

*Decree affirmed 251 U. S. ——, 40 Sup. Ct. 228, 64 L. Ed. ——.

Upon May 14, 1919, what is known as "chapter 627 of the Laws of 1919," and entitled "An act to amend the tax law, in relation to imposing taxes upon and with respect to incomes," became a law of this state.

Section 351 of the act provides:

"A tax is hereby imposed upon every resident of the state, which tax shall be levied, collected and paid annually upon and with respect to his entire net income as herein defined at rates as follows:" 1 per cent. on amounts not exceeding $10,000, 2 per cent. upon amounts in excess of $10,000 and not in excess of $50,000, and 3 per cent. on amounts in excess of $50,000.

The section continues: "A like tax is hereby imposed and shall be levied, collected and paid annually, at the rates specified in this section, upon and with respect to the entire net income as herein defined, except as hereinafter provided, from all property owned and from every business, trade, profession or occupation carried on in this state by natural persons not residents of the state." The tax shall first be levied and paid with respect to the calendar year 1919.

From here on the act proceeds to specify its provisions in much detail. "In general," says Mr. Powell in his very recent work, Taxation of Corporations and Personal Income, "it may be said that the New York law has copied the Federal Income Tax Act, substituting 'taxpayer other than a resident' for 'nonresident alien' and 'January 1, 1919' for 'March 1, 1913.' The remedial procedure and method of collection in the New York Corporation Tax Law, arts. 9 and 9a, are substituted for the federal procedure."

Nonresidents are not entitled to the personal exemption provided for residents, to wit, $1,000 for unmarried persons and $2,000 for married persons and $200 for each dependent.

Residents are likewise entitled to certain deductions in computing net income, but nonresidents are allowed such proportion of deduction as the income arising from sources within the state bears to the total income. The method of apportionment and allocation of claimed deductions is to be determined by the state comptroller.

The act creates "withholding agents," and the complainant would be one under the definition of the term, and such agents are required "to deduct and withhold 2% from all salaries, wages, commissions, annuities, emoluments, and other fixed and determinable annual or periodical gains, profits and incomes of which he shall have control, receipt, custody, disposal or payment, if the amount paid or received in any year equals or exceeds $1,000, unless there shall be filed with the withholding agent before the time to return any payment a certificate * * * to the effect that the person entitled to such salary," etc., is a resident, and setting forth his residence in the state.

The complainant alleges the existence between it and its employés of term contracts, and is so positioned generally as to come within the terms of this act, and would, it says, be put to considerable expense in withholding a percentage of the salaries of its employés. The defendant as comptroller is alleged to threaten to enforce the penalties of the statute against the complainant unless it complies with the terms of the statute. The jurisdictional allegations of the bill being sufficient, the complainant asks for equitable relief against the threatened action of the comptroller upon the grounds:

(1) That the statute is illegal and unconstitutional, in that it is contrary to and in violation of article 1, § 8, of the Constitution by interfering with and directly hindering commerce;

(2) That it impairs the obligation of contracts between the complainant and its employés;

(3) That it is contrary to section 2 of article 4 of the Constitution, in that it deprives the citizens of the states of Connecticut and of New Jersey of the privileges and immunities enjoyed by citizens of the state of New York.

(4) That it contravenes the Fourteenth Amendment of the federal Constitution, in that it abridges the privileges and immunities of citizens of the United States residing in, and citizens of, Connecticut and New Jersey and states other than New York, and that the complainant and its employés are deprived of their property without due process of law, and that they are denied the equal protection of the laws.

Louis H. Porter and Archibald Cox, both of New York City (F. Carroll Taylor, of Stamford, Conn., on the brief), for complainant.
James S. Y. Ivins, Deputy Atty. Gen., of the State of New York, for defendant.

KNOX, District Judge (after stating the facts as above). By reason of the decision which I have determined should be made in this case, it will be unnecessary to enter upon a discussion of the enactment in its entirety. That a state possesses practically unlimited powers of taxation within the realm of its jurisdiction save as circumscribed by constitutional limitations is elementary, and income taxes are no exception.

The outstanding question, it seems to me, in this litigation is whether the act as drawn transgresses upon the equal privileges and immunity provisions of the federal Constitution. If it does, I need proceed no further.

So far as decided cases upon this precise question go, there appear to be none.

It is true the question was raised in the Income Tax Cases of Wisconsin, 148 Wis. 456, 134 N. W. 673, 135 N. W. 164, wherein Chief Justice Winslow said:

"It is argued that the provisions which deny to nonresidents the exemptions which are allowed to residents * * * violate section 2 of article 4 of the federal Constitution, which provides that 'the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states.' * * * We regard it as a question involved in considerable doubt, and one not necessary to be passed upon now."

The case of Shaffer v. Howard (D. C.) 250 Fed. 873, by reason of its facts, is but of little help in this instance, and it is necessary to consider more or less original sources, and resort is had to the case of Corfield v. Coryell, 4 Wash. C. C. 381, Fed. Cas. No. 3,230.

The accuracy of the language, and the authority of this case, so far as I know, have not been questioned, and Justice Washington there said that he had no hesitation in confining the expression that "the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states" to those privileges and immunities which were in their nature fundamental, which belong of right to citizens of all free governments and which have at all times been enjoyed by the citizens of the several states which compose the Union from the time of their becoming free, independent, and sovereign. Among these fundamental rights, said Justice Washington, were "the right of a citizen of one state to pass through or to reside in any other state, for the purposes of trade, agriculture, professional pursuits, or otherwise; to claim the benefit of the writ of habeas corpus; * * * to take, hold, and dispose of property, either real or personal, and an exemption from higher taxes or impositions than are paid by the other citizens of the state."

Thereafter, in Paul v. Virginia, 8 Wall. 168, at page 180 (19 L. Ed. 357), the Supreme Court said:

"It was undoubtedly the object of the [constitutional] clause in question to place the citizens of each state upon the same footing with citizens of other

states, so far as the advantages resulting from citizenship in those states are concerned. It relieves them from the disabilities of alienage in other states; it inhibits discriminating legislation against them by other states; it gives them the right of free ingress into other states, and egress from them; it insures to them in other states the same freedom possessed by the citizens of those states in the acquisition and enjoyment of property and in the pursuit of happiness; and it secures to them in other states the equal protection of their laws. It has been justly said that no provision in the Constitution has tended so strongly to constitute the citizens of the United States one people as this."

Again, in Ward v. Maryland, 12 Wall. 418, 20 L. Ed. 449, the court, in specifying some of the rights included within the words "privileges and immunities," said one of them was that a citizen of one state should be "* * * exempt from any higher taxes or excises than are imposed by the state upon its own citizens." See, also, Cooley, Const. Limitations, 16. Subsequently in the Slaughterhouse Cases, 16 Wall. 36, 21 L. Ed. 394, it was said that the purpose of the Fourteenth Amendment "* * * was to declare to the several states that whatever those rights, as you grant or establish them to your own citizens, or as you limit or qualify, or impose restrictions on their exercise, the same, neither more nor less, shall be the measure of the rights of citizens of other states within your jurisdiction." Certainly, the force of this pronouncement was not qualified by the vigor of the dissents in these cases; and also in Barbier v. Connolly, 113 U. S. 27, 5 Sup. Ct. 357, 28 L. Ed. 923, in a discussion of the Fourteenth Amendment somewhat similar language was used.

Then there may be found the cases of Blake v. McClung, 176 U. S 59, 20 Sup. Ct. 307, 44 L. Ed. 371, followed by Sully v. American National Bank, 178 U. S. 289, 20 Sup. Ct. 935, 44 L. Ed. 1072, whereir it was held that nonresident unsecured creditors stood upon the same footing with resident unsecured creditors, a statute of Tennessee to the contrary notwithstanding.

It need not be argued that the rights of a corporation created by one state within the borders of another state are not altogether similar to the rights of a natural person so circumstanced (Paul v. Virginia, supra); but, even so, it was decided in Southern Railway v. Greene, 216 U. S. 400, 30 Sup. Ct. 287, 54 L. Ed. 536, 17 Ann. Cas. 1247, that to tax a foreign corporation under the circumstances there present by a different and more onerous rule than was used in taxing domestic corporations for the same privilege constituted a denial of the equal protection of the law.

In Wiley v. Parmer, 14 Ala. 627, it was held that the statute of that state, taxing the slaves of a nonresident at double the amount at which those of a resident were taxed, was unconstitutional.

In Bliss's Petition, 63 N. H. 135, it was held that a state cannot refuse a peddler's license to a citizen of another state, asked for upon the same terms that it grants licenses to its own citizens. Among other things the court said:

"The equality of privileges and immunities guaranteed by the federal Constitution * * * to the citizens of each state exempts them from any higher taxes than the state imposes upon her own citizens."

Other cases to the same general effect are State v. Lancaster, 63 N. H. 267; McGuire v. Parker, 32 La. Ann. 832; Oliver v. Washington Mills, 11 Allen (Mass.) 280; Town of Farmington v. Downing, 67 N. H. 441, 30 Atl. 345.

In Sprague v. Fletcher, 69 Vt. 69, 37 Atl. 239, 37 L. R. A. 840, it was declared that an act of Vermont which denied to nonresidents of the state rights which are allowed to residents under the same circumstances, in respect to deductions from taxable personal property by reason of debts owed by the taxpayers, conflicts with article 4, § 2, of the federal Constitution, which secures to citizens of each state "all the privileges and immunities in the several states."

Tested by the standard of the principles set forth in the foregoing cases does the failure to accord to nonresidents of the state the exemptions and immunities provided for to residents make this law, or part of it, invalid?

It becomes necessary to determine what persons are meant by the term "nonresidents." The comptroller of the state has used this language in referring to the term:

"A person is a nonresident within the meaning of the act, if he receives taxable income from property owned or from a business, trade, profession or occupation carried on in the state, but is not a resident thereof."

What I have to say will be confined to such nonresidents who are citizens of states other than New York.

The question is of importance to the state of New York, and is likewise of importance to the thousands of persons, residents, and citizens of adjoining states, who daily come into this state and here contribute to its welfare and prosperity.

It may be well to inquire what is the nature of the discrimination which it is alleged nonresidents will be subjected to under the operation of the law. The following illustration will serve to answer the inquiry:

Two persons are employed in this state by the plaintiff. Their work is in all respects similar, and each receives a salary of $2,000 per annum. Assume that each employé is married, one living with his wife in New York, the other living with his wife in Connecticut. Under the law as it is written the resident of New York would be exempt from taxation, but the resident of Connecticut would be subject to a tax of $20.

[1] Section 366 provides that "every withholding agent shall deduct and withhold two per centum from all salaries," etc., of nonresidents. The tax imposed by section 351 is at the rate of one per cent. on net incomes up to $10,000. This is obviously an error in the act, and under the regulations withholding agents are required to withhold but 1 per cent. Without commenting upon the authority of the regulation so imposed, this discrepancy may be passed. The withholding of any sum from the salaries of nonresidents is objected to, inasmuch as there is no withholding from residents. Assuming the power to lay a tax upon nonresidents based upon personal service, this feature of the act I am inclined to think is not necessarily fatal to its validity. It is the law, I think, that not only must the final purpose of

the law be considered, but the means of its administration—the ways it may be defeated. St. John v. New York, 201 U. S. 633, 26 Sup. Ct. 554, 50 L. Ed. 896, 5 Ann. Cas. 909. As to this feature of administration, I believe that some classification between residents and nonresidents may with propriety be made. District of Columbia v. Brooke, 214 U. S. 138, 29 Sup. Ct. 560, 53 L. Ed. 941; Field v. Barber Asphalt Co., 194 U. S. 618, 24 Sup. Ct. 784, 48 L. Ed. 1142. Reference may also be had to Bell's Gap Railroad Co. v. Pennsylvania, 134 U. S. 232, 10 Sup. Ct. 533, 33 L. Ed. 892, wherein the court held that the deduction of a tax by a withholding agent is merely a matter of convenience, adopted as a secure method of collecting the tax, and as such is not objectionable.

As to the inconvenience resulting to the nonresident by reason of the payment by the withholding agent of the gross amount so withheld, and the trouble and expense of the taxpayer in recovering any excess over the tax finally determined upon, I need not now comment.

[2] Paragraph 5 of section 360 provides that a resident may deduct losses incurred in any transaction entered into for profit, though not connected with the trade or business, "but in the case of a taxpayer other than a resident of the state only as to such transaction within the state." The result of this is that two employés of complainant, each receiving a salary of $5,000 a year, may together enter into a business venture in another state; if the venture within a year results in a loss of say $5,000 to each, the resident of New York may deduct his loss and pay no tax, but the nonresident of New York is subject to the tax. Also under paragraph 6 a resident may deduct his losses from fires, but unless the property of a nonresident injured by fire is within this state he can make no deduction.

Theoretically, the first of the two last-mentioned discriminations may be justifiable upon the ground that as to a resident of New York the state is entitled to tax upon his gains and profits from sources without the state, whereas as to a nonresident the tax may be recovered only as to net income from property, businesses, and occupations within the state of New York. The fact, however, remains that it is the personal knowledge of us all that the only appreciable source of income of thousands of nonresidents subject to this tax lies within the confines of this state, and that as a matter of practical operation of the statute the effect will be simply to deny to a nonresident, no matter what his misfortune, any exemptions. That there are in these provisions of the law a number of problems as to the character and place of income sought to be taxed well worthy of serious consideration is undeniable; but, in the aggregate, I am of opinion that as now framed the statute cannot operate without depriving citizens of other states of privileges and immunities which are open to citizens and residents of New York.

The difficulty here has arisen, it would appear, by the Legislature having assumed that a citizen of the United States residing in a state other than New York sustains to the taxing power of that state the same relationship that a nonresident alien sustains to the federal taxing power. There is, however, a distinction. Generally speaking, the

United States government, as suggested by Mr. Powell in his book Taxation of Corporations and Personal Incomes, may prescribe terms under which aliens may do business here, or prevent them from doing business here altogether. By the Fourteenth Amendment it is declared that—

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside," and "no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States."

It is this provision of the Constitution along with the second section of article 4 and the interstate commerce section of our fundamental law that have been largely responsible for the community of interest, the unanimity of purpose, the united effort, and the magnificent accomplishments of our people. If now, under one pretense or another the states are to erect economic and taxation barriers along their boundaries, it is but a question of time when the citizens of the various states will for all practical purposes be burdened with the disabilities of alienage, and this would be intolerable.

For these reasons, I am constrained to hold that the provisions of chapter 627 of the laws of the state of New York for the year 1919 are, in so far as they attempt to assess, lay, and collect a tax upon citizens of the United States who are not residents of the state of New York, and who are citizens of other states, without according them the privileges and immunities afforded by said act to citizens of the United States who are citizens of the state of New York and resident therein, are unconstitutional and void. Nothing herein, however, is meant to be decided as to the validity of the statute so far as it relates to residents of the state of New York.

Neither that question nor the question as to the power of the state to lay a tax upon nonresident citizens of another state based upon their earnings in this state for personal service rendered need, in view of the basis of my decision, now be considered.

The motion will be denied.

GRIESEDIECK BROS. BREWERY CO. v. MOORE, Internal Revenue Collector, et al.

(District Court, E. D. Missouri, E. D. November 21, 1919.)

No. 5207.

1. CONSTITUTIONAL LAW ⇐45—QUESTION OF CONSTITUTIONALITY OF ACTS OF CONGRESS IS FOR THE COURTS.
   Where the constitutionality of an act of Congress is challenged, the question for determination is one for the courts, and the jurisdiction of the court to determine the same cannot be successfully attacked.

2. INJUNCTION ⇐85(2)—COURTS HAVE JURISDICTION TO ENJOIN PUBLIC OFFICER FROM ENFORCING UNCONSTITUTIONAL ACTS.
   Courts have jurisdiction to enjoin public officers from enforcing unconstitutional acts, for such officers, in enforcing such acts, become mere unofficial intermeddlers, and are not entitled to protection as officers.

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

3. INTOXICATING LIQUORS ⚖6—RESERVED POWERS OF STATES TO REGULATE.
In time of peace, and in the absence of the Eighteenth Amendment, the states have exclusive power to regulate the manufacture and sale of intoxicating liquors; such power falling within the police power reserved to the states.

4. INJUNCTION ⚖85(2)—ENJOINING ENFORCEMENT OF NATIONAL PROHIBITION ACT BEFORE PROHIBITORY AMENDMENT BECAME EFFECTIVE.
In view of the fact that the Eighteenth Amendment provided a period of one year after ratification before it should go into effect, and that active hostilities had ceased and the armed forces had been demobilized at the time Congress passed the National Prohibition Act, which contained provision to carry into effect the previously enacted War-Time Prohibition Act, *held*, the Eighteenth Amendment not yet having become effective, that enforcement of those provisions of National Prohibition Act designed to carry into effect the War-Time Prohibition Act, and which prohibited the sale of 2.75 per cent. beer, manufacture of which was allowed by previous acts, will, in view of the injury, be temporarily enjoined pending determination of the constitutionality of such act.

In Equity. Suit by the Griesedieck Brothers Brewery Company against George H. Moore, Collector of Internal Revenue, and another, consolidated with suits by other brewery companies against the same defendants. On motion of defendants to dismiss for want of jurisdiction and equity, and on application of plaintiffs for temporary injunction. Injunction pendente lite granted.

Edward C. Crow, John T. Fitzsimmons, Charles A. Houts, Edgar R. Rombauer and W. K. Koerner, all of St. Louis, Mo., for plaintiff.

Walter L. Hensley, U. S. Atty., and Benj. L. White, Asst. U. S. Atty., both of St. Louis, Mo., for defendants.

POLLOCK, District Judge. The above entitled and numbered suit arose out of the consolidation, for the purpose of hearing and decision, of five like suits, brought, respectively, by the Independent Breweries Company, St. Louis Brewing Association, Griesedieck Bros. Brewery Company, Schorr-Kolk-Schneider Brewing Company, and Louis Obert Brewing Company, against defendants, the collector of internal revenue for the First district of the state of Missouri, and the United States attorney for the Eastern district of the state of Missouri, to restrain and enjoin said defendants from enforcing or attempting to enforce against complainants certain provisions of an act of Congress entitled the National Prohibition Act, approved October 28, 1919 (chapter 85). The specific ground on which such injunctive relief is demanded is the alleged want of constitutional power in Congress to enact said legislation; therefore the act, in so far as challenged by complainants, affords defendants no warrant of law to do the injurious acts by them threatened to be done unto complainants in their persons and property rights, as set forth in the bills of complaint.

To the several complaints so filed defendants have appeared, and interpose separate motions to dismiss for want of jurisdiction in the court to entertain them, and, further, for want of equity. The several complainants have applied for a temporary injunction to protect the status of the parties until the constitutional validity of the act may

be finally determined and decreed. On said motions and applications the consolidated cause stands argued and submitted for decision on the pleadings, motions, and proofs in the form of affidavits filed by the complainants.

From the pleadings and proofs certain facts are deducible beyond all controversy. Complainants, each and all, were on the day said act by its terms became effective engaged in brewing, manufacturing, selling, and distributing within the jurisdiction of this court certain beverages containing not to exceed 2¾ per cent. alcohol, in pursuance of and in strict conformity with the provisions of the acts of Congress of August 10, 1917 (40 Stat. c. 53), and of November 21, 1918 (40 Stat. c. 212), and all other acts of the Congress, and in strict compliance with and conformity to all the laws of the state of Missouri, and under permission or license received from the lawfully constituted authorities of the state of Missouri. In the conduct of said lawful business under the laws of the state complainants engaged many workmen, employés, and laborers at vast expense, employed vast amounts of capital invested in buildings, machinery, materials, and products specially devoted to the conduct and carrying on of said business, and for the purpose of obtaining the permission of and a license from the state of Missouri to engage in and conduct said business. Complainants for years had been, and were at the time said act became operative according to its terms, compelled to and did pay to the state large amounts of money by way of revenues collected and used by the state. Such beverages so being manufactured by the complainants are not in truth and fact intoxicating liquors or drinks, as the word "intoxicating" is defined or employed in its common acceptation among men, or as defined or employed in scientific language or treatise on the subject. That the enforcement by defendants against complainants and their properties, plants, and apparatus so employed of the provisions of said act of October 28, 1919, in so far as applicable to the period of one year after ratification of the Eighteenth Amendment to the national Constitution by the states, will operate to confiscate the property of complainants, will deprive complainants of the use, benefit, and value of the same without just compensation and without due process of law, etc. Therefore complainants pray injunctive relief against the threatened acts of irreparable injury, loss, and damage provided for in said portion of the act.

[1, 2] Coming, now, first to a consideration of the separate motions of defendants filed against the complainants to dismiss the same for want of jurisdiction, it may be said:

It is perfectly obvious this court has jurisdiction to hear and determine the question raised as to the constitutional validity of the provisions of the act of Congress challenged, for such issue is a judicial, and not a legislative, question, and on the decision of this one issue depend all others in this case; for, if the act in so far as challenged be within the constitutional power of the Congress to enact into law, the complainants, and all others, including the defendants, must obey and enforce its terms. On the contrary, if the provisions of the act challenged by complainants are found and decreed as a mat-

ter of law to lie without and beyond the constitutional power of the Congress to enact into law, then the act is not a law. It has no office to perform, has no binding force or effect upon any citizen of the republic, and defendants in enforcing it, or in attempting or threatening to enforce its provision against complainants or their property and property rights, to their irreparable loss, injury, and damage, are not officers of the law, acting within the scope of their lawful authority, but are, when so engaged, mere private individuals, volunteers, and intermeddlers, whose injurious acts ought to and in justice should be restrained. To such extent and end go all the authorities on the subject. Osborn v. United States Bank, 9 Wheat. 737, 6 L. Ed. 204; Dobbins v. Los Angeles, 195 U. S. 223, 25 Sup. Ct. 18, 49 L. Ed. 169; Ex parte Young, 209 U. S. 123, 28 Sup. Ct. 441, 52 L. Ed. 714, 13 L. R. A. (N. S.) 932, 14 Ann. Cas. 764; Wes. Un. Tel. Co. v. Andrews, 216 U. S. 165, 30 Sup. Ct. 286, 54 L. Ed. 430; Herndon v. Chi., Rock Island & Pac. Ry., 218 U. S. 135, 30 Sup. Ct. 633, 54 L. Ed. 970; Philadelphia Co. v. Stimson, 223 U. S. 605, 32 Sup. Ct. 340, 56 L. Ed. 570; Truax v. Raich, 239 U. S. 33, 36 Sup. Ct. 7, 60 L. Ed. 131, L. R. A. 1916D, 545, Ann. Cas. 1917B, 283; Wilson v. New, 243 U. S. 332, 37 Sup. Ct. 298, 61 L. Ed. 755, L. R. A. 1917E, 938, Ann. Cas. 1918A, 1024; Hammer v. Dagenhart, 247 U. S. 251, 38 Sup. Ct. 529, 62 L. Ed. 1101, Ann. Cas. 1918E, 724; Jacob Hoffman Brewing Co. v. McElligott, 259 Fed. 525, — C. C. A. —; Scatena et al. v. Caffey and Edwards (Southern District of New York, August 20, 1919) 260 Fed. 756.

The court has jurisdiction to consider and determine the constitutional validity of the act in question. If valid the court must so declare, and being valid the law must be obeyed. If void for want of constitutional power, the courts to which that question is lawfully submitted must so declare; and, if such result be decreed, neither the government, the defendants herein nor any right-minded citizen will desire its enforcement, and the courts to which this question is lawfully submitted can neither decline nor escape decision of the question raised.

[3] Is the act of October 28th, in so far as by complainants challenged in this controversy, constitutional and valid? The act on its face is divided into two distinct parts: First, one having relation to the continued enforcement of what is known as the War-Time Prohibition Act of November 21, 1918, as changed, modified, and amended, until the conclusion of the treaty of peace between this country and the German allies, or at least until that time is reached at which the President by his proclamation shall declare the war at an end. The other part of the act deals with the enforcement of national prohibition after the prohibitory amendment to the Constitution shall by its terms become operative. With this second part of the act this controversy does not concern itself, but does involve alone the first part or provision of the act.

That the right of complainants to manufacture, barter, sell, dispose of, or use the beverages by them produced, whether in their nature intoxicating or nonintoxicating, within the territorial limits

of the state of Missouri, in time of peace, in the absence of the Eighteenth Amendment to the national Constitution, can be prohibited or regulated alone by the exercise of the sovereign police power of the state, none can well deny. As under the national Constitution, formed by the union and consent of the several states in existence when it was formed, and to which the subsequently admitted states have irrevocably bound themselves by the act of admission, all police power is expressly reserved to be exercised by the sovereign states in such manner and form as they may lawfully ordain and prescribe by law, it is too clear for argument no power or pretended power of Congress in the enactment of the act in question can or may be traced to any such source. If permissible, at this late date, to cite authorities in support of this position, the following may be noted: Kidd v. Pearson, 128 U. S. 1, 9 Sup. Ct. 6, 32 L. Ed. 346; Vance v. Vandercook, 170 U. S. 438, 18 Sup. Ct. 674, 42 L. Ed. 1100; Keller v. United States, 213 U. S. 128, 29 Sup. Ct. 470, 53 L. Ed. 737, 16 Ann. Cas. 1066; Hammer v. Dagenhart, 247 U. S. 251, 38 Sup. Ct. 529, 62 L. Ed. 1101, Ann. Cas. 1918E, 724.

Indeed, the state of Missouri, in the lawful exercise of its undoubted reserve police power, has ordained complainants in this case may do, and has legalized complainants in the doing of, the precise acts which Congress by its act in controversy condemns and makes criminal. As all legislative power conferred upon or which may be exercised by the Congress was first vested in the sovereign states, and was by the states through the medium of the national Constitution delegated to the national Congress, then, if, as in this instance, the Congress assumes in the enactment of any law to invade the realm of the sovereign police power of the states expressly reserved by the creators of the nation to the sovereign states, of necessity, it must and does follow, he who would contend for the constitutional validity of such enactment must point out some specific provision of the national Constitution which in express terms, or by necessary implication, justifies and authorizes the Congress in making such invasion, or the act so done must fail of constitutional power.

[4] In the instant case defendants justify the invasion of the reserve police power of the states by Congress in the passage of the act in question by pointing to the war powers of the government as found expressed in article 1, section 8, of the national Constitution. In opposition to this contention complainants reply: (1) That in fact the war between this country and the German allies had actually terminated before the date the act was passed over the veto of the executive; that the executive has so declared in his official capacity. Hence the power of the Congress to proceed under its war powers granted in the national Constitution had ceased to exist. (2) Because during the period of warfare between this country and the German allies the Eighteenth Amendment to the national Constitution was by the Congress proposed to and ratified by the states and had become a part and parcel of our national Constitution at the date of the passage of the act in question, by reason of which assent the right of the Congress to exercise control over the subject of intoxicating beverages concur-

rently with the states was in express terms deferred until one year after ratification of said amendment by the states. Hence said amendment by necessary implication excluded Congress from the passage of the act in question, so far as it relates to the provisions of the act here challenged.

These contentions of the respective parties to the suit bring the controlling question for decision before the court in this form: On the one hand, in support of the constitutional validity of the act, we have reference to the war powers of the government and such legislative authority thereunder as the Congress was warranted in exercising at the date of the act. In opposition to this, we have: (1) Prior to the date of the passage of the act all police power employed in times of peace to prohibit, regulate, or control the manufacture, sale, transportation, or use of intoxicating beverages under the national Constitution expressly reserved to be exercised by the several states. (2) The Eighteenth Amendment to the national Constitution, proposed by the Congress and ratified by the states during a period of actual warfare, places the exercise of the police power employed to prohibit, regulate, or control the manufacture, barter, sale, and use of intoxicating beverages under the concurrent control of the sovereign nation and the sovereign states, to be thereafter exercised, however, only on the part of the nation at the expiration of one year from the date said amendment was ratified by the states. In this condition of our organic law the Congress acted in the passage of the law in question. Does such condition of the organic law authorize the act done?

Complainants contend the states created this nation because they could not continue to endure as a single state or nation without a central power authorized to employ in certain matters and contingencies powers above and beyond that possessed by the state or any other power. That the states made for the nation they so created a written Constitution. This Constitution was made to contain the provisions and conditions on which it might thereafter be modified or amended. That under this provision, and in pursuance thereof, the Eighteenth Amendment to the national Constitution became a part of the organic law. That the national Constitution is a written instrument. Its true intent and construction must be gained by considering all within its four corners as a completed whole. As no provision may be excluded therefrom, so, provisions apparently conflicting, if any be found therein, must be reconciled and harmonized in construction. That the war powers therein granted to the nation were irrevocably delegated for the express purpose of empowering the nation, independent of all other source of power, to preserve and perpetuate its national existence in times of national peril arising from or out of war. That the war powers of the nation as employed in the Constitution are emergency powers. When the emergency arises, the peril comes, then sui sponte the war powers of the nation spring into use to be exercised by the Congress. When such emergency ceases to exist, and the peril to the nation ends, the war power of the nation relapse into disuse. Whether the exigency calling for the exercise of the power has arisen is a question of fact for the determination of the

courts, and is not concluded by the fact the Congress has exercised the power. Ex parte Milligan, 4 Wall. 2, 18 L. Ed. 281; Mitchell v. Hamony, 13 How. 115, 14 L. Ed. 75; Perrin v. United States, 232 U. S. 478, 34 Sup. Ct. 378, 58 L. Ed. 691; Willoughby, Constitutional Law, vol. 2, p. 1251; Milligan v. Hovey, 3 Biss. 13, Fed. Cas. No. 9,605; In re Egan, 5 Blatchf. 319, Fed. Cas. No. 4,303; Johnson v. Jones, 44 Ill. 142, 92 Am. Dec. 159; Griffin v. Wilcox, 21 Ind. 370; Nance & Mays v. Brown, 71 W. Va. 519, 77 S. E. 243, 45 L. R. A. (N. S.) 996, Ann. Cas. 1914C, 1; United States v. Hicks (D. C.) 256 Fed. 707; Montoya v. United States, 180 U. S. 261, 21 Sup. Ct. 358, 45 L. Ed. 521; Jacob Hoffman Brewing Co. v. McElligott, 259 Fed. 321, — C. C. A. —.

If this argument made by complainants in the end prevails it is entirely clear there was not, as shown by the proofs in this case, and as determined by those governmental and historical acts of which the court will take judicial notice, any such emergency existing on October 28, 1919, as to authorize the Congress in resorting to the war powers of the nation as embodied in the Constitution to invade the reserve police powers of the state in the passage of the act in question so far as challenged in this suit, and, further, that the prohibition found in the act against the manufacture, barter, sale or use of beverages by complainants containing not to exceed 2¾ per cent. of alcohol bears no just or substantial relation to either the conduct of any war then in fact prevailing between this country and any other nation of this earth, or on the process of disbanding any troops theretofore engaged in the prosecution of any such war. However this question of grave doubt may ultimately be determined, there is another aspect of this case, which, in my mind, gives rise to serious concern. The national Constitution considered as a whole, inclusive of the recent Eighteenth Amendment thereto, takes away from the several states the theretofore exclusive exercise of the police power in dealing with the subject of the manufacture, sale, transportation, and use of intoxicating beverages, and places the right to exercise such power under the concurrent control of the nation and the several states, only, however, after the expiration of a period of one year from the date said amendment was ratified by the states. This one-year period had not as yet expired at the date the act in question was passed by the Congress. The act in question, so far as it relates to a time prior to the expiration of said one-year period does not pretend to concur with the legislation of the state of Missouri on the subject-matter thereof, but, on the contrary, as has been seen and stated, is in direct conflict with the lawful legislation of the state now in force, enacted under its reserve police power.

This amendment was made to the Constitution at a time when the war in fact was raging in Europe. Theretofore the Congress had, in the exercise of the war powers of the government, passed the acts of August 10, 1917, and of November 21, 1918, which said acts were in full force at the date the Eighteenth Amendment was by the Congress proposed to the states. This proposal, as made and accepted by the states, provides such powers of legislation as are therein conferred

on the Congress shall be withheld for the period of one year from the date of ratification by the states. Yet the Congress, in the passage of the act in question, in so far as here challenged, attempts by a re-exercise of the war powers of the government within the one-year restricted period to accomplish that purpose which the Eighteenth Amendment at the time expressly withheld from national control. In other words, the act challenged comes to this: By a re-exercise of an implied power under one provision of the national Constitution, the Congress attempts the doing of those acts withheld from its jurisdiction or control by the express provisions of another provision of the Constitution. True, if it is possible to conceive, think, or believe such exercise of the war powers of the nation arose out of any emergency of the government at war, or bears any just or substantial relation to any exigency of the nation in the conduct or conclusion of war, all right-minded men will most cheerfully and willingly yield obedience thereto without question, "for the safety of the nation is the supreme law." But if, as expressed by the Chief Executive in his message vetoing the act, the war was then at an end, demobilization of our forces completed, and no emergency of government calling for its enactment, containing powers by the national Constitution still reserved to be exercised by the states under their police powers, then the necessity of the Congress to resort to the war powers having ceased, the power to so do had ceased, and may not be pointed to in support of the act, and the courts of the country, when their jurisdiction is lawfully invoked, should and must so declare.

Beyond all cavil the purpose sought to be subserved in postponing the exercise of the power conferred on Congress by the Eighteenth Amendment for the period of one year therein found was to protect the property and property rights of citizens similarly situated with complainants, located in states whose then laws permitted the manufacture, sale, and use of beverages such as are produced by complainants from spoliation or confiscation under legislative enactment by the Congress, such as is contained in that portion of the act of October 28, 1919, herein sought to be enjoined, to the end that during said period of one year the owners might change, convert, and devote said properties to other lawful and beneficial uses consistent with the exercise of the power so conferred upon the Congress at the end of the period. From the very fact the amendment so provides, it must be thought those states, such as the state of Missouri, in which such properties were lawfully owned, employed, and enjoyed at the date the amendment was ratified, would not, through their legislative bodies, have ratified the same, in the absence of the one-year provision found in the amendment; or, had it been thought by the legislative bodies of such states, during said one-year period, and on October 28, 1919, the Congress would have enacted the drastic provisions found in that part of the act here challenged, unless impelled thereto by positive, pressing exigencies of war itself.

Without declaring or attempting to declare the act to be either constitutional or unconstitutional, but having in view the grave doubts

expressed as to its constitutional validity, so far as challenged in this suit; in view of the fact the injunctive relief sought in this case is the very life of the bill itself; in view of the fact the present enforcement of the drastic provisions therein found will work irreparable loss and damage to complainants; in view of the conclusive showing, made in this case, the beverages being manufactured by complainants are in no just or true sense intoxicating or baneful in their effects; and in view of the further fact no injury or damage can come to the defendants by the making of an interlocutory order preserving the status of the parties pendente lite, it follows—the motions to dismiss for want of jurisdiction and equity must be denied, and are denied. The application for an injunction pendente lite, and until a determination of the constitutional validity of the act so far as herein challenged is decreed on full hearing, is granted, on such terms as to bonds and forms of order as may be agreed upon by the parties or hereafter determined by the court.

It is so ordered.

NIRDLINGER v. STEVENS.

(District Court, D. New Jersey. December 26, 1919.)

1. JUDGMENT ⊜570(5)—DISMISSAL FOR FAILURE TO PROVE TITLE, NOT RES JUDICATA.

In a suit under 4 Comp. St. N. J. 1910, p. 5399, "to compel the determination of claims to real estate," in which the court is required by the statute to finally adjudge whether defendant has any interest in the property, and to fix and settle the rights of the parties, a decree simply dismissing the bill, on the ground that plaintiff had failed to establish his title, as pleaded, *held* not an adjudication which barred a second suit, in which plaintiff sets up a different title.

2. COURTS ⊜371(2)—FEDERAL COURTS MAY ENFORCE REMEDIES GIVEN BY STATE STATUTES.

A federal court of equity may entertain a suit to quiet title under a state statute, brought by one in peaceable possession, who is without adequate remedy at law.

3. NAVIGABLE WATERS ⊜36(3), 44(3)—BOUNDARY OF STATE LANDS BELOW HIGH-WATER MARK SHIFTS AS HIGH-WATER LINE CHANGES.

The boundary between land owned by the state below high-water line on navigable water and the land of a shore owner is ambulatory, shifting from time to time as the high-water line advances or recedes, due to erosion, reliction, or accretion; and a grantee of the state acquires no greater right, and cannot claim title to land formed by accretion.

4. NAVIGABLE WATERS ⊜44(4)—DIVISION OF ACCRETION BETWEEN RIPARIAN OWNERS.

Where ocean shore lands within a city were conveyed with reference to a survey and plat, their lines running parallel with the streets, accretions along their front *held* properly divisible between their owners by extending the boundary lines between them to the then high-water line.

In Equity. Suit by Samuel F. Nirdlinger against Henry E. Stevens, Jr. Decree for complainant.

George A. Bourgoose, of Atlantic City, N. J., and Robert H. McCarter, of Newark, N. J., for plaintiff.

Wilson & Carr, of Camden, N. J., for defendant.

HAIGHT, Circuit Judge. This suit is primarily instituted under an act of the New Jersey Legislature, entitled "An act to compel the determination of claims to real estate in certain cases, and to quiet the title to the same." 4 N. J. Comp. St. p. 5399. The bill also contains allegations which, it is claimed, bring the suit within the general quia timet jurisdiction of a court of equity, irrespective of the statute. Accordingly it prays for a decree removing a cloud upon the title of the plaintiff to the land in question, alleged to have been created by a certain riparian grant made by the riparian commissioners of the state of New Jersey, for a decree establishing that the defendant has no estate or interest in the land, and for a decree fixing and settling the rights of the parties therein.

Some time prior to the institution of this suit the present plaintiff and a corporation known as the Dewey Land Company, being at that time tenants in common of the land in question, brought a suit in the Court of Chancery of New Jersey under the same statute against the same defendant, and therein sought the same relief in respect to

substantially the same property as is sought in the present suit, except that the prayer for relief in the bill in the former suit did not, as does the bill in the present suit, specifically pray for the removal of the before-mentioned alleged cloud upon the title. The former suit was duly prosecuted, and resulted in a decree dismissing the bill. Upon appeal, the Court of Errors and Appeals of New Jersey affirmed the decree of the Court of Chancery. The plaintiff subsequently and prior to the institution of the present suit acquired the interest of the Dewey Land Company.

[1] 1. Naturally the first question which is raised is whether the decree in the former suit is res adjudicata of the issues in the present suit and a bar to the prosecution thereof. In solving that question, the decree actually made and the grounds upon which the same was rested by the respective New Jersey courts must be considered, in connection with the statute under which the bill was filed. This statute was originally passed in 1870 (P. L. 1870, p. 20), and, as is set forth in the title, its purpose is not only to quiet titles, but—

"to compel the determination of claims to real estate in certain cases," viz. those where one is "in peaceable possession of lands * * * claiming to own the same and his title thereto or to any part thereof is denied or disputed, or any other person claims or is claimed to own the same or any part thereof, or any interest therein, or to hold any lien or encumbrance thereon, and no suit shall be pending to enforce or test the validity of such title, claim or incumbrance." Section 1, 4 Comp. Stat.

As is pointed out by Vice Chancellor Stevenson in Fittichauer v. Metropolitan Fireproofing Co., 70 N. J. Eq. 429, 430, 61 Atl. 746, it takes care of—

"those cases of hardship, where the defendant out of possession makes a claim, while the complainant in possession has no means of compelling the defendant, either at law or in equity, to submit his claim for determination, and thus have it either established as valid or finally declared void. The great object of the statute is not to afford the complainant a new means of asserting and establishing his title, but to afford the complainant a means of compelling the defendant to either abandon or establish his title or have it decreed invalid."

As is indicated in the last-quoted remarks, the act provides for those cases where the defendant may disclaim all interest in the land, but provides that, if he shall answer, claiming any interest therein, he shall in his answer specify and set forth the same, as well as the manner in which, and the source through which, it is claimed to be derived. These provisions have been construed by the courts of New Jersey to constitute an answering defendant the real actor in the suit—the plaintiff—so that he must not only set forth in his answer, but must maintain by proofs, any adverse title or claim which he asserts; and the actual complainant in the suit is under no obligation to exhibit his own title until after the defendant has shown his, being required in the first instance to merely establish the jurisdictional facts, viz. that he is in peaceable possession, claiming to own the lands, and that no suit is pending in which the defendant's claim, whatever it may be, can be tested. Fittichauer v. Metropolitan Fireproofing Co., supra; Ocean View Land Co. v. Loudonslager, 78 N. J. Eq. 571, 80 Atl. 471.

In furtherance of the object of the statute, as expressed in its title, it is provided that, when a defendant has answered, setting up his claim, except in cases where either party has applied for the framing of an issue at law and a trial thereof by a jury (with which feature of the statute we are not concerned in this case)—

"the Court of Chancery shall proceed to inquire into and determine such claims, interest and estate, according to the course and practice of that court, and shall * * * finally settle and adjudge whether the defendant has any estate, interest or right in, or encumbrance upon, said lands, or any part thereof, and what such interest, estate, right or encumbrance is, and in or upon what part of said lands the same exists." Section 5.

It is further provided in section 6 that—

"the final determination and decree in such suit shall fix and settle the rights of the parties in said lands, and the same shall be binding and conclusive on all parties to the suit."

The statute, therefore, specifically directs that the final decree in the cause shall (1) finally adjudge whether the defendant has any interest in the property and if so, exactly what it is; and (2) fix and settle the rights of the parties. No other decree is provided for in the statute; nor, except in cases where the complainant has failed to establish the jurisdictional facts of peaceable possession, etc., or something kindred thereto, would any other kind of decree seem to be permissible. In the latter class of cases there must necessarily be, as in practice there has been, I think, a decree simply dismissing the bill. See Steelman v. Blackman, 72 N. J. Eq. 330, 65 Atl. 715, and Oberon Land Co. v. Dunn, 60 N. J. Eq. 280, 47 Atl. 60.

It is thus apparent that in a decision on the merits the ascertainment and settlement of the defendant's interest is the primary and absolutely essential requirement of the statute. The decree of the Court of Chancery of New Jersey in the suit which is set up as a bar to this suit was simply that the complainant's bill be dismissed. No attempt was made to adjudicate the defendant's interest, or to settle the rights of the parties in the land. That decree was merely affirmed by the Court of Errors and Appeals. It was in no respect ordered to be modified or changed. The decree of the Court of Chancery (as appears from the unreported memorandum filed by the Chancellor) was based on the conclusion that, as the defendant asserted a claim based on a riparian grant of the state, made through the riparian commissioners, and as the validity of the grant could not be attacked collaterally, but only by a direct proceeding instituted for that purpose by or in the name of the Attorney General, the bill, which was held in effect to be such a collateral attack, could not be maintained. The Court of Errors and Appeals disagreed with the ground upon which the Chancellor had dismissed the bill, and held that the complainants might maintain their bill "if they have made out their title." Dewey Land Co. v. Stevens, 83 N. J. Eq. 314, 316, 90 Atl. 1040. The Chancellor's decree of dismissal, however, was affirmed, on the ground that the deeds, upon which the complainants relied to establish their title,

conferred, in fact, no title upon them; Mr. Justice Swayze remarking at the conclusion of his opinion:

"We think the complainants fail to establish the title set up in the amended bill. The decree of dismissal must therefore be affirmed."

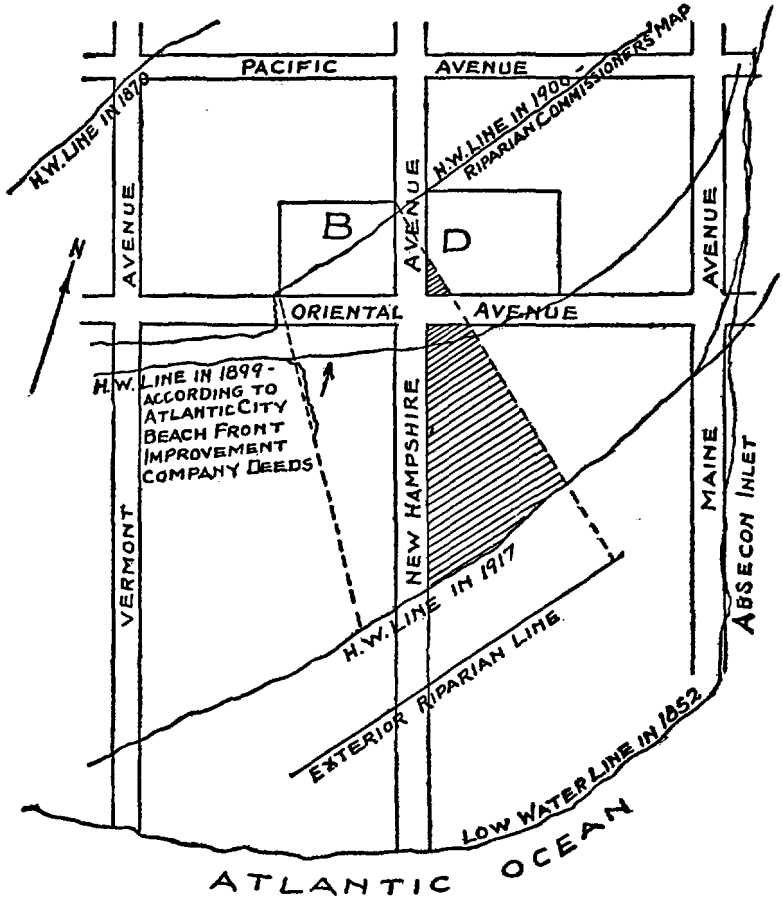
What, therefore, has the New Jersey decree specifically established and settled? Nothing, it seems to me, but that the complainants in that suit had not established facts sufficient to warrant the relief prayed for in their bill and authorized, by the statute, to be given. It established nothing more, for instance, than it would have established, had the complainants' bill been dismissed because they had failed to establish that they were in peaceable possession of the locus in quo, as in Steelman v. Blackman, supra, or, as in Oberon Land Co. v. Dunn, supra, because the parties had by their own act made it impossible for the court to carry out the direction of the statute and by decree fix and settle the rights of the parties in the lands.

But it is urged on behalf of the defendant that, although the decree did not in form do so, it has actually settled that the defendant's title is superior to that asserted in that suit by the complainants. This contention is based on the proposition that because under the statute, as hereinbefore construed, it was incumbent upon the defendant in the first instance to assert and prove his title before the complainants were called upon to reveal theirs, the Court of Errors and Appeals must have found that defendant's prima facie title, which rested upon the state's riparian grant, was superior to that asserted by the complainants; otherwise, the court would not have affirmed a dismissal of the bill. But this is a non sequitur. It may be that that decision has established a new jurisdictional requirement, viz. that the plaintiff must establish some kind of title to the land in controversy before the defendant is required to set forth and establish his claim, and, in the event of his failure so to do, the court is not at liberty to entertain a bill filed under the statute in question.

On the other hand, its action in merely affirming a dismissal of the bill may have been due to the fact that, upon examining the record, it found that the deeds relied upon by the complainants conferred no title upon them, and, consequently, it adopted a practical and convenient way of disposing of the case, thus rendering it unnecessary for it to determine whether or not the defendant had any interest in the lands, and hence it advisedly merely dismissed the bill; the complainants being treated rather as interlopers, without a shadow of title. That in a suit instituted under the statute in question, if the decree fixing and settling the rights of the parties in the disputed premises is appealed from and is reversed, the Court of Errors and Appeals must direct what decree is to be entered, is recognized by that court in Blackford v. Conover, 40 N. J. Eq. 205, 218, 1 Atl. 16, 7 Atl. 354. If, therefore, the Court of Errors and Appeals in the New Jersey suit had intended to fix the rights of the parties in the land in question, it would have remitted the record to the Court of Chancery, with a direction to enter such a decree as would have fixed those rights as it adjudged them. I would be loath indeed to hold that a decision in

a former case is res adjudicata upon a mere speculation as to what another court may have meant to decide, especially when its actual decree or judgment is not in harmony therewith. Nor, in my judgment, is there anything in the opinion of the court, which was written by Mr. Justice Swayze (a "concurring" opinion having also been written by Judge White), which would justify such a conclusion as defendant contends for.

In approaching the discussion of this point, it seems advisable to refer briefly to some of the facts. The locus in quo, which for all practical purposes is the same in this case as it was in the New Jersey case, is situate in Atlantic City, N. J., and borders on the Atlantic Ocean. It probably can best be described, and other matters, which it becomes necessary to hereafter discuss, can best be understood, I think, by reference to the following diagram, which is made for convenience of reference to conform as nearly as possible to that in Judge White's opinion in the Dewey Land Company Case. It is not drawn to scale:



The locus in quo is the triangular piece of property lying east of New Hampshire avenue and indicated by the shaded lines. In 1852 the entire tract shown on the diagram was fast land, and was owned by one Robert B. Leeds. In 1856, and apparently after some of the land had been encroached upon by the ocean, he conveyed it to John McClees, describing it as bounding on "the edge of Absecon Inlet." In 1897 McClees conveyed it to the Atlantic City Beach Front Improvement Company, by a description bounding it on the "high-water mark of Absecon Inlet and the Atlantic Ocean." At that time, as appears on the diagram, the land in question was under water; the ocean in the intervening years having moved inward many feet. Whether the land had been lost by erosion or avulsion, I do not at this point attempt to decide. The predecessors in title of both the defendant and the plaintiff acquired their respective titles to the fast land from the Atlantic City Beach Front Improvement Company. In 1900 the immediate predecessor in title of the defendant, William H. Bartlett, who owned the shore front lot marked B on the diagram, procured a riparian grant from the state for the land, then under water, included within the dotted lines shown on the diagram. In 1899 and 1900, respectively, the then upland part of the lot marked D on the diagram was acquired by the plaintiff's predecessors in title from the Atlantic City Beach Front Improvement Company. Since that time, the shore front by reason of accretions has moved much further oceanward, and is now located approximately as shown on the diagram. It is thus apparent that the triangular piece of the lot marked D—the locus in quo—is now fast land, and is within the bounds of the riparian grant to Bartlett.

In 1910 the Dewey Land Company and the present plaintiff, who then were tenants in common of lot D, as before stated, filed the before-mentioned bill in the Court of Chancery of New Jersey against the present defendant to have the latter's interest in the locus in quo determined and settled. In the original bill in that case the complainants claimed title to the locus in quo by reason of accretions. Subsequently, however, they amended their bill, eliminated all claim based on accretions, and rested their title upon quitclaim deeds taken in 1911 from John McClees and in 1912 from the heirs of Robert B. Leeds, respectively. This was apparently done under a mistaken notion of the effect of a decision rendered by the Court of Errors and Appeals of New Jersey in Ocean City Ass'n v. Shriver, 64 N. J. Law, 550, 46 Atl. 690, 51 L. R. A. 425. In the deed from the Leeds heirs, the property was described as running to the high-water mark as it existed in 1852, and in the McClees deed as running to the high-water mark as it existed on April 15, 1853.

It is important that the title asserted by the complainants in the New Jersey suit be borne in mind in ascertaining what the Court of Appeals in New Jersey decided in that suit. As will be seen by reading the opinion of Mr. Justice Swayze (83 N. J. Eq. 316, 90 Atl. 1040) and the opinion of Judge White (83 N. J. Eq. 656, 91 Atl. 934), it was held that neither of these deeds conferred any title upon the complainants to the locus in quo, for the reasons which are very clearly set

forth in Mr. Justice Swayze's opinion. It is entirely clear, both from Justice Swayze's opinion and from Judge White's opinion, that the New Jersey court did not attempt to determine what rights, if any, any of the parties to that suit had acquired in the land in question by reason of accretions, and Judge White distinctly says that the question as to what rights the defendant had acquired in the locus in quo by virtue of the riparian grant was not before the court. What better assurance could there be that the court did not attempt to decide that question? It is true that Justice Swayze said (83 N. J. Eq. 317, 90 Atl. 1042):

"If the land was formerly fast land, and the title was lost by erosion, it became the property of the state, not merely as long as it remained under water, but, if the state made a riparian grant, absolutely. Stevens v. Paterson & Newark Railroad Co., 34 N. J. Law, 532 [3 Am. Rep. 269]. Whatever right the former owners might have as against private persons upon the ocean receding was of no avail against the state's riparian grant; the title lost by erosion was then lost forever, unless it was regained by accretion, and the right of accretion was the compensation of the former owner for his loss; each grantee had the same right."

It was these remarks which called forth the opinion of Judge White. I do not think that they give any warrant for the conclusion that Justice Swayze meant to say that the riparian grant deprived the owner of lot D of such land within the bounds of the riparian grant as might thereafter be formed by accretions, if, in other respects, he would be entitled thereto. It is true that he made a broad statement when he said that "it became the property of the state, not merely as long as it remained under water, but, if the state made a riparian grant, absolutely"; but that statement must be read in the light of what he had just been discussing and what he said afterwards. He had just been discussing, not the effect of the riparian grant, but of the title, if any, acquired by the complainants through the deeds which they had received from John McClees and the Leeds heirs. I think that his remarks had reference to the devolution, as respects these grantors, of the title to the property embraced within the original Leeds and McClees deeds, when it or a part of it became covered with water, and later when it became uncovered by reason of accretions. In the succeeding sentence, Justice Swayze said:

"The title lost by erosion was then lost forever, unless it was regained by accretion."

If this means anything, it is a clear limitation upon the broader statement theretofore made. The case of Stevens v. Paterson & Newark Railroad Co., cited by Mr. Justice Swayze, simply held that the state of New Jersey is the absolute owner of the land under all navigable waters, below the ordinary high-water line, within its limits, and can grant such land to any one without making compensation to the owner of the shore, with the possible exception of the right to "alluvium and dereliction," pointed out in Judge White's opinion in Dewey Land Co. Case. This case did not hold, and in fact the question was not involved, that in making a riparian grant of land under water the state could confer a title upon its grantee which would deprive the owner of the ripa of his right to such accretions as might form in front of

his land, within the bounds of the grant, before the grantee might have filled in or otherwise reclaimed the land thus granted to him. As pointed out in Judge White's opinion, the statute of New Jersey, under which the grant in this case was made, provides:

"That before an independent grantee from the State may fill the land under water in front of the land of a riparian owner who has failed to take out a state grant after notice, such independent grantee must extinguish such riparian owner's right to accretions by paying to him the value thereof, to be fixed by the riparian commissioners, subject to an appeal to the Supreme Court and to a trial by jury." Dewey Land Co. v. Stevens, supra, 83 N. J. Eq. 659, 91 Atl. 935.

Accordingly, it is not to be presumed that Justice Swayze, by the before-mentioned broad statement which he made, considering the circumstances under which he made it, the subsequent apparent limitation, and what was actually decided in Stevens v. Paterson & Newark Railroad Co., intended to lay down as an absolute rule that a riparian grant from the state divested the owner of the ripa, when a different person from such grantee, of his right to land formed by accretions before such grantee had reclaimed the land under water thus granted. This will be more manifest, I think, in the light of the general rules, which will hereafter be discussed, regarding the relative rights of the owner of shore front property and the state and the latter's grantee.

Reverting now to the question of the effect of the New Jersey decree and decision on this suit, as before shown, the determination of whether the defendant has any interest, and, if so, what it is, is the primary and absolutely essential requirement of the statute. A decree or decision which either expressly or impliedly falls short of that requirement necessarily does not dispose of the case on the merits. It is, of course, elementary that, for a judgment in one suit to be a bar to the prosecution of another suit between the same parties or their privies, the point in controversy must be determined on its merits, and if the first suit be dismissed for want of jurisdiction, or disposed of on any ground which did not go to the merits of the action, the judgment rendered will prove no bar to the prosecution of another suit. Hughes v. United States, 4 Wall. 232, 18 L. Ed. 303.

Nor is the practical effect of the decree to bar the present action, because of the rule that a judgment on the merits is res adjudicata, not only as to any matter which was offered to sustain or defeat the claim in controversy, but as to any other matter which might have been offered for that purpose; in other words, I do not think that the fact that the plaintiff in this suit did not assert, with his co-complainant in the New Jersey suit, the title upon which he now relies to defeat the title set up by the defendant, precludes him from now asserting it. That rule has no more application to this case than it would have to a judgment of involuntary nonsuit rendered in an action at law, which is based upon the failure of the plaintiff to establish facts entitling him under the law to relief. Such a judgment, of course, does not preclude the plaintiff from supplying in a subsequent action facts which he might have supplied in the first action, and which would have made out a case entitling him to relief, if not sufficiently answered by the defendant. Manhattan Life Insurance Co. v. Broughton, 109

U. S. 121, 3 Sup. Ct. 99, 27 L. Ed. 878; Beckett v. Stone, 60 N. J. Law, 23, 36 Atl. 880; 23 Cyc. 1136 and cases there cited.

I accordingly conclude that the New Jersey decree is not res adjudicata of the questions in this case. If a contrary conclusion were reached, there would be presented a situation where, although the title or interest of the defendant had never been settled, neither party would ever be able to procure a decree under the statute, setting at rest the title to the land. Indeed, the practical effect would be to confirm the defendant's claim of title to land of which the complainant was and is in peaceable possession, not because it had ever been so decreed by any court, but because in a previous suit the complainant had failed to establish his title. Such a result should, of course, be avoided, if possible.

This conclusion has made it unnecessary for me to consider whether the fact that the bill in the present suit seeks, quite independently of the statute, to remove a cloud upon the title, or whether the fact that the premises in question in this suit do not include a part which was in question in the former suit, viz. the part beyond the present high-water line, has any effect on the question under discussion. As no claim is made in the present suit on account of the deeds upon which the plaintiff and his co-complainant relied in the New Jersey suit, the effect of that decision as respects any question which might have arisen in this case, because of these deeds, need not be considered.

[2] 2. It is conceded that the plaintiff is in peaceable possession of the land in question, claiming to own the same, and that no suit is pending to test the validity of the title or claim asserted by the defendant; consequently the jurisdictional facts required by the statute are present. It is also apparent that the plaintiff is without any adequate remedy at law. As he is in peaceable possession of the land, he cannot institute an action in ejectment, and no suit is pending at law wherein the validity of his title and the claim of the defendant can be tested. Under these circumstances, it is entirely clear that not only has this court jurisdiction to entertain the bill in this suit and thus administer the New Jersey statute, but that it is its clear duty to do so. Holland v. Challen, 110 U. S. 15, 3 Sup. Ct. 495, 28 L. Ed. 52; Reynolds v. Crawfordsville Bank, 112 U. S. 405, 5 Sup. Ct. 213, 28 L. Ed. 733; Chapman v. Brewer, 114 U. S. 158, 5 Sup. Ct. 799, 29 L. Ed. 83; Wehrman v. Conklin, 155 U. S. 314, 15 Sup. Ct. 129, 39 L. Ed. 167. In all of these cases, statutes in no material respect different from the New Jersey statute were administered in the federal courts. In the last-cited case, it was held that such a state statute could not be administered by a federal court, where the plaintiff had an adequate remedy at law.

[3] 3. I am now brought to a consideration of the case on its merits. Both the plaintiff and the defendant claim to own the locus in quo. The defendant's claim is based both upon the riparian grant from the state and upon accretions to the fast land, of which his predecessor in title was the owner at the time of the riparian grant, and of which the defendant is now the owner. The plaintiff's claim of title is likewise based upon accretions to the upland, of which he and his prede-

cessors in title from time to time have been the owners. He also makes claim under the doctrine pertaining to avulsion. The first question on this phase of the case is whether the riparian grant to the defendant's predecessor in title, in and by itself, has conferred any title on the defendant to the locus in quo, in view of the fact that it is now fast land, and was not reclaimed by the state's grantee before the accretions had formed it. The solution of that question necessitates the ascertainment of the relative rights of the owner of shore front property and the state and the latter's grantee. For all purposes necessary to be considered in this case (there are some differences), the rights of the state of New Jersey to lands under navigable waters are the same as those which before the revolution were vested in the Crown of England; the title to the soil beyond the ordinary high-water line being formerly vested in the crown, and since the revolution in the state. Bell v. Gough, 23 N. J. Law, 624, 633; Stevens v. Paterson & Newark Railroad Co., supra; Paul v. Haselton, 37 N. J. Law, 106; Hoboken v. Pennsylvania Railroad, 124 U. S. 656, 8 Sup. Ct. 643, 31 L. Ed. 543. It was the rule of the common law, as it is the rule in New Jersey and elsewhere, so far as I know, that as the high-water line shifts from time to time, due to erosion, accretion, or reliction, the crown's or state's inland boundary and the outward boundary of the riparian proprietors respectively, shift, so that both are ambulatory, and depend from time to time upon the location of the high-water line. The King v. Yarborough, 3 Barn. & Cress. 91; In re Hull & Selby Railway, 5 M. & W. 328, 131 English Reports (Full Reprint) 139; Camden & Atlantic Land Co. v. Lippincott, 45 N. J. Law, 405; Ocean City Assoc. v. Shriver, 64 N. J. Law, 553, 554, 46 Atl. 690, 51 L. R. A. 425; New Orleans v. United States, 10 Pet. 706, 716, 9 L. Ed. 373; County of St. Clair v. Lovingston, 23 Wall. 46, 23 L. Ed. 59; Gould on Waters, § 165, and cases there cited.

On principle, it would seem to necessarily follow that the state's grantee can acquire no greater rights than the state itself had. If, therefore, the state's inland boundary is ambulatory, and it has no title to lands formed by accretions, its grantee can have none, and must merely acquire a like boundary. The authorities so hold. I am not now speaking of the right of a grantee under the New Jersey statute to fill in and reclaim land under water conveyed to him by the state's riparian commissioners, upon compensating the owner of the upland, because that right rests on, as I take it, an entirely different principle, viz. that of eminent domain. The leading case on this point is Scratton v. Brown, decided by the Court of King's Bench in 1825 and reported in 4 Barn. & Cress. 488. One of the questions in that case was whether a conveyance of certain property, lying between the high and low water marks, acquired originally by the grantor from the crown, conveyed that which from time to time, as the sea encroached upon or receded from the beach, lay between the high and low water marks, or only that which at the time that the deed was made was bounded by the then high and low water marks. It was held that, as the high and low water marks shifted, the property conveyed by the deed also shifted. In the course of his opinion, Judge Bayley said (page 498):

"The question here is whether there may be a certain quantity of land shifting in situation and vesting in the same persons at different times? That must be the case of land fronting the sea or a river, where, from time to time, the sea or river encroaches or retires. If the sea leaves a parcel of land, the piece left belongs to the person to whom the shore there belongs. The land between high and low water marks originally belonged to the crown, and can only vest in a subject as the grantee of the crown. *The crown by a grant of the seashore would convey, not that which at the time of the grant is between the high and low water marks, but that which from time to time shall be between these two termini. Where the grantee has a freehold in that which the crown grants, his freehold shifts as the sea recedes or encroaches.* Then what was the object of the parties to the deed of 1773? To grant the land within certain limits. Those to the east and west were ascertained, but those on the north and south were to be ascertained by the high and low water marks. I think that those words must be construed with reference to the rule of the common law upon the subject of accretion, and that, as the high and low water marks shift, the property conveyed by the deed also shifts."

The above rule and the authority of Scratton v. Brown is approved by the Court of Appeals of New York in Trustees, etc., of East Hampton v. Kirk, 84 N. Y. 215, 38 Am. Rep. 505, as it is also by the Circuit Court for the Southern District of New York in De Lancey v. Welbrock, 113 Fed. 103, in which latter case it was applied in construing a riparian grant of land under water originally made by the British crown and subsequently sold by the state of New York for failure to pay the rents provided for in the grant. The same principle is recognized by the United States Supreme Court in County of St. Clair v. Lovingston, supra. It will be noted that at the beginning of the opinion in that case, 23 Wall. 62 (29 L. Ed. 59) Mr. Justice Swayne said:

"We shall assume, for the purposes of this opinion, that all the title which could be passed by Congress and the state was and is vested in the plaintiff in error."

Scratton v. Brown is cited with approval by the New Jersey courts in Camden & Atlantic Land Co. v. Lippincott, supra, and Ocean City Land Co. v. Shriver, supra, although the precise point now under discussion does not seem to have been involved in either of these cases. Indeed, I think that this rule is recognized by Justice Swayze in the Dewey Land Co. Case, because, as before noted, he said:

"Title lost by erosion was then lost forever, unless it was regained by accretion."

It is expressly adopted by Judge White in his opinion. Consequently, I have no hesitation in reaching the conclusion that if the plaintiff, by virtue of owning lot D, is otherwise entitled to the land formed by accretions within the locus in quo, the riparian grant in question conferred no title thereto on the defendant.

[4] The next inquiry, then, is whether the complainant or the defendant, by reason of being respectively riparian proprietors of the upland, is entitled to the accretions which have formed the locus in quo. On this point the decisive question is how the lines of their respective properties, so far as including accretions is concerned, should run—whether they should follow exactly or approximately the lines of the riparian grant, or whether they should follow lines parallel to New Hampshire avenue.

This question is by no means free from difficulty. The division of lands formed by accretions among coterminous riparian proprietors, and of lands between high and low water marks when the title thereto is not vested in the state, as in Massachusetts, has always been a perplexing question and the subject of considerable discussion in the courts. While I have examined a great many authorities, it would, I think, serve no useful purpose, but would unduly and unnecessarily burden this opinion, to attempt to review them. It is impossible, and the courts have heretofore so recognized, to formulate a general concrete rule by which all cases can be governed, because of the many varying conditions which each case presents. The fundamental principle, however, which underlies all the cases is that the division should be equitable and fair according to the conditions of each particular case. In ascertaining what is equitable in any given case, except possibly in some of that class where the actual or presumed agreement of the parties or their predecessors in title has been considered as the decisive factor (see, for instance, Adams v. Boston Wharf Co., 10 Gray [Mass.] 521, 530), the courts have been primarily governed by the general rule announced by Chief Justice Shaw in Deerfield v. Arms, 17 Pick. (Mass.) 41, 45, 28 Am. Dec. 276, as follows:

"Two objects are to be kept in view, in making such an equitable distribution; one is, that the parties shall have an equal share in proportion to their lands, of the area of the newly formed land, regarding it as land useful for the purposes of cultivation or otherwise, in which the value will be in proportion to the quantity; the other is, to secure to each an access to the water, and an equal share of the river line in proportion to his share on the original line of the water, regarding such water line in many situations as principally useful for forming landing places, docks, quays, and other accommodations, with a view to the benefits of navigation, and as such constituting an important ingredient in the value of the land."

That case was specifically approved by the United States Supreme Court in Johnston v. Jones, 1 Black, 200, 222, 17 L. Ed. 117. While in Delaware, Lackawanna & Western Railroad ads. Hannon, 37 N. J. Law, 276, there was not directly involved the question of the division of alluvion between coterminous riparian proprietors, yet the question which was before the court was for all practical purposes the same. The case was decided in accordance with the same principle; Chief Justice Beasley thus expressing it, viz.:

"It is not probable that any precise formula, applicable to every case, can be devised. The principle to work by is, that when practicable, each owner is to have his full shore front; when this is not practicable, he is to have his ratable part of such front. I do not see how the rule can be further specialized."

In the application of these general principles to particular cases various concrete rules have been adopted. In some cases it was found that inequalities would result if the side lines separating the upland holdings of the various riparian proprietors were extended over the newly formed land, because of the contour of the new shore front, or because of the direction in which the side lines approached the old shore front, and for other reasons; while in other cases it was held that the extension of side lines would divide the new shore front and the newly formed land equitably between the adjoining owners. In still other cases, where the old shore front was in a cove, another

method of division was adopted; and in some cases the lines have been run perpendicular to the old shore front, etc. A collection of the cases will be found in the foot note of 21 L. R. A. 776, and 25 L. R. A. (N. S.) 257. See, also, Gould on Waters, §§ 162, 163.

But there is still another rule (hereinbefore referred to as a possible exception to the general rule), which rests upon and gives effect to the actual or presumed agreement (which may be found from acquiescence or conduct) of the owners (either the present owners or some of their predecessors in title) of the upland as to the boundary lines of lands between high and low water marks, to which they, respectively, are or may become entitled as owners or otherwise. It was upon that ground that the decision of the Court of Chancery of New Jersey in Stockham v. Browning, 18 N. J. Eq. 390, was based. The facts in that case in several important respects are so nearly analogous to the facts in the case at bar as to make the case an important authority. The last-mentioned rule has been most frequently applied by the Supreme Court of Massachusetts in the division of the flats (the shore between high and low water mark) which, under an ancient colony ordinance, belong to the riparian proprietors. Valentine v. Piper, 22 Pick. (Mass.) 85, 33 Am. Dec. 715; Piper v. Richardson, 9 Metc. (Mass.) 155; Drake v. Curtis, reported in a foot note to Curtis v. Francis, 9 Cush. (Mass.) 446; Adams v. Boston Wharf Co., 10 Gray (Mass.) 521; Attorney General v. Boston Wharf Co., 12 Gray (Mass.) 553; Gerrish v. Gary, 120 Mass. 135. See, also, cases cited in Gould on Waters, §§ 162 and 164. It needs no argument to demonstrate that this rule is as applicable to the division of lands formed by accretions as it is to the division of "flats," as in the Massachusetts cases, or the division of the shore front for wharfage purposes, as in the New Jersey case.

It is now necessary to consider some additional facts in light of these general rules. As before noted, all of the lands of the plaintiff and the defendant, as well as all land in that vicinity, was originally fast land. In the years intervening between 1852 and 1870, the ocean had encroached to such an extent that all of the lands of the plaintiff and defendant, and considerably more to the north and west and all to the east were under water. The high-water mark at the last-mentioned year was, on a curving line, at approximately the intersection of Pacific and Vermont avenues. Thereafter the land which had been washed away began to reform. In 1852 all of the property in the vicinity of the locus in quo and for a considerable distance to the west was surveyed, and a map made thereof. Between 1852 and 1854 a street system was laid out on this map and an agreement entered into between the various property owners adopting that street system and dedicating the streets shown thereon to the public. On this map, New Hampshire avenue is shown as extending in a straight line and at right angles to Pacific avenue to the low-water mark of the Atlantic Ocean, further in distance than it actually extends at the present time.

As before stated, John McClees in 1856 had acquired title to a considerable part of the property in the vicinity of the locus in quo, in-

cluding all of the property owned by the respective parties to this suit. In 1858 he conveyed a plot 160'x100', lying approximately midway between Pacific and Oriental avenues, to one Wooton. In this deed the property was described as lying on the south side of New Hampshire avenue, 150 feet from the corner of Pacific avenue, and the various courses were run in accordance with these two avenues. In 1897 McClees conveyed to the Atlantic City Beach Front Improvement Company a part of the land which he had acquired from Leeds, excepting the lot which he had theretofore conveyed to Wooton, by a deed wherein the first course was stated to begin on the southerly side of Pacific avenue, 175 feet east of Vermont avenue, and extending in an easterly direction along Pacific avenue to the land of the Camden & Atlantic Land Company, thence to the edge of Absecon Inlet, thence along the high-water mark thereof and of the Atlantic Ocean to a point 175 feet east of Vermont avenue, and thence north, parallel with Vermont avenue, a certain number of feet to the place of beginning. The Atlantic City Beach Front Improvement Company in turn conveyed a parcel of the then upland to a predecessor in title of the defendant by reference to New Hampshire, Oriental, Atlantic, and Pacific avenues, and made New Hampshire avenue the easterly boundary of the property. That grantee, as well as defendant's immediate predecessors in title, conveyed by like reference to the street system, and by the same easterly boundary. The Atlantic City Beach Front Improvement Company also conveyed to plaintiff's predecessors in title by reference to the same street system, and made New Hampshire avenue the westerly boundary of the property so conveyed, as did likewise each of the plaintiff's subsequent predecessors in title.

New Hampshire avenue is an improved street. Manifestly there is here a clear recognition by the common grantor of the parties to this suit, as well as by McClees, of New Hampshire avenue, as laid down on the original map, as a boundary line between at least two portions of the upland; and in this connection it must be borne in mind that the land conveyed by the Atlantic City Beach Front Improvement Company to the predecessors in title of the plaintiff and defendant, respectively, was alluvial land, some of which had been formed by accretions before the company acquired title from McClees, and some of it afterwards. It seems to me that the case thus falls clearly within the principle of the rule last above mentioned. There are differences, I freely admit, between the facts of the cases heretofore cited to support the rule, and the facts of the case at bar, but none which distinguish them in principle.

Not only do I think that the owners of all of this land, as it existed in 1854, in dedicating New Hampshire avenue as a public street, across the same, to and at right angles to the ocean, divided the land into two parts and thus fixed the natural side lines of accretion gains for these parts, as suggested in Judge White's opinion in the Dewey Land Co. Case, but the subsequent owners, down to and including the plaintiff and defendant, have, by the recognition of New Hampshire avenue as a boundary line, so divided the upland, which in fact had been formed by accretions, as to make it inequitable to adopt any other division

lines for accretion gains. Indeed, to do otherwise would be to fail to give effect to what may be clearly presumed, from the conduct and conveyances of their predecessors in title, was their understanding and intention. In addition, since 1900, there have been recorded some 400 deeds and 200 or 300 mortgages affecting the property in the vicinity of the locus in quo. In all of these, the properties have been described by lines running at right angles to and parallel with the street system, both as respects that which was upland at the time the defendant received his riparian grant, as well as that which has since been formed by accretions.

Moreover, the newly formed land in the vicinity of the locus in quo, has, to a very great extent, been built upon, and large sums of money invested therein. The plaintiff has been assessed and has paid taxes, as well as assessments for improvements, on the locus in quo. It is manifest, therefore, that if it should be held that the respective riparian proprietors are entitled to accretions in accordance, or approximately in accordance, with the lines of their riparian grants (there were riparian grants made at about the same time as the defendant's, both to the west of his land and to the east of the plaintiff's land), a very great confusion in titles would result, and the door be thrown open, in the straightening out of lines, to the making of exorbitant demands on the part of those who would thus be held to own parts of land which has been improved on the assumption that the various riparian proprietors were entitled to accretions on lines parallel and at right angles respectively to the street system. On the other hand, if it be held that accretions should be awarded in accordance with such street system, these difficulties will all be avoided, and a stability given to titles in that vicinity.

I appreciate, of course, that such a holding will result in certain persons holding riparian grants for land under water when they do not own the upland immediately in front thereof. What effect that may have upon the validity of such riparian grants under the New Jersey statutes it is not necessary to determine in this case. Under the rule heretofore adopted, as new land forms hereafter, it is clear the inland boundary of the riparian grant will move oceanward, and thus no practical difficulty will be experienced, at least until some attempt has been made by holders of riparian grants to reclaim the land under water, in ascertaining who is the owner of the land formed by accretions from time to time. It seems entirely clear, therefore, that the land formed by accretions since the riparian grant, or preferably since the Atlantic City Beach Front Improvement Company made its first conveyance to one of defendant's predecessors in title, should be divided in accordance with the street system. If such a course is adopted, and the plaintiff decreed to be entitled to the accretions formed between the easterly line of New Hampshire avenue and a line beginning the same number of feet east of New Hampshire avenue as the easterly boundary line of his original upland (as it was when Atlantic City Beach Front Improvement Company conveyed it) is distant therefrom, and running parallel to New Hampshire avenue, and if the defendant is decreed to be entitled to the accretions formed be-

tween like lines on the westerly side of New Hampshire avenue, it is apparent that each will get approximately an equal share of the newly formed land in proportion to their upland, so far as frontage on the ocean is concerned, each will secure access to the water, and each will have approximately an equal share of the new high-water line of the ocean in proportion to his share of the original line.

Such a division will therefore be fair and equitable under all of the circumstances, and thus, in addition, will comply with the beforementioned fundamental rules. Whether the riparian proprietors who own lands east of the plaintiff's lands should have the accretions divided among them on lines parallel with New Hampshire avenue, or on lines parallel with Pacific and Oriental avenues, it is not necessary to decide. I merely make this observation because of one of the points made in the brief of counsel for the defendant. It is true that Judge White, in the opinion which he delivered in the Dewey Land Co. Case, seems ot have expressed an inclination to accept for the division of accretion gains the lines adopted by the riparian commissioners in making riparian grants, provided that in any given case it was not shown that such a division would be unfair. But he also indicated, as before stated, that a different conclusion might be reached if it should be found that by the dedicating of New Hampshire avenue, etc., it was inequitable for the state, in making its grant, to have disregarded the lines so fixed. Whether or not the act of the state in disregarding the lines of the streets was inequitable, it is clear, for the reasons heretofore given, that it would be inequitable or at variance with the presumed intention or understanding of the predecessors in title of the respective parties to divide the accretions in accordance with the lines of the riparian grant.

Upon the whole, therefore, I will hold that the plaintiff is entitled to all lands formed by accretions between the easterly line of New Hampshire avenue and a line drawn parallel thereto and distant easterly therefrom the same number of feet as the easterly boundary line of his original upland (as it was when the Atlantic City Beach Front Improvement Company conveyed it) is distant from the easterly line of New Hampshire avenue. This necessarily results in finding that the defendant has no title by reason of accretions to any part of the locus in quo. As I have heretofore found that he has no title thereto by reason of the state's riparian grant, and as his only claim of title is based on the riparian grant and his right to accretions, it follows that he has no right, title, or interest in the locus in quo.

This conclusion renders it unnecessary for me to consider whether the doctrine pertaining to lands lost by evulsion and subsequently regained is applicable to this case, or whether the principle of Banks v. Ogden, 2 Wall. 57, 17 L. Ed. 818, is pertinent.

The plaintiff is entitled to a decree to the above effect, with costs.

TUCKERMAN v. MEARNS et al.

(Court of Appeals of District of Columbia. Submitted October 9, 1919. Decided December 1, 1919.)

No. 3240.

1. BROKERS ⟸6—STOCKBROKER CUSTOMER'S AGENT IN BUYING STOCK.
As to stock purchases, a broker is the customer's agent, and is bound to follow his directions or decline the agency.

2. BROKERS ⟸26—CUSTOMER HAS TITLE TO STOCK BOUGHT FOR CUSTOMER.
A broker, advancing money and purchasing stock for a customer, becomes the customer's creditor, and if he retains possession of the stock as security for his advancements, he is a pledgee of the stock, or if the stock is fully paid for, and he retains possession subject to the customer's order, he is merely a bailee, but in any case the title is in the customer.

3. BROKERS ⟸38(2)—CUSTOMER'S REMEDY AGAINST BROKERS AT LAW PRECLUDES EQUITY SUIT.
A customer cannot proceed in equity against the former members of a bankrupt brokerage concern, which had purchased stock for plaintiff, upon the theory that the brokerage firm was a trustee holding the legal title for the customer's benefit, without evidence indicating an intent to create a trust; his remedy being at law.

4. BANKS AND BANKING ⟸153—"SPECIAL DEPOSIT" DEFINED.
A "special deposit" implies the custody of property without the authority in the custodian to use it, and the right of the owner to receive back the identical thing deposited.

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

5. BROKERS ⟸23—HOLDING CUSTOMER'S STOCK NOT A SPECIAL DEPOSIT.
Stock purchased by a broker for a customer does not constitute a special deposit in the broker's hands, since the broker might discharge his obligation by delivering other stock of equal kind and denomination.

6. PARTNERSHIP ⟸239(5)—LIABILITY OF RETIRING MEMBERS NOT DISCHARGED BY DEALINGS WITH NEW FIRM.
The retirement of defendants from a stock brokerage firm between the time the firm became unable to meet its obligations to plaintiff customer and the date the firm became bankrupt does not absolve them from liability, although plaintiff continued to do business with the firm, and to receive dividends on the stock in question after defendants' retirement; such acts not amounting to acquiescence by plaintiff in defendants' withdrawal and the acceptance of the responsibility of the new firm for the obligation.

7. COURTS ⟸444(2)—STATUTE SUPERIOR TO RULE OF SUPREME COURT OF DISTRICT OF COLUMBIA.
Judicial Code, § 274a (Comp. St. § 1251a), relating to procedure in cases not brought on the proper side of the court, is superior to any rule inconsistent therewith formulated under Code of Law, § 85, authorizing the District of Columbia Supreme Court to make equity rules, etc.

8. COURTS ⟸444(2)—RETROACTIVE OPERATION OF RULES OF DISTRICT OF COLUMBIA SUPREME COURT.
Rule 76 of the District of Columbia Supreme Court, relating to transferring cases brought on the wrong side of the court, is inapplicable to a case in which the decree was rendered prior to its adoption.

9. COURTS ⟸352—STATUTES RELATING TO TRANSFER BETWEEN EQUITY AND LAW SIDES APPLICABLE TO BILL FILED BEFORE ITS ENACTMENT.
Judicial Code, § 274a (Comp. St. § 1251a), relating to the procedure in cases brought on the wrong side of the court, is applicable to a case in

which the bill was filed before, and the decree entered after, its enactment.

10. COURTS ⊜352—TRANSFERRING CAUSE TO LAW SIDE INSTEAD OF DISMISSING.
Under Judicial Code, § 274a (Comp. St. § 1251a), relating to amendments in actions brought on the wrong side of the court, etc., a customer's action against brokers, erroneously brought in equity, should not be dismissed, but the pleadings recast, and the cause transferred to the law side of the court.

Appeal from the Supreme Court of the District of Columbia.

Suit by Wolcott Tuckerman against William A. Mearns, Charles P. Williams, Rudolph Kauffman, and others. From a decree dismissing the bill, plaintiff appeals. Reversed and remanded.

C. C. Tucker, C. A. Keigwin, and Allen MacCullen, all of Washington, D. C., for appellant.

F. J. Hogan and W. H. Donovan, both of Washington, D. C., for appellees.

VAN ORSDEL, Associate Justice. Appellant, plaintiff below, brought a suit in equity in the Supreme Court of the District of Columbia to recover the value of certain stock purchased for him by defendant firm of Lewis Johnson & Co.

Lewis Johnson & Co. were a copartnership, conducting a banking and stock brokerage business in the city of Washington from 1858 until November, 1914, when it went into bankruptcy. At the time of the transaction here involved, the partners constituting the firm were defendants Mearns and Williams and one John W. Henry. Plaintiff was a customer of the bank, and on March 28, 1912, had on deposit therein the sum of $21,890.40, together with certain securities bought on his account and held for him. On that date he directed the firm to purchase for him 200 shares of the capital stock of the Amalgamated Copper Company. The stock was purchased through Post & Flagg, brokers, the firm's New York correspondent, at $80 per share. On the same day, Johnson & Co. notified plaintiff of the purchase, and on the following day debited plaintiff's account with $16,000, the purchase price, plus $25 commission.

No demand for delivery of the stock was ever made by plaintiff. The record evidence, on which there is no dispute, disclosed that from the date of the purchase until the failure of the firm, about 2 years and 8 months, the stock was carried on the books of the firm to the credit of plaintiff, and periodical statements were furnished plaintiff, showing the credit to his account of successive quarterly dividends accruing upon the stock. It also appears that Johnson & Co. never had actual possession of the stock, but that it was held by Post & Flagg to the credit of Johnson & Co. Until May 31, 1912, or about 2 months after the purchase, Johnson & Co. had to its credit with Post & Flagg 200 shares of the Amalgamated Copper Company's stock, but after that date it was short at least 400 shares, and so continued until the date of the bankruptcy.

Plaintiff, in his bill, averred at length the circumstances of the purchase of the stock and the leaving of the stock with Johnson & Co.

upon special deposit subject to plaintiff's order. It was sought by the prayers to discover the whereabouts of the stock and what had become of it, and to secure its surrender to plaintiff, if possession could be had; otherwise, a personal judgment for its value.

At the conclusion of the hearing, the trial court dismissed the bill with the following statement:

"In this case no accounting is sought and under the proofs the facts show a simple bailment. While the bill prayed for a discovery, the answers of the defendant revealed no facts other than those which were within the knowledge of the complainant. I am of the opinion that the remedy at law is plain, adequate, and complete, and that the bill should be dismissed without prejudice to an action at law."

[1, 2] From the decree dismissing the bill, plaintiff appealed. At the inception we are confronted by the peculiar relation which exists between a stockbroker and his customer. It is the customer who purchases the stock. He merely procures the broker as his representative to buy it on his account. The broker is but the agent of the customer, bound to follow his directions or decline the agency. Galigher v. Jones, 129 U. S. 193, 9 Sup. Ct. 335, 32 L. Ed. 658. Being a mere agent for the purchase of the stock, the title to the stock, both legal and equitable, is in the customer. Richardson v. Shaw, 209 U. S. 365, 377, 28 Sup. Ct. 512, 52 L. Ed. 835, 14 Ann. Cas. 981. If the broker advances money in making the purchase, he becomes the creditor of the customer, and if he retains possession of the certificates of stock as security for money advanced, he is a pledgee of it; or, if the stock is fully paid for, as in the present case, and he retains possession of it subject to the order of the customer, he is merely a bailee of it. The law is briefly, but clearly, summarized in Jones on Pledges, § 496, as follows:

"The broker acts in a threefold relation: First, in purchasing the stock he is an agent; then in advancing money for the purchase he becomes a creditor; and, finally, in holding the stock to secure the advance made, he becomes a pledgee of it. It does not matter that the actual possession of the stock was never in the customer. The form of delivery of the stock to the customer and a redelivery by him to the broker, would have constituted a strict formal pledge. But this delivery and redelivery would leave the parties in precisely the same situation they are in when, waiving this formality, the broker retains the certificates as security for advances."

[3] Whatever may be the distinction between a case where the certificates of stock are held by the broker as security for money advanced and the present case, where the broker purchased the stock and charged the full purchase price to the account of the customer, it cannot affect the underlying principle common to both—that the title is in the customer. Equity, therefore, cannot be invoked on the untenable ground that the broker is a trustee in whom is vested the legal title. While it is true that there is a limited trust relation in every case of bailment, there is nothing here in the conduct of the parties from which an intention to create a trust may be assumed. Blackstone defines a bailment as:

"A delivery of goods in trust, upon a contract, express or implied, that the trust shall be faithfully executed on the part of the bailee." 2 Bl. Comm. 451.

In a case of simple bailment, like the present, divested of any facts or circumstances from which it may even be inferred that the parties intended to create a trust, where the obligation does not arise from confidential relations, and no such fiduciary relations exist between the parties as to require the intervention of equity, the remedy is at law. In Young v. Mercantile Trust Co. (C. C.) 140 Fed. 61, the court, considering a situation strikingly analogous to that here presented, concluded as follows:

"The next point is whether the relations between the contending parties were of a fiduciary character. Assuming the relations of bailor and bailee to have existed, the question naturally arises whether a fiduciary responsibility was imposed thereby. That the transactions of principal and agent, bailor and bailee, and pledgor and pledgee are not cognizable in equity, is clear, unless accompanied by facts and circumstances from which it may be presumed that the intendment of the parties was to create a trust, or where the obligations imposed arose out of confidential relations."

[4] Nor does counsel for plaintiff improve his jurisdictional dilemma by calling this a special deposit. A special deposit implies the custody of property without authority in the custodian to use it, and the right of the owner to receive back the identical thing deposited.

"In the case of a special deposit, the bank assumes merely the charge or custody of property, without authority to use it, and the depositor is entitled to receive back the identical money or thing deposited. In such case, the right of property remains in the depositor, and if the deposit is of money, the bank may not mingle it with its own funds. The relation created is that of bailor and bailee, and not that of debtor and creditor." 3 R. C. L. 522.

[5] But this was not a special deposit of specific shares of stock. In brokerage transactions, the broker may make good on demand of the customer by delivering stock of equal kind and denomination as that originally purchased. The character of the property involved permits the substitution. As was said in Richardson v. Shaw, supra, 209 U. S. 378, 28 Sup. Ct. 516, 52 L. Ed. 835, 14 Ann. Cas. 981:

"It is objected to this view of the relation of customer and broker that the broker was not obliged to return the very stocks pledged, but might substitute other certificates for those received by him, and that this is inconsistent with ownership on the part of the customer, and shows a proprietary interest of the broker in the shares; but this contention loses sight of the fact that the certificate of shares of stock is not the property itself—it is but the evidence of property in the shares. The certificate, as the term implies, but certifies the ownership of the property and rights in the corporation represented by the number of shares named. A certificate of the same number of shares, although printed upon different paper and bearing a different number, represents precisely the same kind and value of property as does another certificate for a like number of shares of stock in the same corporation. It is a misconception of the nature of the certificate to say that a return of a different certificate, or the right to substitute one certificate for another, is a material change in the property right held by the broker for the customer."

[6] It is urged by counsel for appellees that defendants Mearns and Williams are released from liability by reason of their retirement from the firm of Lewis Johnson & Co. between the date when, according to its books, the firm was short in Amalgamated Copper Company's stock, and therefore unable to meet plaintiff's demand for delivery of his stock had such demand been made, and the date when the firm went in-

to bankruptcy. It appears that, after these defendants withdrew from the firm and gave notice of their withdrawal, plaintiff continued to do business with the firm and to receive dividends on the stock in question. This, it is insisted, amounted to an acquiescence by plaintiff in defendants' withdrawal, and the acceptance of the responsibility of the new firm for this obligation. With this contention we cannot agree. The situation here presented is not different from that presented in the recent case in this court of Mearns v. Chatard, 47 App. D. C. 257, which involved a conversion of stock by the same firm involved in the present case. In that case a wrongful hypothecation of the stock had been committed while Mearns was a member of the firm. This was corrected by redemption of the stock before Mearns withdrew from the firm. Another conversion of the stock occurred after Mearns' withdrawal, and it was contended that his liability for the original conversion was purged by the redemption of the stock while he was yet a member of the firm. On this point the court said:

"To this we cannot assent. The liability which he assumed as a member of the old firm when the stock was first placed with it continued until the stock was accounted for to its owners, or he was released therefrom. Blew v. Wyatt, 5 Car. & P. 397; Daniel v. Cross, 3 Ves. Jr. 277; Bernard v. Torrance (Md.) 5 Gill & J. 383; Easton v. Wostenholm, 137 Fed. 524, 70 C. C. A. 108; Neal v. M. E. Smith & Co., 116 Fed. 20, 54 C. C. A. 226. It was not accounted for, and we have found he was not released; therefore he was liable for it, either as of the date of the first or the second hypothecation. Appellee could have selected one or the other."

[7-10] It is urged by counsel for plaintiff that, assuming the court was correct in holding that there was a complete and adequate remedy at law, it was error to dismiss the bill. The proper order, it is contended, should have been to transfer the case for trial from the equity to the law side of the court. It was held in Curriden v. Middleton, 232 U. S. 633, 636, 34 Sup. Ct. 458, 58 L. Ed. 765, that equity rule 22 of the Supreme Court of the United States (198 Fed. xxiv, 115 C. C. A. xxiv) has no application to the courts of the District of Columbia. The ruling is based upon section 85 of the District Code, which, defining the jurisdiction of the equity court, provides:

"The practice in said court shall be according to the established course of equity and procedure and the rules established by the said Supreme Court of the District not inconsistent with law."

This brings us to the consideration of section 274a of the federal Judicial Code (38 Stat. 956 [Comp. St. § 1251a]), which is as follows:

"That in case any of said courts shall find that a suit at law should have been brought in equity or a suit in equity should have been brought at law, the court shall order any amendments to the pleadings which may be necessary to conform them to the proper practice. Any party to the suit shall have the right, at any stage of the cause, to amend his pleadings so as to obviate the objection that his suit was not brought on the right side of the court. The cause shall proceed and be determined upon such amended pleadings. All testimony taken before such amendment, if preserved, shall stand as testimony in the cause with like effect as if the pleadings had been originally in the amended form."

This statute was enacted as an amendment to the Judicial Code, and appended to and made a part of chapter 11 thereof, which relates to the jurisdiction common to the courts of the United States generally, including the courts of the District of Columbia. It must be held, therefore, that the provisions of 274a are superior to any rule inconsistent therewith formulated under authority of section 85 of the Code.

Rule 76 of the Supreme Court of the District of Columbia, adopted April 25, 1919, is as follows:

"If at any time it appear that a suit commenced in equity should have been brought as an action on the law side of the court, or that a suit at law should have been brought in equity, it shall be transferred to the law or equity side of the court, as the case may be, and be there proceeded with, with only such alteration in the pleadings as shall be essential."

This rule is in conformity with section 274a, supra. The statute seems to more particularly define the course of procedure in the District Courts of the United States where the same judge simultaneously holds both an equity and a law court. The rule, however, merely conforms the procedure defined in the statute to the custom of the Supreme Court of the District of Columbia in holding the equity and law courts in separate divisions and presided over by different judges.

We come now to the procedure which should have been adopted in the court below. It will be observed that, under the statute:

"Any party to the suit shall have the right, at any stage of the cause, to amend his pleadings so as to obviate the objection that his suit was not brought on the right side of the court."

This, in effect, forbids the dismissal of a bill in equity on the ground of an adequate remedy at law, or the sustaining of a demurrer at law on the ground that the remedy is in equity. When either of these conditions arise, it is the duty of the trial judge, either upon motion of counsel or upon his own motion, to order a recasting of the pleadings and the transfer of the cause to the proper side of the court. In Collins v. Bradley Co. (D. C.) 227 Fed. 199, 201, the court, considering the broadening effect of section 274a upon equity rule 22 of the Supreme Court of the United States, said:

"The equity rule and the statute have swept away entirely any and all technical objection whatsoever. While the Constitution preserves the right to a jury trial in every action at law, the practice as to raising the objection is revolutionized. Defendant's motion to dismiss may be taken as a motion to transfer the case to the law side, if the remedy at law is adequate."

We are in accord with this practical construction of the intent of Congress to establish a simple, speedy, and inexpensive means of according justice, and at the same time closing the door against the bar of the statute of limitations which, under the former practice, frequently furnished an available avenue of escape for the party justly liable, thereby resulting in a miscarriage of justice.

Rule 76 had not been adopted when the decree in this case was entered, and therefore is not applicable here. Section 274a was enacted after the original bill was filed, but it was in force when the decree here appealed from was entered, and applies directly to this action. Collins v. Bradley Co., supra. The court, therefore, erred in dis-

missing the bill. The order should have been to recast the pleadings and transfer the cause to the law side of the court.

The decree is reversed, with the costs of this appeal to be equally divided between the appellant and appellees, and the cause is remanded for further proceedings not inconsistent with this opinion.

Reversed and remanded.

NATIONAL SAVINGS & TRUST CO. v. RYAN et al.

(Court of Appeals of District of Columbia. Submitted October 14, 1919. Decided December 1, 1919.)

No. 3257.

1. APPEAL AND ERROR ⟸254—EXCEPTION UNNECESSARY TO RULINGS WHICH NEED NOT BE INCORPORATED IN BILL OF EXCEPTIONS.
   The action of the trial court in sustaining a demurrer to, and striking out, defendant's pleas, may be reviewed without an exception, for an exception is unnecessary, save to rulings which must be brought into the record by a bill of exceptions.
2. TRUSTS ⟸316(1)—TESTAMENTARY TRUSTEES ENTITLED TO COMPENSATION ON TRANSFER FROM THEMSELVES AS EXECUTORS.
   Where executors settled their accounts as such, and were ordered to transfer the funds to themselves as trustees, they are entitled to further commissions as trustees.
3. TRUSTS ⟸359(2)—PROCEEDING BY REMAINDERMEN AGAINST TESTAMENTARY TRUSTEES MUST BE BROUGHT IN EQUITY.
   A proceeding by remaindermen to require a trustee to turn over certain property to them must be brought in equity, if the trust is still open and the trustee's commissions and some outstanding claims against the estate are undetermined.
4. APPEAL AND ERROR ⟸917(1)—ON APPEAL FROM RULING ON DEMURRER TO PLEAS, THEIR TRUTH ASSUMED.
   On appeal from trial court's action in sustaining a demurrer to, and striking out, defendant's pleas, it will be assumed that the statements in such pleas are true.
5. PLEADING ⟸264—PLEAS NOT ABANDONED BY FILING AMENDED PLEA.
   Defendant's action in offering an amended plea did not waive or constitute an abandonment of his previous pleas, where the amended plea was not offered as a substitute for them.
6. EXECUTORS AND ADMINISTRATORS ⟸291—EVIDENCE INSUFFICIENT TO SHOW ASSENT OF EXECUTORS TO VESTING ESTATE IN BENEFICIARIES.
   The fact that the cestuis que trustent united with an executor in prosecuting a claim does not, as a matter of law, establish the executor's assent to vesting of title in them, but, at most, raises a question of fact.
7. LIMITATION OF ACTIONS ⟸155(6)—TOLLED BY TESTAMENTARY TRUSTEE'S PAYMENTS TO REMAINDERMEN.
   A testamentary trustee's payments to plaintiff remaindermen after the life tenant's death tolled the three-year period of limitations prescribed by Code of Law, § 1265, for bringing suit against the trustee's executor.
8. TRUSTS ⟸287—TRUST DOES NOT VEST IN NEW YORK COURTS ON TRUSTEE'S DEATH, WHERE HIS ONLY UNFINISHED DUTY WAS TO ACCOUNT.
   Code Civ. Proc. N. Y. 1910, § 2818, providing that a surviving trustee's death vests an unexecuted trust in the New York courts, etc., is inapplicable, where the deceased trustee had nothing further to do, except to account, and an action in such a case may be brought against the trustee's executor.

Appeal from the Supreme Court of the District of Columbia.

Action by Joseph M. Ryan and Christine C. Sartor, as executor and executrix of the estate of Theodore A. Sartor, deceased, against the National Savings & Trust Company, as executor of the estate of Charles J. Marc, deceased. Judgment for plaintiffs, and defendant appeals. Reversed, with directions.

James Gillin, of New York City, for appellant.

R. C. Thompson and J. E. Laskey, both of Washington, D. C., for appellees.

SMYTH, Chief Justice. The appellees, Joseph M. Ryan and Christine C. Sartor, in their capacity as executors of the estate of Theodore A. Sartor, deceased, brought action against the appellant, National Savings & Trust Company, as executor of the estate of Charles J. Marc, deceased. The case was tried to a jury, and from a verdict and judgment against it the Savings & Trust Company appeals.

Joseph F. Sartor died in 1897, leaving a will in which he named his mother-in-law, Henrietta M. Rouviere, and Charles J. Marc as executors and trustees of his estate, giving to them "full power and authority to sell, convey, mortgage or lease any or all of the property" of his estate, and "to collect the rents and profits arising therefrom and to invest, reinvest and keep the same invested for the uses and purposes * * * set forth" in the will. He also directed that they pay to his mother-in-law during her life the income and profits arising out of the estate, and that at her death the surviving trustee should pay four legacies, aggregating $20,000, to certain persons and institutions, and then said:

"I hereby give, devise and bequeath all the rest, residue and remainder of my estate, after the aforesaid bequests have been paid, and the aforesaid trust fulfilled to my brother Theodore A. Sartor, his heirs and assigns forever."

Mrs. Rouviere and Marc qualified as executors. Theodore A. Sartor, the beneficiary under the clause just quoted, died in May, 1903, leaving a will which was duly admitted to probate. In it he named Christine C. Sartor, his wife, and Joseph M. Ryan, the appellees, as executors, and said in the second clause:

"I give and bequeath unto my beloved wife Christine Celina Sartor and to my son Joseph Rene Sartor the whole of the proceeds of my brother's (Joseph F. Sartor) estate whatever that may amount to, of which I am residuary legatee. Also all the rest, residue and remainder of my real and personal property, wheresoever situated of which I am possessed, to be by them divided share and share alike, but in the case of my son his share is to be invested and given him on attaining the age of twenty-five (25) years."

The named executors qualified in August, 1903. Mrs. Rouviere died in 1907, leaving Marc as surviving trustee of the estate of Joseph F. Sartor. He died July 5, 1911, without accounting to the remaindermen for the trust fund. The National Savings & Trust Company was designated as sole executor of his estate, and in due time qualified as such.

Some time afterwards Ryan, as executor, Sartor, as executor and legatee, and Joseph Rene Sartor, as legatee of Theodore A. Sartor,

joined in a claim against the estate of Marc for the amount of money which they asserted was due to them under the provisions of the wills of Joseph F. Sartor and Theodore A. Sartor, respectively, which we have quoted. The claim was rejected, and this action followed.

On the petition of Charles J. Marc, his account as acting executor of the will of Joseph F. Sartor (Mrs. Rouviere having neglected to act) was judicially settled and allowed, and it was found that he had in his hands on July 28, 1899, the sum of $59,311.99, out of which he was directed to make certain disbursements, which, when done, left a balance of $58,255.44. The decree further provided that Marc should turn over to himself and Mrs. Rouviere, as testamentary trustees under the will of Joseph F. Sartor, that amount, to be dealt with as provided in the will of Joseph F. Sartor. The appellees gave Marc credit for having paid the four specific legacies designated in the will, and for certain other payments, which brought the amount claimed down to $24,841.35. This sum, they say, should have been paid by Marc to Theodore A. Sartor, his heirs or assigns, under the will of Joseph F.; that, Theodore having predeceased the life tenant, Mrs. Rouviere, they, as executors of his will, were entitled to receive it, and hence their claim against the estate of Marc.

It is urged by the appellant in varying forms that a court of law has no jurisdiction of the case, because, as asserted, an accounting is necessary to fix the amount due from Marc, and where this is true an action at law by cestuis que trustent against the testamentary trustee to recover the trust property cannot be maintained. Appellant filed certain pleas, which were rejected. In one way or another it set up in these pleas that commission was due to Mrs. Rouviere and to Marc as trustees, but that the amount was never determined; that Marc had invested the trust funds, as he was authorized to do under the will, in bonds and mortgages on real estate located in different counties of the state of New York; that in 1902 or 1903 he became a resident of this District, and continued therein until his death in 1911; that he, in the usual course of business, and in the exercise of due and proper care, employed one Gray, a reputable member of the New York bar, to collect from time to time, as they became due, the amounts invested; that Gray did not account to Marc for all the collections which he had made; that he is now asserting a claim of $15,000 for attorney's fees for services rendered to the estate; and that Marc had disbursed all the money of the estate which came into his hands, excepting that which Gray had received and failed to turn over. A demurrer was sustained to five of the pleas, and two were stricken out. No exception was taken to the action of the court. Appellant offered no proof.

[1] Notwithstanding the fact that no exception was taken to the decision of the court just mentioned, we think it is properly here for review. An exception is not necessary, save to a ruling which must be brought into the record by a bill of exceptions. Nalle v. Oyster, 230 U. S. 165, 176, 33 Sup. Ct. 1043, 57 L. Ed. 1439. The ruling before us does not fall within that category.

[2] The writer doubts that the appellees or those whom they rep-

resent stand in the attitude of cestuis que trustent. They are seeking to enforce the right of remaindermen under the will of Theodore A. Sartor. This, it seems, is a legal right. Bergland v. Owen, 48 App. D. C. 26, 34. But none the less, before the amount which Marc's estate is responsible for can be determined, the questions raised by the pleas must be passed upon. Where executors settle their accounts as such, and are ordered to pay the funds in their hands to themselves as trustees, the fund to be managed by them, they are "entitled to further commissions as trustees." In re Willets, 112 N. Y. 289, 296, 19 N. E. 690, 693; Robertson v. De Brulatour, 188 N. Y. 301, 80 N. E. 938; Olcott v. Baldwin, 190 N. Y. 99, 82 N. E. 748. Whether the allegations with respect to Gray are sufficient to exonerate Marc or his estate from responsibility for the fund intrusted to him is a matter upon which we express no opinion. It is, however, with the other questions raised by the pleas, a proper subject for investigation in the light of equitable principles, which must be applied in a court of equity.

[3, 4] Where no ascertainment of the amount due, either by computation, adjustment, or uncontradicted evidence, has been made, "the only remedy for the cestui que trust is by a bill in equity. An action at law does not lie in his favor against the trustee while the trust is open." Davis v. Coburn, 128 Mass. 377, 382. Perry on Trusts and Trustees (6th Ed.) § 843, says:

"Unless some legal debt has been created between the parties, or some engagement, the nonperformance of which may be the subject of damages at law, a court of equity is the only tribunal to which he [the cestui que trust] can have recourse for redress."

In Edwards v. Bates, 7 Man. & G. 590, an action for money had and received by a cestui que trust against a trustee, Tindall, Chief Justice, speaking for the court, denied the right of the plaintiff to maintain the action, because the amount of certain costs and charges which the trustee claimed should be paid out of the fund had not been determined, and said that he (plaintiff) "ought to have filed a bill in equity for an account." "If the trust is still open, the accounts of the trustee unsettled, and the amount going to the particular beneficiary unknown, resort must be had to a court of equity. It is the peculiar province of that court to supervise the execution of trusts, the distribution of trust property and the conduct of trustees in managing trust estates. With all interested persons before it, its decrees protect all interests and enforce all rights." Husted v. Thomson, 158 N. Y. 328, 335, 53 N. E. 20, 21. Other authorities bearing on the same subject are Brown v. Fletcher, 235 U. S. 589, 35 Sup. Ct. 154, 59 L. Ed. 374; Mitchell v. Penny, 66 W. Va. 660, 662, 66 S. E. 1003, 26 L. R. A. (N. S.) 788, 135 Am. St. Rep. 1046; Nelson v. Howard, 5 Md. 327; Herrick v. Snow, 94 Me. 310, 47 Atl. 540; Deering v. Pierce, 149 App. Div. 10, 133 N. Y. Supp. 582, 39 Cyc. 469.

Nothing in conflict with these holdings has been brought to our attention. McLaughlin v. Swann, 18 How. 217, 15 L. Ed. 357, is a case much relied upon by appellees, but it is not in point. There the lower

court charged the jury that, since there was no evidence that "any specified sum ascertained by the accounts of the trustees, or by judicial decision," was due to the plaintiffs, the law court was without jurisdiction. The Supreme Court disapproved this, saying that the "trust was for the payment of specified debts, which should be presented to the trustees before a fixed day. The payments made, and the sums received in execution of the trust, were liquidated sums, ascertained with entire precision. The trust was completely executed, and the balance remaining in the hands of the trustees was a sum certain. Under these circumstances, an action at law for money had and received could be sustained. * * *" But the balance due from Marc or his estate had not been "ascertained with entire precision"; it is not "a sum certain." This distinguishes the case from the one before us.

Neither does Palmer v. Fleming, 1 App. D. C. 528, aid the appellees. It holds that a mere allegation of an equitable ground for relief, without setting forth the facts, is not sufficient to divest the law court of its right to decide the case. We have much more in the present case than a mere allegation of an equitable ground for relief, if the statements in the pleas are true, and we must assume that they are for our present purpose. All the other cases cited by appellees proceed upon the assumption that the trust was closed. Where this is so, an action at law will undoubtedly lie; but the trust we are considering is not closed. It is still open for the purpose of settling the things set up in the pleas. Where this is so, we find no authority for holding that an action at law may be prosecuted. We think the pleas show that the case is one for equitable cognizance, and that the learned court below erred in putting them aside.

[5] The appellant did not abandon these pleas by filing the amended seventh plea, because it was not offered as a substitute for them. If it had been, there would be force to the contention of the appellees that they had been abandoned. "The plaintiff, by filing an amended declaration in lieu of his original declaration, must be treated as having waived all objection to the court's action upon the demurrer to it, and to have been content to stand upon his amended declaration." Birckhead v. Railroad, 95 Va. 648, 649, 29 S. E. 678. But, as we have just seen, nothing of that kind was done here.

Howard v. Railway Co., 11 App. D. C. 300, and Clearwater v. Meredith, 1 Wall. 25, 17 L. Ed. 604, do not help the argument of the appellees. In the first case the question was as to whether or not the defendant had waived his objection to the jurisdiction of the court over his person by moving to set the ruling of the court aside, which was done upon condition that he should plead the general issue. He accepted the condition, and this, says the court, "worked an abandonment of the pleas attacking the jurisdiction and the validity of the service of the writ. * * *" The Clearwater Case, like Birckhead v. Railroad, supra, was one in which a plea was substituted for the rejected one. The court held that by the substitution the party waived his objection to the action of the court in rejecting the first plea.

This disposes of the appeal. There are, however, other matters discussed in the briefs, which will undoubtedly arise upon a new trial, if there should be one, if not ruled upon now, and therefore we decide them.

[6] It is asserted that the appellees have no title to Theodore A. Sartor's interest under the will of Joseph F. Sartor, and, in consequence, have no right to maintain this action. This rests upon the theory that the bequest, which the appellees are seeking to recover, is a specific legacy; that it was the duty of the executors to assent to the vesting of title thereto in the beneficiaries as soon as they had ascertained that the remaining personal property of the testator was sufficient to pay his debts; that this assent may be express or implied, and that there is a presumption that it arose immediately after the expiration of the time fixed by law for the administration of the estate; and that as ten years, lacking one month, have elapsed since the granting of letters testamentary to the appellees, the presumption is conclusive that they gave their assent. It is further urged that the evidence establishes that the appellees expressly assented to the vesting of the title in the cestuis que trustent.

The assent claimed has not been established. During the entire period referred to the appellees were actively urging their rights, as executors, to the fund. They commenced a suit in New York immediately after the death of Henrietta M. Rouviere to recover the fund from Marc. Their right to receive the fund was acknowledged by Marc by his making payments to them from time to time, running down to June, 1910. These payments were made by Gray as attorney for Marc. His authority is denied in argument by the appellant; but it was admitted at the trial that he was Marc's attorney. This admission, it is said, was the result of inadvertence; but the record does not show that to be the fact. Within a year after Marc's death appellees filed a claim against his estate for the amount asserted to be due, and upon that having been rejected they instituted this suit. While the cestuis que trustent united with the executors in the claim, this falls far short of establishing that the latter had assented to the vesting of title in them. They all joined, no doubt, as a matter of precaution. The most that may be said for their action in this connection is that it constitutes, with the other facts disclosed, a question of fact for the tribunal charged with the finding of facts. It certainly did not establish the assent so clearly as to require the court to rule as a matter of law that the assent was given.

With regard to the evidence adduced by the appellees to show the value of the estate of Joseph F. Sartor at the time of the death of the life tenant, we think it was quite sufficient, especially in view of the fact that it was not contradicted.

[7] There is no merit in the argument that this action is barred by the statute of limitations. Mrs. Rouviere, the life tenant, died in 1907. Appellees' cause of action arose then. Marc, as we have seen, made payments from time to time after her death, the last on June 17, 1910. This tolled the running of the statute. Marc died July 5, 1911, and letters testamentary were issued upon his estate September

29, 1911, 2 months and 24 days thereafter. Under section 1266 of the Code, the time between the death of the deceased and the granting of letters testamentary is not to be counted in determining whether or not the statute of limitations has run. This suit was brought July 10, 1913. When we eliminate the 2 months and 24 days, we find that the interval between the last payment and the date on which suit was instituted is less than 3 years, the period of the statute of limitations. Code, § 1265.

Section 348 of the Code says that, if a creditor of an estate shall not within 9 months after his claim has been rejected by the executor or administrator commence suit for recovery, it shall be barred. In this case the executors filed their claim on September 26, 1912; it was rejected October 19, same year, and this action was commenced July 10, 1912, some 9 days less than the period limited.

[8] We do not think that section 2818 of the Code of Civil Procedure of the state of New York applies to this case. It provides in substance that upon the death of a last surviving trustee the trust estate does not descend to his personal representative; but if the trust be unexecuted, in the absence of contrary directions on the part of the person creating the same, it vests in the Supreme Court of the state of New York, and is to be executed by some person appointed by the court. From this it is urged that the trust fund did not come to the appellant as executor of the estate of Marc, and hence the appellant cannot be held liable for Marc's failure to account. To give it the construction urged would be unreasonable. Why appoint a trustee to bring suit against Marc's estate for the benefit of the remaindermen, when they, or those who represent them, are qualified to enforce their own rights? That statute deals only with cases where there is something besides merely accounting for the estate to be done by the trustee. Here the only duty remaining to be performed by Marc at the time of his death was the turning over to the remaindermen of the amount of money for which he was responsible as trustee. That was a duty which he should have discharged many years before, but which remained unexecuted at his death. The theory of the appellees is that, since he was derelict in that respect, his estate is liable, and hence that an action will lie against his personal representative. In this we think they are right.

The judgment must be reversed, at the cost of the appellees, and the case remanded, with directions to the court to transfer it to the equity side of the court, there to be prosecuted as a suit in equity, after the pleadings have been properly recast. Section 274a, Judicial Code (38 Stat. L. 956, c. 90 [Comp. St. § 1251a]); District of Columbia v. Washington Terminal Co., 47 App. D. C. 570, 576; Tuckerman v. Mearns, 49 App. D. C. ——, 262 Fed. 607, this day decided.

Reversed, with directions.

CONKLING v. NEW YORK LIFE INS. & TRUST CO. et al.

(Court of Appeals of District of Columbia. Submitted October 8, 1919. Decided December 1, 1919.)

No. 3230.

1. EQUITY ⟸81—LACHES NO BAR WHERE UNSUCCESSFUL NEGOTIATIONS INTERVENED.
   A bill to impress a trust on property improved by plaintiff's mother with plaintiff's funds was seasonably brought some three years after the mother's death, where the intervening period had been occupied with unsuccessful negotiations for a settlement and filing a claim against the mother's estate in New York State.
2. EVIDENCE ⟸186(2)—TESTIMONY AS TO LOST LETTERS ADMISSIBLE.
   In suit to impress a trust on property which plaintiff's deceased mother had improved with plaintiff's money, a witness may testify concerning lost letters from the mother to plaintiff, which the witness had read, and from which he had made extracts.
3. TRUSTS ⟸81(4)—RESULTING FROM INVESTMENT BY MOTHER OF SON'S MONEY IN LAND.
   Evidence that plaintiff's mother had removed his bonds from a safe deposit box to which they had joint access to another box used by her alone, and that the proceeds were used in remodeling real estate which she apparently had expected to deed to her son, etc., *held* to establish plaintiff's right to have a trust declared on the improved real estate to the extent that the proceeds of his bonds went into the property.
   Smyth, Chief Justice, dissenting.

Appeal from the Supreme Court of the District of Columbia.

Suit by David Paul Burleigh Conkling, against the New York Life Insurance & Trust Company, executor and trustee under the will of Sarah B. Conkling, deceased, Delia Mason Caldwell, Sarah B. C. Moller, and others. From a decree dismissing the bill, plaintiff appeals. Reversed and remanded.

Wm. G. Johnson, of Washington, D. C., for appellant.

B. S. Minor and L. Randolph Mason, both of Washington, D. C. (Hugh B. Rowland and Colley W. Bell, both of Washington, D. C., of counsel), for appellees.

ROBB, Associate Justice. Appeal from a decree in the Supreme Court of the District dismissing appellant's bill for discovery, the declaration of a resulting trust, and the conveyance to appellant of the trust estate, and for general relief.

Mrs. Sarah B. Conkling, the mother of appellant and a resident of the city of New York, died February 22, 1904, leaving a will under which the appellee New York Life Insurance and Trust Company was named executor and trustee. Appellant and the other appellees are the beneficiaries of the trust estate created by the will. Appellant is a sculptor, and the youngest of three children, having been born in 1871. In 1885 he was given five bonds, of the aggregate value of $50,000. Shortly after his graduation from college, and when he was 23 years of age, appellant went abroad, and continued to reside abroad for more than 10 years.

From May 8, 1900, to February 21, 1904, a safe deposit box was rented by appellant and his mother at the Fifth Avenue Bank in New York, either to have access thereto. On several occasions the mother was seen at the vault of that bank, and this was the only box she had there; but she did have a safe deposit box in the Lincoln Trust & Safe Deposit Company in New York, to which appellant did not have access. Upon an occasion when appellant was in this country, about 2 years prior to his mother's death, he went to his deposit box, above mentioned, and there then were in that box nine Union Pacific, six Chesapeake & Ohio, and three Richmond & Danville bonds. After the mother's death no bonds were found in the deposit box at the Fifth Avenue Bank, but in the mother's box at the Lincoln Trust & Safe Deposit Company were found Richmond & Danville, Union Pacific, and Chesapeake & Ohio bonds, together with a slip of paper on which was written, in appellant's handwriting, the following:

"3 bonds Richmond & Danville 6%.
"9 bonds Union Pacific 4%.
"6 bonds Ches. & Ohio 4%.

"D. B. P. C."

—and underneath were the words, in the mother's handwriting, "Cut coupons, S. B. C."—the letters "S. B. C." being the initials of the mother's name.

There had been some correspondence between appellant and his mother with reference to the remodeling of two small houses belonging to the mother and located on New Hampshire avenue, N. W., in the District of Columbia. Not long after the death of the mother, appellant exhibited to John M. Dickinson, Esq., of New York, who was an intimate friend of the family, some letters from his mother. Mr. Dickinson, who was very familiar with the mother's handwriting, read the letters for the purpose of formulating an affidavit for appellant, to be used in New York in prosecuting there appellant's claim to the 18 bonds heretofore mentioned. Mr. Dickinson "took extracts from the letters at that time and copied them in his own handwriting." The originals then were handed to appellant and subsequently lost. Mr. Dickinson testified that the first extract read as follows:

"I was not offended, as you thought, from your inquiry about the Washington house, but only felt that you should trust your mother. The house and land will be worth more than $20,000, if you ever wanted to sell, as Washington property is always going up. I have spoken to Octave (a sister) and perhaps to Lizzie about our plans, but I do not want the matter discussed. The less said the sooner mended. I will send you 4% interest, so that you will not lose anything there."

The second extract reads:

"Do try to practice economy. Two thousand more and the twenty will be completed."

The third extract is as follows:

"I have been thinking over our talk about your bonds. I think it would be very foolish for you to have them in Paris, and it will not be long now before the house is finished and in your name anyway. They are as safe at the Lincoln as in your box, and much more convenient for me. If you insist, I will send them; but please do what I say."

The remodeling of the house was going on when these letters were received, and was completed about the time of the mother's death, at a cost of about $20,000.

Mr. Benjamin R. Bechtel, an artist living in London, deposed that he was intimately acquainted with appellant, having lived in the same studio building with him for several years. Deponent had known appellant's mother for 6 or 7 years prior to her death. In May or June of 1902 he met her on the landing stage at Liverpool, as she was disembarking from the steamship Oceanic, and accompanied her to Calais. She referred to the house which she owned in Washington, D. C., and said she intended remodeling it, and was in hopes that her son Paul, the appellant, would occupy the house when he returned to live in America; that Paul had handed over to her $20,000 in bonds, "which she was going to use in the proposed improvements and alterations of the house, and she considered it was a better investment for him than the way in which the money was placed at the time." This statement was made voluntarily, and not in response to any inquiry by deponent.

Appellant in his testimony stated that after the death of his mother he found in his deposit box at the Fifth Avenue Bank a 12-page letter in the handwriting of his mother, on the envelope of which, also in her handwriting, were the words, "To my son Paul, to be opened after my death." Fearing that he might lose this letter, he made a careful copy of it, which he took to Europe and showed to his sisters. The original he placed in the envelope containing the other letters of his mother, and this letter with its contents subsequently was lost. The copy which he showed his sisters was attached to their deposition in this case. Over objection, the copy was read in evidence. In the letter, after discussing her children, their prospects, and the provision she had made for them, the mother wrote:

"You have the Washington house and your income from the trust [created by her will] and with your own efforts should be able to live nicely. The paper about the house is in my desk, but if you want it done more legally I will see to it with you when we meet again. Anyway, it is sure to be all right."

The sisters, who first examined the desk above referred to, admitted having destroyed certain of its contents. At the time of their testimony they were quite certain that nothing was destroyed, other than some letters from them to their mother. Mr. Dickinson, however, who talked with one of them not long after the occurrence, testified that they were not then clear as to just what had been destroyed by them. At all events, the paper was not found among the mother's effects.

[1] Immediately upon the death of his mother, appellant returned to this country, and, failing to find his bonds or the paper referred to in his mother's letter, proceeded to take steps looking to the adjustment of the matter. He first filed a claim against the estate of his mother in New York, for the return of the bonds or their value. This claim he subsequently withdrew, because he was advised that under the laws of the state of New York he could neither testify concerning the matter nor introduce in his behalf the letters he had received from his mother. Negotiations were had with his sisters,

but, no settlement resulting, this bill was filed in November of 1907. That it was seasonably filed there can be no doubt. In Southern Pac. Co. v. Bogert et al., 250 U. S. 483, 39 Sup. Ct. 533, 63 L. Ed. 1099, decided by the Supreme Court on June 9, 1919, more than 22 years had elapsed "since the wrong complained of was committed." The court said:

"It is essential that there be also acquiescence in the alleged wrong or lack of diligence in seeking a remedy. Here plaintiffs, or others representing them, protested as soon as the terms of the reorganization agreements were announced; and ever since they have with rare pertinacity and undaunted by failure persisted in the diligent pursuit of a remedy as the schedule of the earlier litigation referred to in the margin demonstrates. * * * Nor does failure, long continued, to discover the appropriate remedy, though well known, establish laches, where there has been due diligence, and, as the lower courts have here found, the defendant was not prejudiced by the delay."

In the present case, appellant immediately asserted his rights and consistently and persistently sought their recognition.

Appellant in his deposition, which was received in evidence by the court, had testified in considerable detail as to conversations that had taken place between his mother and himself concerning the remodeling of the house in question, and it was conceded by his counsel at the hearing below that much of this testimony was inadmissible under the statute of frauds. It is contended, however, that when such a deposition is offered it is within the power of the court to receive it with the same effect as though the party had been called to testify by the court, as provided in section 1064 of the Code. This question was before us in Ockstadt v. Bowles, 34 App. D. C. 58, but was not determined. Nor do we deem its determination necessary here, owing to the view we take of the case, although appellant's deposition was regularly taken and he was fully and carefully cross-examined by counsel for appellees; in other words, the result was exactly the same as though he had been called to testify by the court.

[2] It was not error for the court to permit Mr. Dickinson to testify concerning the letters from Mrs. Conkling to appellant, which witness had read, and from which he had made extracts. He was familiar with the handwriting of Mrs. Conkling, and it is apparent from the testimony that the extracts are not garbled. Indeed, they speak for themselves. But, as we do not determine the power of the trial court to consider all of appellant's deposition, we must eliminate from consideration here the letter which he found in his deposit box after his mother's death, for the contents of that letter are established by no other testimony. In so ruling, however, we do not wish to be understood as casting any reflection upon the appellant, for the copy of the letter produced by him bears indubitable evidence of authenticity.

[3] The evidence before us, then, amounts to this: Appellant unquestionably had 18 bonds in a safe deposit box in the Fifth Avenue Bank, to which his mother had access. It is apparent from her letters to him that she cut the coupons from those bonds from time to time and sent him the interest. It is further apparent, from the mother's letters and from the unimpeached testimony of Mr. Bechtel, that as the result of an understanding with her son she transferred those bonds

from appellant's deposit box to her own deposit box in another bank, and, in effect, subsequently converted them by investing the amount of their value in the remodeling of the house in question. Just what the arrangement was is difficult to determine, but it is certain that neither of the parties understood the transaction as a gift to the mother. That the mother understood she was investing the proceeds of these bonds for her son, and expected to account to him therefor, is too plain to admit of question. It is quite probable that the mother intended and the son understood that, after the repairs on the house were completed with his money, the house would be deeded to him; but, this not having been accomplished before the mother's death, we think that under the evidence equity will be met by giving appellant the relief he first sought, namely, by following this fund into the property and impressing thereon a trust in his favor. He therefore will receive back the value of his bonds, with interest from the date of the final payment on the house.

The decree is reversed, with costs, and the cause remanded, with directions to enter a decree in conformity with this opinion.

Reversed and remanded.

SMYTH, Chief Justice (dissenting). The theory of the majority is that the mother, pursuant to an agreement, "difficult to determine," invested the proceeds of certain bonds belonging to the son in the remodeling of the house in question, and that she expected to account to him therefor; and on this theory a trust is impressed upon the house in favor of the son. I might say at the outset that this is utterly out of harmony with the son's testimony, for he does not claim anywhere that the bonds belonging to him were converted into cash by the mother and the proceeds invested in the house. On the contrary, he says they were found in his mother's safe deposit box after her death.

Some space is given to a letter written by the mother to the son, and which was found in her safe deposit box after her death; but, as it is held that this letter is incompetent under the Code (section 1064), I put it aside as of no consequence.

When the son, at the age of 23, left college in 1885, his parents gave him $50,000 in government bonds. According to the records of the United States Treasury, these bonds were held by the son until April, 1900, at which time they were assigned by him in person, and were afterwards received at the Treasury Department in Washington, "some for transfer and some for redemption for account of various persons." Subsequent to this he acquired, he said, nine Union Pacific, six Chesapeake & Ohio, and three Richmond & Danville Bonds, but the "larger share of my [his] holdings was in Reading" bonds. He was unable to give the number of the bonds, or any other description which would distinguish them from other bonds issued by the same companies. When he last saw them before his mother's death, they were, he said, in his safe deposit box. He later contradicts this, as we shall see in a moment, by saying that they were in his mother's box before her death; that is, at the time he wrote the memorandum referred to by my Associates. When he next saw the box, which was a month after

his mother's death, they "were not all there." The missing bonds were the Union Pacific, Chesapeake & Ohio, and the Richmond & Danville. He saw Union Pacific, Chesapeake & Ohio, and Richmond & Danville bonds in his mother's box, but whether she then owned bonds of that description, which she had not derived from him, he could not tell. Over objection, he testified that the memorandum just mentioned, in which the Richmond & Danville, Union Pacific, and Chesapeake & Ohio bonds are noted, was "partially in my handwriting and partially in my mother's"; that the words "cut coupons" and letters "S. B. C." were in her handwriting, and all the rest was in his, and added:

"I went to the Lincoln Safe Deposit Company with my mother one day and helping her with some papers there, and I told her that I thought these bonds which she had of mine on account of this house ought to be kept separately from the rest, and I wrote that memorandum and stuck it in an elastic. Those bonds were together—I mean, separate from the rest of the bonds and papers and various accounts that she had in her box."

He thus testified to a transaction between him and the deceased, and this, of course, was incompetent.

Nor is it shown by proper testimony that he found the memorandum among his mother's papers. With respect to that he said at the trial that the appellee trust company "had taken possession of all her papers and the contents of the box," and that he asked them "if they would look through the papers and see if there was anything among them which referred in any way to me" [him]; that they went through them, found the memorandum, and delivered it to him. But whether it was located in what had been the "contents of the box" or among the other papers he does not say. True, he averred in an ex parte affidavit, which was put in evidence over the defendant's objection, that he found the memorandum in his mother's box; but such testimony was inadmissible, and, besides, was in conflict with what he said at the trial, as we have just shown. The memorandum, then, must be disregarded, for the reason that it was not properly authenticated.

We now come to consider the extracts taken by Dickinson from letters written by the mother to the son. The dates of these letters are not given by him; so we do not know when they were written. The extracts are copied in the majority opinion, and need not be set out here in extenso. A summary will suffice. In one letter the mother wrote that she was not offended, as he thought, by his inquiry about the Washington house, but only felt that he should trust her, and then observed that "the house will be worth more than $20,000, if you [he] ever wanted to sell, as Washington property is always going up," and concluded by saying, "I will send you 4% interest, so that you will not lose anything there." In the second extract she admonishes him to practice economy, and said that $2,000 more, and the $20,000 would be completed. In the third and last extract she says that she had been thinking over their talk about the bonds; that in her judgment it would be very foolish to have them sent to Paris; that "it will not be long now before the house is finished and in your name, anyway"; and concludes thus:

"They [meaning the bonds] are as safe at the Lincoln as in your box, and much more convenient for me. If you insist, I will send them; but please do what I say."

There is nothing in these extracts, I submit, which warrants the conclusion that the mother had converted bonds of the son into cash and had invested the proceeds in the house. Further comment could not make this plainer.

With respect to Bechtel's testimony, he said on cross-examination that the statement made to him by Mrs. Conkling concerning the house in Washington was that—

"The amount of payment made on account of the house was $20,000, and the character of the payment was United States government bonds, and the payment was made in 1901 or 1902; I do not know which."

This is clearly a mistake. She could not have made such a statement, because at that time her son did not have any government bonds to give her, and the record clearly demonstrates that he never gave her any government bonds for that purpose or any other. The Treasury's statement, referred to above, shows that the government bonds held by him were disposed of in 1900. Besides, the son does not say that he gave his mother any government bonds, or that he ever advanced her any money. His contention is, as we have heretofore observed, that she took his railroad bonds, which were found in her box after her death. In view of this, Bechtel's testimony must be rejected as unreliable.

This leaves the theory adopted by the majority as entirely without support in the evidence. Especially is this true when we consider that, in a case like the one before us, where the contract relied upon rests partly in parol and partly in disconnected excerpts from letters written by the deceased, the proof "must be clear, definite and conclusive. * * *" Purcell v. Miner, 4 Wall. 513, 517, 18 L. Ed. 435. See, also, Barbour v. Barbour, 51 N. J. Eq. 271, 29 Atl. 148; Schuey v. Schaeffer, 130 Pa. 16, 18 Atl. 544; Krauth v. Thiele, 45 N. J. Eq. 407, 18 Atl. 351.

In addition, on the theory of the son, as expressed in his bill and testimony, the mother was the legal and equitable owner of the bonds. He claims that in pursuance of his agreement with her she took the bonds to reimburse herself for money previously expended upon the house, and that she, in turn, was to convey the house to him, but failed to do so—in other words, breached her contract to convey. In these circumstances she was in no sense a trustee of the bonds for him. She owned them absolutely. On what principle, then, can it be held that equity has the power to impress a lien on the house. It is familiar law that, before this can be done, two things must concur: (a) That she was a trustee of the bonds; and (b) that in some way they or their proceeds were invested in the house. In Macy v. Roedenbeck, 227 Fed. 346, 353, 142 C. C. A. 42, 49 (L. R. A. 1916C, 12), it was said:

"That only so long as the trust property can be traced and followed into other property into which it has been converted does it remain subject to the trust."

See Illinois Trust & Savings Bank v. First National Bank (C. C.) 15 Fed. 858; Spokane County v. First National Bank of Spokane

et al., 68 Fed. 979, 16 C. C. A. 81; Zenor v. McFarlin, 238 Fed. 721, 151 C. C. A. 571; In re See, 209 Fed. 172, 126 C. C. A. 120; City of Lincoln v. Morrison, 64 Neb. 822, 90 N. W. 905, 57 L. R. A. 885; Bradley v. Chesebrough, 111 Iowa, 126, 82 N. W. 472; Hopkins et al. v. Burr et al., 24 Colo. 502, 52 Pac. 670, 65 Am. St. Rep. 238; Reeves v. Pierce, 64 Kan. 502, 67 Pac. 1108.

This is the general rule, to which I find no exception. He neither established a trust in the bonds nor traced them into the property, but demonstrated the contrary by his own testimony. He may have a claim at law against the estate for the value of the bonds, but he has no standing in a court of equity.

For these reasons, I think the decree of the lower court should be affirmed, and hence I dissent.

WOODWARD & LOTHROP, Inc., v. UNION TRUST CO. OF ROCHESTER, N. Y., et al.

UNION TRUST CO. OF ROCHESTER, N. Y., et al. v. WOODWARD & LOTHROP, Inc.

(Court of Appeals of District of Columbia. Submitted December 1, 1919. Decided January 5, 1920.)

Nos. 3260, 3261.

1. MECHANICS' LIENS ⊂=225—OWNER PAYING MONEY INTO COURT BEFORE SUIT PROTECTED.
   Under Code of Law 1901, §§ 1239, 1246, 1254, 1255, providing that an owner may pay money demanded in mechanic's lien suit into court and be relieved from further liability, a payment into court by an owner after a subcontractor had filed a lien, but before suit had been started, and later applied by the court to pay such subcontractor's lien, constitutes a substantial compliance with the statute, and the owner is not liable to pay such sum a second time to the contractor's assignee.
2. MECHANICS' LIENS ⊂=268—OWNER NEED NOT NOTIFY CONTRACTOR'S ASSIGNEES OF SUBCONTRACTOR'S SUIT.
   An owner need not notify a contractor's assignees that a subcontractor had instituted a mechanic's lien suit against it.
3. INTEREST ⊂=1—NOT RECOVERABLE WHERE CREDITOR PREVENTS PAYMENT.
   Ordinarily, interest is not recoverable where payment is prevented by the creditor.
4. MECHANICS' LIENS ⊂=161(4)—OWNER NOT REQUIRED TO PAY INTEREST ON BALANCE DUE CONTRACTOR.
   Where the amount an owner owed a contractor was rendered uncertain by the owner's claim that a substantial allowance should be made for inferior work and mechanic's lien proceedings instituted by subcontractors, *held*, that interest on the balance due from the owner to the contractor was properly disallowed.

Smyth, Chief Justice, dissenting.

Appeals from the Supreme Court of the District of Columbia.

Mechanic's lien proceedings by the Garden City Plating & Manufacturing Company against Woodward & Lothrop, Incorporated, in which the Union Trust Company and the Central Bank, both of Rochester, N. Y., intervened. From a decree sustaining exceptions to a special

master's report, Woodward & Lothrop, Incorporated, appeal; and from a decree overruling exceptions to the master's report, the interveners appeal. Reversed on first-named appeal, and affirmed on the second appeal.

B. W. Parker, of Washington, D. C., for Woodward & Lothrop, Incorporated.

W. G. Johnson, of Washington, D. C., for Union Trust Co. of Rochester, N. Y., and another.

ROBB, Associate Justice. These appeals involve a decree in the Supreme Court of the District sustaining certain exceptions and overruling other exceptions to the report of a special master in a case growing out of a suit to enforce mechanics' liens.

In June of 1913 Woodward & Lothrop contracted with F. T. Nesbitt Company, of New York, for the erection of a store building at Eleventh and F. Streets, Northwest, in this city, and at about the same time contracted with the John Hofman Company, of Rochester, N. Y., for the furnishing and installation, for $31,000, of the store fixtures in the new building and in parts of the adjoining old building. This installation was completed in December following.

During the month of September, 1913, and while the contract of the Hofman Company was being executed, that company borrowed sums of money from the Central Bank of Rochester aggregating more than $16,000, for which it gave its promissory notes and executed assignments of money due and to become due from Woodward & Lothrop; the balance due under these assignments when the work was completed being $9,280. During the same month the Hofman Company borrowed from the Union Trust Company of Rochester $5,000 under the same conditions, and there was a balance due under that assignment to this bank of $2,170 at the completion of the contract.

Shortly after the execution of the above assignments the Hofman Company became financially embarrassed, and on November 8, 1913, the company notified its creditors that a petition for voluntary dissolution had been filed in New York, and that G. Albert Taylor had been appointed temporary receiver. On December 26th following the company was adjudged a bankrupt, and Mr. Taylor subsequently was appointed trustee. On November 11, 1913, the Union Trust Company notified Woodward & Lothrop of its assignment from the Hofman Company, and on November 14th following wrote Woodward & Lothrop that it might disregard the former notice, and might make settlement "direct with the receiver, G. Albert Taylor." The Central Bank first notified Woodward & Lothrop of its assignment from Hofman & Co. on January 13, 1914. On the same day the Union Trust Company wrote Woodward & Lothrop, requesting direct payment to the bank under its assignment.

Among the subcontractors of the Hofman Company was the Pittsburgh Plate Glass Company, and on the 27th of December, 1913, it filed in the court below its notice of lien in the sum of $3,286.53. On the 30th of December following an order was passed in the court below, authorizing Woodward & Lothrop to pay into the registry of the court

"the sum of $3,286.53 the amount of the claim of the lienor in these proceedings, together with the sum of $200 to cover interest and costs"; the order further reciting that "upon the payment of said moneys into the court in accordance with the terms of section 1254 of the Code, the property shall be released, and the money so paid shall be subject to the final decree of the court." On January 21, 1914, pursuant to the provisions of the Code, the Pittsburgh Company filed its bill of complaint in the court below to enforce the lien theretofore asserted. Service was made on the Hofman Company by publication and by notice to their last known place of residence in Rochester. Woodward & Lothrop made answer, stating, among other things, that it was without knowledge of the terms of the contract alleged to have been entered into between the Hofman Company and the Pittsburgh Plate Glass Company, claimed that certain adjustments would be necessary, owing to defective work by the Hofman Company, and directed attention to the deposit it had made and to the bankruptcy of the Hofman Company. On February 4, 1915, about a year after the filing of its bill, the court entered a decree confirming the lien of the plaintiff, the Pittsburgh Plate Glass Company, in the amount claimed, and directing that amount to be paid plaintiff or its attorney of record from the sum deposited in court, which payment thereupon was made.

Numerous other subcontractors of the Hofman Company filed notice of liens during December of 1913 and January of 1914, and on April 20, 1914, the Garden City Plating & Manufacturing Company, one of these lienors, filed a bill for the enforcement of its lien against Woodward & Lothrop and the Hofman Company, and also naming the other lienors, including the Pittsburgh Plate Glass Company, as defendants. In that bill were detailed the proceedings culminating in the decree in favor of the Pittsburgh Plate Glass Company.

On October 26, 1915, a decree pro confesso was taken against the Hofman Company, and on November 10th following this decree was set aside on motion of counsel for the Hofman Company. On the same day the Hofman Company and the two banks, by leave of court, filed intervening petitions in the suit of the Garden City Company, one of the banks claiming $9,280 and the other $2,170 under the assignments already mentioned. Leave to file a similar petition also was sought and obtained by the trustee in bankruptcy of the Hofman Company, but no petition was filed.

While the record does not definitely disclose who then represented the banks, it is fair to assume that the counsel who obtained the setting aside of the pro confesso decree, and thereby laid the foundation for the filing of the intervening petitions by the banks also represented them. This inference is supported by the fact that since that time he has represented the banks. The intervening petitions of the two banks are silent as to the averments in the main petition concerning the suit of the Pittsburgh Plate Glass Company; the allegation being merely that the claims of the interveners are paramount to those of the plaintiff or of any of the defendants. The cause was referred to a special master, to report findings of fact and conclusions of law.

At the first session before the special master on November 15, 1915.

which it will be observed was subsequent to the filing of the intervening petitions, it was stipulated between counsel for Woodward & Lothrop and counsel for the lienors that the balance due from Woodward & Lothrop to the Hofman Company was $6,013.60, and that no claim would be made against Woodward & Lothrop for any sum in excess of the amount admitted to be due. Hearings were had before the special master, and on September 30, 1918, his report was filed. The master found that the furnishings supplied under the Hofman contract by the various subcontractors, asserting their claims in the proceedings, were not affixed to the realty, and hence were not fixtures within the meaning of the mechanic's lien statute. He further found that the loans of the two banks were made in good faith and that the assignments were not affected by the bankruptcy proceeding; "that the payment into court in the mechanic's lien case of the Pittsburgh Plate Glass Company to discharge an alleged lien, which would have been a cloud upon the title of the said Woodward & Lothrop, Incorporated, having been paid by order of the court to the alleged lienor, Woodward & Lothrop, Incorporated, are not bound to pay the money over again." The master further observed that "the assignees cannot complain of this result, because their failure to give notice of their assignments to Woodward & Lothrop would be sufficient to protect the latter in making any lawful payment out of the fund." The master accordingly found the amount due from Woodward & Lothrop to be the amount stipulated on November 15, 1915. The record does not disclose that any claim was made for interest.

To this report the bank filed exceptions, claiming that Woodward & Lothrop was not entitled to credit for the money paid into court in the Pittsburgh Plate Glass Company's suit, and that interest should have been allowed on the balance due from Woodward & Lothrop on December 30, 1913. The first of these exceptions was sustained, and the second overruled. Accordingly, Woodward & Lothrop appealed from the first, and the banks appealed from the second, ruling.

[1] We first will consider the appeal of Woodward & Lothrop. Under the provisions of section 1239 of the Code a subcontractor is entitled to a mechanic's lien, and that lien is declared by section 1245 to be superior "to all judgments, mortgages, deeds of trusts, liens, and incumbrances which attach upon the building or ground affected by said lien subsequently to the commencement of the work upon the building," etc. This lien must be enforced by a bill in equity. Section 1246. Under section 1254, when such a suit has been filed, the owner of the building affected "may be allowed to pay into court the amount claimed by the lienor, and such additional amount, to cover interest and costs, as the court may direct," or he may file a written undertaking, with sureties to be approved by the court after notice to the defendant. "On the payment of said money into court, or the approval of such undertaking, the property shall be released from such lien, and any money so paid in shall be subject to the final decree of the court." Section 1255 provides that a similar undertaking may be offered before any suit is brought. The contention of counsel for the appellee banks is that the payment into court by Woodward & Lothrop, having been made be-

fore the suit of the Pittsburgh Plate Glass Company was filed, was unauthorized by statute.

The evident purpose of sections 1254 and 1255 is to enable the owner, against whose building or fixtures a lien has been asserted, to be relieved of the embarrassment of the lien through the payment into court of a sum equal to the amount of the lien with interest and costs, or the filing of an undertaking to cover that amount. Where admittedly an amount is due the principal contractor, and the lien is asserted by a subcontractor, there is no contest between the owner and the subcontractor; the issue being restricted to the contractor and subcontractor. If the owner does not take advantage of these provisions of the Code for the release of the lien, the statute imposes upon him no duty to notify the contractor of the pendency of the subcontractor's suit. In the present case, had Woodward & Lothrop failed to take advantage of the provisions of either of these sections of the Code, the result would have been exactly the same, for, after the Pittsburgh Company had obtained a final decree confirming its lien, Woodward & Lothrop would have been fully protected in satisfying that decree.

How, then, were the banks prejudiced in any way by what actually was done? The Pittsburgh Company had asserted its lien, the court authorized the payment into its registry of the amount claimed, and when the suit was filed that amount was in court, where it was treated as a deposit under the statute, and from that time on exactly the same procedure was followed as though the filing of the suit had preceded the deposit. In substance and effect there was a compliance with the terms of the statute. To hold otherwise would be to prefer form to substance, and impose upon the owner a duty not contemplated by the statute. It will be observed that no notice is required under section 1254, where a money payment is made by the owner; the theory evidently being that cash speaks for itself, and that no one possibly could be prejudiced by the substitution of cash for the obligation of the owner to pay the amount due under its contract. It was for this reason that section 1255 makes no mention of a cash payment. The object of the filing of an undertaking is to release the property from the lien and to satisfy the final decree. When the suit of the Pittsburgh Company was instituted, therefore, the court had a right to treat the payment of Woodward & Lothrop as a payment made on account of that suit. There the responsibility of Woodward & Lothrop ended, for money thus paid into court no longer is under the control of the owner, but of the court.

[2] Counsel for the banks contend that Woodward & Lothrop should have notified them of the suit of the Pittsburgh Plate Glass Company. It is significant, this being a proceeding in equity, that in their intervening petition the banks did not allege their lack of knowledge in this connection. Moreover, on December 12, 1913, the receiver of the Hofman Company, in a letter to Woodward & Lothrop, announced his purpose to come to Washington on a day certain to "straighten out the tangle." To do this he was to interview "the attorneys acting for Hofman creditors." On January 14, 1914, after the receiver had been appointed trustee in bankruptcy, he notified

Woodward & Lothrop that, inasmuch as the banks "were the chief parties at interest," he would turn the facts in his possession over to them. It is inconceivable, in the circumstances, that these banks should have made no inquiry during the year intervening between the filing of the suit of the Pittsburgh Company and the decree under which its lien was confirmed and payment made out of the registry of the court in satisfaction of the decree. Such quiescence is not customary with banks. But, however that may be, Woodward & Lothrop owed them no duty in the premises. The suit was of record, and their remedy, if any, must have been obtained therein.

Counsel assert that it should have been ruled in this proceeding that the asserted lien of the Pittsburgh Plate Glass Company was without foundation. That question was not before the court, having been finally adjudicated in another proceeding.

[3, 4] We now will consider the appeal of the two banks from the action of the court in disallowing interest. It is a general rule that interest is not recoverable where payment is prevented by the act of the creditor. Thompson v. Boston & Maine R. R., 58 N. H. 524; Le Branthwait v. Halsey, 9 N. J. Law, 4; Bowman v. Wilson (C. C.) 12 Fed. 864. In the present case it is insisted that Woodward & Lothrop might have paid the money into court by filing an intervening petition. It is apparent from the foregoing recital of the facts that the situation was decidedly complicated. Woodward & Lothrop claimed a very substantial allowance on account of poor work, and this allowance ultimately was made. That Woodward & Lothrop were endeavoring to avoid unnecessary delay and expense apparently was recognized by counsel for the lienors when, in November of 1915, they entered into a stipulation to the effect that no interest would be demanded. The banks then had intervened, and at no time prior to the filing of the report of the special master did they raise any question as to interest. Woodward & Lothrop were innocent parties, and they have been compelled to incur a very considerable expense in protecting their interests. They at all times were ready to pay the amount they really owed, and the delay was through no fault of theirs. We think the court below was right in disallowing the claim to interest.

The decree in No. 3260 is reversed, with costs, and the cause remanded for a decree in conformity with this opinion. The decree in No. 3261 is affirmed, with costs.

No. 3260 reversed.

No. 3261 affirmed.

Mr. Chief Justice SMYTH is of the view that payment into court by an owner, being a statutory right, must be in strict conformity with the statute, and he therefore dissents from the opinion and decree of the court in appeal No. 3260. In appeal No. 3261, he is of the view that Woodward & Lothrop, having had the use of the balance due, should pay interest, and he therefore dissents from the opinion and decree of the court in that cause.

MEARNS v. SULLIVAN (two cases).

(Court of Appeals of District of Columbia. Submitted December 2, 1919. Decided January 5, 1920.)

Nos. 3275, 3276.

1. APPEAL AND ERROR ⟸71(4)—RECEIVERS ⟸58—PARTY WITHOUT NOTICE OF ORDER APPOINTING MAY PETITION FOR REVOCATION, AND APPEAL FROM DENIAL OF PETITION.
A party, without notice or opportunity to answer a petition seeking appointment of receivers, may petition for revocation of the appointment, and, under Code of Law D. C. 1901, § 226, appeal from a denial of his petition.

2. APPEAL AND ERROR ⟸71(4)—INTERLOCUTORY ORDER IN RECEIVERSHIP PROCEEDINGS NOT APPEALABLE.
Where an order appointing receivers directed appellant to turn over certain money to them, a subsequent order in the receivership proceedings, reiterating the direction that appellant pay the money to the receivers, is not appealable, under Code of Law D. C. 1901, § 226, allowing appeals from interlocutory orders in which "the possession of property is changed or affected."

3. CONTEMPT ⟸66(2)—ORDER IN RECEIVERSHIP PROCEEDINGS NOT APPEALABLE.
A contempt order in receivership proceedings, punishing appellant for his refusal to turn over certain funds to the receiver, pursuant to other orders of the court, is not appealable, under Code of Law D. C. 1901, § 226, making certain interlocutory orders appealable.

Appeal from the Supreme Court of the District of Columbia.

Two proceedings by George E. Sullivan, receiver, against William A. Mearns. From adverse orders, Mearns appeals. Appeals dismissed.

C. H. Merillat and Henry E. Davis, both of Washington, D. C., for appellant.

Geo. E. Sullivan, of Washington, D. C., pro se.

VAN ORSDEL, Associate Justice. A suit in equity was brought in the Supreme Court of the District of Columbia by one Morril B. Spaulding against the International Sales Corporation, William A. Mearns, its president, and other officers and stockholders of the corporation. In the course of the proceedings receivers were appointed, to take over certain money of the corporation alleged to be in the possession of appellant, Mearns, and hold it pending the equity litigation. These appeals are from orders made in proceedings instituted by appellee Sullivan, surviving receiver, to compel Mearns to comply with the order appointing the receivers. After a series of proceedings under the receivership, in which Mearns responded by answers to rules to show cause and otherwise, the court made the order appealed from in No. 3275, requiring him to pay over to the receiver, out of the money found by the order appointing the receivers to belong to the corporation, the sum of $3,878.30.

[1] It is unnecessary to consider the validity of the order under which the receivers were appointed, since the case turns upon a question of jurisdiction. Section 7 of the Act of Congress of February 9,

1893 (27 Stat. 434; Code D. C. § 226), conferring jurisdiction upon this court, among other things, provides:

"Appeals shall also be allowed to said Court of Appeals from all interlocutory orders of the Supreme Court of the District of Columbia, or by any justice thereof, whereby the possession of property is changed or affected, such as orders for the appointment of receivers, granting injunctions, dissolving writs of attachment, and the like; and also from any other interlocutory order, in the discretion of the said court of appeals, whenever it is made to appear to said court upon petition that it will be in the interest of justice to allow such appeal."

This appeal is not from the order appointing the receivers, but from an order made in the course of the receivership proceedings. While it is true that appellant, Mearns, had no notice of or opportunity to answer the petition asking for the appointment of receivers, and therefore no opportunity to appeal directly from that order, his proper course, if he objected, was to have filed a petition seeking its revocation, and, if the court had denied the petition, he could then have appealed from that order.

But that is not what was done. Mearns, instead of making timely objection, defended in the receivership proceeding, until the order complained of was entered. The order in which "the possession of property is changed or affected" is not the order appealed from, but the original order for the appointment of receivers. That order directed the receivers—

"to take over and hold pendente lite, or until the further order of the court, that part or portion claimed by the plaintiff, as averred in the bill of complaint herein, all the profits heretofore and hereafter derived from the certain contracts referred to in said bill."

[2] The order here appealed from is merely a supplemental order directing Mearns to turn over a certain specific amount of the money found by the court in the original order to belong to the corporation, and which, in the order of appointment, the receivers were directed to take over and hold pending the equity litigation. It is, in effect, in so far as it goes, a repetition of the original order. It is not, therefore, a final order, or such an interlocutory order as is contemplated by the statute conferring general appellate jurisdiction upon this court.

[3] The appeal in No. 3276 is from an order adjudging Mearns in contempt of court by reason of his failure and refusal to comply with the order appealed from in No. 3275. This order is to enforce compliance with the order requiring him to turn over the money. It is the exercise merely of an inherent jurisdictional prerogative employed by courts as a last resort to compel obedience to their orders. Such an order is not final. The extent of its duration depends upon the powers of resistance displayed by the contemnor, with whom its discharge is wholly lodged. The discharge of the former order will discharge the latter. They are both interlocutory in the course of the receivership proceedings.

For the reasons stated, the court is without jurisdiction in either case, and the appeals are dismissed.

Dismissed.

In re MACLIN-ZIMMER-McGILL TOBACCO CO., Inc.

(Court of Appeals of District of Columbia. Submitted November 10, 1919. Decided January 5, 1920.)

No. 1241.

TRADE-MARKS AND TRADE-NAMES ⇐43—REGISTRATION OF ENGLISH NAME PRECLUDES SPANISH EQUIVALENT.

"El Gallo," which is Spanish for "The Rooster," cannot be registered as a trade-mark, where the words "Our Rooster" and a picture of a rooster had been previously registered for the same goods by another concern.

Appeal from the Commissioner of Patents.

Application by the Maclin-Zimmer-McGill Tobacco Company, Incorporated, to register a trade-mark. From a decision refusing registration, the applicant appeals. Affirmed.

Henry M. Wise, of New York City, for appellant.

T. A. Hostetler, of Washington, D. C., for appellee.

ROBB, Associate Justice. Appeal from a Patent Office decision refusing registration to the words "El Gallo," as a trade-mark for tobacco.

"El Gallo" is the Spanish for "The Rooster," and it appears that "Our Rooster" and a picture of a rooster have been registered as a trade-mark for tobacco by another concern. In Nestle & A. S. C. Milk Co. v. Walter Baker & Co., 37 App. D. C. 148, 152, we ruled that "Milkmaid" and a pictorial representation of a milkmaid meant the same to the public, and that the "right to employ one necessarily includes the right to employ both." It matters not that appellant has employed the Spanish language, instead of English. In re Bradford Dyeing Ass'n, 46 App. D. C. 512.

The decision was right, and is affirmed.

Affirmed.

Application of STEPHENS-ADAMSON MFG. CO.

(Court of Appeals of District of Columbia. Submitted November 13, 1919. Decided January 5, 1920.)

No. 1259.

1. TRADE-MARKS AND TRADE-NAMES ⇐44—APPLICATION MAY BE AMENDED BY STRIKING OUT WORD.

A trade-mark application to register the words "Unit Carrier" for roller brackets for belt conveyers may be amended by striking out the word "carrier."

2. TRADE-MARKS AND TRADE-NAMES ⇐3(4)—"UNIT" AS TRADE-MARK FOR ROLLER BRACKETS FOR BELT CONVEYERS NOT DESCRIPTIVE.

The word "Unit," as a trade-mark for roller brackets for belt conveyers, is entitled to registration against the objection that it is descriptive.

Appeal from a Decision by the Commissioner of Patents.

Application by the Stephens-Adamson Manufacturing Company to register a trade-mark. From a decision by the Commissioner of Patents, denying the application, the applicant appeals. Reversed.

L. K. Gillson and C. B. Gillson, both of Chicago, Ill., for appellant.
T. A. Hostetler, of Washington, D. C., for appellee.

SMYTH, Chief Justice. [1] The Stephens-Adamson Manufacturing Company applied to have the words "Unit Carrier" registered as a trade-mark for roller brackets for belt conveyers; but the application was denied, on the ground that the words were descriptive. While the application was pending a motion for leave to strike out of the mark the word "Carrier" was overruled by the Commissioner of Patents. According to the decisions of this court (In re Beckwith, 48 App. D. C. 110, and authorities there referred to), this was error.

[2] Considering the mark as embracing merely the word "Unit," the question as to whether or not it is descriptive is a close one. We have sustained the word "Cream" as a valid trade-mark for baking powder over the objection that it was descriptive. And the following words have been upheld: "Holeproof," as applied to hosiery (Holeproof Hosiery Co. v. Wallach Bros., 172 Fed. 859, 97 C. C. A. 263); "Cream," as applied to rolled oats (Albers Bros. Milling Co. v. Acme Mills Co. [C. C.] 171 Fed. 989); "Anti-Washboard," as applied to soap (O'Rourke v. Central City Soap Co. [C. C.] 26 Fed. 576); and many others, equally suggestive, referred to in the last case, where the opinion is by Judge Brown, afterwards Mr. Justice Brown of the Supreme Court of the United States. He said of the words "Anti-Washboard" that they were not objectionable, "although the natural inference from them is that by the use of the soap the necessity of rubbing cloths is obviated." Continuing he ruled:

"We incline to the opinion that they are rather suggestive than descriptive, and that they may be properly claimed as a trade-mark."

It may be said that a mark to be suggestive must contain some element of descriptiveness; but if this be true, it seems from the foregoing decisions that this does not render it obnoxious to the law. The word "Unit" is not descriptive, therefore, because it may suggest to the mind that the carrier, consisting of three rollers, moves as one. Standing alone, it does not necessarily indicate "a plurality of similars." It refers as well to a single person or thing. Standard Dictionary, 1913. In electricity we speak of a unit current—one in which a unit quantity of electricity flows in unit time.

We think, therefore, that the applicant company, upon eliminating the word "Carrier," is entitled to have the word "Unit" registered as a trade-mark for the goods mentioned in its application.

The decision of the Commissioner is reversed.

Reversed.

TURNER v. HENNING.

(Court of Appeals of District of Columbia. Submitted December 2, 1919. Decided January 5, 1920.)

No. 3271.

1. CONTRACTS ⊜295(1)—CONTRACTOR INTENTIONALLY DEFAULTING CANNOT INVOKE DOCTRINE OF SUBSTANTIAL PERFORMANCE.
In a mechanic's lien proceeding, plaintiff contractor, who intentionally failed to observe portions of the building specifications and repeatedly refused to remedy the defects, is not entitled to the benefit of the equitable doctrine of substantial performance.

2. DAMAGES ⊜123—OWNER MAY DEDUCT ENTIRE COST OF COMPLYING WITH SPECIFICATIONS.
Where contractor intentionally fails to observe a portion of the building specifications, the owner may deduct the entire cost of making the building conform to specifications, and is not required to deduct merely the difference between value of the work as done and its value if it had been performed pursuant to the specifications.

Appeal from the Supreme Court of the District of Columbia.

Mechanic's lien proceeding by Watkins L. Turner against Samuel Carl Henning. Decree for plaintiff, and he appeals. Affirmed.

H. W. Wheatley, of Washington, D. C., for appellant.
Edmund Brady, of Washington, D. C., for appellee.

SMYTH, Chief Justice. [1] Turner instituted a suit against Henning to foreclose a mechanic's lien for $940, a balance said to be due on a contract with Henning for the construction of a dwelling house for the latter. From a decree deducting several items from his claim, and awarding him only $59, less the costs, Turner appeals.

The contract followed a form usually employed by building contractors. It provides that the sum agreed upon "shall be paid by the owner to the contractor in current funds, and only upon certificates of the architect."

Appellant alleged in his bill that he had completed the building in "strict and full accordance" with the contract, except in certain minor particulars consented to by the owner, and that "the architect arbitrarily, unreasonably, and without just cause declined to give a certificate." The owner in response denied that the contract had been performed according to its terms, and asserted that in many respects, detailed by him, the contractor failed and refused to do what was required of him, and prayed that the bill be dismissed.

The court deducted from the sum claimed by the appellant the cost of reconstructing the parts which it found were not in accordance with the contract. The testimony of the architect, supported by that of several other competent witnesses, satisfies us that the contractor intentionally failed in the respects mentioned in the decree. This is illustrated by the following instances: The specifications called for a concrete floor in the cellar, consisting of a one-inch topping with a three-inch base, making four inches in all. But the floor laid did not

have an inch topping and measured only from 1½ to 2½ inches in total thickness. Upon little pressure a pick punctured the surface. If the floor was constructed as the contract required, the pick "could not have made any more than just a slight impression, and sparks would have responded from the pick," said an architect of more than thirty years' experience. "The porch" of the building, testified the architect in charge, "was to be finished with a master builders' preparation for a red top, but when it was finished it lacked the coloring. It was mottled and a dull red, not the kind he expected. * * * There was a great deal of the black color on the west side under the covered portion. * * * and when completed it gave the appearance that lamp black or something else had been worked into it. It was very much disfigured." Appellant repeatedly refused to remedy these and the other defects.

Under this state of the proof he is not entitled to the benefit of the equitable doctrine of substantial performance. That doctrine—

"is intended for the protection and relief of those who have faithfully and honestly endeavored to perform their contracts in all material and substantial particulars, so that their right to compensation may not be forfeited by reason of mere technical, inadvertent, or unimportant omissions or defects. It is incumbent on him who invokes its protection to present a case in which there has been no willful omission or departure from the terms of his contract." Gillespie, etc., v. Wilson, 123 Pa. 19, 16 Atl. 36.

[2] Appellant urges that, if the work was defective, the owner should have been allowed only the difference between the value of it as done and the value of it if performed in accordance with the contract. Is this sound? The owner did not want a cellar floor, nor a porch such as we have described, and he should not be required to pay for them, but this is what would result if appellant's theory as to the measure of damages is followed. Appellant did not do the things for which appellee agreed to pay him, and he should not be permitted to thrust upon the latter things not substantially the same, but much inferior, even though he is willing to let him have them at a reduced price.

In our judgment the correct rule of damages in a case like the one before us is announced in Morgan v. Gamble, 230 Pa. 165, 79 Atl. 410, and Long v. Owen, 21 Idaho, 243, 121 Pac. 99, Ann. Cas. 1913D, 465. In the Morgan Case it is said that the contract provided:

"That Acme anti-rust paint should be used for the tin painting, but in direct violation of this provision of the agreement the plaintiff used Princess' metallic paint. He does not assign any reason for a change in the paint, but offered, and was permitted, to show on the trial that the paint he used was as good as that provided in the agreement. The defendants had a right to insist upon the substantial performance of these express stipulations of the contract, and the plaintiff was not relieved from this duty by reason of the fact * * * that the paint used by the plaintiff was of the same or a better quality than that provided in the agreement."

Further on, speaking of the action of the contractor in substituting an iron for a strong lead water pipe, the court said:

"Unless we hold that the contractor had the right to thus change the specific stipulation in the agreement, and use his own judgment instead of that of

the defendants as to the pipe to be laid, we must require him to pay to the defendants, not the difference between the iron and lead pipes, but the cost of laying a lead pipe as provided in the agreement. This is the proper measure of damages."

The Long Case involved the construction of a sidewalk, which was defective in some particulars, and also failed to meet the requirements of a city ordinance. The court said in reversing a judgment for the contractor:

"If upon a new trial the respondent [contractor] has not yet repaired or reconstructed the walk so as to meet the substantial requirements of the ordinance, there should be deducted from the contract price a sufficient sum to place the walk in condition that it will substantially comply with the specifications prescribed by the city authorities."

We think it proper, however, to add that in our judgment the cost should always be the equivalent of the prevailing market value of the things omitted.

At the bar it was argued that if the owner had removed the defective parts and replaced them according to the contract, he might be entitled to deduct the cost of the replacement; but, because he did not do so, but is keeping these parts and using them, he should pay their value. We cannot accede to this. Appellee, after appellant had refused to perform his contract, had his election either to use those parts or take them up and throw them away. Neither course would result in any benefit to the appellant; therefore, he could not be injured by appellee's taking the one course rather than the other. If the latter could return to the appellant the defective things, the rule might be otherwise (Mack v. Sloteman [C. C.] 21 Fed. 109; Watson v. Bigelow Co., 77 Conn. 124, 58 Atl. 741), but obviously he could not do so. To remove them would be to destroy them.

To enjoy the house for which appellee had paid nearly $8,000, he was compelled to use, more or less, the defective parts. This did not work an acceptance of them, since they were negligible as compared with the whole, and he had repeatedly said to the appellant that he would not accept them. Equity will not penalize him, in the circumstances, by compelling him to pay for that which he does not want.

Nothing we have said is in conflict with Mercantile Trust Co. v. Hensey, 27 App. D. C. 210. That was an action by the owner for damages because, as claimed, the contractor had not completed the buildings as required by his contract. The owner accepted the buildings and sued for the difference between their value as they were and their value if constructed as agreed. Of course, the measure of damages was the difference between the two values. This must be so in an action of that character. Moulton v. McOwen, 103 Mass. 587; White v. Brockway, 40 Mich. 209, cited by appellant. But it is otherwise where, as here, the plaintiff bottoms his suit on the assumption that he had fully performed his contract. Unless he establishes that, or at least a substantial performance, he must fail.

The law of damages, strictly speaking, has no relation to the issue. Appellant relied upon full performance. In this he failed. The rule adopted by the trial court substituted what the things omitted would

cost for the things themselves, and deducted the amount from the sum to which the appellant would otherwise be entitled under his contract. This is in accord with the decisions referred to, as well as with sound reason.

The lower court was right, and its decree is affirmed, with costs.

Affirmed.

PAUL F. BEICH CO. v. KELLOGG TOASTED CORN FLAKES CO.

(Court of Appeals of District of Columbia. Submitted November 14, 1919. Decided January 5, 1920.)

No. 1265.

TRADE-MARKS AND TRADE-NAMES ⇐43—"GOLDEN CRUMBLES," used on candy, NOT INVALIDATED BY PRIOR USE OF "KRUMBLES" ON CEREALS.

The trade-mark "Golden Crumbles," used on candy since 1915, was not invalidated by the opposing party's use of the word "Krumbles" for cereal breakfast foods since 1912, and on candy since 1916, since the essential characteristics of breakfast foods and candy are different, and there was no proof that cereal breakfast food manufacturers usually engaged in producing candy.

Appeal from a Decision by the Commissioner of Patents.

Proceeding in the Patent Office by the Kellogg Toasted Corn Flakes Company to cancel a trade-mark of the Paul F. Beich Company. From a decision sustaining the petition, defendant appeals. Reversed.

Jas. L. Steuart and S. R. Perry, both of New York City, for appellant.

W. H. C. Clarke, of New York City, for appellee.

ROBB, Associate Justice. Appeal from a Patent Office decision sustaining appellee's petition for the cancellation of appellant's trade-mark "Golden Crumbles," which it had used on candy since February of 1915.

It appears that the words "Golden Crumbles" were suggested by the color of the candy and its tendency easily to crumble. A very considerable business soon was established. Appellee, in 1912, adopted the word "Krumbles" as a trade-mark for a cereal breakfast food. In April of 1916, more than a year subsequent to appellant's adoption of its mark, appellee commenced using its mark on a confection. It contends that this was a legitimate and natural expansion of its business. We do not think so. Quaker Oats Co. v. Mother's Macaroni Co., 41 App. D. C. 254. The acting Examiner of Interferences pertinently observed that there is no "proof to the effect that manufacturers of cereal breakfast foods are in the habit of engaging in the production of candy." Moreover, the general and essential characteristics of breakfast foods and candy are different, and we are of opinion that the use of a mark by a dealer in one leaves its use open to a manufacturer of the other.

The decision is reversed.

Reversed.

KENNICOTT v. CAPS.

(Court of Appeals of District of Columbia. Submitted November 10, 1919. Decided January 5, 1920.)

No. 1242.

PATENTS ⊂=113(7)—CONCURRENT DECISIONS OF PATENT OFFICE TRIBUNALS WILL NOT BE DISTURBED.

The concurrent decisions of the three Patent Office tribunals, in interference proceedings, that one of the parties had failed to show diligence in seeking to amend, and in awarding priority, will not be disturbed, where supported by competent evidence.

Appeal from a Decision by the Assistant Commissioner of Patents.

Interference proceeding in the Patent Office between Cass L. Kennicott and John E. Caps. From a decision awarding priority to Caps, Kennicott appeals. Affirmed.

Frances M. Phelps, of Washington, D. C., and Frank A. Howard, of Chicago, Ill. (Dyrenforth, Lee, Chritton & Wiles, of Chicago, Ill., on the brief), for appellant.

Joseph H. Milans and Calvin T. Milans, both of Washington, D. C., and Rudolph W. Lotz, of Chicago, Ill., for appellee.

SMYTH, Chief Justice. The Assistant Commissioner of Patents awarded priority of invention to Caps in an interference between his application and that of Kennicott, and the latter appeals. Improvements in an apparatus for softening water constitute the subject of the invention. There is only one count of the interference. It reads:

1. In a water-softening apparatus a reagent drum, means for passing water to be softened through the reagent in said drum, a water meter for measuring the water flowing through the said drum, a valve for shutting off the flow of water through the drum, and means operable by said meter for actuating the said valve.

Caps alleged conception in January, 1915, and disclosure in February following. He filed his application in June, 1916. Kennicott in his original preliminary statement claimed that he had conceived the invention and reduced it to practice in December, 1915. His application was filed in March following. He is, therefore, the senior party. After Caps' testimony had been completed, and Kennicott knew the dates claimed by him, he sought leave to amend his statement by alleging conception in February, 1914, nearly two years before the date first claimed, and about a year anterior to Caps.

The three tribunals of the Office concurred in denying leave to amend, on the ground that he had failed to show diligence in discovering the assumed error in his first statement. They also concurred in holding, on the question of fact presented, that Caps was the first to conceive, and, being diligent thereafter, and up to the time of the filing of his application, was entitled to priority. It is a well-settled rule of decision in this court that where the tribunals of the Office concur with respect to the proper solution of a question of fact we will not

disturb their action, if there is any competent evidence to sustain it. Greenawalt v. Dwight, 49 App. D. C. —, 258 Fed. 982, and cases there cited. We think the evidence here amply satisfies the rule, and therefore we affirm the decision of the Assistant Commissioner of Patents.

Affirmed.

HOPKINS v. RIEGGER.

(Court of Appeals of District of Columbia. Submitted November 12, 1919. Decided January 5, 1920.)

No. 1256.

PATENTS ⇐112(4)—CONCURRENT DECISIONS OF PATENT OFFICE TRIBUNALS CONCLUSIVE, UNLESS CLEARLY WRONG.

The concurrent decisions of the three Patent Office tribunals in awarding priority in an interference proceeding will not be reversed, unless manifestly wrong.

Appeal from a Decision by the Commissioner of Patents.

Interference proceeding in the Patent Office between Arthur T. Hopkins and Constantin Riegger. From a decision awarding priority to Riegger on all counts except one, Hopkins appeals. Affirmed.

Chas. S. Jones, Clarence O. McKay, and W. Lee Helms, all of New York City, for appellant.

C. L. Sturtevant, of Washington, D. C., and Oscar W. Jeffery, of New York City, for appellee.

SMYTH, Chief Justice. This is an interference involving nine counts, which cover a subject-matter that relates to a tank ball or rubber float valve for the outlet in toilet flush tanks. The Commissioner of Patents awarded priority to Riegger on all the counts except No. 9, which was given to Hopkins, and the latter appeals.

Counts 1 and 4 illustrate the character of the invention. They are as follows:

1. A tank ball formed with a seat engaging portion of flexible rubber, an upper portion of flexible rubber, and a reinforcement formed of rubber composition vulcanized to the upper portion for preventing the collapsing thereof, said reinforcement being formed with an annular enlargement opposite the juncture of the seat engaging portion and the upper portion.

4. A float ball valve formed with a flexible seat portion, an upper portion, a separate stiffening member arranged interiorly of said upper portion to prevent the collapsing thereof, and also to prevent the collapsing of the upper edge of the seat portion, and a reinforcing member arranged at the juncture of the upper portion and the lower portion, said reinforcing member overlapping said stiffening member for providing a substantially rigid joint.

The thing about which the controversy centers, as we have just stated, is a ball, the lower part of which is made of soft white rubber, and the top of like material reinforced on the inside with a hard black rubber core cemented and vulcanized to it. In order that the joint between the two parts may not separate easily, the upper part is carried

down to and across the edge of the lower part, while a reinforcing strip embraces the lower edge of the shell and is vulcanized to the upper and lower portions of the ball.

Both parties claim the inventive idea, each asserting that the other derived it from him. There is evidence tending to support the cause of each, but it is not necessary for us to go into an analysis of it. The three tribunals of the Patent Office decided in favor of Riegger. Where they concur, the question being one of fact, as here, we will not review the Commissioner's decision, unless it be manifestly wrong (Greenawalt v. Dwight, 49 App. D. C. ——, 258 Fed. 982, and cases cited), and we cannot say that it is in the case before us.

For this reason the decision of the Commissioner must be affirmed. Affirmed.

In re SMITH.

(Court of Appeals of District of Columbia. Submitted November 13, 1919. Decided January 5, 1920.)

No. 1258.

1. PATENTS ⊂=26(1)—COMBINATION OF MECHANICAL EQUIVALENTS IS NOT INVENTION.
   A combination of applicant's previously patented aeroplane with hydroplane features known to the prior art is not patentable, since assembling the mechanical equivalents of features old in the art into a single structure does not constitute invention.
2. PATENTS ⊂=113(2)—DECISION DENYING AMENDMENT AFTER TAKING APPEAL NOT REVIEWABLE.
   The action of the Commissioner of Patents in denying a petition for rehearing, seeking permission to substitute new claims for those denied, and which was filed after an appeal had been taken from the rejection of the original claims, is not reviewable, since the case had passed beyond the Commissioner's jurisdiction when the rehearing petition was presented, and no proper final judgment on the patentability of the substitute claims was presented for review.
3. PATENTS ⊂=113(2)—FINAL DECISIONS REGARDING PATENTABILITY NECESSARY FOR REVIEW.
   An appeal lies only from a final decision of the Commissioner on the issue of patentability.

Appeal from a Decision of the Commissioner of Patents.

Patent application proceeding by Rexford M. Smith. From a decision denying the application, the applicant appeals. Affirmed.

E. S. Clarkson, of Washington, D. C. (C. C. Hines, of Washington, D. C., of counsel), for appellant.

T. A. Hostetler, of Washington, D. C., for appellee.

VAN ORSDEL, Associate Justice. This appeal is from a decision of the Commissioner of Patents denying the application of appellant for a patent on improvements in hydroaeroplane construction.

The application is in 41 claims, all of which were considered by the tribunals of the Patent Office, and refused, in the light of the prior

art. On appeal to this court, appellant has abandoned all but 10 of the claims.

[1] It appears that on November 24, 1914, applicant was granted a patent on the present disclosure, with claims limited to the aeroplane features. Whatever aeroplane features are contained in the present application could have been claimed in that patent. It was therefore held not to constitute invention to substitute his patented aeroplane in hydroplanes of the prior art. To review in detail appellant's claims, or the relation of the prior art to his disclosure, would amount merely to a restatement of that which is clearly set forth in the opinions of the respective tribunals of the Patent Office. The combination here sought to be patented, while not disclosed in a single structure of the prior art, is so completely shown in different prior inventions as to admit easily of mechanical simulation. Such an assembling of mechanical equivalents of features old in the art into a single structure does not constitute invention.

[2, 3] After the present appeal had been perfected, applicant filed with the Commissioner of Patents a petition for a rehearing, asking permission to withdraw the entire 41 claims appealed and present in lieu thereof 6 claims. The Commissioner denied the rehearing, and applicant seeks a hearing upon the substituted claims in this court. It is clear that the claims cannot be here considered, since an appeal only lies from a final decision of the Commissioner on the issue of patentability. The claims were not presented to the Commissioner until the case had passed beyond his jurisdiction, and no case was before him in which the claims could be heard or to which a judgment thereon could attach. It follows, therefore, that no proper judgment on the patentability of these substituted claims is before this court for review.

The decision of the Commissioner of Patents is affirmed, and the clerk is directed to certify these proceedings as by law required.

Affirmed.

ENGLE v. MANCHESTER & SPOONER.

SAME v. MANCHESTER (two cases).

(Court of Appeals of District of Columbia. Submitted November 14, 1919. Decided January 5, 1920.)

Nos. 1262–1264.

PATENTS ⊂=91(4)—EVIDENCE SUSTAINS SENIOR PARTY IN INTERFERENCE PROCEEDINGS.

In patent interference proceedings over an electric battery, evidence regarding the junior party's acquiescence in statements that the senior party was the inventor, etc., *held* to establish, contrary to the Assistant Commissioner's decision, that the senior party was entitled to priority.

Appeal from a Decision by the Assistant Commissioner of Patents.

Patent interference proceeding between George S. Engle and Manchester & Spooner, and two similar proceedings between George S. Engle and Arthur P. Manchester. From a decision awarding priority to the junior parties, George S. Engle appeals. Reversed.

Vernon E. Hodges, of Washington, D. C., for appellant.

A. S. Steuart and Melville Church, both of Washington, D. C., for appellees.

SMYTH, Chief Justice. This is an appeal from a decision of the Patent Office awarding priority in three interference proceedings—to Manchester and Spooner in No. 1262, and to Manchester alone in Nos. 1263 and 1264. Engle is the senior party, having filed some two months before the others. The subject-matter of each interference is so closely related to that of the others that the three have been submitted on the same record, and they shall be disposed of as one case.

The invention concerns an electric battery, and the claims of the issue are illustrated by the following:

No. 1262.

1. An electrode for batteries composed of cupric oxide (CuO) and cuprous oxide (Cu_2O).

5. An electrode for batteries formed of cupric oxide and cuprous oxide in the form of scales of appreciable size bonded together and compressed into a dense hard mass.

11. The process of producing a copper oxide electric battery element consisting in forming flakes of black or cupric oxide of copper carrying therewith portions of unoxidized copper and treating the said flakes to eliminate any unctuous matter therefrom, thoroughly mixing the flakes carrying the portions of unoxidized copper with a binder and pressing the mass thus produced into a desired shape so that the black or cupric oxide of copper and portions of the metallic copper will be regularly distributed throughout the body of the pressed mass, then subjecting the compressed mass to the action of heat until the compressed mass is cured and the binder reduced to a minimized residuum, then placing the compressed mass carrying the minimized residuum of the binder in the oven and subjecting the said mass to a high degree of heat to first burn out the binder residuum and next to change the metallic copper within the body of the mass of cuprous oxide removing the mass now composed of cupric and cuprous oxides of copper from the baking oven and again compressing the same while red with heat, and finally allowing the plate to cool in the air.

No. 1263.

1. A gelatinous alkaline electrolyte for primary batteries formed of an alkaline hydroxide of approximately 28° gravity Baume with which vegetable starch is combined at a temperature of approximately 180° F. and in quantity substantially less than that required to gelatinize an equal quantity of water.

No. 1264.

1. The herein described process of making an alkaline gelatinous electrolyte, consisting in thoroughly mixing a caustic alkaline solution comprising about one part of starch to ninety parts of the solution and thoroughly stirring the two components, subjecting the mixture of alkaline solution and starch to a degree of heat less than that required to boil the mixture to avoid the liberation of the constituents of starch that would have a tendency to harden the electrolyte, and allowing the mixture to cool to a pouring consistency.

Appellant was successful before the Examiner of Interferences and the Board of Examiners, but failed before the Assistant Commissioner. Originality is the crux of the dispute, and the question for decision is one of fact. Manchester and Spooner, being junior parties, must overcome the claim made by Engle, or they cannot succeed. All the parties worked together in the same house upon the invention. Manchester and Spooner assert that they were partners with Engle; that he was merely a promoter and legal adviser, but supplied none of the inventive ideas, while Engle says that Manchester and Spooner were employés of his; that he furnished the funds necessary to carry on the work, and also the ideas embodied in the invention.

The testimony is a tangled web of contradictions; none the less there are certain things in it which stand out prominently and point to the right direction for the investigator. One of the witnesses called by Manchester and Spooner refers to the battery throughout his testimony as Engle's and speaks of Spooner as Engle's workman, though he later tried to change his testimony on the latter point. Spooner, without dissent, witnessed a contract, after it had been read to him, in which Engle was represented as the inventor, and both Manchester and Spooner knew that Engle was going to file an application for a patent on the invention, but neither objected. Indeed, Engle was distinctly asked in the presence and hearing of Manchester at the time his application for a patent was being prepared as to whether he (Engle) was the sole inventor, or a joint inventor with Manchester, and he answered that he was the sole inventor. Manchester did not deny it, but acquiesced in the answer by his silence. Perhaps this conduct on the part of Manchester and Spooner may be explainable in harmony with their claim of inventorship. They attempt to show that it is by saying that they were misled by Engle, who, they assert, gave them to understand that he was the proper one to make the application, and that he would, after having obtained a patent, recognize their interests in it. This may be correct, but it is difficult to accept it, for it means that they, knowing they were the inventors and that Engle was not, made no protest against his pretensions. They would have to be far less intelligent than the record shows them to be before we could believe that they did not understand that a person who is not an inventor cannot, under the statute, obtain a patent. These things, in connection with others in the record, tend to establish with much force that

Manchester and Spooner have not sustained the burden of proof imposed upon them by the law. With great care the Examiner of Interferences and the Board of Examiners have analyzed the testimony in their respective opinions. We are entirely satisfied with their reasoning, and therefore the decision of the Assistant Commissioner must be reversed, and priority of the subject-matter involved in the three interferences awarded to Engle.

Reversed.

BRAUN v. WIEGAND.

(Court of Appeals of District of Columbia. Submitted November 18, 1919. Decided January 5, 1920.)

No. 1271.

1. PATENTS ⊜91(4)—JUNIOR PARTY MUST ESTABLISH PRIORITY BEYOND REASONABLE DOUBT.

   In patent interference cases, where a patent has issued to the senior party before the junior party files his application, the junior party must establish that he is the inventor beyond reasonable doubt.

2. PATENTS ⊜91(4)—PRIORITY OF SENIOR PARTY, EXCEPT AS TO ONE CLAIM, SUSTAINED BY EVIDENCE.

   Evidence in a patent interference proceeding, involving an improved electrical system for wiring in heating devices, regarding the activities of the rival parties, who had worked for the same concern, that the junior party delayed filing his application until nine months after the senior party's patent issued, and for two years after he claimed to have made a disclosure of the device, etc., *held* to establish that the senior party was entitled to priority, except as to one claim.

Appeal from a Decision by the Assistant Commissioner of Patents.

Patent interference proceeding between Edwin L. Wiegand and William A. Braun. From a decision of the Assistant Commissioner of Patents, awarding priority to the senior party, Braun appeals. Affirmed, as modified.

Harry Frease, of Canton, Ohio, and L. C. Wheeler, of Milwaukee, Wis., for appellant.

John B. Hull and Harold E. Smith, both of Cleveland, Ohio, for appellee.

SMYTH, Chief Justice. Braun appeals from a decision of the Assistant Commissioner of Patents awarding priority to Wiegand in an interference concerning the invention of an apparatus for embedding an electric resistance wire in the insulating portion of heating devices, such as the electric sadiron. There are 14 counts, illustrated sufficiently by counts 1, 5, 6, and 9:

1. In an apparatus of the character described, the combination of a base support, a supporting device for a conductor, means for moving said device toward and from the base, and means adapted to remove the conductor from its supporting device and apply it to the base.

5. As a means for applying a conductor to a suitable base, the combination of a plurality of pins whereto the conductor is applied, and means co-operating with the conductor to remove the same from the pins.

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6. As a means for applying a conductor to a suitable base, the combination of a support for a conductor, and means co-operating with the conductor to remove the same from the support.

9. In an apparatus of the character described, the combination of a base support, a base plate having a plurality of pins projecting therefrom on the ends of which the conductor is wound, a stripping plate mounted on the pins and interposed between the conductor and the base plate, means for moving said base plate toward the base support, and means for moving the stripping plate relatively to the base plate to remove the conductor from the projecting ends of the pins.

[1] Both parties claim the invention and rely upon the same reduction to practice, which was accomplished in the shops of their employer, the Dover Manufacturing Company, Dover, Ohio. The problem to be solved, therefore, is one of originality. Wiegand was granted a patent for the invention March 30, 1915, on an application filed January 9, 1914. Braun did not apply for a patent until January 19, 1916. In order, therefore, that Braun may succeed, he must establish beyond a reasonable doubt that he is the inventor. Sharer v. McHenry, 19 App. D. C. 158; Dashiell v. Tasker, 21 App. D. C. 64; Sendelbach v. Gillette, 22 App. D. C. 168; Schmidt v. Clark, 32 App. D. C. 291.

[2] Braun is an electrical engineer, and entered the employ of the Dover Manufacturing Company in April, 1911, and, for aught that appears, is still there. His first work for that company was to design a sadiron embodying an automatic control, for which he had previously secured a patent. This proved so unsatisfactory that the officers of the company became convinced that the iron would have to be improved or its manufacture discontinued.

Wiegand, a young man, became an employé of the same company in June, 1911. He had taken a course in electrical engineering, and, with his brother, had equipped a shop at his home, where he made various electrical devices, such as motors, batteries, etc. In January, 1912, he was assigned to the work of assembling and testing the irons which the company was manufacturing. After awhile he became foreman of the electric flatiron department, and was regarded as an expert in that line.

Braun assigned his application to his employer. Nearly all his witnesses are officers of that company, while Wiegand depends on the testimony of himself, his brothers, and a friend. The evidence is very conflicting; nearly every material statement made by the one side is denied by the other. We must, therefore, test its accuracy by the circumstances surrounding the parties, as well as by things which were done or omitted to be done by them, and about which there is no controversy.

An important consideration in this connection is the fact that the sadirons which the company was manufacturing were totally unsatisfactory, and consequently that it was very anxious to discover an iron which would meet the requirements of the trade. Keeping this in mind, we find that Braun's preliminary statement asserts conception in October, 1911, and disclosure about January 15, 1912. Haug, the general superintendent of the company, testified that in the early part of December, 1911, after the president of the company had strongly ex-

pressed to Braun his dissatisfaction with the latter's first invention, Braun came into the office where Haug was, made sketches, and explained in detail the complete machine of the issue. Yet that machine was not constructed until the latter part of 1912. It appears, also, that before the device disclosed by Braun, according to Haug, was developed, Braun spent several months working on a less satisfactory form, but finally returned to the form first conceived. If Haug's recollection as to the time of the disclosure be correct, why the delay in preparing the structure for the market? Especially pertinent is this inquiry in view of the earnest desire of the company to discover an acceptable device. The trade was waiting for it; the company had it, according to Haug, and yet neglected to construct it and put it on sale. It is claimed on behalf of Braun that there are a number of witnesses who testified that he commenced work upon the machine of the issue in January, 1912; but we do not think their testimony supports the claim. It relates to what is known as the groove type of winding form, which was operated by hand for a little while, and not to the pin type of winding form, which is the invention in controversy.

Wiegand gave much attention to experimental work. Besides the patent in controversy, he had obtained two other patents. It is admitted that he made the working drawings for the machine of the issue. He claims that they were made at his home, while Braun insists that they were made at the factory, under the latter's directions. Wiegand is supported by the testimony of his brother, who says that the drawings were made at his home at night. Another brother testifies that in January, 1912, Wiegand told him that he had a machine figured out which "would bring this wire down, put it in the bottom all at once, something in this style," and illustrated it by bringing his right hand down into his left hand. Wiegand filed his application in January, 1914, and left the company in the summer of that year. This shows that Wiegand had a conception of the invention of the issue before Braun, unless the latter has established beyond a reasonable doubt that he conceived it in 1911 and disclosed it in January, 1912. But he has not done so.

In addition to this it must not be overlooked, because it is in our judgment of much importance, that Braun did not apply for a patent until nine months after Wiegand's patent had issued, and not until over three years after the invention patented by Wiegand was to a large extent in commercial use. Braun knew that Wiegand had applied for a patent and that he had received one; nevertheless he, though he had been seeking earnestly the device of the issue, made no objection whatever at the time. Not only that, but he permitted more than two years to elapse between the date on which he claims to have made a disclosure of the device, and the time of his application for a patent thereon, thus allowing the bar of public use to run against any right that he might otherwise have to a patent. This in itself constitutes strong evidence against him. Sendelbach v. Gillette, 22 App. D. C. 168, 180. All these things, when considered, convince us that, as to all the claims, except No. 6, Braun has not established beyond a reasonable doubt that he is entitled to them.

But with respect to claim 6 we think that he has clearly proven by the required quantum of evidence that the device on which it reads was made and used in January, 1912, prior to the date of conception claimed by Wiegand. There is no limit in it to the pin type of winding form, nor is there any limitation to an organized machine for supporting the form and bringing it down to the base whereon the plastic material is supported. It calls particularly for a means of applying a conductor to a suitable base, including or comprising a support for the conductor, which may be the grooved winding form of Braun's Exhibit 13, and means co-operating with the conductor to remove the same from the support which in Braun's Exhibit 13 may be the movable spider with which the form is provided, and therefore we think that Braun is entitled to this claim.

The decision of the Assistant Commissioner of Patents is affirmed, with respect to all the claims excepting claim 6, and as to it priority of invention is awarded to Braun.

Modified.

SCHEUERLE v. CONNER.

(Court of Appeals of District of Columbia. Submitted November 17, 1919. Decided January 5, 1920.)

No. 1269.

PATENTS ⊂=81—EVIDENCE SHOWING REISSUE PATENTEE ENTITLED TO PRIORITY.

Evidence that the person to whom a reissue patent for polishing bifocal lenses had been issued was using a similar mechanism before the date of conception claimed for the opposing party, and the failure of such opposing party to testify in behalf of the concern owning his application, etc., *held* to show, contrary to the Assistant Commissioner's decision, that the reissue patentee was entitled to priority.

Appeal from a Decision of the First Assistant Commissioner of Patents.

Interference proceedings in the Patent Office between Theophilus D. Conner and Marie E. Scheuerle, administratrix of the estate of Henry A. Scheuerle, deceased. From a decision awarding priority to Conner, Marie E. Scheuerle appeals. Reversed.

A. E. Paige, of Philadelphia, Pa., for appellant.

V. H. Lockwood, of Indianapolis, Ind., for appellee.

SMYTH, Chief Justice. From a decision of the First Assistant Commissioner of Patents, awarding priority to Conner, in an interference, Scheuerle appeals. The invention relates to mechanism for polishing or abrading the major areas of bifocal lenses. A reissue patent emerged to Henry A. Scheuerle July 27, 1915, on an application filed June 8, 1915. He afterwards died, and the interest of his estate in the patent is represented by his widow, Marie E. Scheuerle, as administratrix.

Conner's application was filed May 25, 1912. There are four counts in the issue, of which count 3 is typical. It reads:

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

3. The combination with an annular rotary lap having a central recess, of a rotary holder for the surface to be abraded, means arranged to relatively rotate said lap and holder, and means maintaining the axes of said lap and holder in such angular relation that said recess spans the axis of said holder, in eccentric relation therewith, with said axes intersecting at a center of curvature of said surface, whereby said lap is prevented from abrading the axial region of said surface while it is caused to abrade an annular region of said surface concentric with the axis of said surface, but eccentric with the axis of said lap.

The case turns upon a question of fact. At the very outset we are confronted by these significant things: Conner refused to sign the preliminary statement made on his behalf; it was signed by one Rau, president of the Onepiece Bifocal Lens Company, which owns Conner's application. Conner—who was in Indianapolis when testimony was being taken there in this proceeding, a fact well known to the Lens Company—was not called as a witness in its behalf. It had the right to force his attendance, but it did not see fit to exercise it. This warrants the inference that he, in the judgment of counsel for the company, would not support the claims made in his name.

The earliest date of conception claimed for Conner in the first preliminary statement filed on his behalf is about February 1, 1911, but in an amended statement the date is moved back to August 1, 1910.

The witness Wall, an officer of Wall & Ochs, manufacturers of lenses, testified that in 1906 Scheuerle was employed by his establishment, and at that time "had knowledge of the manufacture of bifocal lenses." Brown, another witness, says that in the spring or summer of 1909 Scheuerle made an abrading tool for use in the preparation of bifocal lenses, and Henry A. Scheuerle, a practical optician, nephew of Scheuerle, the patentee, testified that his uncle was manufacturing bifocal lenses in 1909 at his residence with a mechanism the same as Exhibit K; that "he had several customers, his own patients that he refracted, that he supplied with these lenses." Margath, who seems to be an intelligent witness, supports him with respect to the use, by the elder Scheuerle, of a mechanism like Exhibit K. In short, a careful study of the record satisfies us that, to borrow the language of the examiner of interferences:

"It positively appears that as early as 1909 Scheuerle had made the abrading tool as illustrated in his reissue patent involved in this interference, and that during the Christmas holidays of the same year he had disclosed his method to others, and by February, 1910, had operated his tool and holder in the manner set forth in this issue, and had in 1911 actually sold lenses made thereby."

We do not think the part of the record sent up by the office in response to our writ of certiorari, issued at the instance of the party Conner, was necessary, and therefore the costs of it are taxed against Conner; this being in accordance with the terms of the order for the writ.

The decision of the First Assistant Commissioner is set aside, and priority of invention of the subject-matter in issue is awarded to Scheuerle.

Reversed.

REICHEL v. DORSET.

(Court of Appeals of District of Columbia. Submitted November 14, 1919. Decided January 5, 1920.)

No. 1261.

1. PATENTS ⟸90(5)—OBTAINING HOG CHOLERA PRODUCT WITHOUT TESTING NOT A REDUCTION TO PRACTICE.
Merely obtaining an improved hog cholera product, without testing it by immunizing a hog, does not constitute a reduction to practice.

2. PATENTS ⟸90(4, 5)—FAILURE TO APPRECIATE PATENTABILITY NO EXCUSE FOR NOT REDUCING TO PRACTICE OR APPLYING FOR PATENT.
Failure to appreciate the patentability of an invention does not excuse either failure to reduce it to practice or making timely application for letters patent.

3. PATENTS ⟸91(4)—DUE DILIGENCE NOT SHOWN IN REDUCING TO PRACTICE.
Evidence that a party to patent interference proceedings did not test and reduce to practice his improved hog cholera preparation until a year after he had obtained the product *held* to show, contrary to the Assistant Commissioner's finding, that he had not proceeded with due diligence.

Appeal from a Decision by the Assistant Commissioner of Patents.

Interference proceeding in the Patent Office between John Reichel and Marion Dorset. From a decision for Dorset, Reichel appeals. Reversed.

L. H. Campbell, of New York City, for appellant.

C. W. Boyle and A. J. Decker, both of Washington, D. C., for appellee.

VAN ORSDEL, Associate Justice. The issue in this interference is in four counts, of which counts 1 and 3 are illustrative:

"1. The process of eliminating, from hog cholera 'antitoxin,' the serum albumins, cellular débris fibrin, or living or dead germs by precipitation with chemical precipitants other than those forming insoluble hydroxides and filtration and preserving only the active substances whereby the hog cholera immune bodies and the globulins are obtained, having the characteristics of increasing the resistance of the hog against infection from hog cholera virus or the cause of hog cholera, and adapted to be used either alone or in connection with hog cholera virus or the cause of hog cholera to prevent the disease known as hog cholera in healthy hogs or to cure hogs sick of hog cholera."

"3. As a new substance hog cholera globulin, consisting only of the hog cholera immune bodies and the globulins obtained from hog cholera defibrinated blood antitoxin, having the active substance in concentrated and sterile form."

The invention relates to a process for refining antitoxin for hog cholera and the produce thereby obtained.

The respective dates found by the tribunals below are fully sustained by the record. Appellant, Reichel, conceived the invention October 15, 1913, and constructively reduced it to practice by filing his application April 3, 1914. Dorset conceived the invention in the latter

part of 1912, obtained a product in May, 1913, which was tested and reduced to practice May 16, 1914. The reduction to practice consisted in Dorset sending some of the defibrinated blood antitoxin to Dr. Schroeder at the experiment station at Bethesda, Md., where it was tested by immunizing a hog, and was found to be potent in preventing cholera. Dorset filed his application for patent August 5, 1915.

[1] We are of the opinion that the mere obtaining of the product by Dorset in May, 1913, without a test of its potency by immunizing a hog, does not amount to a reduction to practice. The invention is an important step in a difficult art, and therefore nothing short of a successful test could meet the legal requirements of a reduction to practice.

[2, 3] The diligence of appellee at the time appellant entered the field is the sole question in the case. The Examiner of Interferences held that Dorset was lacking in diligence, and awarded priority to Reichel. He was reversed by the Board of Examiners in Chief and the Assistant Commissioner. Dorset's excuse for his inactivity from May, 1913, to May, 1914, is pressing official duties. He was chief of the Biochemic Division of the Bureau of Animal Industry of the Department of Agriculture. In March, 1913, Congress passed an act requiring the Agricultural Department to inspect all plants producing hog cholera serum and other veterinary biological products. All the field work in connection with this inspection was assigned to Dorset, and he claims that, inasmuch as he was working under orders as a government official, he was not at liberty to lay aside his assigned work and devote his time to testing his invention.

The validity of this sort of excuse depends entirely upon the facts and circumstances of the instant case. If he had perfected the product, as he claims, it would seem that, without any material loss of time or interference with his official duties, he could have done in May, 1913, what he did in May, 1914—send some of the perfected defibrinated blood antitoxin to Dr. Schroeder, at Bethesda, Md., and have it tested.

But the record discloses circumstances which, we think, point more accurately to the real cause of appellee's delay. He did not think the process patentable until Reichel visited his office in May, 1915, and told him that a patent had been allowed on his application. Dorset then caused a protest to be filed against the issuance of the patent, and shortly thereafter filed his application. This resulted in a withdrawal of Reichel's case from issue and the declaration of this interference.

Failure to appreciate the patentability of an invention is no excuse, either for failure to reduce it to practice or to make timely application for letters patent. Dorset allowed one year to elapse between his alleged perfecting of the product and its reduction to practice, during which time Reichel conceived the invention and constructively reduced it to practice by filing his application in the Patent Office. Another year of inactivity on Dorset's part elapsed, until he discovered the allowance of the patent to his rival, when, spurred to activity, he entered his protest and filed his application. While the delay in filing,

had he been diligent in reducing to practice, would not have barred his right to priority, it is a circumstance strongly indicating that lack of appreciation of the patentability of the invention was the real cause of his inactivity, when the law required diligence.

The invention in issue was a development of the work in which Dorset was officially engaged. The government was deeply interested in a discovery which would effectually aid it in its war upon a destructive disease; hence, considering the relation of Dorset to the public service, the delay of one year in sending the product to Dr. Schroeder for test is totally inexcusable.

The decision of the Commissioner of Patents is reversed, and the clerk is directed to certify these proceedings as by law required.

Reversed.

LEE et al. v. VREELAND.

(Court of Appeals of District of Columbia. Submitted November 11, 1919. Decided January 5, 1920.)

No. 1252.

1. PATENTS ⟸106(1)—PRIORITY MAY BE AWARDED ON THE RECORD TO SENIOR APPLICANT.

In patent interference cases, the Commissioner, in proper cases, may award priority on the record to the senior applicant.

2. PATENTS ⟸106(3)—AFFIDAVIT OVERCOMES PRIMA FACIE SHOWING OF SENIOR APPLICANT.

In patent interference proceedings involving wireless receiving systems, an affidavit by the junior applicant, stating that the apparatus disclosed in the earlier application was inoperative, if tested in light of the development of the art at the time the application was filed, etc., *held* to overcome the prima facie record showing of the senior party.

Appeal from the Patent Office.

Interference proceeding in the Patent Office between Frederick K. Vreeland and John W. Lee and John L. Hogan, Jr. From a decision awarding priority to Vreeland, the junior parties appeal. Reversed and remanded.

F. W. Winter, of Pittsburgh, Pa., for appellants.

F. L. Dyer, of New York City, and Melville Church, of Washington, D. C., for appellee.

ROBB, Associate Justice. Appeal from a decision of the Commissioner of Patents in an interference proceeding awarding priority of invention to the party Vreeland upon the record; neither party having taken testimony.

The application of Lee and Hogan was filed on November 16, 1912, and ripened into a patent (No. 1,141,717) on June 1, 1916. Vreeland's application in interference was filed October 27, 1915, or nearly five months after the grant of the Lee and Hogan application, as a division of an earlier application filed January 2, 1907, upon which a

patent was issued September 1, 1917. In the divisional application, Vreeland copied verbatim claims from the Lee and Hogan patent. The contention of Lee and Hogan is that the apparatus disclosed by Vreeland in his early application is inoperative, and that their motion for leave to take testimony to that effect should have been allowed; in other words, that, in the circumstances of the case, Vreeland was not entitled to an award of priority on the record.

The invention relates to an improvement in wireless receiving systems, and particularly for receiving persistent and continuous waves. It is conceded that this is a highly technical subject-matter, in which very slight changes and modifications may be of great importance, and it clearly appears that there has been a very decided advance in the art since the filing of Vreeland's original application. Moreover, it should be observed, that, the claims having originated with Lee and Hogan, they must be given an interpretation in harmony with that patent.

Under the view we have taken of the case, we do not deem it necessary to do more than set forth the substance of the affidavit which Lee and Hogan filed to overcome the effect of Vreeland's original filing date. In that affidavit it is stated that an apparatus like that shown in Vreeland's early application had been constructed by the affiant and had been found to be inoperative, that the Vreeland battery is short circuited around the detector, and that if there were assumed such values of the elements of the circuit as prevailed in actual practice, and hence were known to those familiar with the art, the device would not be operative. Vreeland, both in the Patent Office and in the argument at bar, did not seriously contend that his early device as shown was operative for practical purposes, but he did contend that it could have been made so by a skilled mechanic. The Examiner of Interferences ruled that the affidavit of Lee and Hogan stopped short of showing that, by assuming values other than those commonly used, the Vreeland structure would not operate. The Examiners in Chief were of the view that—

"The accuracy of the conclusions of neither party, based on the conditions assumed by him, can be assailed. The question is a practical one, depending largely upon how far in an actual system we may depart from the theoretical value of a zero resistance in the resonant circuit without seriously interfering with the operation of the system," etc.

The Commissioner, while expressing some doubt as to certain of the conclusions reached by the lower tribunals, accepted those conclusions.

[1, 2] The authority of the Commissioner to award priority on the record to the senior applicant in a proper case is settled. Ewing v. Fowler Car Co., 244 U. S. 1, 37 Sup. Ct. 494, 61 L. Ed. 955. In that case the applicant last to file *had copied the claims of the earlier applicant,* and failed to "intimate the existence of any circumstances which would overcome the priority of invention as determined by the difference in times of the conception of the contending applicants. * * * There was not only the precedent conception," said the

court, "but there was its expression in claims; and that it was practical, a useful gift to the world, petitioner concedes by adopting the claims. There were, therefore, all of the elements of a completed invention—one perfected before the filing of petitioner's application."

The present invention, as we have stated, relates to an obscure and highly technical art. The claims of the later applicant were copied by Vreeland, and the later applicant has filed an affidavit to the effect that the apparatus disclosed in the early application, if tested in the light of the development of the art at the time that application was filed—that is, in 1907, instead of 1916, the date of the affidavit—is inoperative. The affidavit further alleges that certain changes in the apparatus amounting to invention are essential to operativeness. We are of the view that, in the circumstances of the case, the affidavit overcame the prima facie showing of the senior party.

The decision is therefore reversed, and the case remanded for a trial on the merits.

Reversed and remanded.

COMMERCIAL SECURITY CO. v. HOLCOMBE.
In re E. E. FORBES PIANO CO.

(Circuit Court of Appeals, Fifth Circuit. January 7, 1920.)

No. 3429.

1. BANKRUPTCY ⊜210—COURT HAS JURISDICTION TO ADJUDICATE LIEN CLAIM.
An order of a referee, requiring a holder of notes and accounts receivable of a bankrupt to turn the same over to the trustee for collection, transferring the claim of the holder to a lien to the proceeds, and expressly reserving the right to afterwards pass on the validity of the claim, the holder being present by attorney and assenting, *held* to give the bankruptcy court jurisdiction over the claimant to adjudicate its claim.

2. SALES ⊜6—CONTRACT CONSTRUED AS PLEDGE AND NOT PURCHASE OF PAPER.
Transactions by which bankrupt, a dealer in musical instruments, transferred paper taken from its customers to claimant under a contract in accordance with which claimant advanced 70 per cent. of its face and agreed to pay 20 per cent. more on collection, where bankrupt was required to pay interest on such sums, to meet payments on the paper when due, and collected and kept the proceeds of actual payments by the makers, with the privilege of substituting other acceptable paper, or of taking up any paper by payment, *held* not sales of the paper, but a pledging as collateral for loans.

3. USURY ⊜57—REPLEDGING COLLATERAL FOR PLEDGEE'S USE NOT BROKERAGE TRANSACTION, WARRANTING CHARGE OF USURIOUS RATE.
That a pledgee of collaterial repledges the same to secure money borrowed by itself and used in carrying on its business does not make it the agent of the pledgor in such transaction, nor justify the taking of usurious interest.

4. USURY ⊜72—PLEDGE OF NOTES IN CONTINUOUS DEALING UNDER CONTRACT FOR LOANS NOT SEPARATE TRANSACTIONS.
Where a large number of notes were pledged from time to time to secure loans under a contract for continuous dealing, which gave pledgor the right to take up or replace any note separately, the transaction was not for that reason a separate one as to each note, but a single continuous transaction of lending, and was not closed as to a note when it was taken up or replaced by another, so as to cut off the defense of usury.

5. USURY ⊜100(1)—ONLY FINAL SETTLEMENT IS BAR TO DEFENSE.
Under a contract for loans on pledged notes, by which pledgee advanced 70 per cent. of the aggregate face value of notes pledged and agreed to pay 20 per cent. additional on payment, with right in the pledgor to pay and take, up any single note, where on such payment of a note no part of the retained 20 per cent. was paid, the transaction was open to the defense of usury until final settlement.

Appeal from the District Court of the United States for the Northern District of Alabama; William I. Grubb, Judge.

In the matter of the E. E. Forbes Piano Company, bankrupt; J. H. Holcombe, trustee. From an order of the District Court, the Commercial Security Company appeals. Affirmed.

Forney Johnston and W. R. C. Cocke, both of Birmingham, Ala., for appellant.

Borden Burr, Claude D. Ritter, and D. K. McKamy, all of Birmingham, Ala., for appellee.

Before WALKER, Circuit Judge, and FOSTER and EVANS, District Judges.

WALKER, Circuit Judge. This is an appeal from a decree confirming an order made by the referee in bankruptcy which adjudged that the appellant, Commercial Security Company, an Illinois corporation, restore and pay back to the appellee, the trustee in bankruptcy of E. E. Forbes Piano Company, the sum of $12,893.41, which amount had been paid to the appellant pursuant to an order which provided that the court reserved the right, for the purpose of a correct, proper, and legal administration of the estate in bankruptcy, to order the restoration in part or in whole of sums so paid; that the appellant surrender and deliver to the trustee in bankruptcy designated assets and papers found to belong to the bankrupt estate; and that the appellant pay the costs of the proceeding, instituted by the trustee in bankruptcy, in which the order in question was made. The order followed findings to the effect that transactions by which the appellant had acquired from the bankrupt, which had been engaged in the business of leasing and selling pianos and organs, notes and other obligations made to the latter by its customers, were in the nature of pledges or hypothecations to secure the amounts of loans made by the appellant to the bankrupt at usurious rates of interest, and that payments made to the appellant prior to the bankruptcy amounted to $4,062.71 in excess of the amounts lent by it to the bankrupt with legal interest thereon.

[1] In behalf of the appellant it is contended that the court had not acquired jurisdiction of the appellant for the purpose of making such an order as the one appealed from. The appellant was present by its attorneys of record at the first meeting of the bankrupt's creditors. At that meeting, with the consent of all parties present, the referee made an order which contained the following provisions:

"(3) The said trustee is authorized, empowered, and directed to proceed to collect all accounts, notes, claims, and demands receivable, and to incur the reasonable expenses thereof, and wherever any person, firm, or corporation has, or claims to have, any lien or claim upon any such accounts, notes, claims, or demands receivable, the lien or claim of such person, firm, or corporation shall be transferred as of this day, and in precisely the same plight and condition as such lien or claim now stands, to the money or other thing of value which may so be collected by the trustee, and if anything but money be so collected and resold or converted, then to such and subsequently received proceeds; but as to each such collection or substitute or the proceeds thereof, all such expenses, including an equitable apportionment of the general costs and expenses of the administration and of this proceeding, the part represented by such lien or claim shall bear its own burden or part and the excess or balance remaining of each such part upon which lien or claim is or may be asserted shall be subjected to the satisfaction of such claim or demand after the legality thereof shall be finally determined by this court; but that any person, firm, or corporation, including the trustee, who or which may consider himself or itself aggrieved, shall have the right of review, appeal, or benefit of any or all appellate proceedings which otherwise are now authorized by law.

"The intent and purpose of the foregoing and of the next succeeding paragraph is to authorize and empower the trustee to collect and liquidate all of the assets and estate of the bankrupt, or in which the bankrupt or this estate has any claim, title, or right, legal or equitable, and to impose upon that portion of each collection upon which any other person, firm, or corporation has, or claims to have, any lien, claim, or demand a proportionate share of the expenses of making such collection, including the necessary general costs and expenses of administration under this proceeding in bank-

ruptcy, but without prejudicing and without adjudicating at the present time the legality or validity or the extent of any such claim or demand of any such person, firm, or corporation, but as to each item of balance or excess over the claim or demand of each and every such person, firm, or corporation, respectively, shall stand in precisely the same plight and condition as such claim or demand now stands in reference to the property or thing from which the excess or balance may be derived. The trustee shall from time to time make application for instructions and orders for distribution, including these balances upon which there may be liens or claims, or of or concerning which he has any information, whether obtained before bankruptcy or afterwards, that any person, firm, or corporation has, or claims to have, any lien, claim, or demand, of the hearing of which applications the person, firm, or corporation shall be given ample notice by the court; and any such person, firm, or corporation may at any time itself make such application, and no matter what the form of application, whether by petition, motion, or otherwise, the making of such application shall, for the purpose of the hearing and of the disposition thereof, be construed and considered as if having been made by the trustee as the actor in procuring the action of the court with reference thereto.

"(4) Commercial Security Company, Hamilton Investment Company, and Empire Security Company, each of Chicago, Ill., and J. H. Shale trustee of New York City, each claim to be the holder of certain papers or security originally delivered to them, respectively, by the bankrupt in the conduct of its business, each of which securities held by them, respectively, purports to cover, or carry title to, certain musical instruments described in each such paper and each of which consents, with the same provisions, limitations, and burdens expressed in numbered paragraph next supra, that the said trustee proceed to collect from the obligors under said papers, using his best judgment in making such collections in money or any other thing of value from such obligors.

"Nothing herein in this paragraph, or in this order anywhere contained, shall be construed as a general appearance by said Commercial Security Company, Hamilton Investment Company, Empire Security Company, J. H. Shale, trustee, Bank of Cody, Smith & Barnes, Bush & Gerts, and French & Sons, the appearance of whom is limited expressly to the making of this order and the terms and provisions hereof.

"(5) The trustee will keep a separate account of all collections, whether of money or other thing of value, and of all substitutes for such other things of value, in each instance where any lien or claim is made, or which has come to his attention before or after bankruptcy and the proceeds of such collections shall be distributed as herein provided, and as may be hereafter ordered by this court in this proceeding."

Following the making of the agreement evidenced by the order just quoted from, the appellant delivered to the trustee sundry notes for pianos and organs and piano and organ leases and mortgages given to the bankrupt and acquired from it by the appellant, and thereafter for more than a year continued to deliver to the trustee for collection all such paper called for by the trustee, and the trustee proceeded to make collections on those papers and on other claims in favor of the bankrupt. After the trustee had in this way realized a considerable sum of money, and before any decision by the court on the question of the legality of appellant's claim to notes, etc., acquired by it from the bankrupt had been made, the court, on the petition of the appellant and others, made the above-mentioned order, under which the trustee paid to the appellant the amount which the decree appealed from ordered the latter to restore and pay back. By the terms of the order in pursuance of which the appellant delivered to the trustee notes, etc., made to the bankrupt by its customers, the appearance of the appellant in the bankruptcy proceeding was limited "to the making of this order and

the terms and provisions hereof." Included in the "terms and provisions" referred to were an authorization to the trustee to collect all accounts, notes, etc., payable to the bankrupt to which the appellant asserted any claim, and a consent that the question of the legality of the appellant's claim to those notes, etc., or collections thereon, be determined by the court making the order consented to. It does not seem to us to be fairly open to question that the appellant submitted itself to the jurisdiction of the court, so far as concerns the enforcement of its agreement to deliver to the trustee notes, etc., made to the bankrupt and held by the appellant, and the determination of the legality of appellant's claim to or against assets administered or agreed to be administered by the trustee in bankruptcy. The decree appealed from did not embrace any matter as to which the appellant had not consented to the court's exercise of jurisdiction. Plainly the court's jurisdiction so assented to was not exhausted by a payment made to the appellant under the above-mentioned order, containing a reservation to the court of the right to require a repayment to the trustee of the sum so conditionally disbursed.

[2] During several years, commencing in 1910, the appellant had dealings with the bankrupt, with the result that the former acquired many so-called "piano contracts" made to the latter by its customers for the whole or deferred parts of the price of pianos or organs sold or leased. Those dealings were, except as stated below, in pursuance of the terms of three substantially similar written contracts entered into successively between the appellant and the bankrupt—the first one on August 16, 1910, for the period of one year from its date; the second one on August 16, 1911, for a like period; and the third one on August 16, 1912, which provided that it should remain in force until terminated by two months' written notice—such termination not to affect or impair any obligation given under the contract then in force. Those contracts did not obligate the appellant to acquire paper offered by the bankrupt, but stated the terms on which appellant would acquire such offered paper as was acceptable to it. By the terms of the contracts mentioned the transactions provided for were called "sales"; the price stated being 90 per cent. of the face value of the paper accepted, 70 per cent. of such face value being payable in cash, and 20 per cent. thereof to be retained by the appellant until the assigned paper was paid off, the appellant having the right to apply any money in its possession belonging to the bankrupt to the payment of installments due on assigned paper in default, the bankrupt agreeing promptly to repurchase at par of the uncollected part of paper in default, or to substitute therefor other like acceptable paper of equal value and to pay in cash for such portions as shall then be in default. The bankrupt was to pay all expenses of making collections on paper assigned, and guaranteed the payment of such paper. It was stated in the contracts disclosing the basis of dealings between the parties that they were made upon representations in writing concerning the financial responsibility of the bankrupt.

While those contracts provided that the subjects of them were to be contracts drawing interest at the rate of 6 per cent. per annum, the

provision as to the rate of interest called for by assigned paper was ignored; the practice followed being that the appellant accepted paper offered without regard to the rate of interest it bore, some of it bearing no interest at all, and most of it bearing interest at the rate of 8 per cent. per annum. The course of dealing was as follows: From time to time the bankrupt made offerings of a number of "piano contracts," listed and serially numbered on forms provided by the appellant. Upon acceptance of the papers so offered the appellant would pay 70 per cent. of the amount unpaid thereon, by a deposit in a Chicago bank to the credit of the bankrupt, and would set aside an additional 20 per cent. in what was termed a reserve fund. Every month the appellant sent to the bankrupt a bill for interest on the "entire line carried" at the rate of 6 per cent. per annum, deducting interest at the same rate on the amount in the 20 per cent. reserve fund. The bankrupt would pay the interest called for by the bill, without regard to what it had collected from its customers on the paper assigned. Twice a month the bankrupt would remit to the appellant the amount due on paper transferred. If the amount due each month was not paid by the makers of the papers, the bankrupt had to pay such amounts out of its general funds. Moneys collected by the bankrupt from its customers was deposited in bank to its own credit, and, with the knowledge and consent of the appellant, was treated as belonging to the former. Whenever a transferred paper was in default, the bankrupt substituted other like paper or paid in cash the amount in default. The appellant had no dealings with the makers of the transferred paper, not even notifying them of its transfer, and never attempted to collect from them the amount due on such paper in default.

That the transactions in question were not sales, but were loans secured by the transferred paper as collateral, is persuasively indicated by a number of attending circumstances, among them the following: That the bankrupt had the right to reacquire the paper by paying the amount it called for, with interest thereon, the aggregate being an amount in excess of that paid, or in any event to be paid, by the appellant; that the bankrupt was to, and did, pay all expenses of making collections on the paper, and was treated as the owner of it, except in so far as was required to give the transfer the effect of enabling the appellant to hold it until the amount it called for, with interest thereon, was paid to the appellant; that the bankrupt paid 6 per cent. per annum interest on the amounts owing on the paper, whether it bore interest or not; and that as to most of the transferred paper, namely, that part of it which bore interest at a rate in excess of 6 per cent. per annum, the bankrupt was recognized, after the transfers were made, to be the owner of part of the amount owing on such paper, the right to retain as its own property, free of any claim in favor of the appellant, so much of the interest collected as was in excess of 6 per cent. being admitted.

The nature of a transaction is determined, not by the name given to it by the parties, but by its operation and effect. That a transfer of paper evidencing indebtedness payable after the date of the transfer, and which does not include any interest, is not a sale, is quite obvious,

when the transferor is required to pay to the transferee interest on the amount owing on such paper before anything is payable by maker, and the transferor has the right to reacquire the paper by paying to the transferee the sum it calls for with interest thereon. That such transactions as those under consideration are loans has been decided in several recent cases, among them the following: In re Grand Union Co., 219 Fed. 353, 135 C. C. A. 237, certiorari denied Hamilton Investment Co. v. Ernst, 238 U. S. 626, 35 Sup. Ct. 664, 59 L. Ed. 1495; Home Bond Co. v. McChesney, 239 U. S. 568, 36 Sup. Ct. 170, 60 L. Ed. 444; National Trust & Credit Co. v. F. H. Orcutt & Son Co., 259 Fed. 830, —— C. C. A. ——. The contract which was the basis of the dealings between the parties in the first-cited case, a copy of which is set out in the report of that case, is identical in its terms with the above-mentioned contracts between the appellant and the bankrupt.

[3] In behalf of the appellant it is contended that the evidence as to the disposition made of the transferred paper by the appellant discloses a material difference between the facts of the instant case and those of the cases above cited. That evidence showed that the appellant, by using the transferred paper as security for bonds issued by it, acquired the money required to enable it to carry on the business of purchasing and marketing such paper as that offered by the bankrupt. It is urged that, though the difference between the appellant's possible outlay and what it was to realize from the transferred paper amounts to more than legal interest, the appellant was entitled to contract for the payment of such difference, because it included compensation in the way of brokerage for the service rendered in marketing the paper. In pledging the transferred paper to secure its own obligations the appellant acted for itself, not as a selling or borrowing agent of the bankrupt. It acquired and held that paper in its own right, whether as owner or as pledgee. As to that paper the relation of principal and agent did not exist between the bankrupt and the appellant. The latter's exaction of more than legal interest is no more justifiable than would be a banker's reservation of more than the allowable discount on the ground that he had to rediscount paper so acquired to be enabled to carry on the business of discounting. One cannot charge another for a service he renders to himself. There can be no brokerage, where there is no broker or agency. Home Bond Co. v. McChesney, supra.

[4] It is contended that each transfer of a piece of "piano paper" was a separate transaction, and that as to such of those transactions as were settled by payment of the amount called for by the paper, or by substituting other paper in lieu thereof, they were so closed as not thereafter to be open for the purpose of the elimination of the usurious charges which figured in them. It is true that a separate account was kept as to each paper transferred, which showed what was paid on that particular paper (all payments being on specified paper), when it was in default, and when it was redelivered to the bankrupt upon payment in full, or upon default and other paper being delivered in lieu of it. From the fact that an account is kept as to each piece of paper pledged as collateral, so as to disclose the occurrence of any default

in the payment of the debt evidenced by that paper, and to indicate when the substitution of other collateral is desirable, it does not follow that that paper is unrelated to other paper similarly pledged, or that the pledging of it was a transaction separate and independent of the pledging of other like paper, either at the same time or in the course of continuing dealings consisting of advancements made on such security as it is offered from time to time. The dealings between the parties were such as to afford ground for treating them as constituting one continuous transaction of lending or advancing money secured by successive pledges of assigned paper; there being substitutions of collateral from time to time, part of the amount payable by the appellant for or on any paper accepted being retained by it with the right of applying what was so retained on debts evidenced by other like paper. Dorothy v. Commonwealth Co., 278 Ill. 629, 116 N. E. 143, L. R. A. 1917E, 1110.

[5] Whether the dealings are so regarded or not, or whether the acquisition of each piece of paper or the acceptance of each offering of a number of such papers together is considered to have been a separate transaction, a material feature of each of the transactions was the reservation by the appellant of 20 per cent. of the amount owing at the time on the paper offered and accepted. Such a transaction could not properly be regarded as settled and closed so long as the reserved 20 per cent. is not paid or applied pursuant to requirements of the contract. Until that is done an obligation imposed on the appellant by the transaction remains undischarged. The practice of redelivering transferred paper when paid off, without paying or applying the reserved part of the amount it called for, indicates an absence of intention to close the transaction by which that paper was acquired, and was hardly consistent with the existence of an understanding that that transaction was separate from and independent of other similar ones. To support the claim made in behalf of the appellant that many of the transactions had been finally settled and closed, with the result that they could not be reopened because of usury, it was incumbent on it to show that the amount it reserved when the paper was acquired by it had been paid or accounted for. There was no evidence negativing the conclusion that the amounts so reserved by the appellant remained in its hands without having been applied in pursuance of the contract. In the absence of such evidence it may be presumed that the transactions remained open so far as concerns the payment or application of the amounts retained or reserved by the appellant.

The transactions remaining open and unsettled as to a material feature of them, they were open for the purpose of eliminating usurious charges involved in them, and of ascertaining whether the secured debt or debts, with legal interest thereon, had been paid, with the result of extinguishing appellant's right to the pledged collateral. The evidence was such as to justify the finding that the appellant had been paid the amounts owing to it, including legal interest, before its receipt of the amount ordered to be repaid. As the decree appealed from did not require the payment by the appellant of the amount found to have been that of the overpayment to it prior to the bankruptcy, there

is no occasion to inquire as to the propriety of the amount of that finding.

What has been said disposes of the grounds of complaint against the decree appealed from which seem to us to call for discussion or comment. The conclusion is that on no ground urged is that decree subject to be reversed.

It is affirmed.

BAIN v. UNITED STATES.*

(Circuit Court of Appeals, Sixth Circuit. January 6, 1920.)

No. 3301.

1. CRIMINAL LAW ⟸935(1)—GRANTING NEW TRIAL FOR INSUFFICIENCY OF EVIDENCE IN DISCRETION OF COURT.

In a criminal case, it is not a trial court's legal duty to grant a new trial, when he is not himself satisfied that the evidence establishes guilt beyond a reasonable doubt; but he may deny a new trial, unless convinced that reasonable men could not have considered the evidence to have established accused's guilt beyond a reasonable doubt.

2. WITNESSES ⟸298—DEMANDING ACCUSED'S PRODUCTION OF PAPERS REQUIRES DEFENDANT TO TESTIFY AGAINST HIMSELF.

In a prosecution for defrauding a national bank, a demand that accused produce certain checks and drafts which the bank should have returned to him *held* erroneous, because equivalent to an attempt to compel accused to testify against himself.

3. CRIMINAL LAW ⟸1168(1)—DEMAND THAT ACCUSED PRODUCE EVIDENCE AGAINST HIMSELF NOT REVERSIBLE ERROR.

In a prosecution for defrauding a national bank, the error in demanding that accused produce certain checks and drafts for use against him does not require reversal, where the court directed the jury to disregard the demand, secondary evidence established many of the checks and drafts involved, and defendant later offered in evidence all the checks and drafts in his possession.

4. BANKRUPTCY ⟸242(2)—CROSS-EXAMINATION ON TESTIMONY UNDER BANKRUPTCY ACT.

Under Bankruptcy Act, § 7, cl. 9 (Comp. St. § 9591), providing for an examination of the bankrupt, which shall not be offered in evidence against him in a criminal proceeding, etc., an accused, on trial for defrauding a national bank, is not subject to be cross-examined regarding his testimony on his bankruptcy examination.

5. CRIMINAL LAW ⟸1043(1)—OBJECTION TO ADMITTING DEPOSITION INSUFFICIENT.

In a prosecution for defrauding a national bank, objection that a deposition of accused in the bankruptcy court was not the best evidence, and the final objection that it was incompetent, do not save for review the point that Bankruptcy Act, § 7, cl. 9 (Comp. St. § 9591), precluded such testimony from being used against the bankrupt, since the general objection that the deposition was incompetent must have been supposed to relate back to the objection that it was not the best evidence.

6. BANKRUPTCY ⟸242(2)—NECESSITY OF OBJECTING TO BANKRUPTCY DEPOSITION.

Bankruptcy Act, § 7, cl. 9 (Comp. St. § 9591), providing that a bankrupt's testimony shall not be offered in evidence against him in criminal proceedings, does not obviate the necessity of objecting to such testimony when offered.

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

*Certiorari denied 251 U. S. —, 40 Sup. Ct. 396, 64 L. Ed. —.

7. CRIMINAL LAW ⟸1186(4)—ERROR IN ADMITTING ACCUSED'S DEPOSITION AGAINST HIM NOT PREJUDICIAL.

In a prosecution for defrauding a national bank, the erroneous admission of accused's deposition, taken under Bankruptcy Act, § 7, cl. 9 (Comp. St. § 9591), does not require reversal, where accused did not deny anything important developed in the deposition, as Judicial Code, § 269 (Comp. St. § 1246), as amended by Act Feb. 26, 1919, requires judgment to be given without regard to technical errors not affecting substantial rights.

In Error to the District Court of the United States for the Middle District of Tennessee; Edward T. Sanford, Judge.

Arthur Bain was convicted of defrauding a national bank, and he brings error. Affirmed.

Bain was a business man who, for a series of years, had dealings with a neighboring national bank. When the bank failed, its cashier and manager claimed that he had paid over large sums to Bain, by honoring checks and drafts which were not covered by any funds on deposit, and by paying cashier's checks and certificates of deposit which had been issued to Bain without consideration. The cashier and Bain were indicted for conducting these transactions with intent to injure and defraud the national bank. The cashier seems to have pleaded guilty. Bain was convicted, and brings this writ of error. The assignments of error all pertain to the admission of evidence, and all, except two, were abandoned on the argument in this court. These two, and one alleged error, not assigned, constitute the matters for decision.

A. M. Tillman, and J. C. McCall, both of Nashville, Tenn., for plaintiff in error.

Lee Douglas, U. S. Atty., of Nashville, Tenn.

Before KNAPPEN, DENISON, and WARRINGTON, Circuit Judges.

DENISON, Circuit Judge (after stating the facts as above). 1. One of the grounds of a motion for new trial, overruled by the trial judge, was that the verdict was not supported by the evidence. As to this, the trial judge said:

"The verdict is sustained by material evidence, and is not manifestly against the weight of the evidence, so as to require or warrant its being set aside."

While it is not claimed that we could or should review the discretion of the trial judge in passing upon the motion for new trial, it is urged that he misconceived his legal duty, and thus committed reversible error. This ground of error is not assigned; but, if there was error in this respect, which was plain and clear, we should be inclined to notice it under rule 11 (202 Fed. viii, 118 C. C. A. viii), and accordingly we have considered this complaint.

[1] Counsel's proposition is that, if the trial judge is not himself satisfied that the evidence shows defendant's guilt beyond a reasonable doubt, it is his legal duty to set aside the conviction and give a new trial; that what the judge said in this case indicated his own belief that the evidence was not of this compelling character; and that there was no room for the exercise of his discretion, since, by

his conclusion, he had removed the foundation therefor. We think this position untenable, and that there was no error, even if it should be assumed that the personal opinion of the trial judge was as is thus supposed. It is, of course, within the discretion of a trial judge to grant a new trial, if he thinks that, in a civil case, the jury disregarded the preponderance of evidence, or that, in a criminal case, the evidence lacks that degree of persuasiveness without which there should be no conviction; but we do not understand that his imperative legal duty in this respect, apart and distinct from his discretionary rights and duties, is different from that of an appellate court, nor that he must set aside a verdict merely because he thinks it is not the right one under the evidence; and it follows that it cannot be said to be his legal duty to set aside a conviction, unless he is convinced that no reasonable man can think the evidence sufficient beyond a reasonable doubt—in other words, unless he concludes that the verdict was not supported by any substantial evidence, in the sense in which that phrase must be used in connection with the necessity of proof beyond a reasonable doubt. See Kelly v. U. S. (C. C. A. 6) 258 Fed. 392, and cases cited on pages 406, 407, —— C. C. A. ——.

The general principle may be illustrated by the familiar case where the trial judge sets aside a verdict in a civil case because it is against the weight of the evdence, and, upon another trial before the same judge and upon the same evidence, another jury renders the same verdict. Undoubtedly, he may, as he often does, consider this history as a sufficient reason for disregarding his still persisting individual opinion about the evidence, and for refusing another trial; and this practice demonstrates that the opinion of the judge upon that subject does not, as matter of law, constrain him to grant a new trial accordingly. There is nothing in this record to show that the trial judge had found the evidence so insufficient as to deprive him of his ordinary discretionary power.

[2, 3] 2. Many of the transactions involved, during the long period of time covered, depended upon Bain's checks and drafts which, in due course of business, would have been returned by the bank to him. The prosecution was prepared to give secondary evidence regarding their contents, and undertook to lay the basis therefor by demanding that Bain produce the originals of these as well as of his unpaid checks and drafts. It is sufficient to say that the manner of the demand and the proceedings had in connection therewith clearly constitute error, in that they amounted to an attempt to compel the respondent to testify against himself, within the definition fixed by this court in McKnight v. U. S., 115 Fed. 972, 54 C. C. A. 358. It ought to be said that not until after the proceedings had reached this stage was the attention of the court called to the particular objection, nor—apparently—did it occur to defendant's counsel. When the objection was made and had been considered, the court said to the jury:

"Under the constitutional right of defendant, that notice [to produce original checks and drafts] should not have been given, and the court was in error

in making the suggestion and permitting the notice to be given in your presence, and that action is withdrawn. That notice goes for nothing. You are not to draw any inference as to whether the defendant has or has not these vouchers in his possession. There is no inference to be drawn against him, if it appears that he does not produce them later in the trial. The government proceeds to prove its case and [the defendant was not required to make the production] and no inference whatever is to be drawn from his failure to do so. You understand that. Expunge that matter from your minds as though you had not heard it."

We do not find that any exception was saved to the earlier action of the court in permitting the demand, nor to any supposed insufficiency of the effort thus made by the court to cure the error; and yet we do not depend solely upon that ground for concluding, as we do, that there was no reversible error. Plainly, the trial court did everything possible to neutralize the false step which had been made. The argument of counsel is that the injury was past remedy, since it was impossible for the jury to expunge from their minds the things which they had seen and heard. See comment to that effect in Gillespie v. State, 5 Okl. Cr. 546, 115 Pac. 620, Ann. Cas. 1912D, 259, 35 L. R. A. (N. S.) 1171. Every such case must depend upon its own circumstances as to whether the net result is reversible error; and we therefore look further into the record. The case is one where ample secondary evidence was at hand to prove many of these checks and drafts, and some evidence as to all of them, and there are no suggestions that this secondary evidence was attacked or questioned. The inference that many of these originals had come into Bain's possession, and that he could or would produce them or account for their absence, if he questioned anything shown by the bank books, would be so natural in the minds of all men that we doubt whether it could be regarded as either created or strengthened in the minds of this jury by the demand which was made.

Later in the trial, and as a part of his defense, Bain produced all that he had of these same checks and drafts, and offered them in evidence; and while, under many circumstances, such a production and offering could not be called voluntary, after what had occurred, yet we have no substantial doubt that he would have produced and offered them just the same, if the objectionable demand had never been made. Further, it cannot be said that the evidence covered by the demand was "highly incriminatory." Having this view of the practical situation, we cannot think that Bain was, in the end, substantially prejudiced by the erroneous view which the court temporarily and briefly held and expressed. For instances where it was thought that such an error might be sufficiently cured, see Wilson v. U. S., 149 U. S. 60, 67, 68, 13 Sup. Ct. 765, 13 L. Ed. 650, and Dunlop v. U. S., 165 U. S. 486, 489, 17 Sup. Ct. 375, 41 L. Ed. 799, and People v. Gibson, 218 N. Y. 70, 112 N. E. 730, Ann. Cas. 1918B, 509.

3. At some time prior to the trial, Bain had gone into bankruptcy and had submitted to an examination, pursuant to section 7 (9) of the Bankruptcy Act (Act July 1, 1898, c. 541, 30 Stat. 548 [Comp. St. § 9591]). His deposition had been written out and signed by him and

deposited with the clerk of the bankruptcy court. The original deposition was not available, but, upon the trial of this indictment, the district attorney had a copy of the deposition, certified by the clerk of the bankruptcy court, and offered it in evidence. Eventually, the entire deposition was received in evidence and filed; but no portions of it were read to the jury, excepting those portions which were read to Bain on cross-examination when he was testifying as a witness in his own behalf, and the reading of each portion to him was accompanied by the question whether he did not so testify upon his bankruptcy examination. In each case he said he did. In each of these instances, no objection was made to this use of a portion of the deposition; but it is fairly to be inferred that it had been the intention of all parties to save such questions as they desired to save upon this subject while the admission of the entire deposition was being considered, and we therefore overlook the absence of any specific objection at the later times, when alone the use of these portions could have been prejudicial.

[4] The substantial objection now urged is that the same paragraph of the Bankruptcy Act which authorizes this examination (section 7, cl. 9) concludes:

"But no testimony given by him shall be offered in evidence against him in any criminal proceeding."

Obviously, the use permitted of this deposition was erroneous, and we have only to decide whether objection was properly saved for our consideration, and whether there was substantial prejudice.

[5] It is plain that the thought that the statute itself forbade this use of the deposition never occurred, either to counsel or the court, until motion for new trial was made. At first, it was specifically objected that the certified copy was not the best evidence. Eventually, this was withdrawn, and it was agreed that the copy should be considered as if it were the original. Still the objection was made that it was not the best evidence, but that the testimony should be proved by some one who heard it given. In one form or another, this claim was insisted upon at several different times, and though, upon the final conclusion of the court to admit the deposition, it was objected to as "incompetent," there was still no suggestion as to why it was incompetent, except for the reason which had already been given.

Such a record, showing that the objection was rightly overruled so far as concerns the only reason then urged in its support, does not call upon us to reverse a judgment because counsel have later discovered another and a better reason. It may well be said, as it has been (Johnson v. U. S., 163 Fed. 30, 31, 89 C. C. A. 508, 18 L. R. A. [N. S.] 1194), that where an objection in general words must have been understood by counsel and by court to be for a particular reason, because that reason was well known and no other was suggested, the objection will be considered sufficiently definite to base error upon; but that is not this case. Here the objection that the testimony was incompetent had been based upon a special reason strenuously urged, and all the circumstances contradict any infer

ence that either court or counsel could have supposed it to rest upon the objection now urged. See Davis v. U. S. (C. C. A. 6), 107 Fed. 753, 757, 46 C. C. A. 619.

[6, 7] Objection by defendant was necessary. True, the statute says the deposition "shall not be offered"; but we cannot construe this language as obviating the right to use by consent, nor the inference that consent is to be implied from lack of objection. Burrell v. Montana, 194 U. S. 572, 577, 24 Sup. Ct. 787, 48 L. Ed. 1122. If we should hesitate to consider this alone an arbitrarily sufficient reason for refusing to disturb a conviction, we would again look into the record to discover how much Bain was hurt by the use of this deposition. It is difficult to find any substantial injury. It does not seem that, as a witness on this trial, he questions or denies anything important that developed in the deposition, or that there was really, in the end, any dispute of fact which was materially affected by anything read to the jury out of the deposition. Such inconsistencies as there were are too trifling to justify thinking that the jury gave any force to them.

A reasonable probability (to say the least) that this error need not be thought prejudicial under the practice formerly prevailing in the federal appellate courts becomes a certainty in view of section 269 of the Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1163 [Comp. St. § 1246]), as amended February 26, 1919, c. 48, 40 Stat. 1181.[1] It is now provided that judgment shall be given upon a writ of error "without regard to technical errors, defects or exceptions which do not affect the substantial rights of the party." Under this section, it must at least be true that there cannot be, from the mere existence of error, any effective presumption of prejudice, when the appellate court is able to say from the record that it is not reasonable to infer that the substantial rights of the plaintiff in error have been injuriously affected. West v. U. S. (C. C. A. 6), 258 Fed. 413, 415, — C. C. A. —.

The judgment of the court below must be affirmed.

DUCKTOWN SULPHUR, COPPER & IRON CO. v. GALLOWAY et al.

(Circuit Court of Appeals, Sixth Circuit. January 6, 1920.)

No. 3308.

1. MASTER AND SERVANT ⊜95½—STATUTORY MINE FOREMAN DEEMED SERVANT OF MINE OWNER.

Under Acts 1915 Tenn. c. 169, providing that a mine foreman must be employed in every mine, that he must have proper qualifications, and be certified by the proper state board, that he shall perform enumerated duties to keep the mine safe for workmen, and be criminally liable for breach thereof, and declaring in section 19 that the foreman shall be deemed the agent or representative of the owner or operator, and in view of the change from the similar Acts Tenn. 1903, c. 237, which provided for a mine foreman, and in section 20 declared that he should not be subject to the control of the owner, *held* that the foreman must be deemed the employé

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

[1] Comp. St. Ann. Supp. 1919, § 1246.

of the owner or operator so the doctrine of respondeat superior applies in case of a miner injured by reason of the foreman's negligence, notwithstanding that the owner must make his selection from a restricted choice.

2. MASTER AND SERVANT ⊂=95½—PROVISION FOR ASSISTANT DOES NOT PREVENT STATUTORY MINE FOREMAN FROM BEING DEEMED SERVANT OF OPERATOR.
The provisions in Acts Tenn. 1915, c. 169, that the duties of the mine foreman shall in his absence be performed by an assistant whom he shall select, etc., do not prevent the foreman himself from being considered a servant of the owner or operator, so that a miner injured by reason of the foreman's negligence may recover from the owner or operator, under the doctrine of respondeat superior.

3. MASTER AND SERVANT ⊂=95½—STATUTORY MINE FOREMAN IS EMPLOYÉ NOTWITHSTANDING STATUTORY DUTIES.
The provision of Acts Tenn. 1915, c. 169, that the statutory mine foreman shall devote all his time to his statutory duties *held* not to prevent him from being considered an employé of the owner or operator, hence a miner injured through the foreman's negligent failure to make the mine safe, etc., may recover against the owner or operator under the doctrine of respondeat superior.

4. CONSTITUTIONAL LAW ⊂=275(2)—MASTER AND SERVANT ⊂=11—REQUIREMENT THAT MINE OWNER ENGAGE STATUTORY FOREMAN WHO IS DEEMED AN AGENT WORKS NO DEPRIVATION OF PROPERTY WITHOUT DUE PROCESS OF LAW.
Though Acts Tenn. 1915, c. 169, requiring the employment of a mine foreman in every mine to perform statutory duties to keep the mine safe for miners, makes the foreman the agent of the owner or operator, so that the owner or operator is liable under the doctrine of respondeat superior to a miner injured through the foreman's negligence, such act is not invalid as depriving the owner or operator of his property without due process either in violation of U. S. Const. Amend. 14, or the state constitution.

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

Action by Luther and Ed. Galloway, administrators, against the Ducktown Sulphur, Copper & Iron Company. There was judgment for plaintiffs, and defendant brings error. Affirmed.

W. B. Miller, of Chattanooga, Tenn., for plaintiff in error.

James B. Cox, of Johnson City, Tenn., for defendant in error.

Before KNAPPEN, DENISON, and DONAHUE, Circuit Judges.

DENISON, Circuit Judge. While engaged as a miner in the Ducktown Company's copper mine, Galloway was killed by the fall of material from the roof. His administrators brought this action in the court below, and recovered a judgment, against which the company prosecutes this writ of error.

The negligence upon which the right of action depended was that of the defendant's mine foreman, who is said to have been careless in the duty of inspection. The chief question preserved and brought to this court is whether the mine foreman should be regarded as the agent of the defendant, so as to bring into action the respondeat superior rule; and this, in turn, depends upon whether the Tennessee statute is rightly to be considered as consistent with such theory of agency, and whether, when so considered, it is in conflict with either the due process clause of the Fourteenth Amendment to the federal

Constitution, or the "law of the land" clause of the Tennessee Constitution (article 1, § 8). There is no occasion to consider the Tennessee Constitution separately, since the clause thereof which is invoked and the due process clause of the Fourteenth Amendment are, for the purposes of this case, substantially equivalent.

[1] The statute in question is chapter 169, § 19, of the Tennessee Acts of 1915. It provides that a mine foreman must be employed in every mine; that he must have certain qualifications and must be "certified" by the proper state board; that he shall perform certain duties to keep the mine safe for the workmen; and that he shall be criminally liable for the breach of any of these duties. He is, undoubtedly, in certain respects, placed above and beyond the orders or direction of the mine owner; and the final question is whether the status of agent for the state in the exercise of its police powers, thus created for him by the statute, is so inconsistent with the status of agent for the mine owner in operating the mine as to defeat any inference of the latter agency, or, if agency must be assumed, as to make the taking of the mine owner's property to answer for the default of the foreman a violation of the constitutional provision.

The Tennessee act was first passed in 1903 (Laws 1903, c. 237), and was in substantially its present form, with the exceptions hereinafter noted. Section 20 of the act of 1903 contained the provision:

"That said mine foreman shall not be subject to the control of the operator or owner in the discharge of the duties required of said foreman by this act."

This act came before the Supreme Court of Tennessee, in Coal Co. v. Priddy, 117 Tenn. 168, 96 S. W. 610. It was held that the mine foreman was not the agent or representative of the owner in the performance of the duties required by the act, although he was employed by and subject to discharge by the owner, and although he was performing for the owner duties which, by general law, rested upon the owner. In reaching this conclusion, some force was put—we cannot be sure just how much—upon that part of section 20 above quoted; but the case was grounded chiefly on the rule announced by the Supreme Court in Homer Ramsdell Co. v. La Compagnie, 182 U. S. 406, 21 Sup. Ct. 831, 45 L. Ed. 1155, and stated by Sherman & Redfield on Negligence (volume 1, p. 231, quoted by the Tennessee court) in this form:

"Where a general manager of a department is appointed in obedience to a statute making such appointment compulsory and making such manager expressly responsible and independent of his employer's control, such employer is not liable for anything more than due care in selecting him."

The Priddy Case may well involve only the meaning of the 1903 statute; it does not touch the constitutional question now urged.[1] Upon the subject of interpretation, however, we will be obliged to reach the same conclusion, unless, as to this feature, there is good reason for distinguishing the 1915 statute from that of 1903.

[1] Unless by implication from the statement "under such a statute there is no ground on which to place the liability of the owner, etc."

In the act of 1915 (section 19), the above-quoted words are omitted, and, in place thereof, we find:

"Said mine foreman is expressly declared to be the agent or representative of the operator or owner of the mine in the discharge of the duties required of said mine foreman by this act."

We thus have here old matter stricken out and new matter inserted. From the omission alone, we could not draw any satisfactory inference as to change in intent. It was plain enough, looking at other parts of the old statute, that, in the discharge of the duties required of the foreman by the act, he was not subject to the control of the owner; to make the declaration in so many words did not clearly add anything of substance; and to strike out this declaration did not subtract much. The same cannot be said of the new matter inserted. If we consider this insertion alone, the intent of the Legislature could not be more clearly expressed to create, or to affirm the existence of, the master and servant relationship with its ordinary incidents. In view of the construction which had been given to the earlier act by the Tennessee court and the plain words of the later act, we must infer that the Legislature, in the earlier act, observed the inconsistency between some of its provisions and the theory of agency by the foreman, and, to emphasize this inconsistency, inserted the express statement that the foreman was not subject to the owner's control, and that, in the later act, it observed an ambiguity as to whether this agency existed, and endeavored to solve that ambiguity by an express statement of intent. That intent, of course, should be given effect, unless to do so would be inconsistent with the general purpose and result of the act as evidenced by other provisions.

The other provisions especially relied upon to overrule the expressly stated intent are four: (1) That the owner must select the foreman from a small class, membership in which is confined to those approved by the controlling state authority; (2) that in the statutory matters the judgment of the foreman, and not of the owner, controls; (3) that, in the absence of the foreman, his place is taken by an assistant selected by him without any approval from the owner; (4) that the foreman is required to give his entire time to his statutory duties.

The first two may be considered together. Much reliance is placed upon the Homer Ramsdell Case, supra, the result in which was thought, by the Seventh Circuit Court of Appeals, to depend upon compulsion to select a particular person as distinguished from compulsion to select out of a class. Fulton v. Wilmington Co., 133 Fed. 193, 197, 66 C. C. A. 247, 68 L. R. A. 168. A careful study leads us to doubt whether the result stands on that distinction. From the opinion in the case, with the quoted certificate, and from the opinion at the District Court trial (63 Fed. 848), it appears that the New York statutes compelled an incoming boat to take a pilot, and had the color of directing acceptance of the first pilot who offered; that, upon the outgoing trip of the same boat, the master was compelled to take the same, or practically the same, pilot who brought him in, unless the master protested, in which case the pilot commissioners would select another for him.

Construing this statute, the New York courts had held (Gillespie v.

Zittlosen, 60 N. Y. 449, 451; and, of course, the federal courts intended to accept this construction, 182 U. S. 411, 21 Sup. Ct. 831, 45 L. Ed. 1155) that upon the inbound trip the master was under no obligation to accept the first pilot, but might select any licensed pilot whom he wanted, and whom he could get out of the whole class. The statutes, therefore, must be taken as providing that, when coming in, the master must take one of the class, but, when going out, he must take a previously chosen individual. The controversy regarding the liability of the boat for the negligence of the pilot arose out of the outbound trip, and therefore might have been decided as being a case where there was no right of selection; however, the Circuit Court of Appeals certified, and the Supreme Court considered, the matter as if there were no difference between the situation coming in and going out.

The question certified to the Supreme Court reached and covered the case of a boat coming in, where the right to select among the class existed; and both because the Supreme Court decided the whole question certified, and because it cites with approval (on page 416 of 182 U. S., on page 835 of 21 Sup. Ct. [45 L. Ed. 1155]) the extract from Story, where his conclusion is based on the absolute duty of the master to take some pilot, instead of piloting the boat himself, and without regard to the right of class selection, we do not think the opinion can be distinguished from the present case merely upon the ground that the mine owner may select from the whole class of certified foremen, and need not take the first applicant.

However, there is ample difference between the Homer Ramsdell Case and this, both in the fact that the statutes there did not attempt to create the master and servant relationship, and in the fact that the position of a pilot on a ship is very different from that of a foreman in a mine. By long-settled rules, the pilot supersedes the master in the entire matter of management, while this mine foreman supersedes the owner, at most, as to only one phase of the owner's rights and duties.

The argument that the owner cannot be liable because he neither selects nor controls the foreman is not entirely persuasive. We find the ordinary field or basis for the relation of master and servant in full existence. The duty of reasonable inspection, in order to keep the premises fairly safe, is universally accepted as the master's duty, and one to whom that duty is delegated continues to be his representative for whose acts of negligence he must respond. The owner makes his choice, when he employs the mine foreman—a restricted choice, it is true, but nevertheless a substantial right; and he may discharge his foreman at any time, when dissatisfied, unless he has contracted not to do so. In the presence of this suitable background, we are not convinced that the statute took away the control from the master so wholly and completely as to leave not enough of substance to support the respondeat superior rule.

Doubtless, if the owner thinks the place is safe and the foreman thinks it is not, it will be the latter's statutory duty to disregard the owner's instruction to do nothing about it—though, even then, the owner could measurably constrain the foreman's action by threat of discharge;

but this is only one aspect of the situation. If the foreman thought the place was safe and the master thought it was not, we think it would be, as between them, the clear duty of the foreman to obey the master's instructions to make it safer. Neither does it appear that either the restriction to a class or the exaltation of the foreman's judgment as to safety is particularly important. Any man competent to be foreman ought to be, and probably is, given a certificate; and, in all the particulars involved, the owner would usually yield to the judgment of his skilled foreman, with or without any statute.

[2] The claim, which depends upon the possible substitution of an assistant, without the consent of the owner, is not without force; but neither by itself nor in connection with the other provisions is it sufficient to override the expressly stated intent. The bringing in of an assistant in such a way as to throw liability on the owner is an incident which may or may not occur, and whether such an assistant foreman would be within the legislative declaration of agency is a question that does not arise in this case. The possibility that there may be instances of insuperable obstacle to carrying out the declared theory of the statute does not forbid the application of that theory where the obstacle does not exist.

[3] The remaining provision relied upon is that the foreman is required to give all his time to his statutory duties, and that, since he would have no time remaining for the performance of duties directed by the master, it must be assumed that he is subject to no such duties; and since the owner may not control the foreman in his statutory duties, it is said that the owner has no power to control at all. This contention is of the same class; it has force, but not controlling force, as against the deliberate designation of the foreman as the owner's agent.

[4] Passing from the question of construction, we come, now, to that of constitutional powers; and, for that purpose of this decision, we assume that, in spite of the statutory attempt to make the foreman the agent of the owner, there might be such an utter lack of basis for this attempt that to recognize and enforce it would be to deny to the owner due process. We find that the Supreme Court, in Wilmington v. Fulton, 205 U. S. 60, 27 Sup. Ct. 412, 51 L. Ed. 708, has gone far towards covering this subject. In that case, a similar statute was involved; the Illinois court had construed it as intending to create the relationship with its attendant liabilities; that construction, the Supreme Court, of course, followed; and, upon the basis thus formed, it affirmed the constitutional power of the state to do what had been done. We do not find any satisfactory reason for thinking that the power did not exist here, if it did in that case. The distinctions which exist are those which we already discussed and which go rather more to the question of intent than to that of power, though they do have some bearing upon the latter aspect. It is probably true that the Tennessee law goes further than the Illinois law did in putting the foreman's statutory duties beyond the owner's control, and the Supreme Court put some reliance upon the state policy as declared by the state court—a background not present here—but the principle affirmed, on page 74 of 205 U. S., on page 417 of 27 Sup. Ct. (51 L. Ed. 708), is

ample to cover this case. The refusal to accept the rule of the state courts of Pennsylvania and West Virginia (205 U. S. 72, 27 Sup. Ct. 416, 51 L. Ed. 708; and see Farmer v. Kearny, 115 La. 722, 39 South. 967, 3 L. R. A. [N. S.] 1105), and the adoption of the contrary Illinois view, are made to depend, we think, not on the varying degrees of control remaining in the owner, but rather on the idea that this class of duty belongs to the master, that he cannot delegate it, and that he cannot claim exemption merely because he is somewhat constrained in his choice of a foreman, and because the state has closely defined some of the duties and given its aid in compelling their performance.

The other errors alleged afford no basis for reversal, either because they are sufficiently covered by what has been said, or because they do not rest upon any exception properly taken below.

The judgment is affirmed.

UNITED STATES v. RIDGELY et al.

(Circuit Court of Appeals, Eighth Circuit. January 6, 1920.)

No. 5334.

PUBLIC LANDS ⊂=53—APPROVAL OF COMMISSIONER REQUISITE TO ACQUISITION OF RIGHTS IN INDEMNITY LANDS.

A state, which was owner of school land included within a national forest reserve, by selecting and making application for lieu land in compliance with the statutes and regulations, acquires no estate, legal or equitable, in the land selected, as against the United States, prior to approval of its application by the Commissioner of the General Land Office, and pending such approval it is subject to withdrawal from selection as mineral land.

Appeal from the District Court of the United States for the District of Wyoming; John A. Riner, Judge.

Suit in equity by the United States against H. S. Ridgely and others Decree for defendants, and the United States appeals. Reversed.

Henry F. May, Sp. Asst. Atty. Gen. (Charles L. Rigdon, U. S. Atty. of Cheyenne, Wyo., on the brief), for the United States.

John W. Lacey, of Cheyenne, Wyo. (D. A. Preston, of Cheyenne, Wyo., William L. Walls, Atty. Gen., of Wyoming, and Herbert V. Lacey and Hilliard S. Ridgely, both of Cheyenne, Wyo., on the brief), for appellees.

Edwin A. Meserve, Shirley C. Ward, and Jefferson Chandler, all of Los Angeles, Cal., amici curiæ.

Before HOOK and STONE, Circuit Judges, and AMIDON, District Judge.

AMIDON, District Judge. The state of Wyoming was admitted by act of Congress on July 10, 1890 (26 Stat. 224), which granted to it sections 16 and 36 for educational purposes, with certain indemnity lands in place thereof in case they had been otherwise disposed of; the indemnity lands to be selected with the approval of the Secretary of the Interior. Under this grant the state acquired a perfect title to

a certain section 36. On February 22, 1897, the Big Horn National Forest Reserve, created by proclamation of the President (29 Stat. 909), included within its outer boundaries the section referred to, at a time when title thereto had vested absolutely in the state.

On April 4, 1912, the state filed in the proper local land office its application under the provisions of the act of Congress of July 10, 1890 (26 Stat. 222), and sections 2275 and 2276 of the Revised Statutes, and the acts amendatory thereof (Comp. St. §§ 4860, 4861), for the tract of land involved in the present suit as indemnity for a part of said section 36. The state did everything necessary to show a perfect title to the land relinquished and perfect relinquishment thereof to the government, and everything that was required either by statute or regulation of the Land Department to select the land here involved as indemnity for the land so relinquished. Among other things in the showing was an affidavit that the land applied for contained no known deposits of mineral or petroleum, and it was stipulated at the hearing that at the time the application was filed the land "had been classified by the government in no way as mineral lands." The filing of the application was allowed by the local land office, publication ordered, the receipt of the publication fee accepted, and all the papers submitted by the state were sent to the Commissioner of the General Land Office on April 30, 1912, with proper certificate of the local officials, showing that the records in their office disclosed no adverse claims to the land selected.

On May 6, 1914, the President, under the terms of the act of June 25, 1910 (36 Stat. 847 [Comp. St. §§ 4523–4525]), withdrew as oil land the tract so applied for by the state.

On April 29, 1915, the Commissioner of the General Land Office caused notice to be given to the state advising it that, inasmuch as the tract applied for had been withdrawn as oil land, certification of the selection, if made, would contain a reservation of the petroleum deposits under the act of July 17, 1914 (38 Stat. 510 [Comp. St. § 4640c]), unless the state within 30 days filed an application for classification of said land as nonmineral, together with a showing, in which event the state would be allowed a hearing to show that the tract was not valuable for petroleum.

On May 24 of the following year, 1916, the state made what purported to be a lease of the property to defendant Ridgely, for the purpose of drilling for oil thereon, which lease was thereafter by mesne conveyance assigned to defendant Midwest Refining Company.

By letter dated the day following the date of the lease, to wit, May 25, 1916, the state replied to the notice given under instructions of the Commissioner last above referred to, declining to accept a surface patent, so called, and, instead of asking for a hearing as to the character of the land, claimed that an equitable title had vested in it by virtue of its compliance with the laws and regulations in its application for selection of April 4, 1912.

Thereafter, on August 17, 1916, the Commissioner of the General Land Office held the selection for cancellation, on the grounds that the land had been withdrawn as oil lands and had been shown to be

such. An appeal was taken by the state to the Secretary of the Interior, and the decision of the Commissioner was affirmed on October 25, 1916, and this decision was made final by the Secretary of the Interior on February 26, 1917, on petition for rehearing.

Going back, now, to developments on the land, in the year 1916 drilling for oil was undertaken by the defendant Midwest Refining Company, and carried on to discovery and subsequent production. But no discovery was made or drilling commenced until after May 24, 1916, the date of the lease to Ridgely, and nearly a year after the letter of July 29, 1915, from the Commissioner to the state of Wyoming, notifying it that, if the selection were allowed, it would contain a reservation of the petroleum deposits. Since that time production has been carried on by defendant Midwest Refining Company, and is now being carried on by it from a number of wells making a large production. This suit was brought by the United States to enjoin the continuing trespass involved in such drilling and operation and exhaustion of the oil content of the land, to quiet title in the government, and to cancel the various instruments relied on by defendants, as supporting their claim of an equitable title thereto, and for an accounting. The state intervened in the action. It and the other defendants filed separate answers. Evidence was adduced, showing the facts substantially as above recited. The trial court dismissed the bill upon the merits, and the present appeal seeks a review of that decision.

It is stated in the briefs, and was referred to in the oral arguments, that it is the purpose of all parties in this case to present squarely the question whether or not the state can obtain title to lieu lands by filing its application for selection and complying with all the requirements of the statutes, rules, and regulations on its part to be complied with, although its selection never was approved, but prior to action thereon by the Commissioner of the General Land Office and while the application for the selected land was pending before him, the land applied for was shown to be oil land, and withdrawn as such, and upon those grounds the selection was rejected.

We think that it has been clearly determined by the Supreme Court that the state, down to the time of the approval of the application by the Commissioner of the General Land Office, acquires no estate, legal or equitable, in the lands applied for *as against the government.* The only right which it acquires by its application and the proceedings in the local land office is to be protected against any subsequent right in the tract being acquired by *private parties* in case the government decides to dispose of the lands as agricultural lands.

This in our judgment is placed beyond controversy by the decision of the Supreme Court in Wisconsin Railroad Co. v. Price County, 133 U. S. 496, 511, 512, 10 Sup. Ct. 341, 33 L. Ed. 687, and more particularly by the decision in Cosmos Co. v. Gray Eagle Oil Co., 190 U. S. 301, 23 Sup. Ct. 692, 24 Sup. Ct. 860, 47 L. Ed. 1064. The latter case is directly in point. There are minor circumstances in which it differs from the present case, but none of these constitutes a substantial ground of distinction.

In brief, the Cosmos Case holds that the local officials are not vested with any jurisdiction to pass upon any of the questions, either of law or fact, involved in the application. Their power is confined to accepting the state's papers, making the proper notation upon their records to protect the application against subsequent rights of private parties, and then transmitting the papers, with a certificate showing the tract to be free from adverse claims so far as disclosed by the records in their office, to the Commissioner of the General Land Office. That officer is clothed with jurisdiction, not only to pass upon the paper showing made by the state, but to make any investigation which he sees fit to determine whether the lands are nonmineral, so as to come within the statutes controlling the application. Until he approves of the application, there is, as Mr. Justice Field said in the Price County Case, 133 U. S. 511, 10 Sup. Ct. 341, 33 L. Ed. 687, no selection. In other words, the favorable action of the Commissioner is an element of the selection, and until that is obtained the state acquires no title, legal or equitable, to the land. In exercising his jurisdiction, the Commissioner is not reviewing the action of the local land officials. His jurisdiction is original and primary. While the case is pending before him, the transaction is simply an application to exchange. The government is as free in that transaction as the state.

The case of Daniels v. Wagner, 237 U. S. 547, 35 Sup. Ct. 740, 59 L. Ed. 1102, L. R. A. 1916A, 1116, Ann. Cas. 1917A, 40, does not impair the authority of the Cosmos Case, but expressly approves it as to the power of the Commissioner to determine the mineral character of the land applied for. All the Daniels Case decides is this: That the applicant for lieu lands, by presenting his application to the local land office, acquires the right *as against private individuals* whose rights in the property arise subsequently, to be protected against such subsequent private rights, and that the Commissioner of the General Land Office in the name of discretion cannot, while holding the lands subject to disposal as agricultural, timber, or desert lands, give the land to a private party whose rights arose after the application to select the indemnity lands was made to the local land office. The Daniels Case has nothing to do with the right of the government to decide any question of fact involved in the application to select the land as indemnity. It simply holds that a private individual, whose rights arise subsequent to the entry of the application in the local land office, cannot be given priority over such applicant. The Supreme Court in the case cited simply holds the Commissioner, in exercising his jurisdiction to dispose of the lands as between private parties, must give effect to the general doctrine of priorities.

In the argument and briefs there is a great array of authorities holding that it is the "known" mineral quality of lands at the time a right to them is acquired which controls in suits to cancel patents, and that the discovery of the mineral character of the land subsequent to the inception of the right does not give the government the right to cancel a patent. The difference between those cases and the present is plain. This is not a suit to cancel a patent or an equitable title. The suit simply involves the question of the right of the government, through

the Commissioner of the General Land Office, to determine whether the lands are of a character subjecting them to plaintiff's claim. Until that question is decided, as we have already stated, the applicant, as against the government, acquires no title in the property, legal or equitable. This is not only established by authority, but is justified by experience. The right to select indemnity lands in lieu of agricultural lands lost, which empowers the selector to range over a whole state in search of lieu lands, has been the agency by means of which great frauds have been perpetrated upon the government. What is "known" about lands some years prior to the time when that knowledge becomes determinative of a right is a difficult field of inquiry. The showing at the time of the filing in the local land office is made wholly by the applicant. It is a paper showing. So far as the government is concerned, it is an ex parte proceeding. The selector is entitled to agricultural lands, and not to mineral lands. The Commissioner of the General Land Office, in the exercise of his jurisdiction to determine whether the lands applied for are such as the applicant is entitled to under the law, may not only make such inquiry through agents as he sees fit, but, if need be, he may make such exploration as is necessary to determine the question upon which he is asked to pass. This is the only way in which the government can be protected against grave frauds in the administration of the public land laws. The power and duty of the Commissioner to determine whether the land is mineral is not dependent on whether some private party has filed a contest. His jurisdiction to protect the United States is certainly as obligatory as to protect the private rights of contestants.

The decree of the District Court is reversed, with directions to the trial court to enter a decree in favor of the plaintiff in accordance with the prayer of the bill, and proceed with the cause.

SIMONS v. CROMWELL et al.

(Circuit Court of Appeals, Second Circuit. December 19, 1919.)

No. 57.

WILLS ⊂=68—MAKING OF CONTRACT QUESTION FOR JURY.

Evidence in support of an allegation that a decedent, in consideration of services rendered and to be rendered to her by plaintiff, and which were afterward rendered, promised to bequeath to plaintiff a stated sum by her will, *held* sufficient to require submission of the issue to the jury.

Rogers, Circuit Judge, dissenting.

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

Action at law by Annie S. Simons against William Nelson Cromwell and another, executors. Judgment for defendants, and plaintiff brings error. Reversed.

Roger Foster, of New York City, for plaintiff in error.

Sullivan & Cromwell and Clarke M. Rosecrantz, all of New York City (P. L. Miller, of New York City, and Hiram C. Todd, of Saratoga Springs, N. Y., of counsel), for defendant in error Cromwell.

Edgar T. Brackett, of Saratoga Springs, N. Y., for defendant in error Cramer.

Before WARD, ROGERS, and MANTON, Circuit Judges.

WARD, Circuit Judge. This is a writ of error to a judgment for the defendants, executors of the estate of Frank Leslie, deceased, directed by the court. The complaint demanded judgment in the sum of $40,000 upon three separate causes of action as follows:

First. A promise made by the decedent, Mrs. Leslie, to the plaintiff in 1902, that in consideration of personal services theretofore and to be thereafter rendered by her, to bequeath her a legacy of $50,000; whereas, Mrs. Leslie bequeathed her a legacy of only $10,000.

Second. A promise, in consideration of the services aforesaid, to pay to the plaintiff the reasonable value of the said services, which was the sum of $50,000, no part of which the decedent has paid, except by a legacy of $10,000.

Third. A promise, in consideration of the services aforesaid, to bequeath the plaintiff a sum equal to the reasonable value thereof, which was $50,000; whereas, the decedent left the plaintiff only a legacy of $10,000.

The answers of the defendants contained denials, and also pleaded to the second cause of action the New York statute of limitations of six years.

Mrs. Leslie sustained a paralytic stroke in 1902, and was thereafter, down to the time of her death at the age of 77, in 1914, a semi-invalid. Evidence as to her wealth and as to her relatives was proper, and it appeared therefrom that she was a rich woman, with no direct descendants, and that the plaintiff is her first cousin. Our conclusion makes it unnecessary to state in detail the particulars of Mrs. Leslie's

disabilities and of the plaintiff's services. Suffice it to say that for the 12 years in question the plaintiff spent one or two months each year with Mrs. Leslie, and did render her services made necessary by her age and condition of health.

Taking up, first, the second cause of action, it will be seen that within 6 years of the decedent's death the plaintiff could in the aggregate have rendered services covering a period in all of not over one year. We agree with the trial judge that $10,000 was as much as any jury could award as the reasonable value of such services. Any verdict rendered for the plaintiff on this cause of action would have been set aside by the trial judge, and therefore it was within his power to direct a verdict in favor of the defendants on it.

The testimony in support of the third cause of action was that of the plaintiff's son, as follows:

"I had a conversation with Mrs. Leslie about what she intended to do for my mother after her death in the year 1904 at Charleston. I saw that Mrs. Simons was running down in health, and I thought I would take her out to the theater. I wanted to invite her to the theater. So, on a drive in a carriage with Mrs. Leslie—we used to relieve her from that duty at times—I invited her, and she said she didn't want to go. I knew she wouldn't go, because she always went to bed at 9 o'clock. I asked her, did she object to Mrs. Simons going, and she said she did. I said, 'I think she ought to have a little recreation,' and she said to me, 'Robert, your mother is going to be well paid for what she is doing for me, and I don't wish her to go,' so I dropped the conversation further.

"Q. Did she say how your mother was going to be paid? A. I inferred from her previous statement—

"Mr. Rosecrantz: No; no.

"A. Not at that time.

"Q. What did she state at any other time? A. She said some short while before that, on one of these drives, 'I don't know why your mother worries so about the future, as I have provided for her."

This is not the language of contract, but of pure intention or expectation, quite insufficient to prove an agreement to bequeath to the plaintiff a sum equal to the reasonable value of the services rendered or to be rendered by her.

The first cause of action is the only one requiring serious consideration. To recover, the plaintiff must establish a promise made to her by the decedent that, in consideration of services rendered and to be rendered, the decedent would leave her a legacy of $50,000. Under section 829 of the Code of Civil Procedure the plaintiff was an incompetent witness on this subject. Still such a promise could be established by circumstantial testimony. The testimony on which the plaintiff relies is that of her husband, as follows:

"* * * March, 1902. Mrs. Leslie did not get up until very late, about 9 o'clock in the morning, and I had gone to my business. Saturday afternoon I went into the room with her, and I said, 'Cousin Florence, my wife tells me that you are going to leave her $50,000 in your will, and I wish to thank you for it.' Her reply was, 'Robert, I am due Annie that money for what she has done in many services rendered to me in my present condition, and I intend to call on her in the future.'

"Q. Do you recollect anything more about that conversation? A. That is the conversation. Then there was no more conversation after that. Mrs. Leslie was a woman that, whenever you said anything to her, that settled it. * * *

"Q. You must use the language as near as you recollect that you used to your wife? A. I said, 'I went to thank Cousin Florence for that $50,000 she proposed to leave to you, and she replied to me, 'Robert, I am due Annie this, because she has been kind to me, and has nursed me in my recent illness, and I propose to call on her in the future.'"

This testimony, if believed, was evidence that the decedent had admitted a conversation with the plaintiff as to her services rendered and to be rendered, and as to the compensation to be paid for them in the decedent's will. A jury might find it to be, not language of expectation or intention, but of agreement. The details necessary to establish a contract appear specifically; the consideration, the amount, and manner of compensation are all stated. The decedent, perhaps in not technical language, but substantially stated to the witness the consideration, viz. that there was "due" by her to Annie the sum of $50,000 for services rendered in the past and for which she was going to call in the future. These services had been and were subsequently rendered by the plaintiff. We think the case should have gone to the jury upon the first cause of action. The testimony in support of it was quite different from that of the plaintiff's son in support of the third cause of action. No doubt it would be proper to instruct the jury as to the care and scrutiny with which they should weigh the testimony, in view of all the circumstances of the case, but in our opinion the question was for them. McKeon v. Van Slyck, 223 N. Y. 392, 119 N. E. 851.

The judgment is reversed.

ROGERS, Circuit Judge, dissents.

In re H. L. HERBERT & CO.

Appeal of NATIONAL SURETY CO.

(Circuit Court of Appeals, Second Circuit. December 10, 1919.)

No. 54.

1. INDEMNITY ⟸1—CONSTRUCTION OF CONTRACT TO ASSUME AND PAY DEBTS OF ANOTHER; "CONTRACT TO PAY."

Agreement by a corporation, which acquired the business of an individual, to assume and pay all obligations of the seller "contracted in said business, now due or to become due," *held* a contract to pay the debts, and not one to indemnify the seller.

2. LIMITATION OF ACTIONS ⟸46(12), 105(2)—ACCRUAL OF RIGHT OF ACTION ON PROMISE TO PAY DEBT OF ANOTHER; EFFECT OF LITIGATION BY ORIGINAL DEBTOR CONTESTING THE DEBT.

Where a corporation contracted to assume and pay the debts of another, and such other owed a debt then due, either he or his creditor had an immediate right of action, against which limitation ran from that time, notwithstanding the fact that he was then contesting the claim in the courts.

3. INDEMNITY ⟸1—DEBTOR MAY SUE ON CONTRACT ASSUMING HIS DEBTS.

A debtor, whose debts another has assumed and agreed to pay, may sue on the contract for the amount of a debt due, although he has not paid it.

4. LIMITATION OF ACTIONS ⟸43—ACCRUAL OF RIGHT OF ACTION, RATHER THAN DAMAGES, STARTS RUNNING OF STATUTE.

The amount or kind of damages recoverable on breach is immaterial; it is the existence of a right of action that starts the statute of limitations.

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

In the matter of H. L. Herbert & Co., a corporation, bankrupt. From an order expunging its claim, the National Surety Company appeals. Affirmed.

Appeal from an order expunging the claim, as creditor, of National Surety Company, entered in the District Court for the Southern District of New York. The facts, as stated in the proof of claim of the appellant, are that on and prior to April 30, 1902, one Henry L. Herbert, being engaged in the business of buying and selling coal, "entered into a contract with" one Thedford, which contract said Herbert failed to fulfill, "to the damage of Thedford in the sum of $10,542.38, which sum was due and payable to said Thedford on February 1, 1903." Herbert failed or refused to pay. Thedford brought suit in the courts of New York, and after numerous trials and appeals Thedford received a judgment, which was finally affirmed in the New York Court of Appeals in 1914. 210 N. Y. 606, 104 N. E. 1142.

The surety company had at Herbert's individual request and against collateral deposited with it by him, executed the undertaking on appeal in this suit, and when Thedford finally prevailed, and on March 13, 1914, it paid Thedford his judgment. It then realized upon the securities deposited with it by Herbert, but therefrom failed to obtain repayment in full, so that the surety company remained a creditor of Herbert to the extent of some $9,000.

While the action of Thedford v. Herbert was proceeding, and on or about May 31, 1907, this bankrupt corporation (H. L. Herbert & Co.) was formed. On the date last mentioned the directors of this new company passed a resolution reciting that, the corporation "having organized with the purpose of acquiring" Herbert's individual business, it was therefore resolved that said corporation "assume and pay all obligations of Henry L. Herbert contracted in said business, now due or to become due." That Herbert's individual liability to Thedford was contracted or incurred "in said business" is admitted.

There is no evidence that the bankrupt ever managed, conducted, or took any part in the litigation between Thedford and Herbert. On September 27, 1916, the petition in bankruptcy herein was filed, whereupon the surety company filed its proof of claim for the said balance of about $9,000. Motion by the trustee to expunge the same was granted, on the ground that it was barred by the statute of limitations. This appeal was then taken.

William R. Page, of New York City, for appellant.

Frank M. Patterson, of New York City, for trustee in bankruptcy.

Before ROGERS, HOUGH, and MANTON, Circuit Judges.

HOUGH, Circuit Judge (after stating the facts as above). [1] There can be no difference between the assumption of a mortgage, when the party assuming receives grant of the mortgaged lands, and the assumption of business debts, when such a party receives or takes over the business. The law of New York on this subject is summarized in Willard v. Wood, 135 U. S. 309, 10 Sup. Ct. 831, 34 L. Ed. 210. See, also, Schley v. Fryer, 100 N. Y. 71, 2 N. E. 280, and Goodyear, etc., Co. v. Dancel, 119 Fed. 692, 56 C. C. A. 300.

This bankrupt, therefore, became personally liable to Thedford in 1907, and the relation of the Herbert Company and Herbert the man to Thedford became that of principal and surety (Union Co. v. Hanford, 143 U. S. 187, 12 Sup. Ct. 437, 36 L. Ed. 118) as soon as Thedford knew of the agreement. As he never called on the corporation to pay, so far as this record shows never learned of the assumption, and

has received payment in full, no effort can be made by appellant to claim through Thedford. It follows that, to recover at all, appellant must stand in Herbert's shoes, for there was never any contract directly between surety company and bankrupt.

Therefore the crucial inquiry is to classify or define the nature of the contract between Herbert and the Herbert Company, embodied in the resolution above recited. It is either an agreement to pay, or an agreement to indemnify; i. e. to save Herbert harmless. See Mills v. Dow, 133 U. S. 423, 10 Sup. Ct. 413, 33 L. Ed. 717, where the contract was both, and the difference is emphasized.

In contracts of indemnity the obligee cannot recover until he has been actually damnified, and then only to the extent of injury at the time suit brought; but, where the agreement is to pay, a recovery may be had as soon as breach of contract exists, and the measure of damages is the full amount agreed to be paid. Wicker v. Hoppock, 6 Wall. 99, 18 L. Ed. 752. In our opinion, the contract at bar was plainly to pay; it says so, and does not by words or inference promise to save Herbert harmless, which is the substance of an indemnity agreement.

[2, 3] But, when one promises to pay, the right of action on that promise is complete and perfect the moment the debt to which the promise relates becomes due and remained unpaid. Hume v. Hendrickson, 79 N. Y. at page 127. Applying that doctrine here, Thedford could have sued the bankrupt on this contract for his benefit as soon as it was made, or Herbert could have sued, assigning for breach that the corporation had not paid Thedford, whose debt was long before "due and payable." That he had not paid Thedford would be no defense, if as matter of fact he owed the money. Rector, etc., v. Higgins, 48 N. Y. 532, as expained in Maloney v. Nelson, 144 N. Y. 182, 39 N. E. 82.

[4] The amount or kind of damages recoverable on breach is immaterial; it is the existence of a right of action that "starts the statute" of limitations. Aachen, etc., Co. v. Morton, 156 Fed. 657, 84 C. C. A. 366, 15 L. R. A. (N. S.) 156, 13 Ann. Cas. 692; Goelet v. Ward Co., 242 Fed. 65, 155 C. C. A. 9. Indeed, an agreement to pay a debt due at date of promise may be said to be broken the moment it is made. It follows that the statute of limitations barred any suit of Herbert's against the bankrupt in six years—i. e., in 1913—and the court below was right in expunging the surety company's claim on that ground.

That Herbert chose to prolong litigation with Thedford confuses the issue, but is immaterial; the only result of suit was to prove that Herbert had owed the money since 1903, which is now admitted.

Order affirmed, with costs.

BERKSHIRE HILLS PAPER CO. v. BYRON WESTON CO.

(Circuit Court of Appeals, First Circuit. February 7, 1917.)

No. 1247.

PATENTS ⊂=328—PROCESS OF GROOVING PAPER NOT INFRINGED.

The Ramage & Shaw patent, No. 958,174, for paper and process of grooving same, which covers a method of making hinged ledger leaves, by grooving the paper after the same is dry, and before it is sized and calendered, *held* not infringed by a process which operates upon the wet pulp.

Appeal from the District Court of the United States for the District of Massachusetts; Dodge, Judge.

Suit in equity by the Berkshire Hills Paper Company against the Byron Weston Company. Decree for defendant, and complainant appeals. Affirmed.

Fred R. Shaw, of Adams, Mass., Edward S. Duvall, Jr., of Washington, D. C., and Henry L. Harrington, of Adams, Mass., for appellant.

W. K. Richardson, of Boston, Mass. (C. L. Sturtevant, of Washington, D. C., on the brief), for appellee.

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

BINGHAM, Circuit Judge. The plaintiff, the Berkshire Hills Paper Company, is the owner of the United States letters patent No. 958,174, issued May 17, 1910, to Ramage & Shaw, for "paper and process of grooving same," and complains that the defendant, the Byron Weston Company, has infringed claims 4, 5, and 9 of the patent in its manufacture of hinged ledger leaves. Claim 5 is the broad claim of the patent, and is the only one to which special reference need be made. It reads as follows:

"The herein described method of making hinged ledger leaves, which consists in forming a paper sheet from pulp, in producing a relatively thin section therein to form the hinge, then sizing the thinned sheet, and finally calendering."

The specification states that "the invention consists essentially in the process of forming grooves or flexible portions in the web or sheet of paper while the same is being made and before it has been sized and calendered, so that such flexible portions will possess the same durability as the rest of the sheet," that "the grooving operation is performed during the manufacture of the paper after the same is dry, and preferably in web form," and that "the manner in which the paper is grooved" is as follows:

"The web of paper as it nears the 'drier' end of the paper-making machine, commonly known as the 'Fourdrinier' type, and after it has passed around the last drier roll, is passed over an adjustable platen over which cutter wheels are rotated at a high rate of speed, in a direction opposite to the travel of the web. The cutter wheels and platen are both adjustable to cut any number or depth of grooves in the paper, and the paper, after it passes under the cutters, goes to the sizing boxes, and then it is calendered in the proper man-

ner and cut into the proper sized sheets. Thus it will be seen that the dry and unfinished paper is grooved, afterward animal sized, then calendered and finished."

The defendant makes hinged ledger leaves under a reissue patent, No. 13,730, granted to Phillip Weston, May 12, 1914. In defining the defendant's method of making hinged ledger leaves, the court below said:

"To produce its relatively thin hinged section in the completed sheet, the defendant operates at what is called the 'wet' end of the Fourdrinier machine. upon the wet pulp web, spread upon the wire apron, and at a point near the discharge end of said apron. The pulp has at that stage lost some of the water contained in it when first spread upon the wire apron, and during its travel thereon its fibres have become so distributed and interwoven that they are ready to become felted together when compressed and dried. But the process of drying it can hardly be said to have begun, while the process of pressing it has not begun at all. Both processes are indispensable to the production of a paper sheet, and they require for their completion more machinery and more space in the machine than has been employed in getting the pulp web to the point at which the defendant's relatively thinned section is formed in it.

"It is there formed by removing some of the wet pulp constituting the web along defined lines. Such removal is effected by suction from the upper side of the web, during or just before its passage over suction boxes operating upon its under side, which begin the process of extracting the water contained in it. Thus thinned along the defined lines desired in its upper surface, the web passes over more suction boxes; then underneath the dandy roll, which forms the water-mark in it; then between two couch rolls, which compress it to a state in which it can leave the wire apron; then to the successive felt aprons and press rolls, which further compact it and squeeze out its contained water, delivering it, in the stage at which it is usually first called paper, to the drier rolls, and from them, its dampness removed, to the calendar rolls, which finish its surface."

In its opinion the court below found and ruled: (1) That claims 4 and 9 were not infringed by the defendant's process, "even if the defendant could properly be said to form its relatively thin sections by operating upon a paper sheet," as, by these claims, the patentees have expressly limited themselves to "grinding or cutting a paper sheet as their means for forming relatively thin sections"; that "the wet pulp upon which the defendant operates could not be ground or cut, any more than the paper sheet upon which the patentees operate could be thinned by suction"; and (2) that claim 5 is not infringed by defendant's process (a) because that claim, by its terms and by the proceedings in the Patent Office, is limited to a removal of the fiber after a paper sheet has been formed from the pulp, and that a paper sheet has not been formed at the point where the pulp web is thinned in the defendant's process; and (b) because the prior art forbids a construction of the claim "which would cover the production of a paper sheet having thin hinged sections in it obtained by any removal of a part of the stock during or simultaneously with the course of manufacture, at *any stage* prior to sizing."

Having carefully considered the proofs and arguments of counsel with reference to these questions, we think the decree of the court below should be affirmed, and for the reasons above stated.

The decree of the District Court is affirmed, with costs to the appellee.

MICKLE v. HENRICHS, Warden of Nevada State Prison, et al.

(District Court, D. Nevada. May 25, 1918.)

No. A-59.

CRIMINAL LAW ⊂=1213—VASECTOMY IS CRUEL AND UNUSUAL PUNISHMENT.

Rev. Laws Nev. § 6293, authorizing trial court to compel certain criminals to submit to an operation known as vasectomy, which destroys the power of procreation, but may be performed in a painless manner, and is otherwise harmless, violates Const. Nev. art. 1, § 6, prohibiting cruel or unusual punishments.

In Equity. Suit by Pearley C. Mickle against Rufus B. Henrichs, as Warden, and Donald Maclean, as Physician of the Nevada State Prison. Decree restraining defendants from performing a proposed operation.

Woodburn & Bartlett, of Reno, Nev., for plaintiff.

Geo. B. Thatcher, Atty. Gen., and E. T. Patrick, Asst. Atty. Gen., of State of Nevada, for defendants.

FARRINGTON, District Judge. Mickle, having pleaded guilty to the charge of rape, was sentenced to be imprisoned in the Nevada State Penitentiary for an indeterminate period of not less than 5 years. It was also ordered as a part of the judgment that an operation be performed on his person sufficient to deprive him of the power of procreation. This suit is brought against the warden and the physician of the Nevada State Prison to procure a decree of this court restraining them from carrying the order of the court into effect. All questions as to jurisdiction have been expressly waived.

The operation directed is known as vasectomy, and is authorized by section 6293 of the Revised Laws of Nevada, which reads as follows:

"Whenever any person shall be adjudged guilty of carnal abuse of a female person under the age of ten years, or of rape, or shall be adjudged to be an habitual criminal, the court may, in addition to such other punishment or confinement as may be imposed, direct an operation to be performed upon such person, for the prevention of procreation: Provided, the operation so directed to be performed shall not consist of castration."

Plaintiff claims that the statute violates section 6 of article 1 of the Constitution of Nevada, "in that the punishment therein permitted and authorized is cruel and unusual." The section referred to is as follows:

"Excessive bail shall not be required, nor excessive fines imposed, nor shall cruel or unusual punishments be inflicted."

Under this provision, if the punishment is either cruel or unusual, it is prohibited. It was agreed by counsel that the operation could be performed in such manner as to be painless, and such was the effect of the testimony. The operation, under a local anæsthetic, occupies but a few minutes. The person operated on may at once

thereafter resume his ordinary avocation and physical activities, without serious discomfort. The power to beget offspring is taken away, without impairing the desire and capacity for sexual enjoyment.

It appears from the record that Mickle is an epileptic. That fact was accorded considerable weight by the court in pronouncing judgment. Possibly in the exercise of its police power, it may be lawful for the Legislature to adopt reasonable measures, adequate and sufficient to prevent degenerates and persons afflicted with transmittable mental defects, physical disease, or criminal tendencies from begetting children; but legislation of that character must operate alike on all unfortunates of the same class, and the classifiation must operate reasonably with relation to the end sought to be accomplished.

The courts of New Jersey recently refused to uphold a state statute providing for the sterilization of certain feeble-minded, epileptic, and criminal defectives confined in penal and charitable institutions of that state. Much stress was laid on the fact that an epileptic confined in a penal institution is less likely to transmit his infirmity to children than an epileptic who is not so confined. It was pointed out by the court that the statute creates two classes, viz. those who are, and those who are not, unfortunate enough to be inmates of such institutions, and it applies its remedy to the former class only; that the classifiation has no relation whatever to the eradication of epilepsy; it is purely arbitrary and artificial, and denies to those least able to protect themselves, equal protection of the law. Smith v. Bd. of Exmrs. of Feeble-Minded, 85 N. J. Law, 46, 88 Atl. 963.

If the purpose of the Nevada statute be to prevent the transmission of criminal tendencies, it must be noted that it does not apply to all convicted offenders, not even to all who are habitual criminals, or to all persons adjudged guilty of rape or carnal abuse of female children, but only to such habitual criminals and persons guilty of rape as the court, in the exercise of a discretion, which is in no wise directed by the statute, may designate.

It is a notorious fact that many judges do not regard mutilation as a wise or lawful method of punishment. It is only those of the contrary opinion who will prescribe vasectomy as a part of the punishment for this offense. Again, it is doubtful whether our penal institutions contain more than a small minority of those undesirables who are inclined to lawlessness and crime. It is easy to imagine that a brute guilty of rape, or who has a tendency to commit such a crime, might regard it rather an advantage than otherwise to be sterilized. As a preventive of this crime vasectomy is without effect. Once free, the convict who has been so punished is still physically capable of committing the offense.

These considerations, however, are beside the issue. There is no attempt by defendants to support the judgment on the ground that vasectomy is calculated to promote general welfare. It is conceded that cruel or unusual punishments are prohibited, regardless of any and all theories of race culture. Whether the operation performed as punishment is violative of the constitutional injunction against cruel or unusual punishment is the question.

This provision in slightly varying form is to be found in the federal Constitution, and in all but three of the state Constitutions. In Washington (article 1, § 14) the inhibition is against "cruel punishment"; in the federal Constitution (article 8) it is against "cruel and unusual punishment"; in Nevada it is against "cruel or unusual punishment"; and in Massachusetts (part 1, art. 26) it is directed expressly to the judiciary:

"No magistrate or court of law shall * * * inflict cruel or unusual punishment."

The federal courts have never attempted a precise definition of either "cruel" or "unusual," as used in the Constitution. The prohibition first appeared in the English Bill of Rights of 1688, and was there directed to modes of punishment which to the modern mind seem barbarous and inhuman, such as the pillory, the thumbscrew, the rack, disemboweling the living victim, drawing, quartering, burning, and boiling.

The decisions are not altogether harmonious. Some hold that, as used in the earlier Constitutions, including that of the United States, the restriction applies only to those ancient punishments which seem so shocking in this more enlightened age. Whitten v. State, 47 Ga. 297, 301.

Judge Story intimates that such limitations on the power to punish are unnecessary, because resort to atrocious punishment is hardly possible by the government of a free people. In support of this view attention is called to the fact that even before the Revolutionary War the modes of punishment mentioned had been practically discarded, not only in the colonies, but in England; and as originally drafted and adopted, the federal Constitution contained no such restriction. It was only in response to a strong popular demand that it became a part of the organic law of the nation as the Eighth Amendment. It is unreasonable to believe that it was adopted solely as a shield against obsolete abuses.

In other and more recent cases there are strong expressions to the effect that imprisonment, though not in itself cruel or unusual, may become so if the term of confinement is grossly disproportionate to the offense. McDonald v. Commonwealth, 173 Mass. 322, 53 N. E. 874, 73 Am. St. Rep. 293; Weems v. United States, 217 U. S. 349, 30 Sup. Ct. 544, 54 L. Ed. 793, 19 Ann. Cas. 705. In the latter case the Supreme Court of the United States seems to have committed itself to the more humane and liberal doctrine that the Eighth Amendment is a regulation of sufficient vitality and adaptability to restrain cruel innovations in the way of punishment.

The Nevada Constitution was not adopted until 1864, a comparatively recent date. Neither then nor at any other time within the history of this state, prior to the date of the act in question, had mutilation of the person been a recognized mode of punishment. It is to be noted that the Nevada Constitution forbids punishments either "cruel or unusual." The terms are used disjunctively, and if accorded their usual significance it is evident the purpose was to forbid newly devised as well as cruel punishments.

In Cooley on Constitutional Limitations (6th Ed.) p. 402, it is said that—

"Those degrading punishments which in any state had become obsolete before its existing Constitution was adopted, we think, may well be held forbidden by it as cruel and unusual. We may well doubt the right to establish the whipping post and the pillory in states where they were never recognized as instruments of punishment, or in states whose Constitutions, revised since public opinion had banished them, have forbidden cruel and unusual punishment. In such states the public sentiment must be regarded as having condemned them as 'cruel,' and any punishment which, if ever employed at all, has become altogether obsolete, must certainly be looked upon as 'unusual.'"

In Hobbs v. State, 133 Ind. 404, 408, 32 N. E. 1019, 1020, 18 L. R. A. 774, 777, the court says that "unusual," as used in the Constitution, means a class of punishments which never existed in the state, or that class which public sentiment must be regarded as having condemned. It may be said, as questioning the accuracy of this definition, that the courts have repeatedly upheld statutes authorizing electrocution, but in those cases death was the punishment; electrocution was merely the means adopted to reach that end as swiftly and as painlessly as possible. Storti v. Commonwealth, 178 Mass. 549, 60 N. E. 210, 52 L. R. A. 530.

In State v. Feilen, 70 Wash. 65, 126 Pac. 75, 41 L. R. A. (N. S.) 418, Ann. Cas. 1914B, 512, the Supreme Court of Washington came to the conclusion that a statute authorizing vasectomy was not unconstitutional. This decision was rendered under a Constitution which prohibited cruel punishment only. In this it differs from the Nevada Constitution, which prohibits cruel or unusual punishment. I am not inclined to adopt the view that the two provisions mean substantially the same thing.

The same question came up in the case of Davis v. Berry (D. C.) 216 Fed. 413. There Judges Smith, Pollock, and Smith McPherson had under consideration an Iowa statute directing the operation of vasectomy to be performed upon convicts in the state prison who had been twice convicted of a felony. After going into the history of similar punishments, the court says:

"When Blackstone wrote his Commentaries, he did not mention castration as one of the cruel punishments, quite likely for the reason that, with the advance of civilization, the operation was looked upon as too cruel, and was no longer performed. But each operation is to destroy the power of procreation. It is, of course, to follow the man during the balance of his life. The physical suffering may not be so great, but that is not the only test of cruel punishment; the humiliation, the degradation, the mental suffering are always present and known by all the public, and will follow him wheresoever he may go. This belongs to the Dark Ages. * * * Our conclusion is that the infliction of this penalty is in violation of the Constitution, which provides that cruel and unusual punishment shall not be inflicted."

Vasectomy in itself is not cruel; it is no more cruel than branding, the amputation of a finger, the slitting of a tongue, or the cutting off of an ear; but, when resorted to as punishment, it is ignominious and degrading, and in that sense is cruel. Certainly it would be unusual in Nevada. It may well be that it came in the minds of the men gathered in the constitutional convention of this

state that there could be unwise punishment without the infliction of physical pain; that legislators, under the stress of unusual conditions and peculiarly atrocious crime, might hastily adopt strange methods of repression, unknown to our criminal practice and harmful to the state.

Reformation of the criminal is a wise and humane purpose of punishment, to be disregarded only when the death penalty is inflicted. It needs no argument to establish the proposition that degrading and humiliating punishment is not conducive to the resumption of upright and self-respecting life. When the penalty is paid, when the offender is free to resume his place in society, he should not be handicapped by the consciousness that he bears on his person, and will carry to his grave, a mutilation which, as punishment, is a brand of infamy. True, rape is an infamous crime; the punishment should be severe; but even for such an offender the way to an upright life, if life is spared, should not be unnecessarily obstructed. It will not do to argue that, inasmuch as the death penalty may be inflicted for this crime, vasectomy, or any other similar mutilation of the body, cannot be regarded as cruel, because the greater includes the less. The fact that the extreme penalty is not exacted is evidence that the criminal is considered worthy to live, and to attempt reformation. For him, and for society, a fair opportunity to retrieve his fall is quite as important as the eugenic possibilities of vasectomy.

A decree will be entered in favor of the plaintiff, restraining the warden and the physician of the Nevada State Prison from performing the proposed operation of vasectomy on the person of the plaintiff.

AMERICAN SURETY CO. OF NEW YORK v. AMERICAN MILLS CO.

(District Court, S. D. New York. January 15, 1920.)

No. 16-36.

1. PRINCIPAL AND SURETY ⊜57—SURETY BOND PROCURED BY FRAUD.
A transaction between defendant mill company and a debtor corporation, apparently insolvent, by which the debtor contracted to deliver a quantity of bags to defendant for payment falsely recited as received, and procured complainant surety company to guarantee delivery, whereby, if the bond was enforced defendant would obtain payment of its debt, *held* fraudulent as to the surety company, and the bond subject to cancellation at its suit.

2. EQUITY ⊜53(1)—OBJECTION TO JURISDICTION BECAUSE OF ADEQUATE REMEDY AT LAW MAY BE WAIVED.
Where the subject-matter of a suit is within the cognizance of a federal court of equity, the right to object to the jurisdiction on the ground of adequate remedy at law may be waived.

3. EQUITY ⊜53(1)—OBJECTION TO JURISDICTION WAIVED BY COUNTERCLAIM.
In a suit for cancellation of a surety bond on the ground that it was obtained by fraud, an objection in the answer to the jurisdiction in equity on the ground that complainant had an adequate remedy at law *held* waived by a counterclaim asking recovery on the bond.

In Equity. Suit by the American Surety Company of New York against the American Mills Company. Decree for complainant.

Henry C. Willcox, of New York City (Henry C. Willcox and Allan C. Rowe, both of New York City, of counsel), for plaintiff.

Henry Uttal, of New York City (Hamilton Moses, of Chicago, Ill., and Herbert J. Haas, of Atlanta, Ga., of counsel), for defendant.

ROSE, District Judge. [1] The plaintiff seeks the cancellation of a bond given to the defendant by the Hartenfeld Bag Company as principal, and itself as surety, and an injunction against suits thereon. The three corporations concerned are of New York, Georgia, and Illinois, respectively, and will be herein severally called the "surety," the "Mills," and the "Bag Company."

For seven years, ending in 1918, the former had bought second-hand bags from the latter, sometimes to the amount of $100,000 annually. Frequently, if not usually, payment had preceded delivery. In August, 1918, the Bag Company was behind in its shipments, and some of the bags which it had furnished had been undergrade. At that time the Bag Company was indebted to the Mills in the amount of about $12,000. Nevertheless, when near the end of August the Mills bought more bags, the Bag Company persuaded it to give, for their purchase price, its notes, aggregating something over $9,000. The Bag Company had been in the habit of selling its accounts to the Commercial Credit Company of Baltimore. Notwithstanding that the notes of the Mills had fully paid for the last purchases, the Bag Company sold its bill for them to the Credit Company, and a few days later discounted the promissory notes of the Mills with a Chicago banker. In this way it obtained double payment for bags which it had certainly never shipped, and which it had probably at that time not even bought.

On the 24th of September, through a telegram from the Credit Company telling the Mills that it had bought the Bag Company's account against it, and stating that a formal notice to that effect had been mailed, the Mills got wind of at least part of what had happened. In due course, the letter of the Credit Company came to hand. It asked to be promptly informed if the Mills claimed any payment, credits, notes, etc., against the account. The Mills, surprised, as it must have been, left the communications of the Credit Company unanswered, but within less than an hour after the receipt of the telegram busied itself in another direction.

The president of the Mills wired the president of the Bag Company that he would arrive at the La Salle Hotel in Chicago on the next evening, September 25th, and to meet him there without fail. The Bag Company's official was not on hand that night, but the next day the president of the mills did see him, and for the next three days they were in more or less constant touch with each other, and then if not before, the president of the Mills learned that his company's notes had been discounted. It was explained to him that what had happened had been due to the mistake of a "bonehead clerk."

It is admitted that the president of the Bag Company said it was

short of money. There is more or less dispute as to the details of what passed between the two men. It is asserted that the president of the Mills asked for money or for security, real estate or other, while he says he did not. He admits that he came to Chicago to get his account settled. What was actually done speaks for itself.

During the war, it not infrequently happened that sellers of goods were forced to ask for advance payments, and some, if not all, of the Surety Companies, got into the habit of guaranteeing deliveries to buyers. On one or two occasions, the surety had done so much for the Bag Company. As a result of whatever passed between the officials of the Mills and of the Bag Company, the latter, on the 27th, entered into a formal contract to sell the Mills $22,100 worth more of bags, and acknowledged the receipt of that sum of money. The contract provided that deliveries under it should be guaranteed by a surety bond.

The president of the Mills admits that, when he came to Chicago, he had no intention of buying bags, and it is further admitted that, prior to the receipt of the surety bond, he wired the Mills nothing was yet accomplished, but to hold any reply to the Credit Company. The Bag Company took the contract to the surety, and on the 28th obtained from it the bond now in controversy, by which the surety guaranteed the deliveries. This bond was at once turned over to the president of the Mills, and on the same day he started back to Atlanta. The statement in the contract that the $22,100 had been paid was untrue. The president of the Mills, on his return to Atlanta, conferred with its counsel, and on October 1st had the Mills draw its check for $22,100 to the order of the Bag Company. The check was certified, and then with it and his legal adviser he returned to Chicago on the 3d of October.

After having agreed with the president of the Bag Company that the latter was indebted to the Mills in the sum of $21,087.20, the latter drew its check for that amount. They then went to the bank of the Bag Company. The $22,100 certified check of the Mills was deposited to the credit of the Bag Company, and the latter's check for $21,087.20 was certified and handed to the president of the Mills. The difference between the face of the two checks was $1,012.80. It so happened that the only bags received by the Mills under the contract of September 27th were of the value of $1,050. It follows that, if the bond had never been obtained or is now unenforceable, the Mills will be $37.20 better off for what took place between September 27 and October 3, 1918, and that, if the bond be held good, it will have profited to the amount of $21,087.20.

The president of the Mills admits that he understood, when he made the so-called contract of September 27th, that the Bag Company would pay his company all that it then owed it out of the price that the Mills agreed to pay for the bags of the new contract. A further analysis of the facts is unnecessary. The making of the contract was obviously a mere means of inducing the surety to guarantee the existing debt of the Bag Company. The surety would never have executed the bond, had it been told the facts, and it is certain that both the

president of the Bag Company and the president of the Mills knew that it would not.

[2] The fraudulent character of the whole transaction is too obvious for further comment. The bond should be canceled if this court has in this case jurisdiction so to decree. The Mills says it has none. Phœnix Mutual Life Insurance Co. v. Bailey, 13 Wall. 616, 20 L. Ed. 501, and many cases since, hold that, as one who is sued at law, upon a bond or policy, the execution of which by him was procured, as he asserts, by fraud, may there defend on that ground, he has an adequate remedy at law, and has no claim to the interposition of equity. If the Mills had stood on its objection to the jurisdiction of equity, the line of authorities referred to would have been conclusive. It is, however, equally well settled that when, as here, the subject-matter is within the cognizance of a court of equity, the right of a defendant to object on the ground that there is a legal remedy may be waived. McGowan v. Parish, 237 U. S. 295, 35 Sup. Ct. 543, 59 L. Ed. 955. It is waived when the defendant by cross-bill under the old practice, or by counterclaim under the new, asks for affirmative relief. Original Consolidated Mining Co. v. Abbott (C. C.) 167 Fed. 681; 1 Street's Federal Equity Practice, § 92. A similar principle was applied in Texas & Pacific Railway Co. v. Eastin, 214 U. S. 153, 29 Sup. Ct. 564, 53 L. Ed. 946.

[3] In this case, the Mills, while in its answer asserting that the plaintiff had an adequate remedy at law, went on to set up its counterclaim on the bond, and prayed for a decree against the surety for $21,050, being the penalty of the bond, less $1,050, the value of the bags received by the Mills under the guaranteed contract. It said it did not thereby waive its objection to the jurisdiction of equity. In its present view, what it did was not voluntary on its part, but was required by the new equity rules. If it had not made a counterclaim, it says it would have imperiled its right subsequently to recover upon the bond anywhere. Is that so?

If the Mills had rested upon its contention that the chancellor was without jurisdiction, one of three things would have followed: This court might have agreed with it. If so, nothing which took place in a forum into which it was taken against its will, and from which, upon its demand, it was dismissed for want of jurisdiction, could have injuriously affected its right in any other tribunal. The court might have retained jurisdiction, and decided that the surety had not made out a case for cancellation. The judicial decision that the bond was good could not possibly have hurt the Mills in a subsequent prosecution of its suit at law, instituted before the bill in equity was filed. The third possibility was that the court might hold that the bond was invalid and should be canceled. Then, of course, the controversy would be finally decided against the Mills; but that result would not have depended in whole or in part upon whether it had made or had refrained from making a counterclaim.

It follows that the Mills had no reason for asking affirmative relief, except the hope of getting a decree against the surety for the amount due on the bond. Under such circumstances, to make a coun-

terclaim is to accept the jurisdiction of the court of equity. It becomes, therefore, unnecessary to decide whether, in a case in which there are other reasons for setting up a counterclaim, good faith does not require that a defendant, who wishes to stand to the end upon his objection to the equity jurisdiction, should not move to dismiss before answering, as the rules permit him to do, or, if he includes both his motion to dismiss and his counterclaim in his answer, whether he is not bound to make it plain that he does so only because his right to recover in another forum upon his counterclaim may not be prejudiced by his silence.

The Mills did neither of these things. At the hearing it offered evidence in support of its prayer for an affirmative decree against the surety. No attempt to withdraw the counterclaim was made until after the court had emphatically expressed an opinion upon the merits. Its waiver of objection to the jurisdiction was complete. It is argued that this court may not enjoin a prosecution of state court suits. That is doubtless true, but is not here important. The Mills offered the bond in controversy in evidence. It is still in the custody of this court. A decree canceling it is within the jurisdiction of this tribunal, and, when passed, will make the invalidity of the bond res adjudicata as between the parties to this suit.

Upon reasonable notice, a draft decree in accordance with the conclusions herein reached may be submitted.

KELLY v. ROBINSON et al.

(District Court, E. D. Missouri. January 31, 1920.)

No. 5031.

1. REMOVAL OF CAUSES ⟸49(1)—JOINT OR SEVERAL LIABILITY OF DEFENDANTS DETERMINABLE BY LOCAL LAW.
   In determining whether there is a separable controversy, which entitles one defendant to remove a cause, the question of joint or several liability of defendants is determinable by the local law.
2. PRINCIPAL AND AGENT ⟸159(2)—AGENT NOT LIABLE TO THIRD PERSONS FOR NONFEASANCE.
   An agent is not personally liable to a third person for nonfeasance, or a mere omission of duty in the course of his employment.
3. REMOVAL OF CAUSES ⟸49(3)—ACTION AGAINST EMPLOYER AND SUPERINTENDENT NOT SEPARABLE CONTROVERSY.
   The petition in an action for death of a miner, against the employer corporation and its superintendent and foreman, alleging negligent failure to furnish decedent a safe place to work, by an allegation that individual defendants were authorized and required to make and keep such place safe, *held* not to state a cause of action against them, and the cause *held* removable by the corporation defendant.

At Law. Action by Nellie Kelly against Robert H. Robinson, Lafayette J. Johnson, and the Federal Lead Company. On motion to remand to state court. Denied.

Safford & Marsalek, of St. Louis, Mo., for plaintiff.
Holland, Rutledge & Lashley, of St. Louis, Mo., for defendants.

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

FARIS, District Judge. Plaintiff's motion to remand is bottomed upon the fact that defendants Robinson and Johnson are citizens of the state of Missouri, of which state the plaintiff is likewise a citizen, and that there is lacking, therefore, that diversity of citizenship whereby jurisdiction of the case is conferred on this court. Defendant Federal Lead Company insists that the controversy is a separable one, and that the existence of a diversity of citizenship as between plaintiff and the corporate defendant (against whom alone, it is urged, a cause of action is stated in the petition) confers jurisdiction upon this court.

The question mooted must be resolved by resort to the allegations of the petition. Plaintiff sued in a state court for the alleged negligent killing of her husband, who came to his death, as it is averred, by reason of certain negligent omissions of duty owed by defendants to plaintiff's decedent. This negligence is set out in the petition thus:

"That * * * defendants herein, in the operation of said mine, negligently employed and provided an insufficient number of miners to inspect and keep safe the roof, or what is commonly known as the 'back,' of said mine, negligently caused and permitted loose, drummy roof or 'back' to be and remain in said mine, in shaft No. 4, stope C 345, above the point where Robert N. Kelly received the injuries herein alleged, and negligently caused and permitted Robert N. Kelly, in performing his duties to defendant Federal Lead Company, to be and remain in said mine, under said loose, drummy roof or 'back,' and defendants by said negligence directly and proximately caused the premises at and near the point where Robert N. Kelly received said injuries, when and for a long time before said injuries were received, to be and remain an unsafe and dangerous place to work, and defendants, by said negligence, on the day and year and in the county and state last aforesaid, directly and proximately caused and permitted the ground and rock of said roof or 'back' in said mine in which defendants were then engaged in mining lead, a valuable mineral, to fall upon and strike and injure and thereby kill said Robert N. Kelly, who was then in the employ of defendant Federal Lead Company, and acting within the scope of said employment."

The petition avers that defendants Robinson and Johnson, at the time plaintiff's decedent came to his death, were respectively superintendent of defendant Federal Lead Company's mines and one of the mine captains thereof, and as such, it is further averred, they were—

"authorized and required to provide a sufficient number of competent miners to inspect and keep safe the roof, or what is commonly called the 'back' of said mine." (Italics are mine.)

As bearing upon the good faith of plaintiff in joining the individaul defendants, affidavits were filed both asserting and denying the financial responsibility of the latter to respond in damages to plaintiff. But in the last analysis the financial capacity of the individual defendants is of negligible value in determining the question now before the court. For obviously, if there is in fact a joint liability against both the corporate and individual defendants, the motive of the plaintiff in proceeding to enforce such liability becomes practically immaterial. Chicago, etc., Railway Co. v. Schwyhart, 227 U. S. 184, 33 Sup. Ct. 250, 57 L. Ed. 473. For if the individual defendants owed any duty to the plaintiff's decedent, which they negligently performed, they are properly joined, and this motion ought to be sustained, and the case remanded to the state court, whence it came.

[1] Stated in its ultimate terms, the duty alleged to have been neglected by defendants was that of furnishing plaintiff's decedent a safe place to work. It needs neither exposition, argument, nor citation upon the proposition that primarily it was the duty of the corporate defendant, and not that of the individual defendants, to provide for plaintiff's decedent such safe place to work. If such place was unsafe, or if it became unsafe, and was allowed to so remain by reason of the nonfeasance of the individual defendants, as contradistinguished from their misfeasance, such defendants would not be liable to the plaintiff. Whether the duty alleged to have been neglected by the individual defendants was so neglected by misfeasance, or mere nonfeasance, is then the decisive question raised by the motion to remand. This question is to be resolved by a reference of the fact of liability vel non to the decisions of the state court of last resort, and not to the decisions of the federal courts. Chesapeake & O. R. R. Co. v. Cockrell, 232 U. S. 146, 34 Sup. Ct. 278, 58 L. Ed. 544; Chicago, etc., Ry. Co. v. Dowell, 229 U. S. 102, 33 Sup. Ct. 684, 57 L. Ed. 1090.

[2] The ground of negligence upon which recovery is sought against all the defendants is, I repeat, the alleged failure of defendants to furnish to plaintiff's decedent a safe place to work. But this duty under the law was not owed to decedent by the individual defendants, who were merely the agents of the corporate defendant. This duty was owed to decedent by the defendant Federal Lead Company alone, and if this corporate defendant failed in discharging its duty, it alone can be sued. Whether in case of dereliction the individual defendants, as servants and agents of the corporate defendant, might or might not be liable to the latter, if the latter by the default of the former be mulcted in damages, I need not pause to inquire. Ordinarily, the liability of a servant or agent of the master or principal for a tort arising in the master's business is to be tested upon the question whether the injury accrued from negligence of the servant or agent sounding in misfeasance or nonfeasance. Steinhauser v. Spraul, 127 Mo. 541, 28 S. W. 620, 30 S. W. 102, 27 L. R. A. 441; Harriman v. Stowe, 57 Mo. 93. An agent is liable to him who is injured by a tort or wrong done by such agent in the scope of his employment, if such injury is the result of the misfeasance or the positive wrong of the agent, as contradistinguished from mere nonfeasance or omission of duty. Tersely expressed the rule is that:

"An agent is personally liable to third parties for doing something which he ought not to have done; but he is not liable for not doing something which he ought to have done." Elwell's Evans on Agency, 438.

The learned observations of Mr. Story in his valuable work on the Law of Agency (Story on Agency [9th Ed.] § 308) seem most accurately to set forth the law on this question. Upon this precise point Mr. Story said this:

"We come, in the next place, to the consideration of the liability of agents to third persons, in regard to torts or wrongs done by them in the course of their agency. * * * And here the distinction ordinarily taken is between acts of misfeasance or positive wrongs and nonfeasances or mere omissions of duty by private agents. * * * The master is always liable to third persons for the misfeasances and negligences and omissions of duty of his

servant, in all cases within the scope of his employment. So the principal, in like manner, is liable to third persons for the like misfeasances, negligences, and omissions of duty of his agent, leaving him to his remedy over against the agent in all cases, where the tort is of such a nature as that he is entitled to compensation. * * * The agent is also personally liable to third persons for his own misfeasances and positive wrongs. But he is not * * * liable to third persons for his own nonfeasances or omissions of duty, in the course of his employment. His liability, in these latter cases, is solely to his principal."

The above excerpt was quoted with approval by Judge Sherwood in the case of Steinhauser v. Spraul, supra, which case is the latest utterance of the Supreme Court of Missouri which I have been able to find upon this subject. Substantially, however, what was said by Judge Sherwood in the Steinhauser Case only reiterated what had theretofore been said by the Supreme Court of Missouri in an early case. Harriman v. Stowe, 57 Mo. 93.

Applying to the allegations of plaintiff's petition the test of misfeasance or nonfeasance connoted by the rule above quoted, it seems plain that defendants Robinson and Johnson were, as to plaintiff's decedent, guilty of a mere omission of duty. These defendants were authorized and required to employ a sufficient number of competent miners to inspect and keep safe the roof of the mine. Having thus pleaded the incumbent duties resting upon the individual defendants plaintiff thereupon avers that the defendants (which of course includes the individual defendants) "negligently employed and provided an insufficient number of miners to inspect the roof of said mine," so that the place where decedent was compelled to work became and remained "an unsafe and dangerous place to work" and by this negligence it is averred decedent came to his death.

[3] In the light of these averments in the petition it is, I think, too plain for argument that the charge here against the individual defendants is merely a charge of a failure, or omission to perform an incumbent duty; that is, a charge of nonfeasance of duty and not misfeasance or wrong performance of such duty. If this view of the fact be correct, then there is no liability in favor of the plaintiff as against the individual defendants. Therefore the case presented is one of a separable controversy, and since, as between plaintiff and the corporate defendant against which a cause of action is pleaded in the petition, diversity of citizenship exists, this court has jurisdiction.

It follows that the motion to remand ought to be overruled. Let this be done.

HOWARD v. MECHANICS' BANK et al.

(District Court, E. D. New York. January 6, 1920.)

1. PLEDGES ⟸31(4)—LIABILITY OF PLEDGEE FOR CONVERSION.
A bank, holding certain new automobiles in pledge as security for a loan, which, on bankruptcy of the debtor, nominally sold them for less than their value to a director, who resold them singly through an agent at a profit, which was turned over to the bank, *held* accountable to the trustee in bankruptcy for the difference between its debt and the amount actually received, with interest.

2. PLEDGES ⟸25—LIEN OF PLEDGEE LIMITED TO PROCEEDS OF WRONGFUL SALE.
A pledgee of property of bankrupts, which ostensibly sold it for the amount of its debt, but afterwards received from the purchaser the profit on resales, *held* to have waived any right to a lien for expenses incurred for storage before its sale.

3. BANKRUPTCY ⟸188(1)—EFFECT OF WRONGFUL SALE BY PLEDGEE OF BANKRUPT.
A pledgee, which wrongfully sold the pledged property, *held* estopped to claim a lien for a greater amount than it received on an accounting to the trustee in bankruptcy of pledgors for the value of the property.

4. BANKRUPTCY ⟸154—RIGHT OF BANK TO APPLY FUNDS ON UNSECURED INDEBTEDNESS.
A bank, which as pledgee wrongfully sold property of bankrupts at private sale for the amount of its lien, but afterwards received the profit from resales by the purchaser, which it held as its own, *held* estopped, on an accounting to the trustee, to apply such sum on unsecured indebtedness of bankrupts.

In Equity. Suit by William Howard, Jr., trustee in bankruptcy of Senior Bros., against the Mechanics' Bank and the Brooklyn Trust Company and Walter S. Ward, executors of N. Willard Curtis, deceased. Decree for complainant.

Horace W. Palmer, of New York City (Charles A. Taussig, of New York City, of counsel), for plaintiff.
Gray & Tomlin, for defendant Mechanics' Bank.
Bruce R. Duncan, of Brooklyn, N. Y., for defendant executors.

CHATFIELD, District Judge. The plaintiff seeks to set aside a conveyance from the defendant bank to the decedent, Curtis, and for an accounting for the market value of some eight automobiles, which it alleges both the bank and the decedent converted, and for the value of which they should be held as trustees. Five of these automobiles are what is known as "Light Sixes," and three as "Twin Sixes," all of the model of 1916, made by the Pathfinder Company, and sent to Brooklyn upon the orders of Senior Bros., the bankrupts herein.

The Mechanics' Bank of Brooklyn had previously advanced certain money upon the strength of warehouse receipts for ten cars, and had possession of them as security. Two of these cars were sold three days before bankruptcy. The remaining eight were sold by the bank to N. Willard Curtis, one of the directors, and then sold to customers, who were told, by men who knew of the bank's transaction, that the

cars could be bought cheap, and to apply to one of the bankrupts, acting as salesman at the bank's request. The proceeds were turned over to the bank. Out of these proceeds the bank repaid themselves the amount due upon the Curtis note, with interest, and thus met the amount of the so-called purchase by Mr. Curtis. The balance was applied on other indebtedness of Dr. Frank S. Senior, father of the bankrupts. The record actually shows that Mr. Roy Senior, one of the bankrupts, was told by the representatives of the bank that each car could be sold for any price over the amount which they owed to the bank on each car, and that, if he obtained more, the bank would apply it for the benefit of his father's account. Since the beginning of the action, Mr. Curtis has died, and his executors have been brought in to defend the action in his place.

It appears that these cars were sold at a time when the Pathfinder Company had no regular repair station or sales office in Brooklyn. One was opened in New York before all of the cars were disposed of, but by parties entirely independent of the Seniors. The Pathfinder Company had placed upon the market in the meantime a 1917 model, which did not differ greatly in structure, but contained some changes of appearance, and the testimony has gone at length into the obtainable price for cars of the sort involved herein under the circumstances existing during the time through which Mr. Roy Senior made sales of these cars. It appears that the buyers of these cars knew that they were getting them at reduced rates. None of the cars were sold from any place recognized as a show room or agency. Each buyer had information that they were being disposed of under such circumstances as would indicate a forced sale of some kind. Each buyer endeavored to get his car as cheap as he could do so, while Mr. Senior apparently endeavored to get as much as the buyer would give.

It was in no case the ordinary commercial transaction of hunting out buyers, who were to be interested in the cars and talked into making the purchase on such terms as the agent was ready to give in making sales. Nor were any of them such sales as would be made where a customer came into an agency and was looking for a car at the lowest price for which the agency would dispose of cars. Each sale in the present case was on a cut rate or forced sale basis, and the value of the cars under those circumstances was what could have been obtained in that kind of a market, rather than the amounts which represented the usual sales price of the cars, or the amounts which might have been obtained if the business of selling the Pathfinder automobiles had been going on in the usual course.

[1] On the evidence it is apparent that Mr. Senior procured fairly good prices for the cars. His willingness to let the cars go at any price which would cover the claims of the bank was evidently restrained by the knowledge that the bank would give his father the benefit of any surplus up to the amount of his father's indebtedness, and the testimony does not indicate that he slaughtered prices, or let the cars go for less than any one else could have obtained under similar circumstances. It will therefore be found that the amount at issue in this case, representing the value of the cars, for which an accounting should

be had, does not exceed the sum which was actually turned over from the purchase of these cars to the bank.

The plaintiff alleges that Mr. Curtis and the bank acted with knowledge of all the circumstances preceding the time when Mr. Curtis nominally bought these cars from the bank. At that time the bank had the right to hold these particular cars and to proceed in a statutory way or according to law to convert the property pledged into money, to pay its debt, and to account for the balance, or to dispose of the property by auction, on giving proper notice, and to apply the proceeds to the liquidation of its debt, accounting for the surplus, if any. The plan adopted by the bank, of selling to some one burdened with knowledge of the facts, for an amount admittedly less than the value of the property, and then to receive the benefit of the full amount realized, was a violation of the duty which the bank owed as a trustee, even when acting upon its legal rights in selling the property to liquidate its debt.

Both the bank and Mr. Curtis held this trust relationship to the bankrupts' creditors, and are liable to account for the difference between the amount due on the notes, with interest to the date of sale to Mr. Curtis, and the total amount actually received. The plaintiff is entitled to receive interest upon this balance from the time of its payment to the bank until the entry of judgment.

[2] An item of $454.96 is sought to be charged by the bank for the amount of storage accrued against these cars when they were taken possession of by the bank, shortly after bankruptcy. When the bank made ostensible sale to Mr. Curtis, it did not include in the purchase price this charge for storage. It is impossible to tell how the bank expected to reimburse itself therefor, or whether it anticipated proving this amount merely as a general creditor of the bankrupts. But it is evident that the bank expected to receive, through Mr. Curtis, additional moneys upon the sales of these cars. They waived any claim of lien or right to apply moneys in their hands to the payment of expenses, by holding out to the world what appeared to be a flat sale for the face value of their debt. To allow the bank to profit by its own wrongdoing, and to thereafter deduct charges as to which the lien had been waived, would not be equitable under the circumstances, and for these charges upon the automobiles the bank should be allowed nothing but a general claim against the bankrupt estate.

[3] If any interest was due thereafter upon the amount which Mr. Curtis was supposed to have paid, it would be a charge against his estate, and his estate cannot come in and insist that the executors be relieved by an admission of primary responsibility on the part of the bank, and at the same time ask that the bank be allowed to enforce a claim for interest, not against them, but against an innocent third party. If the bank considered the notes paid by the sale to Mr. Curtis, except in so far as they may have had a balance at that time which was provable as a general claim against the bankrupt, it cannot now be heard to transfer this balance into a secured claim.

[4] The bank also raises the contention that it has the right to apply any amount which came into its hands from the sale of these

eight automobiles to the payment of other indebtedness owing by the bankrupts to the bank, and for which the bank preferentially took possession of certain other automobiles, which were sold and the proceeds kept by the bank, which has been ordered to pay back the sums involved, leaving it to its proof of general debt for that amount.

The proposition urged by the bank would be true in the ordinary sense. Its right to set off funds in its hands against any indebtedness owing by the bankrupt to it is unrestricted, except in so far as the funds sought to be so used are definitely held as trust funds for a certain purpose, or as the property of another party. But in the present case the bank attempted to dispose of its property to Mr. Curtis, without crediting to the bankrupt anything at all out of the sum which might come into its hands as surplus, and has therefore estopped itself from applying that surplus as a set-off on the amount due to the bank from the bankrupts. It holds the balance which it received from Mr. Curtis in trust to liquidate the claim against his estate, and if the bank applies these funds, or any part of them, to the payment of its own debts, which it may still have the right to do under the bankruptcy law, then judgment for the amount which the bank fails to turn over must be rendered against the estate of Mr. Curtis, which is also jointly liable.

The plaintiff may have a decree for the amount received by the bank over and above its indebtedness upon the notes given, with the eight cars in question as security, together with interest to the date of the sale to Mr. Curtis, in so far as that interest has not been paid. The plaintiff may have interest upon the amount so received from the date of payment of the various sums to the bank, and judgment should run against both the bank and the estate of Mr. Curtis, but with the provision that the debt shall be paid primarily by the bank, and that recourse shall be had against the estate of Mr. Curtis only in such amount as the bank may fail to pay.

Ex parte GIVINS.

(District Court, N. D. Georgia. February 2, 1920.)

1. ARMY AND NAVY ⊂⇒43—COMMANDER OF PERMANENT CAMP HAD POWER TO CONVENE GENERAL COURT-MARTIAL.

   Under Eighth Article of War (Comp. St. § 2308a), authorizing the commanding officer of a district or body of troops to appoint a general court-martial when empowered by the President, a general court-martial called by the commander of a permanent camp, as authorized by General Order No. 56 of the War Department, issued June 13, 1918, by direction of the President, *held* lawfully convened.

2. ARMY AND NAVY ⊂⇒47—RECORD OF COURT-MARTIAL NEED NOT SHOW ALL FACTS ESSENTIAL TO ITS EXISTENCE.

   The record in a case tried by a court-martial need not show all the facts necessary to constitute it a lawful court.

3. ARMY AND NAVY ⊂⇒47—JUDGMENT OF COURT-MARTIAL NOT REVIEWABLE ON HABEAS CORPUS.

   A civil court in a habeas corpus proceeding cannot review the judgment of a court-martial for error.

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4. ARMY AND NAVY ⊂=47—PROOF OF JURISDICTION OF COURT-MARTIAL OVER DEFENDANT SUFFICIENT.

That a defendant was appointed, accepted his commission, and served as an officer in the army is sufficient proof that he was subject to military law.

5. ARMY AND NAVY ⊂=47—COURTS-MARTIAL HAD JURISDICTION OF TRIAL FOR MURDER AFTER ARMISTICE; "TIME OF PEACE."

The provision of article 92, Articles of War (Comp. St. § 2308a), that no person shall be tried by court-martial for murder committed within the geographical limits of the states of the Union in time of peace, *held* not applicable to any time between the declaration of war with Germany and the official conclusion of peace, although the place of war was not within the United States.

6. ARMY AND NAVY ⊂=48—DESIGNATION OF PLACE OF IMPRISONMENT PRESUMED LAWFUL.

Where the judgment of a court-martial, on conviction of a defendant for manslaughter, directed the kind and duration of his imprisonment as authorized by article 93, Articles of War (Comp. St. § 2308a), the place of confinement may be later designated by the War Department, and such designation on the commitment papers will be presumed to have been lawfully made.

7. ARMY AND NAVY ⊂=43—MEANING OF "DISTRICT" IN EIGHTH ARTICLE OF WAR.

The term "district," as used in Eighth Article of War (Comp. St. § 2308a), providing that, when empowered by the President, the commanding officer of any district may appoint general courts-martial, has no technical military meaning, but includes the territory occupied by a permanent military camp.

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

Petition by William J. Givins for writ of habeas corpus. Denied.

John S. Strahorn, of Annapolis, Md., for petitioner.

Hooper Alexander, U. S. Atty., and John W. Henley, Asst. U. S. Atty., both of Atlanta, Ga., and Francis E. McGovern, Judge Advocate, of Milwaukee, Wis., for the United States.

SIBLEY, District Judge. The return to the writ showed the applicant held in the United States penitentiary, Atlanta, Ga., since May 2, 1919, under sentence by a court-martial. The exhibited record shows the arraignment and trial of Capt. William J. Givins, Infantry, United States Army, on October 30, 1918, before a general court-martial convened at Camp Sevier, S. C., under Special Order No. 172, Headquarters, Camp Sevier, S. C., on a violation of the Ninety-Second Article of War (Comp. St. § 2308a), and specifications, in effect, of murdering a private on September 28, 1918, by premeditated shooting. There is a plea of "not guilty," and a finding of not guilty of the charge made, but guilty of violation of the Ninety-Third Article of War, with specifications amounting to manslaughter. The sentence is:

"To be dismissed the service and to be confined at hard labor at such place as the reviewing authority may direct for 10 years."

The sentence having been approved by the convening authority, and the record of the trial forwarded for the action of the President, under the Forty-Eighth Article of War, the following order is made thereon:

"In the foregoing case of Captain William J. Givins, Infantry, the sentence is confirmed, and will be carried into execution. Woodrow Wilson. The White House, 14th April, 1919."

The contentions of the applicant are:

(1) The court-martial was not legal, because convened by a camp commander, who could only call a special court-martial.

(2) The record of the trial does not show accused was an officer as alleged, nor in any manner amenable to trial by court-martial.

(3) The court-martial had no authority to try him for murder, because: (a) There was a time of peace in the United States when the crime was committed; and (b) the pleadings do not negative a time of peace.

(4) The sentence as promulgated did not include confinement in the United States penitentiary at Atlanta, or any other place.

[1] 1. The commander of a camp may, as such and on his own motion, call a special court-martial under the Ninth Article of War; but a special court-martial may not try a captain. Article 13. There is, however, in evidence General Order No. 56, promulgated by the Secretary of War under date of June 13, 1918, which so far as material is as follows:

"By direction of the President, the commanding officer of each of the following camps is empowered, under the Eighth Article of War, to appoint general courts-martial whenever necessary": Naming, among 33 camps, "Camp Sevier, Greenville, South Carolina."

Besides the inherent power of the commander-in-chief to direct the convening of courts-martial (Swaim v. United States, 165 U. S. 553, 17 Sup. Ct. 448, 41 L. Ed. 823), article 8 declares that general courts-martial may be appointed "when empowered by the President," by "the commanding officer of any district or of any force or body of troops."

[7] The term "district" has no technical military meaning, but includes the territory occupied by a permanent military camp, such as Camp Sevier. Moreover, the troops at the camp are ordinarily under the command of its commanding officer, so that the President might authorize such officer to convene general courts-martial, both as the commander of a district and of a body of troops.

[2] 2. The record is not defective in failing to refer to General Order 56 as authority for Special Order 172, by which the court was constituted. While courts-martial are special courts of limited jurisdiction, and have no presumptions to aid them (Runkle v. United States, 122 U. S. 543, 555, 7 Sup. Ct. 1141, 30 L. Ed. 1167; McClaughry v. Deming, 186 U. S. 49, 63, 22 Sup. Ct. 786, 46 L. Ed. 1049), still it is not requisite for an inferior court to spread upon the record of each case which it tries the full pedigree of its powers. Its record need not justify its existence generally, but should show the right to try the particular case. Otherwise, this record must have shown, not only the special order appointing its members and General Order 56, but also that the persons making these orders were really the commanding officer of Camp Sevier and the duly elected President of the United States. Obviously such things need not be made of record,

because they are to be judicially recognized. So a general order of the War Department is an army regulation, and is the law of the army, and will surely be judicially noticed by military courts, without either allegation or proof, and indeed by the civil courts as well. Jenkins v. Collard, 145 U. S. 547, 560, 12 Sup. Ct. 868, 36 L. Ed. 812; Caha v. United States, 152 U. S. 211, 221, 14 Sup. Ct. 513, 38 L. Ed. 415; Gratiot v. United States, 4 How. 80, 117, 11 L. Ed. 884.

[3] 3. If by the second contention is meant that the evidence produced to the court-martial did not sufficiently show that applicant was a captain in the infantry of the United States Army, it must be replied that this court, on habeas corpus, is not a court of errors for the court-martial. The inquiry here is not whether that court decided rightly, but whether it could rightly decide at all. Johnson v. Sayre, 158 U. S. 109, 15 Sup. Ct. 773, 39 L. Ed. 914; Swaim v. United States, 165 U. S. 553, 561, 17 Sup. Ct. 448, 41 L. Ed. 823; Dynes v. Hoover, 20 How. 65, 15 L. Ed. 838; McClaughry v. Deming, 186 U. S. 49, 69, 22 Sup. Ct. 786, 46 L. Ed. 1049. Of course the applicant may here contend that he was not in fact a person subject to military law, and was not triable by court-martial, although that court might have adjudged otherwise, for that denies the jurisdiction in fact of the court, and its record cannot establish its jurisdiction, if indeed it had no authority to make a record.

[4] The evidence introduced here, however, shows that Givins, having served for several months as first lieutenant, was commissioned as a captain September 9, 1918, and accepted his commission September 25, 1918. The only reply made is that there is no proof he took the oath of allegiance at any time, which is said to be the touchstone of soldierhood. In re Grimley, 137 U. S. 147, 156, 11 Sup. Ct. 54, 34 L. Ed. 636. The oath may have been taken long since, and, being oral, may not be capable of convenient proof; but accepting a captain's commission, carrying the privileges and pay of that office, is amply sufficient proof that the petitioner was subject to military law. Article of War 2 (a).

[5] 4. Capt. Givins was arraigned for murder under article 92, and convicted of manslaughter, punishable under article 93. Under article 92 he could not be tried by a court-martial for murder "committed within the geographical limits of the states of the Union * * * in time of peace." It is said that at no time was there other than peace in the United States, and especially so after the armistice was signed with Germany, prior to the promulgation of the sentence in this case. If the right of a court-martial to try a military person under article 92 was intended to exist only in a place of war and in case the civil courts were closed, it would have been easy to say so; but a time of war is made the test, and it must be held that for military persons, at least, such a time continued from the date of the declaration of war by Congress until some formal proclamation of peace by an authority competent to proclaim it. The rapid movement of soldiers, causing the scattering of witnesses before the civil courts could act, as well as the necessity of firm discipline and full control over an army when on a war footing, are prime causes for the substitution of courts-

martial for civil courts in time of war. These causes existed at Camp Sevier, though the state of active operations was far removed.

If in exceptional cases a time of peace may come before official recognition of it, and before a demobilization of the armies, this is not such a case. And again it must be held that the failure of the court-martial's record to aver the crime to have been committed in a time of war is not fatal. On objection duly made it should have been alleged, and doubtless would have been; but, if the fact indeed existed, the failure of the record to state it is an irregularity in the record, and not a real want of jurisdiction in the court. If the jurisdiction really existed, in meeting a collateral attack it may be shown, either by the recitals of the record (which are neither conclusive nor exclusive evidence either way) or by aliunde proof. Galpin v. Page, 18 Wall. 350, 21 L. Ed. 959. The point is of the less practical merit because the petitioner was not convicted under article 92, but under article 93, as to which a time of war or peace is immaterial. Under familiar rules, he went on trial, not only for a charge of murder, but also for every lesser crime included in the offense alleged. He was not tried for murder alone, but for manslaughter and assault also, and was lawfully convicted of manslaughter. Dynes v. Hoover, 20 How. 65, 79, 15 L. Ed. 838.

[6] 5. Article 93 authorized punishment "as the court-martial may direct." The court could properly prescribe the kind and duration of the punishment, as it did; but the place of its execution is under legislative control. Ex parte Karstendick, 93 U. S. 396, 400, 23 L. Ed. 889; Weed v. People, 31 N. Y. 465. The time and place of execution are no part of the judicial sentence. Schwab v. Berggren, 143 U. S. 442, 451, 12 Sup. Ct. 525, 36 L. Ed. 218; In re Cross, 146 U. S. 271, 13 Sup. Ct. 109, 36 L. Ed. 969; Ex parte Waterman (D. C.) 33 Fed. 29; O'Brien v. Barr, 83 Iowa, 51, 49 N. W. 68. They may, under various circumstances, be added or altered after the adjournment of the term of court. Re Bonner, 151 U. S. 242, 14 Sup. Ct. 323, 38 L. Ed. 149; State v. Kitchens, 2 Hill (S. C.) 612, 27 Am. Dec. 410; Ex parte Nixon, 2 S. C. 4; Bland v. State, 2 Ind. 608; State v. Cardwell, 95 N. C. 643; Kingen v. Kelley, 3 Wyo. 566, 28 Pac. 36, 15 L. R. A. 177; In re Bell, 56 Miss. 282; Mills v. Commonwealth, 13 Pa. 631. Else, the specified penitentiary being discontinued or destroyed, a discharge on habeas corpus would result. Other embarrassments would exist in the case of an army in the field. Capt. Givins has been lawfully sentenced to confinement at hard labor for 10 years, and should not be discharged until he has lawfully served it, or been pardoned or paroled.

Under Article of War 42 and under section 2 of the act of March 4, 1915 (38 Stat. 1084 [Comp. St. § 2458a]), he may lawfully be confined on this sentence in *any* penitentiary directly or indirectly under the control of the United States. Further, in promulgating this sentence, after confirmation by the President, the Acting Adjutant General, in his order accompanying the court-martial record, which was sent with the prisoner as a commitment, states that the United States penitentiary at Atlanta, Ga., had been designated as the place of con-

finement. It appears from the evidence that a recommendation of this place by the Secretary of War had accompanied the proceedings when submitted to the President for his confirmation, and there is proof that the designation of the place of confinement in this way, separately from the confirmation proper of the sentence, is the uniform practice of the War Department.

It is argued that it should be assumed that the President had orally directed this place of confinement in accordance with the sentence of the court, and not that the Adjutant General had done so. United States v. Page, 137 U. S. 673, 11 Sup. Ct. 219, 34 L. Ed. 828; United States v. Fletcher, 148 U. S. 84, 89, 13 Sup. Ct. 552, 37 L. Ed. 378; Wolsey v. Chapman, 101 U. S. 755, 770, 25 L. Ed. 915. And see, as to presumption of regularity as to the place designated for imprisonment, Ex parte Wilson, 114 U. S. 417, 421, 5 Sup. Ct. 935, 29 L. Ed. 89. A contrary view could only result in the petitioner's being held until the place could be designated. In re Bonner, 151 U. S. 242, 14 Sup. Ct. 323, 38 L. Ed. 149. He would then lose credit for the time he has heretofore been improperly confined. If there is any objection to his present place of confinement, it can doubtless be changed on such showing as could be made to the President in making now an original designation.

The view will be adopted that the confinement has been and is lawful, and the writ of habeas corpus will be discharged, and the petitioner remanded to custody.

In re BRINSON.

(District Court, S. D. Mississippi, Jackson Division. December 16, 1919.)

No. 1407.

BANKRUPTCY ⊂=143(12)—TRUSTEE ACQUIRES NO INTEREST IN SURRENDER VALUE OF EXEMPT INSURANCE POLICY; "PROCEEDS."

Under Hemingway's Code Miss. §§ 1813, 1814, exempting from debts of the insured the proceeds of a life policy to a certain amount, whether payable to his estate or to others, and which, as construed by the Supreme Court of the state, includes as "proceeds" of a policy its surrender value, the trustee of a bankrupt in that state takes no interest in a policy held by him, under Bankrupcy Act, §§ 6a, 70a (Comp. St. §§ 9590, 9654).

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

In Bankruptcy. In the matter of A. C. Brinson, bankrupt. On petition to revise order of referee. Reversed.

Magee & Gibson, of Monticello, Miss., for bankrupt.

HOLMES, District Judge. This is a petition for revision of an order of the referee holding that the trustee in bankruptcy is entitled to the cash surrender value of an insurance policy on the life of the bankrupt, and requiring the bankrupt to pay to the trustee the amount of such cash surrender value before being entitled to claim said policy as exempt.

Among the assets listed in the bankruptcy schedule was a life insurance policy for $1,000, payable to the wife of the bankrupt as beneficiary, but with the right reserved to the insured to change the beneficiary by written notice to the company. The cash surrender value of the policy upon the filing of his petition and on the date of adjudication was $249. This amount, as well as the policy itself, is claimed as exempt by the bankrupt.

When he filed his petition the bankrupt also claimed as exempt certain real estate and $250 in cash out of $996.58 which he had on hand. The claim for land exemption was denied, and the one for $250 in cash allowed by the referee, and no appeal was taken from his order in either instance.

But the trustee demanded payment of the sum of $249, which was the cash surrender value of the insurance policy, and the referee entered an order requiring payment thereof by the bankrupt within 30 days, and providing that, should the bankrupt fail, within said time, to comply with the terms of said order, then the trustee was directed to take the necessary steps to obtain from the insurance company the said sum, either as cash surrender value or loan value, for the benefit of the creditors of the estate. Ten days were allowed in the order in which the bankrupt might appeal therefrom, which appeal was duly taken.

The bankrupt claims that the cash surrender value of the policy is exempt under the Mississippi law. The referee after quoting section 70a of the Bankruptcy Law (Act July 1, 1898, c. 541, 30 Stat. 565 [Comp. St. § 9654]), says in his certificate:

"I think the creditors are entitled to the cash surrender value of the policy. The Supreme Court of the United States, in the case of Cohen v. Samuels, 245 U. S. 50, 38 Sup. Ct. 36, 62 L. Ed. 143, decided in 1917 the exact question here presented, which is, of course, decisive of the instant case. There the policy was payable to the wife of the bankrupt as beneficiary, but the right was reserved to the bankrupt to change the policy at will. The court held that, under section 70a of the Bankruptcy Act, the creditors were entitled to the avails of the policy."

Section 6a of the Bankruptcy Act is as follows:

"Sec. 6. (a) This act shall not affect the allowance to bankrupts of the exemptions which are prescribed by the state laws in force at the time of the filing of the petition in the state wherein they have had their domicile for the six months or the greater portion thereof immediately preceding the filing of the petition." Act July 1, 1898, c. 541, 30 Stat. 548, § 6 (Comp. St. § 9590).

The claim of the trustee to the cash surrender value of this policy depends entirely upon section 70a of the Bankruptcy Law, which provides that the trustee of the estate of a bankrupt, upon his appointment and qualification, shall be vested by operation of law with the title of the bankrupt, as of the date he was adjudged a bankrupt, to all of his property of designated kinds, "except in so far as it is to property which is exempt."

There is a proviso to subdivision 5 of section 70a which says that, when any bankrupt shall have any insurance policy which has a cash surrender value payable to himself, his estate, or personal representatives, he may, within 30 days after the cash surrender value has been

ascertained, pay or secure to the trustee the sum so ascertained, and continue to hold and own such policy free from the claims of creditors participating in the distribution of his estate, but that if he fails to do this the policy shall pass to the trustee as assets.

It is obvious that sections 6a and 70a first preserve to the bankrupt the title to all property exempt to him by law, and in addition that the proviso to 70a gives the bankrupt the right to secure to himself any non-exempt insurance policy free from claims of creditors by paying to the trustee within a stipulated time the cash surrender value. The trustee takes no title to any life insurance policy which is exempt under the law of the state; but, if the policy is not so exempt, the trustee takes a qualified title, defeasible by the bankrupt upon payment of the cash surrender value of the policy.

I do not think the case of Cohen v. Samuels, 245 U. S. 50, 38 Sup. Ct. 36, 62 L. Ed. 143, is decisive of the question here, because there the policy was not claimed as exempt under the state law. There, as here, the policy was upon the life of the bankrupt, payable to another as beneficiary, but with the absolute right in the insured bankrupt to change the beneficiary without the latter's consent, and there, as here, the policy had a cash surrender value, which the company was willing to pay to the bankrupt. But there, as here, the policy was not directly in words payable to the bankrupt, and therefore literally did not fall within the terms of the proviso that, when any bankrupt shall have "any insurance policy which has a cash surrender value payable to himself, his estate, or personal representatives," he may continue to hold and own the same by paying to the trustee the cash surrender value thereof. The court held that under subdivision 3 of section 70a the trustee was vested with all powers which the bankrupt might have exercised for his own benefit, and that, although the policy was not payable to the bankrupt, it could have been so payable at his own will and by his simple declaration. The effect of this decision is simply that, where the bankrupt has reserved to himself in an insurance policy the absolute power to change the beneficiary at his own will, the policy passes to the trustee, subject to the conditions of the proviso in section 70a, in the same way and just as if it were payable in words to "himself, his estate, or personal representatives." But the decision does not hold that the trustee gets title to a policy, regardless of how payable, which is exempt by the state law, for the exemption in such a policy is expressly recognized by sections 6a and 70a of the Bankruptcy Act.

In Holden v. Stratton, 198 U. S. 202, 25 Sup. Ct. 656, 49 L. Ed. 1018, the court held that policies of insurance which are exempt under the law of the state of the bankrupt are exempt under section 6 of the Bankruptcy Act of 1898, even though they are endowment policies, payable to the insured during his lifetime, and have cash surrender values, and held, further, that the provisions of section 70a of the act do not apply to policies which are exempt under the state law. The court said:

"As section 70a deals only with property which, not being exempt, passes to the trustee, the mission of the proviso was, in the interest of the perpetuation of policies of life insurance, to provide a rule by which, where such policies passed to the trustee because they were not exempt, if they had a

surrender value, their future operation could be preserved by vesting the bankrupt with the privilege of paying such surrender value, whereby the policy would be withdrawn out of the category of an asset of the estate; that is to say, the purpose of the proviso was to confer a benefit upon the insured bankrupt by limiting the character of the interest in a nonexempt life insurance policy which should pass to the trustee, and not to cause such a policy when exempt to become an asset of the estate."

The Mississippi exemption statutes with reference to life insurance policies are found in sections 1813, 1814, of Hemingway's Code, as follows:

"1813. (2140.) *Amount of Life Insurance Policy—How Payable.*—The proceeds of a life insurance policy, to an amount not exceeding ten thousand dollars upon any one life, shall inure to the party or parties named as the beneficiaries thereof, free from all liability for the debts of the person whose life was insured, even though such person paid the premiums thereon.

"1814. (2141.) *Amount of Life Insurance Policy—Payable to Executor.*—The proceeds of a life insurance policy not exceeding five thousand ($5,000.00) dollars payable to the executor, or administrator, of the insured, shall inure to the heirs or legatees, freed from all liability for the debts of the decedent, except premiums paid on the policy by any one other than the insured for debts due for expenses of last illness and for burial; but if the life of the deceased be insured for the benefit of his heirs or legatees at the time of his death otherwise, and they shall collect the same, the sum collected shall be deducted from the five thousand ($5,000.00) dollars and the excess of the latter only shall be exempt."

Laws 1908, c. 175, in effect February 20, 1908.

In Dreyfus v. Barton, 98 Miss. 758, 54 South. 254, the Supreme Court of Mississippi held that the cash surrender value was "proceeds" of a life insurance policy, and exempt under these statutes. The court said:

"This statute exempts the whole proceeds, or any part of it, whether the value accrues during the life or after the death of the insured. The cash surrender value of the policy is just as much 'proceeds' of the policy, within the meaning of the statute, as would be the full amount after the death of the insured. In other words, when the person insured dies, the proceeds of the policy are exempt; while he lives, if the policy acquires a cash surrender value, this cash surrender value is 'proceeds' within the meaning of the statute, and exempt so long as the value in either case does not exceed three [now five] thousand dollars. Any other construction of the statute would impair, if it did not destroy in some cases, the object of the statute."

This case was cited, quoted, and followed in King v. Miles, 108 Miss. 732, 67 South. 182.

The fact that the insured reserved the absolute right to change the beneficiary did not destroy the exempt character of the proceeds of the policy, although the exercise of this right might change the statute under which the exemption would fall as a matter of law. If the beneficiary were changed from the wife to some other "party or parties named as beneficiaries," the proceeds would still be exempt under section 1813; if changed "to the executor or administrator of the insured," the exemption would come under section 1814. See, also, Allen v. Central Wisconsin Trust Co., 143 Wis. 381, 127 N. W. 1003, 139 Am. St. Rep. 1107; Chandler v. Traub, 159 Ala. 519, 49 South. 240; Young v. Thomason (D. C.) 179 Ala. 454, 60 South. 272; In re Morse (D. C.) 206 Fed. 350; In re Carlon (D. C.) 189 Fed. 815; In re Orear, 189

Fed. 888, 111 C. C. A. 150; In re Booss (D. C.) 154 Fed. 494; In re Johnson (D. C.) 176 Fed. 591; Steele et al. v. Buel et al., 104 Fed. 968, 44 C. C. A. 287; In re Pfaffinger (D. C.) 164 Fed. 526; In re Young (D. C.) 208 Fed. 373.

It follows, in my judgment, that the order of the referee should be reversed, and an order entered setting aside this policy, together with the cash surrender value thereof, to the bankrupt as exempt property under the Mississippi law.

NORTHERN IOWA GAS & ELECTRIC CO. v. INCORPORATED TOWN OF LUVERNE, IOWA.

(District Court, N. D. Iowa, C. D. January 28, 1920.)

No. 28.

CONTRACTS ⇐10(1)—CONTRACT TO FURNISH ELECTRICITY VOID FOR LACK OF MUTUALITY.

A contract by which an electric company agreed to furnish a town for a term of years all the electricity and current that should be desired, to be paid for by meter measurement, but by which the town assumed no obligation to purchase any definite quantity of current, *held* void for lack of mutuality.

In Equity. Suit by Northern Iowa Gas & Electric Company against Incorporated Town of Luverne, Iowa. On motion to strike out answer. Sustained.

See, also, 257 Fed. 818.

Price & Burnquist, of Ft. Dodge, Iowa, for plaintiff.

Grimm, Wheeler, Elliott & Jay, of Cedar Rapids, Iowa, for defendant.

REED, District Judge. This proceeding is a continuation of the proceedings upon the application of the plaintiff for a temporary injunction, decided on May 26, 1919, reported in 257 Fed. at page 818, to which reference is now made for a statement of the case and the questions involved, without repeating them here.

After the decision upon such application, the defendant on June 17, 1919, filed an answer to the petition setting forth at length various alleged defenses to the petition, all of which were set forth in substance upon the hearing of the application for the temporary injunction, to which the plaintiff, for the purpose of testing the sufficiency of the various allegations of the answer as a defense to its petition, moved to strike out or dismiss the allegations of said answer under the present equity rules Nos. 29, 33 (198 Fed. xxvi, xxvii, 115 C. C. A. xxvi, xxvii), and perhaps others of such rules, and in effect asked for a rehearing and readjudication of such application.

The preliminary injunction was granted after a full hearing of both parties upon the merits, and upon the ground that the contract between the parties relied upon on such hearing, and now relied upon in this application, is void for lack of mutuality, and affords no ground for relief to the defendant. The contract or agreement between the

parties is set forth in full in the plaintiff's petition, to which reference should be made for the entire agreement, for such bearing as it may have, one clause of which, omitted from the opinion in 257 Fed. 818, reads as follows:

"Should the company, their successors or assigns, fail or refuse to furnish such electricity then stipulated damages in the sum of ten dollars per day shall be paid by it to the town for each day thereof during which it shall fail or refuse to furnish such electricity. But in the case of the happening of an unavoidable casualty or contingency not due to the negligence of the company, or against which the company cannot with reasonable diligence provide, then such stipulated damages shall not obtain for a period of thirty-six hours after the happening thereof and a sufficient number of hours in addition to all for the repair of the matter; and in case the service shall be interrupted by reason of fire or tornado or wind, then such damages shall not be collectible until a reasonable length of time shall have been allowed the company to repay the damages."

The answer as thus assailed by the plaintiff repeats and reiterates the same defenses urged to defeat the preliminary injunction, without alleging any new or other grounds of defense than those urged upon the original hearing, unless it may enlarge some of the allegations originally urged against the granting of the temporary injunction.

The Court of Appeals may, if it shall be so advised, overrule its former decision, upon which the preliminary injunction was granted; but until it shall do so this court feels that it is bound by the former decision of that court. The plaintiff's motion to strike out defendant's said answer will be sustained upon the ground that it alleges no defense to the plaintiff's cause of action, and the order granting the temporary injunction will be reaffirmed, and a decree may be prepared accordingly, to which the defendant is given an exception.

Ordered accordingly.

INCORPORATED TOWN OF LAURENS, IOWA, v. NORTHERN IOWA GAS & ELECTRIC CO. et al.

(District Court, N. D. Iowa, C. D. January 28, 1920.)

No. 24.

1. INJUNCTION ⟸59(1)—RESTRAINING BREACH OF CONTRACT IS NEGATIVE SPECIFIC ENFORCEMENT.

A mandatory injunction to restrain breach of a contract is a negative specific enforcement of that contract, and the general rule is that the granting of such relief by a court of equity is governed by the rules, principles, and practices which limit the granting of relief by writ of injunction.

2. SPECIFIC PERFORMANCE ⟸8—GRANTING OF RELIEF DISCRETIONARY.

Specific enforcement of a contract by a court of equity is not a matter of absolute right, but rests in the sound discretion of the chancellor, dependent upon the circumstances of each particular case.

3. SPECIFIC PERFORMANCE ⟸73—CONTRACTS REQUIRING CONTINUOUS PERSONAL LABOR OR SKILL NOT ENFORCEABLE.

A court of equity will not decree specific performance of a contract, which requires performance of continuous duties involving exercise of personal labor, skill, and cultivated judgment.

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

4. SPECIFIC PERFORMANCE ⊜32(1)—CONTRACTS LACKING MUTUALITY NOT ENFORCEABLE.

A court of equity will not decree specific performance of a contract lacking in mutuality of obligation.

In Equity. Suit by the Incorporated Town of Laurens, Iowa, against the Northern Iowa Gas & Electric Company and another. On motions by defendant to dissolve temporary injunction and to dismiss. Motions granted.

F. C. Gilchrist, of Laurens, Iowa, for plaintiff.
Price & Burnquist, of Ft. Dodge, Iowa, for defendants.

REED, District Judge. This suit is by the incorporated town of Laurens, a municipal corporation of Iowa, against the Northern Iowa Gas & Electric Company (and another party not material in this action) upon a contract between the parties substantially like that in the case of the Northern Iowa Gas & Electric Company against the town of Luverne, another municipal corporation of Iowa (No. 28, Equity, decided by this court May 26, 1919, and reported in 257 Fed. at page 818).

It was brought originally in the district court of Iowa in and for Pocahontas county, on November 25, 1918, against the defendant company, a West Virginia corporation, having a place of business at Humboldt, this state, for producing electricity for lighting, heating, manufacturing, and other purposes, and transmitting it to the plaintiff and to other towns in Northern Iowa, to restrain the defendant from disconnecting its transmission line from the line of the plaintiff, whereby it receives electricity from the defendant company, for lighting, heating, and other purposes, which said contract provides, among other things, as follows:

"The defendant (which is called the company) agrees to sell and furnish to the plaintiff, incorporated town of Laurens, a municipal corporation of Iowa, during a period of ten years from and after the 1st day of November, 1912, all electricity and current that shall be desired by the town or its patrons along its transmission line (whether within or without the town) for lighting purposes, or for other lawful uses, at a stipulated price. At the close of said ten-year period the town may at its option renew this contract for another like period of ten years, and this may be done by the town at its option on the expiration of each recurring ten-year period thereafter until the year 1952. * * *"

There is no other provision of the contract specifying the amount of electricity that the plaintiff town agrees to purchase from the defendant company during the term of said contract, and it is the contention of the defendant that the plaintiff is under no obligation to purchase or take from the defendant company any electricity or power during the period of said contract, or any renewal thereof, and that it is therefore lacking in mutuality and void.

The original petition as filed in the state court asks that the defendant be enjoined and restrained from violating any of the terms and provisions of the contract, which is attached to the petition, also from ceasing to furnish electricity and power as called for under the terms

of the contract, and that the defendant may by a mandatory writ of injunction be required to furnish power and electricity as stipulated in said contract, and to continue to perform all of the conditions thereof; that upon final hearing said temporary writ of injunction be made permanent; that plaintiff have and recover from the defendant such damages as the plaintiff town may at that time be able to establish, and for such other, further, and different relief as may be agreeable to equity and for the recovery of costs. The temporary writ of injunction was granted by the state court as prayed.

The defendant removed the cause from the state court to this court upon the ground of diversity of citizenship and the record has been filed herein. An amendment to the petition was then filed by the plaintiff in this court after its removal here. Upon the removal of the case the defendant herein filed a motion under the present equity rules to test the sufficiency of plaintiff's petition as amended, to dissolve the temporary injunction issued against it by the state court, and dismiss the petition at plaintiff's costs, upon the following grounds: That it appears upon the face of the petition that said contract, which is attached thereto, is void for want of mutuality, in that there is no obligation upon the part of the town to continue taking electricity from the defendant company for any purpose or in any quantity under or by virtue of said contract. Wherefore the defendant prays that the petition as amended be dismissed, that the temporary writ of injunction be dissolved, and that it recover its costs of the suit.

[1] The mandatory injunction, as prayed by plaintiff in its petition and granted by the state court against the defendant, is but a negative order or decree for the specific performance of the contract set out in plaintiff's petition. The general rule is that the power and duty of a court of equity to grant such relief is governed by the same rules, principles, and practices which limit its powers and duties to grant relief by a writ of injunction. 3 Pomeroy's Eq. Jur. §§ 1340, 1343.

[2] The specific performance of a contract by a court of equity is not a matter of absolute right, but rests in the sound discretion of the chancellor, dependent upon the circumstances of each particular case. Hennessey v. Woolworth, 128 U. S. 438, 9 Sup. Ct. 109, 32 L. Ed. 500; Willard v. Tayloe, 8 Wall. 557, 19 L. Ed. 501; Marble Co. v. Ripley, 10 Wall. 339, 19 L. Ed. 955; Shubert v. Woodward, 167 Fed. 47, 52, 92 C. C. A. 509, and cases cited; Hess v. Bowen, 241 Fed. 659, 154 C. C. A. 417, affirming (D. C.) 237 Fed. 510; Zundelowitz v. Webster, 96 Iowa, 587, 65 N. W. 835, and cases cited. In Willard v. Tayloe, 8 Wall. 557, 19 L. Ed. 501, Mr. Justice Field, speaking for the Supreme Court of the United States, said (8 Wall. at page 565, 19 L. Ed. 501):

"This form of relief is not a matter of absolute right to either party; it is a matter resting in the discretion of the court, to be exercised upon a consideration of all the circumstances of each particular case. The jurisdiction, said Lord Erskine, 'is not compulsory upon the court, but the subject of discretion. The question is not what the court must do, but what it may do under the circumstances, either exercising the jurisdiction by granting the specific performance, or abstaining from it.' * * * The rule of equity in carrying agreements into specific performance is well known, and the court is not obliged to decree every agreement entered into, though for valuable consideration, in strictness of law, it depending upon the circumstances."

In Zundelowitz v. Webster, 96 Iowa, 587, 65 N. W. 835, the Supreme Court of Iowa says (96 Iowa, at page 590, 65 N. W. at page 836):

"No rule of law is better settled than 'that specific execution of a contract, in equity, is not a matter of absolute right, but it is a remedy the right to which rests alone in the sound discretion of the chancellor, a discretion controlled by established principles of equity in view of all the facts and circumstances attending the case presented.' [Citing cases.] Specific performance will not be decreed when it would not be equitable, * * * and the party will often be remitted to his legal remedy."

And see Shubert v. Woodward, 167 Fed. 47, 52, 53, 92 C. C. A. 509.

[3] And especially will a court of equity not decree the enforcement of a contract, which requires the performance of continuous duties involving the exercise of personal labor, skill, and cultivated judgment. Marble Co. v. Ripley, 10 Wall. 339, 19 L. Ed. 955, and other cases above cited, including Port Clinton R. R. Co. v. Cleveland & Toledo R. R. Co., 13 Ohio St. 544.

[4] By the terms of this contract the plaintiff town reserves the option to renew it without the consent of the defendant at the end of every ten-year period until the year 1952. In view of this fact and that the contract is lacking in mutuality, I am constrained to deny the injunctive relief granted by the state court to the plaintiff town, dissolve the temporary injunction, and dismiss the petition, at plaintiff's costs.

It is ordered accordingly.

CHICAGO & N. W. RY. CO. v. E. C. TECKTONIUS MFG. CO.

(District Court, E. D. Wisconsin. February 2, 1920.)

CARRIERS ⇐196—SHIPPER CAN ASSERT COUNTERCLAIM FOR DAMAGES TO SHIPMENT IN ACTION FOR FREIGHT.

In an action by a railroad company for freight charges, defendant *held* entitled to counterclaim for damages for goods lost on other shipments.

At Law. Action by the Chicago & Northwestern Railway Company against the E. C. Tecktonius Manufacturing Company. On demurrer to counterclaim. Overruled.

Plaintiff sues to recover tariff charges, accruing to it and connecting carriers on certain freight transported for defendant. The latter, by counterclaim, seeks to recover damages for loss of freight intrusted on other occasions to plaintiff for transportation. Plaintiff demurs to the counterclaim as not pleadable in this action.

R. N. Van Doren, of Milwaukee, Wis., for plaintiff.

Bottum, Bottum, Hudnall & Lecher, of Milwaukee, Wis., for defendant.

GEIGER, District Judge. Concededly the parties could, by independent actions, assert their grievances; and ordinarily whichever sued first thereby furnished to the other the occasion to assert his

or its by counterclaim. It is urged that the counterclaim by the shipper should not be allowed, because thereby he may defer, and therefore, if successful, may defeat, the discharge of the carrier's obligation under the law to collect tariffs in money without abatement in any form, or, as is further suggested, he thereby may decline to pay an admitted obligation in order to set off an unliquidated claim, thus accomplishing through legal proceedings a thing forbidden to be done by agreement in any event; that the practice of permitting set-offs would open the door to collusive compromise, with the intent to evade tariff obligations, etc. The parties cite Railway Co. v. Hoopes (D. C.) 233 Fed. 135, Railway Co. v. Stein (D. C.) 233 Fed. 716, and Johnson v. Railway Co. (D. C.) 239 Fed. 590, in support of the demurrer, and Wells Fargo Co. v. Cuneo (D. C.) 241 Fed. 729, contra.

Of course, as indicated, if, in an action by the carrier for the charges, a shipper cannot counterclaim for a cause of action ordinarily pleadable as such, then, as a corollary, in an action by the shipper, the carrier should not be permitted to counterclaim on a cause of action for tariff charges. This must be so, if, as a basis of the proposition, there be the asserted necessity of eliminating all opportunity to collude or compromise, or to set off liabilities in contravention of the duty to collect tariffs in money. Now, when the matter is thus viewed, we appreciate that there is no ground for differentiating one suit brought by either party, wherein the other counterclaims, from distinct and separate suits by each against the other; the one furnishing, the other excluding, inherently, occasion for or possibility of compromising, colluding, or in fact setting off. Indeed, when we consider litigation as a cover or device for accomplishing any one of these objects, the latter means might prove far more effective. Therefore, if the prohibited object may be accomplished as well in the latter as in former situation, its possibility is not relevant as a basis for the conclusion that in the one, and not the other, the procedural right must be denied. Plainly there is no ground for treating suits by one wherein the other counterclaims as presumptively collusive; and the mere circumstance that it may result procedurally in setting off the amount due or awarded to the other, thus leaving a balance to be compulsorily satisfied, will not, in my judgment, prima facie or otherwise (unless actual fraud or collusion be proved), violate the principle announced in Louisville, etc., Ry. Co. v. Mottley, 219 U. S. 467, 31 Sup. Ct. 265, 55 L. Ed. 297, 34 L. R. A. (N. S.) 671.

An order may be entered overruling the demurrer to the counterclaim, with leave within 20 days to reply.

In re SMITH.

(Court of Appeals of District of Columbia. Submitted November 17, 1919. Decided January 5, 1920.)

No. 1270.

1. PATENTS ⟸74—ANTICIPATION BY PRIOR PATENT REGARDLESS OF INTENT.
A claim cannot be allowed to an applicant for a patent for a construction disclosed in a prior patent, which would inherently accomplish applicant's purpose, whether intentionally or not.

2. PATENTS ⟸25—INVENTION NOT SHOWN BY AGGREGATION OF OLD DEVICES.
Merely bringing old devices into juxtaposition, and there allowing each to work out its own effect, without the production of something novel, is not invention.

Appeal from a Decision of the Commissioner of Patents.

In the matter of the application of William A. Smith for patent for motor. On appeal by applicant from decision of Commissioner of Patents. Affirmed.

B. G. Foster, of Washington, D. C., for appellant.
T. A. Hostetler, of Washington, D. C., for appellee.

SMYTH, Chief Justice. Smith appeals from a decision of the Commissioner of Patents rejecting his application for a patent for an improvement in motors, on the ground that he was anticipated by two patents, one to Joy August 4, 1868, and one to Wakfer October 20, 1914. There are five claims, of which 1 and 4 are examples:

1. In a motor of the character set forth, the combination with a cylinder member having a head chamber and opposite neck chambers extending therefrom, of a piston in the cylinder member, comprising a head operating in the head chamber and oppositely extending necks operating in the said neck chambers, said piston being reversible to permit either neck to operate in either neck chamber, means for supplying motive fluid alternately to opposite sides of the piston head, and means for permitting a portion of such motive fluid supplied to one side of the head to pass into one of the neck chambers behind the neck therein.

4. In a motor of the character set forth, the combination with a cylinder member having a head chamber and opposite neck chambers extending therefrom, of a piston in the cylinder member comprising a head operating in the head chamber, necks operating in the opposite neck chambers, said piston being reversible to permit either neck to operate in either neck chamber, and means for supplying motive fluid alternately to opposite sides of the piston head, said means being controlled by the piston necks.

[1] Claims 1 and 2 read directly on Wakfer. While the passage *16* and *17* in his patent might not suggest the use of a like passage for the purpose outlined by Smith, it would necessarily give the same result. An inspection makes this apparent at once. As the Examiners in Chief said, a claim cannot be allowed to Smith, the appellant, for a construction disclosed by Wakfer "which would inherently accomplish applicant's purpose," whether intentionally or not.

[2] With respect to claims 3, 4, and 5, the Joy patent, particularly

Figure 8, anticipates them. Certain changes, it is true, would be required to make the one conform to the other, but this would not call for invention, for all the factors revealed by the claims are old in the art.

"Merely bringing old devices into juxtaposition, and there allowing each to work out its own effect without the production of something novel, is not invention." Hailes v. Van Wormer, 20 Wall. 353, 368 (22 L. Ed. 241).

We think the decision of the Commissioner should be affirmed. Affirmed.

Application of SCHNEIDER.

(Court of Appeals of District of Columbia. Submitted November 12, 1919. Decided January 5, 1920.)

No. 1255.

1. PATENTS ⊜138(1)—REISSUE WITH BROADENED CLAIMS BARRED BY LACK OF DILIGENCE.

The reissue of a patent with broadened claims, 2 years and 8 months after the original issue, *held* barred by lack of diligence, where the applicant's only excuse was that he had failed to discover the insufficiency of the original claims until shortly before filing his application for a reissue.

2. PATENTS ⊜138(1)—ABANDONMENT PRESUMED WHERE DILIGENCE NOT SHOWN IN SEEKING REISSUE.

Where a patentee, seeking a reissue with broadened claims 2 years and 8 months after the original issue, fails to establish his diligence, it is presumed that he abandoned the new matter to the public.

Appeal from the Patent Office.

Application by Franklin Schneider for the reissuance of a patent. From a decision denying the application, the applicant appeals. Affirmed.

H. B. Fay, of Cleveland, Ohio, for appellant.

T. A. Hostetler, of Washington, D. C., for appellee.

SMYTH, Chief Justice. This is an appeal from a decision of the Commissioner of Patents, refusing a reissue on the ground that the appellant was not diligent in making his application. Two years and eight months elapsed between the issue of the original patent and the filing of his application. The only reason assigned by him for the delay is:

"That he had no occasion to review his patent from the date of its issue until the present time, and that the insufficiencies in his original specification and claims only came to his attention through others, namely, Mr. Burton W. Sweet, who was employed by him, and his attorneys, Messrs. Fay, Oberlin & Fay, within the past few weeks, and that he did not delay after he had knowledge of the insufficiency of his original patent."

It is conceded by him that the claims which he now seeks to have allowed are broader than those of the original patent. This is important.

[1] While the applicant says he had no occasion to review his patent from the date of its issue until the present time, we think prudence would have suggested that he examine his claims when the patent was granted, or soon thereafter, certainly within two years after he had received it, to determine whether or not they were commensurate with his invention. If the claims were intricate, something he could not understand, it was his duty to call for the aid of an expert. A reasonably careful man would have pursued such a course. In Ives v. Sargent, 119 U. S. 652, 662, 7 Sup. Ct. 436, 441 (30 L. Ed. 544), the court, in rejecting the excuse for delay proffered by an applicant for a reissue, said that—

"He assumed, without examination, that the specification and claims of his [original] patent were just what he had desired and intended they should be, and rested quietly in ignorance of the error and of his rights for nearly 3 years, and then did not discover them until after others had discovered that he had lost the right to repair his error by his neglect to assert it within a reasonable time."

This, in effect, is what was done by the applicant in the case before us. The period of his inaction was 2 years and 8 months—"nearly 3 years." During that time he made no examination of his claims and specifications, but assumed, as did the applicant in the Ives Case, that they were just what he had desired.

The court said in Wollensak v. Reiher, 115 U. S. 96, 99, 5 Sup. Ct. 1137, 1139 (29 L. Ed. 350):

"If, at the date of the issue of the original patent, the patentee had been conscious of the nature and extent of his invention, an inspection of the patent, when issued, and an examination of its terms, made with that reasonable degree of care which is habitual to and expected of men, in the management of their own interests, in the ordinary affairs of life, would have immediately informed him that the patent had failed fully to cover the area of his invention; and this must be deemed to be notice to him of the fact, for the law imputes knowledge when opportunity and interest, combined with reasonable care, would necessarily impart it."

In the light of this reasoning it cannot be said that Schneider was diligent. Nor will it do for the applicant to say that the fault was that of his solicitors in drawing the original claims. They were his agents, and he is bound by their acts. In the Ives Case the applicant sought to shift the responsibility to his solicitors; but the court refused to permit him to do so, saying, in effect, that, even if they were negligent, he had not shown sufficient reason why he had not discovered it before.

[2] There being no justifiable cause for applicant's failure to apply for the reissue until more than 2 years had elapsed, the law presumes that he abandoned—

"the new matter to the public to the same extent that a failure by the inventor to apply for a patent within 2 years from the public use or sale of his invention is regarded by the statute as conclusive evidence of an abandonment of the patent to the public." Topliff v. Topliff, 145 U. S. 156, 171, 12 Sup. Ct. 825, 831 (36 L. Ed. 658.)

And it is said in In re Starkey, 21 App. D. C. 519, 525, that—

"We must now regard the law as well settled by the Supreme Court of the United States that, after the lapse of 2 years after the issue of a patent, a reissue which seeks to enlarge the claims of the original patent will not be granted, or, if granted, will be held invalid, unless special circumstances are shown to excuse the delay."

As we have already shown, those circumstances have not been made to appear in this case. It is said that there can be no action without knowledge, and that Schneider did not have knowledge that his original claims were not as broad as they should be; but there may be negligence in not acquiring knowledge, and it was in this respect that Schneider failed. Applicant asserts that the lapse of 2 years applies only to the prima facie presumption of intervening rights; but this is not correct. It is, as we have just observed, also evidence of abandonment. There being no showing of diligence, the decision of the Commissioner is affirmed.

Affirmed.

ELY REAL ESTATE & INVESTMENT CO. v. WATTS et al.*

(Circuit Court of Appeals, Ninth Circuit. February 2, 1920.)

No. 3332.

1. PUBLIC LANDS ⟸223(6)—RECOGNITION BY TREATY OF MEXICAN GRANT.
The owner of a Mexican grant, perfected before the cession by the Gadsden Treaty, was permitted, but not required, by Act July 22, 1854, to assert his claim and have the land reserved thereunder and the fact that he did not do so in no way affects his title, which by the treaty the United States bound itself to recognize and protect.

2. PUBLIC LANDS ⟸220—PERSONS CONCLUDED BY JUDGMENT OF COURT OF PRIVATE LAND CLAIMS.
A judgment of the Court of Private Land Claims, created by Act March 3, 1891, in a suit by the United States, sustaining the validity of a Mexican grant within the territory ceded by the Gadsden Treaty as having been perfected prior to the cession, is conclusive, not only as against the United States, but as against any grantee of the United States.

Appeal from the District Court of the United States for the District of Arizona; William H. Sawtelle, Judge.

Suit in equity by Cornelius C. Watts and Dabney C. T. Davis, Jr., against the Ely Real Estate & Investment Company. From a decree for complainants (254 Fed. 862), defendant appeals. Reversed.

Selim M. Franklin, of Tucson, Ariz., for appellant.

Kingan & Campbell, of Tucson, Ariz., for appellees.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

GILBERT, Circuit Judge. In June, 1860, Congress passed an act (12 Stat. 71, c. 167), granting to the heirs of Luis Maria Cabeza de Baca the right to select lands in the public domain in lieu of the Las Vegas grant, which they claimed to own. The act provided that the heirs of Baca might select "an equal quantity of vacant land, not mineral," in the territory of New Mexico, to be located by them in square bodies not exceeding five in number. In 1863 the Baca heirs made selection of the tract now known as "Baca Float No. 3." In 1864 the Commissioner of the General Land Office approved the selection and ordered a survey, and in 1906 the tract was surveyed. In December, 1914, the field notes of the survey were approved by the Secretary of the Interior. Within the boundaries of Baca Float No. 3 is a tract of land known as the "Sonoita Grant," granted in 1824 by the Mexican government to Leon Herreros. The appellees, the owners of Baca Float No. 3, brought suit in the court below against the appellant, the owner of the Sonoita Grant, to quiet title to the whole of Baca Float No. 3. Upon the final hearing decree was entered in favor of the appellees, as prayed for in their bill of complaint, and it was adjudged that the appellant be barred from asserting any right, title, or interest in the land included within the boundaries of Baca Float No. 3.

[1] The Gadsden Treaty with Mexico of December 30, 1853 (10 Stat. 1031), under which the United States acquired that portion of Arizona in which the land here in controversy lies, declared in article

5 that all the provisions of the eighth and ninth articles of the Treaty of Guadalupe Hidalgo (9 Stat. 929, 930) should apply to the ceded land. Those articles provide that the property of Mexicans within the territory ceded "shall enjoy with respect to it guaranties equally ample as if the same belonged to citizens of the United States," and "shall be maintained and protected in the free enjoyment of their liberty and property," etc. It is not disputed that at the time of the treaty the land in the Sonoita Grant was private property, and that the grant was a perfected grant, whereby the absolute title to the land had passed out of the republic of Mexico and into Herreros, the grantee.

The court below dealt with the claim of the appellant as dependent, not only upon the terms of the treaty, but also upon the provisions of the Act of July 22, 1854, 10 Stat. 308, and held that inasmuch as no steps were taken by the appellant's predecessors in interest to secure under that act the reservation of the land from entry and sale, Congress had the right to regard the Sonoita Grant as forfeited, and to dispose of the land as it saw fit, and that it did so dispose of it by the grant to the Baca heirs of June 21, 1860, which grant, in the opinion of the court, effected a repeal pro tanto of the reservation of the act of 1854. This position is tenable only on the assumption that in order to protect the Sonoita Grant it was necessary for the owner to assert his claim thereto under the Act of July 22, 1854, and thereby effect a reservation of the granted land from disposition or sale by the United States. The Act of July 22, 1854, made it the duty of the Surveyor General of New Mexico to ascertain the origin, nature, character, and extent of all claims to lands under the laws, usages, and customs of Spain and Mexico, and for that purpose it gave him power to issue notices, summon witnesses, administer oaths, etc., and required him to make a full report of all such claims as originated before the cession of the territory to the United States by the Treaty of Guadalupe Hidalgo, denoting the various grades of title, with his decision as to the validity or invalidity of each, and provided that on presentation of his report to Congress all lands covered by such claims should be reserved from sale or other disposal by the government.

There is in the act no expression of the intention of Congress that a Mexican grant to land in the ceded territory should be impaired or affected by the failure of the Surveyor General to investigate the same or report thereon, or the failure of the claimant to present the same for investigation. In that respect the act differs materially from the Act of March 3, 1851, 9 Stat. 631, for the settlement of private land claims in the state of California, which provided that all claimants of land under a Spanish or Mexican grant should present the same to commissioners to be appointed, and declared that—

"All lands the claims to which shall not have been presented to the said commissioners within two years after the date of this act shall be deemed, held, and considered as part of the public domain of the United States." Section 13.

That act provided a special tribunal to settle all questions of title and location. There were afforded three, and at one time four, op-

portunities for a hearing: First, before the Board of Land Commissioners, then successive appeals to the District, Circuit, and Supreme Courts of the United States, in all of which, except the last, the parties were entitled to introduce further evidence. The act of 1854 imposed no obligation upon the claimants of Mexican grants to present the same for investigation and adjudication, as did the act of 1851, nor did it create a commission to adjudicate the validity of such claims, as did the act of 1851, and we cannot think that under the act of 1854 the failure of the Surveyor General to investigate or report the claim of a Mexican grant worked a forfeiture of such a claim or rendered the land subject to disposal by the United States. No reported case so holds. On the contrary, the Supreme Court has in several decisions, either in terms or by implication, held that under the Gadsden Treaty the owner of a perfect grant from the Mexican government is entitled to protection, irrespective of any provision of the Act of July 22, 1854. In Ely's Adm'r, v. United States, 171 U. S. 220, 239, 18 Sup. Ct. 840, 848 (43 L. Ed. 142), the court said:

"This government promised to inviolably respect the property of Mexicans. That means the property as it then was, and does not imply any addition to it. The cession did not increase rights. That which was beyond challenge before remained so after."

And, speaking of the Sonoita Grant (171 U. S. 234, 18 Sup. Ct. 846, 43 L. Ed. 142), the court said:

"These considerations lead us to the conclusion that this grant was one which, at the time of the cession in 1853, was recognized by the government of Mexico as valid, and therefore one which it was the duty of this government to respect and enforce."

In Ainsa v. New Mexico & Arizona Railroad, 175 U. S. 76, 20 Sup. Ct. 28, 44 L. Ed. 78, the court, after adverting to grants of land in prior cessions of territory to the United States, said:

"Even grants which were complete at the time of the cession may be required by Congress to have their genuineness and their extent established by proceedings in a particular manner before they can be held to be valid. But, where no such proceedings are expressly required by Congress, the recognition of grants of this class in the treaty itself is sufficient to give them full effect. * * * The effect of these provisions of the act of 1891 is that all prior acts of Congress providing for the assertion, whether in a judicial tribunal or before a surveyor general and Congress, of either complete or incomplete Mexican grants, are repealed, except as to claims previously acted upon and decided by Congress or under its authority; that all incomplete claims against the United States, coming within the provisions of the act, must be presented to the Court of Private Land Claims; that any one claiming land under a Mexican grant, which was complete and perfect at the time of the cession of sovereignty, 'shall have the right (but shall not be bound) to apply to said court,' as in cases of incomplete grants. * * * The result is that the United States, by the act of 1891, have prescribed and defined the only method by which grants incomplete before the cession can be completed and made binding upon the United States, but have neither made it obligatory upon the owner of a title complete and perfect before the cession to resort to this method, nor declared that his title shall not be valid if he does not do so. A grant of land in New Mexico, which was complete and perfect before the cession of New Mexico to the United States, is in the same position as was a like grant in Louisiana or in Florida, and is not in the position of one under the

peculiar acts of Congress in relation to California, and may be asserted, as against any adverse private claimant, in the ordinary courts of justice."

In Richardson v. Ainsa, 218 U. S. 289, 31 Sup. Ct. 23, 54 L. Ed. 1044, the court held that under the Gadsden Treaty the good faith of the United States was pledged to respect Mexican titles, and that one whose title was absolutely perfected prior to the treaty was not bound to present his title to the Court of Private Land Claims for confirmation under the Act of March 3, 1891. In that case, which was a suit to quiet title brought in 1887, the appellee therein claimed under the Sonoita Grant, and the appellant claimed through patents issued by the United States in 1879 and 1880 under the Homestead Laws (12 Stat. 392, c. 75). The court held that the patents were void, for the reason that the lands conveyed thereby, whether reserved or not by the Acts of July 22, 1854, c. 103, § 8, 10 Stat. 308, and July 15, 1870, c. 292, 16 Stat. 304, were not public lands, but private property, "which the government was bound by the express terms of the Gadsden Treaty of December 30, 1853, to respect." Referring to sections 6 and 8 of the Act of March 3, 1891, the court said:

"After providing in section 6 for incomplete titles, the act goes on in section 8 to deal with complete ones. Holders of claims under such titles, it says, 'shall have the right (but shall not be bound) to apply to said court' for a confirmation of their title. Of course this means that the title is recognized as good without the proceeding in court."

We are unable to distinguish the Richardson Case in principle from the case at bar. If it was unnecessary for the protection of the Sonoita Grant that proceedings should be taken to reserve it against homestead settlement and patents, it was unnecessary that such proceedings be taken to protect it against the grant to the Baca heirs. If the United States could not grant the Sonoita land to homestead settlers, it could not grant it to the Baca heirs. We think it was error, therefore, to hold that the right of the claimant of the Sonoita Grant was lost by the failure to secure a reservation of the same prior to the grant to the Baca heirs, and that it was error to adjudge the title to be in the appellees.

[2] We are of the opinion, moreover, that the appellees are estopped by judgment to assert title as against the appellant. The appellant, in its answer to the bill of complaint, alleged that on October 19, 1892, the United States filed in the United States Court of Private Land Claims under the Act of March 3, 1891, its petition against the predecessors in interest of the appellant to obtain a decree that the claim of the defendants therein to title be adjudged invalid and void, and that upon the issues therein the defendants claiming under the grant to Leon Herreros, a final judgment and decree was entered on August 6, 1902, in favor of the predecessors in interest of the appellant and against the United States, adjudging that the Sonoita Grant constituted a valid title from the Mexican government, which was complete and perfect at the date of the acquisition of the territory by the United States, and that said decree has not in any respect been vacated or modified. The court below held that the decree was not

res adjudicata between the parties hereto, and did not estop the appellees to litigate the question of title here involved. The Act of March 3, 1891, 26 Stat. 851, 857, provides that the decree in a proceeding to confirm title in the Court of Private Land Claims shall not affect any conflicting private interests, rights, or claims held adversely to any such claim or title, and that no confirmation of claims or titles under the act shall have any effect other or further than as a release of all claim of title by the United States, and that no private right of any person as between himself and other claimants or persons in respect of any such lands shall be in any manner affected thereby. A similar provision is found in section 15 of the Act of March 3, 1851, 9 Stat. 631. In Beard v. Federy, 3 Wall. 478, 492, 18 L. Ed. 88, concerning the effect of proceedings under the latter act, the court said:

"As against the government this record, so long as it remains unvacated, is conclusive. And it is equally conclusive against parties claiming under the government by title subsequent. * * * The term 'third persons,' as there used, does not embrace all persons other than the United States and the claimants, but only those who hold superior titles, such as will enable them to resist successfully any action of the government in disposing of the property."

In Dominguez de Guyer v. Banning, 167 U. S. 723, 741, 17 Sup. Ct. 937, 943 (42 L. Ed. 340) the court reaffirmed the conclusiveness of the record as against "parties claiming under the government by title subsequent." In Jones v. St. Louis Land Co., 232 U. S. 355, 34 Sup. Ct. 419, 58 L. Ed. 636, the court cited Beard v. Federy and said:

"It may be said of such direct confirmation by act of Congress, as has been said of confirmation through special tribunals created by Congress, that it constitutes a declaration of the validity of the claim under the Mexican laws and that the claim is entitled to recognition and protection by the stipulations of the treaty."

In Interstate Land Co. v. Maxwell Land Co., 139 U. S. 569, 580, 11 Sup. Ct. 656, 660 (35 L. Ed. 278), the court, speaking of the effect of proceedings to confirm title under the Act of March 3, 1851, and the patents from the United States issued in pursuance thereof, observed:

"The confirmation and patenting of the grant * * * operated to divest the United States of all their rights to the land embraced in the grant which this country acquired from Mexico by the Treaty of Guadalupe Hidalgo; and the only way that that grant can be defeated now is to show that the lands embraced in it had been previously granted by the Mexican government to some other person."

In Teschemacher v. Thompson, 18 Cal. 11, 26, 79 Am. Dec. 151, the Supreme Court of California, in an opinion by Chief Justice Field, after referring to the solemn record of the government of its action and judgment with respect to the title of a claimant existing at the date of the cession, said that the government itself—

"cannot question its verity, nor can parties claiming through the government by title subsequent. * * * But as the record of the government of the existence and validity of the grant it establishes the title of the patentees from the date of the grant."

Again the court said:

"The 'third persons' against whose interest the action of the government and patent are not conclusive under the fifteenth section of the Act of March 3, 1851, are those whose title accrued before the duty of the government and its rights under the treaty attached."

In Carpentier v. Montgomery, 13 Wall. 480, 495 (20 L. Ed. 698), the court said that the fifteenth section of the act—

"was intended to save the rights of third persons, not parties to the proceeding, who might have Spanish or Mexican claims independent of or superior to that presented by the claimant, or the equitable rights of other parties having rightful claims under the title confirmed."

It has been held in numerous decisions that the patent issued upon a confirmed Mexican grant is to be regarded in two aspects: First, it is a quitclaim deed from the United States, which takes effect by relation at the time when proceedings were instituted by the filing of the petition with the commission or court created to adjudicate the claim; second, it is a record of the government, showing its judgment with respect to the title of the patentee at the date of the cession. Leese v. Clark, 20 Cal. 388; Beard v. Federy, 3 Wall. 478, 18 L. Ed. 88; Bissell v. Henshaw, 1 Sawy. 553, 565, Fed. Cas. No. 1,447, affirmed in Henshaw v. Bissell, 18 Wall. 255, 21 L. Ed. 835. In Los Angeles Milling Co. v. Los Angeles, 217 U. S. 217, 227, 30 Sup. Ct. 452, 456 (54 L. Ed. 736), it was said that the action of the tribunals established to pass upon the validity of such grants is—

"an admission that the rightful ownership had never been in the United States, but had passed at the time of the cession to the claimant, or to those under whom he claimed."

The reasons for these rulings are aptly expressed by Chief Justice Field in Leese v. Clark, 20 Cal. 388, 423:

"As against the government, this record, so long as it remains unvacated, is conclusive; as against the government it imports absolute verity; and it is equally conclusive against parties claiming under the government by title acquired subsequent to the time at which the obligation of the government attached; otherwise, the power of the government to enforce the stipulations of the treaty, and the obligation imposed by the law of nations, would be limited and dependent, and not, as they are, sovereign and supreme. And it is in this effect of the patent as a record of the government that its security and protection chiefly lie. If parties asserting interests in lands acquired since the acquisition of the country, could deny and controvert this record and compel the patentee in every suit for the recovery of his land to establish the validity of the grant, his right to a confirmation of his claim thereunder, and the correctness of the action of the officers of the government in the survey and location of the grant, the patent, instead of being an instrument of quiet and security to the possessor, would become a source of perpetual and ruinous litigation."

The decree is reversed, and the cause is remanded to the court below, with instructions to enter a decree in favor of the appellant, quieting its title to the land described in the patent which issued to it from the United States of date October 29, 1906, in pursuance of the decree of the Court of Private Land Claims hereinbefore mentioned.

SWEET v. ALL PACKAGE GROCERY STORES CO.

(Circuit Court of Appeals, Second Circuit. December 12, 1919.)

No. 63.

CORPORATIONS ⊂=688—CLAIM OF STATE FOR LICENSE TAX ON PROPERTY OF FOREIGN CORPORATION PRIOR LIEN.

Claim of the state of New York for license tax imposed on a foreign corporation doing business in the state under Tax Law, § 181, as amended by Laws N. Y. 1917, c. 490, *held* entitled to priority of payment over general creditors from assets of the corporation in the hands of receivers of a federal court in New York, although the state had not, by levy, acquired a lien on the property prior to the receivership.

Hough, Circuit Judge, dissenting.

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

Suit in equity by William L. Sweet, Jr., against the All Package Grocery Stores Company. From a decree denying priority to its claim for license taxes, the State of New York appeals. Reversed.

Charles D. Newton, Atty. Gen. (Robert P. Beyer, of New York City, of counsel), for the People of the State of New York.

Gilbert & Gilbert, of New York City (A. S. Gilbert and Francis Gilbert, both of New York City, of counsel), for appellee.

Before WARD, ROGERS, and HOUGH, Circuit Judges.

WARD, Circuit Judge. The state of New York has presented in this equity receivership claims against the All Package Grocery Stores Company, a corporation of the state of New Jersey, as follows:

"For license fee or tax stated against All Package Grocery Stores Company, a New Jersey corporation, the predecessor of defendant, for the privilege of exercising its corporate franchises and carrying on business within the state of New York based on the amount of capital stock employed in New York state, $977.86.

"For license fee or tax heretofore stated against the defendant for the privilege of exercising its corporate franchise and carrying on business within the state of New York, $22,517.86."

Section 181 of the Tax Law (Consol. Laws, c. 60) of the state of New York was amended by chapter 490, Laws 1917, entitled "An act to amend the tax law in relation to the license tax on foreign corporations," the material provisions being:

"Sec. 181. *License Tax on Foreign Corporations.*—Every foreign corporation, except banking corporations, fire, marine, casualty and life insurance companies, co-operative fraternal insurance companies, and building and loan associations, doing business in this state, shall pay to the state treasurer, for the use of the state, a license fee of one-eighth of one per centum for the privilege of exercising its corporate franchises or carrying on its business in such corporate or organized capacity in this state, to be computed upon the basis of the capital stock employed by it within this state, during the first year of carrying on its business in this state; which first payment shall not be less than ten dollars. * * * The amount of capital upon which such license fees shall be paid shall be fixed by the state tax commission, which shall have the same authority to examine the books and records in this state of such foreign corporations, and the employés thereof as it has in the case of

domestic corporations and the comptroller shall have the same power to issue his warrant for the collection of such license fees, as he now has with regard to domestic corporations."

The remedy which the comptroller had to collect taxes from domestic corporations was provided by section 201, the relevant part of which is as follows:

"Sec. 201. * * * The comptroller may issue a warrant under his hand and official seal, directed to the sheriff of any county of the state, commanding him to levy upon and sell the real and personal property of the person, partnership, company, association or corporation against which such account is stated, found within his county for the payment of the amount thereof with interest thereon and costs of executing the warrant, and to return such warrant to the comptroller and pay to the state treasurer the money collected by virtue thereof, by a time to be therein specified, not less than sixty days from the date of the warrant. Such warrant shall be a lien upon and shall bind the real and personal property of the person, partnership, company, association or corporation against which it is issued, from the time an actual levy shall be made by virtue thereof."

It is contended that this license fee is not a tax, but a conventional agreement between the state and foreign corporations, whereby they contract to pay a fee in consideration of the privilege of doing business in the state. But we think it quite clear that the license fee is a tax. It is provided for in the state Tax Law, described as a license tax in the title of the amending act, called a license tax in the description of section 181 and is fixed by the state tax commission.

The Court of Appeals of New York in Wise v. Wise Co., 153 N. Y. 507, 47 N. E. 788, referring, among other cases, to two earlier decisions of In re Columbian Ins. Co. (N. Y.) 3 Abb. Dec. 239, and Central Trust Co. v. N. Y. C. & N. R. R. Co., 110 N. Y. 250, 18 N. E. 92, 1 L. R. A. 260, said:

"The contention of the learned counsel for the receiver of taxes rests upon a somewhat novel proposition. It is that from the most ancient times the courts of England have recognized the right of the sovereign, representing the state, to priority of payment over all other claims, though they may have been secured by specific liens; that the people of this state have succeeded to all the prerogatives of the British crown as parts of the common law suitable and applicable to our condition. * * * The general doctrines contained in these cases would seem, upon a superficial view, to go far in support of the contention upon which this appeal is based, although it should be observed that a very important fact present in this case was absent in the cases cited, and that was the existence of a specific lien at law upon the personal property acquired by a levy under valid legal process in the hands of the sheriff.

"On a closer examination, however, it will be found that they do not sustain the broad principle contended for. They undoubtedly go far enough to sustain the principle that, when a fund is in the hands of the court or the trustee of an insolvent person or corporation, a claim due to the government upon a debt or for taxes is entitled to a preference in certain cases, or under certain circumstances. * * * In this country the right of the government to be preferred in the distribution of such a fund exists, under the authorities, in two cases: (1) Where the preference is expressly given by statute, as was the case in U. S. v. State Bank of North Carolina, supra, 6 Pet. 29, 34 [8 L. Ed. 308]. (2) Where, before the fund has come to the hands of the receiver or trustee, a warrant or some other legal process has been issued for the collection of the tax or debt, and the fund has come to his hands impressed with a lien in favor of the government in consequence of the proceedings for col-

lection, as was the case in the Columbian Ins. Co. Receivership [N. Y.], 3 Abb. Dec. 239."

In Robinson v. Mutual Reserve Co. (C. C.) 175 Fed. 624, affirmed 189 Fed. 347, 111 C. C. A. 79, we held that the state was not entitled to any preference over general creditors on its claim for taxes when the statutory lien did not arise until after receivers had been appointed and no warrant or other legal process for collection had been issued before their appointment. This was in strict accordance with the test laid down in Wise v. Wise, supra, as to the state's right of preference. In Central Trust Co. v. Third Avenue R. R. Co., 186 Fed. 293, 110 C. C. A. 1, though a lien was given for taxes which came into effect before the appointment of the receivers, we construed the statute as not giving the lien any preference over prior debts specifically secured by lien. Subsequently the Appellate Division of the First Department in Matter of Carnegie Trust Co., 151 App. Div. 606, 136 N. Y. Supp. 466, affirmed 206 N. Y. 390, 99 N. E. 1096, 46 L. R. A. (N. S.) 260, decided that the state as sovereign is entitled to priority of payment for taxes and any other debts, whether such priority is given by statute or not, over unsecured creditors, just as the crown was at common law.

In this case the District Judge held that this priority as confirmed by the highest court of New York was a matter of procedure only. We think it was a matter of substantive right, being a part of the common law adopted by the state Constitution of 1777 as the law of the state of New York. Following this decision, therefore, we now hold that the state's claim for license tax, though not given a lien by statute (except from the time of the actual levy of a warrant for collection issued by the comptroller), is entitled to priority of payment over general creditors.

It is further contended that the prerogative of the state of New York does not exist as against a corporation of the state of New Jersey, with which the state of New York is not in the relation sovereign. But the state is a sovereign as to all persons and things within its own boundaries and as to the property of the defendant corporation in the hands of the receivers here the prerogative clearly exists.

Decree reversed.

HOUGH, Circuit Judge (dissenting). The majority decision does not enforce a specific lien securing either a tax or any other demand; it does recognize a right in the state of New York to preference and priority in the payment of debts over other creditors, by virtue of its sovereignty.

Sovereignty over what? Certainly not over the insolvent corporation, which is of another state, and not over this court (as I suppose), but over the corporate property, because it is physically situated in New York. In other words, when, as here, the state has no lien affecting its debtor's res, its sovereignty is brought forward to operate in rem.

The doctrine, when not imposed by a modern statute, is a trifle archaic, yet perhaps well enough in a court of New York, which is subject in personam (so to speak) to the same sovereignty. But, so far

as New York is concerned, the property of the All Package Company might just as well be in the custody of a court of California, or of Canada, as where it is.

Goods in custodia the District Court of the United States cannot be reached by any process of the state in which that court is sitting; legally they are as remote as if in foreign parts, and the physical situation could only affect legal rights, if the legal custodian were bound by foreign law—in this instance, the law of New York. In matters such as this, it is not so bound by either comity, statute, or constitutional obligation. The majority judgment can only rest on a belief that the court is affected by the sovereignty aforesaid.

This I deny, and therefore dissent.

In re GOTTLIEB.

Appeal of ROXFORD KNITTING CO.

(Circuit Court of Appeals, Second Circuit. December 10, 1919.)

No. 69.

1. BANKRUPTCY ⊜460—NECESSARY PARTIES TO APPEAL FROM ORDER CONFIRMING COMPOSITION.

To an appeal from an order confirming a composition by a creditor, who objected on grounds which go to bankrupt's right to a discharge, other creditors are not necessary parties.

2. BANKRUPTCY ⊜455—APPEAL LIES FROM ORDER CONFIRMING COMPOSITION.

An order confirming composition is appealable.

3. BANKRUPTCY ⊜414(1)—BURDEN OF PROOF ON OBJECTION TO DISCHARGE.

A creditor, objecting to discharge, starts out with the burden of proving by a fair preponderance of evidence the facts alleged, and which, unexplained, warrant an inference of the requisite intent; but, when such proof is made, the burden is cast on bankrupt to explain and disprove such intent.

4. BANKRUPTCY ⊜384—EVIDENCE SHOWING NO RIGHT TO DISCHARGE THROUGH COMPOSITION.

Evidence *held* sufficient to show that bankrupt made a false oath to his schedule, and failed to keep books with intent to conceal his financial condition, which debarred him of the right to make a composition which would effect his discharge.

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

In the matter of Lewis Gottlieb, bankrupt. From an order confirming a composition, the Roxford Knitting Company appeals. Reversed.

Gottlieb was a merchant in a suburban town on Long Island. In the spring of 1918 he made a statement in writing to Roxford Company, "for the purpose of obtaining credit and inducing [it] to sell [him] merchandise," as the document signed by Gottlieb declares. This statement specified (as of January 1, 1918):

Total assets of	$21,582.39
Of which merchandise on hand "at actual cost" accounted for	19,532.39
His only debts are given as—	
On open accounts for merchandise, due or past due	$5,628.00
And due a bank	4,000.00
Total	$9,628.00
His sales for 1917 are stated as	$33,763.32

Roxford Company, after receipt of this statement, sold goods to Gottlieb, for which he has not paid.

Bankrupt testified that he personally took stock on January 1, 1918, and the $19,532.39 represented "actual cost prices." As to sales his evidence is that he had no books that would show "the gross amount of [his] sales," and further that he kept no books enabling anybody to "find out [his] financial condition." How under such a system he knew the amount of his 1917 sales with the accuracy of his financial statement remains unexplained. He did estimate his average sales for January, 1918, and, if that estimate is correct, he must have sold daily about twice as much, every day, including Sundays and holidays, of the year 1917, to reach $33,763.32.

On August 23, 1918 Gottlieb went into voluntary bankruptcy, and his schedules show:

Stock	$22,532.39
With other assets (open accounts, machinery, etc.) amounting to	1,213.23
Total	$23,745.62
His liabilities (all unsecured claims) are	$22,187.62

As to his stock at failure, he swore: "I merely guessed at it, but I thought it was worth it, at that time; but at actual cost it would have amounted to a great deal more." The increased indebtedness in August as compared to January he ascribed to "buying merchandise" from "different people," and who those people were appeared (as he said) in one of the books surrendered to his trustee. There is no testimony contradicting this, and we assume that the schedule statement of debt has been found substantially correct.

On or about December 24, 1918, Gottlieb offered his creditors a composition at 33⅓ per cent. of their claims. Roxford Company filed objections, alleging that the bankrupt had (1) failed to keep books with intent to conceal, etc.; (2) obtained property upon a materially false statement; and (3) made a false oath when he stated his merchandise in his schedules.

A commissioner heard evidence, and reported as to the first objection that there was a failure to keep books, but such failure "was not due to any deliberate intent to conceal financial condition," although concealment was "the obvious result of the system of bookkeeping" adopted. The other objections he overruled: the District Court adopted the report, and approved the composition.

From the order accordingly entered, the objecting creditor appealed, and in this court certain of the other creditors and the trustee appeared and moved to dismiss the appeal, on the ground that neither they nor any other creditor had been cited to appear herein.

Archibald Palmer, of New York City, for moving creditors, etc.

Walter S. Hilborn, of New York City, for objecting creditor appellant.

Frederick H. Sanborn, of New York City, for bankrupt.

Before WARD, ROGERS and HOUGH, Circuit Judges.

HOUGH, Circuit Judge (after stating the facts as above). [1] The motion to dismiss is based on Field v. Wolf, 120 Fed. 815, 57 C. C. A. 326. The appeal record in that case shows an objection filed to a composition, alleging that it was not for the "best interests of the creditors," because (in substance) the bankrupts were well able to pay more than the offered amount, which fact they had concealed, or tried to, by a system of bookkeeping obnoxious to the statute.[1] The evidence

[1] The specification goes into much greater detail; but the above illustrates the pleader's theory, viz. that acts by the bankrupt that would bar a discharge, were reasons why the composition was not for the best interests of creditors. He did not assert that acts barring discharge are per se preventive of composition.

in that record is principally (but not wholly) devoted to showing that the bankrupts had or controlled far more property than they had offered to use in composition.

If the case cited holds no more than that, when the sole or principal ground of appeal is that the District Judge should have disapproved the composition because it was not large enough, the decision relates to something we are not now concerned with, and as to which we express no opinion. Whether a composition is in the interest of creditors, or was accepted out of sympathy and merely with a view to benefit the debtor, is a point not infrequently mooted under the British statute (e. g. Ex parte Hudson, 22 Ch. Div. 773), but hitherto not considered with us.

If, however, the Field decision be thought to lay down a general rule that consenting creditors, or a representative fraction of them, are necessary parties respondent in proceedings like the present, we are compelled to disagree. The ruling as so understood is opposed to our decision in Re Bay State Milling Co., 223 Fed. 778, 139 C. C. A. 598 (subsequently heard on the merits as Re Soloway, 234 Fed. 67, 148 C. C. A. 83). It is also at variance with the considered judgment of the Sixth Circuit in United States ex rel. Adler v. Hammond, 104 Fed. 862, 44 C. C. A. 229.

[2] We adhere to the doctrine that a confirmed composition, because it results in discharge, is the subject of appeal, as is a discharge. Further than that this case does not require a ruling. See In re McVoy Hardware Co., 200 Fed. 949, 119 C. C. A. 337; In re Brookstone, etc., Co., 239 Fed. 697, 152 C. C. A. 531; In re Graham & Sons, 252 Fed. 93, 164 C. C. A. 205.

The motion to dismiss is denied.

The evidence before us first compels belief in one important fact; it is baldly impossible that Gottlieb's financial statement, his schedules in bankruptcy and his testimony before the Commissioner can all be true. Using (for brevity's sake) approximate figures only, he says he had at the beginning of 1918, by actual count and at cost price, goods worth $19,000. His merchandise debts amounted to no more than $5,000, and his bank borrowings to $4,000. Thirty-three weeks later he had, by his sworn schedules, goods worth at least $22,000, and which had cost more than that, while he owed $22,000 for merchandise.

If he had sold no goods and paid for none during the year 1918, he bought on credit in that year $17,000 worth of merchandise; a figure by the bankrupt's own statement much too small. On the same hypothesis, of neither paying nor selling, but always buying on credit, he should have had at least $36,000 worth of goods on the day of bankruptcy. Of course, he admits some selling, but makes no effort worthy the name to show where the sale price went to. It does appear that in 1918 he paid off his bank indebtedness, and drew and expended for clerk hire and family expenses what he estimates at $104 a week or say $3,500. The only additional business expense mentioned is the rent of his store, which he ceased to pay (to his father-in-law) in April; its amount does not appear. If in 1918 he sold only at the rate he testified to for January, he would have taken in nearly $10,000 be-

fore bankruptcy; but, if he sold at the rate he gave for 1917, he would have similarly received over $21,000. Yet on the day of bankruptcy his cash as per schedules amounted to just $3.

The computations suggested by these figures, every one of them based on a statement of Gottlieb, are numerous and obvious, and each leads to palpable falsity under some one of the points above stated. It makes small difference for the purposes of this case whether such falsity is ultimately allocated to one heading or the other.

[3] In matters of discharge every objecting creditor starts out with the burden of proving that which he alleges. In re Miller, 212 Fed. 920, 129 C. C. A. 440. But when a set of facts is shown which unexplained would lead a reasonable man to believe the allegations of the objector, the bankrupt must explain, and a deficit in assets far less than that demonstrably existing here has been held sufficient for that purpose in this court. In re Loeb, 232 Fed. 601, 146 C. C. A. 559; In re Schultz, 250 Fed. 103, 162 C. C. A. 275. Nor is any creditor called upon to prove the substance of his objection beyond a reasonable doubt; a fair preponderance is enough. In re Garrity, 247 Fed. 311, 159 C. C. A. 404.

When such condemning facts are shown, the bankrupt's usual effort is in confession and avoidance; he admits the facts and seeks to avoid by ignorance, and thereby show lack of intent; for the objecting creditor has the burden, not only of showing facts in the ordinary sense of the word, but intent also. In re Garrison, 149 Fed. 178, 79 C. C. A. 126.

But intent, being pre-eminently a fact or phenomenon that (barring confession) can never be proved otherwise than by inference, the same facts—i. e. acts and documents—which cast the burden of explanation or evidence upon the bankrupt also cast on him the burden of disproving the intent of doing those things which are the inevitable and natural consequences of said acts and documents. This is well considered by Sanborn, J., in McKibbon v. Haskell, 198 Fed. 639, 117 C. C. A. 343, and was, we think, plainly indicated in our decision in Re Weston, 206 Fed. 281, 124 C. C. A. 345.

In this evidence, there is no confession in the sense that untruth is admitted; the court is asked to believe what the very statement disproves. The inference from such an attitude, leads to belief in intentional falsity. Nor is there any avoidance. Gottlieb had been in business 15 years, and said he was unable personally to keep proper books; but he was under no such obligation, and never tried; his clerk kept whatever was wanted. That, after so much experience, he could not indicate the results desired from his (unproduced) clerk's bookkeeping, is not even asserted. Indeed, his defense consists in saying (substantially), in response to his counsel's leading question, that he did not intend to deceive anybody. Illiteracy or ignorance of English, the usual avenues of palliation, are not even suggested.

[4] Assuming, what cannot be complained of by appellee, that his financial statement of January, 1918, is true, we hold that his oath to the schedules was an oath to a falsity, and further that he failed to keep books with intent to conceal his financial condition.

On these grounds, the order appealed from is reversed, with costs.

In re OLINER et al.

(Circuit Court of Appeals, Second Circuit. December 10, 1919.)

No. 49.

1. BANKRUPTCY ⟸407(5)—FALSE STATEMENT WHICH WILL PRECLUDE DISCHARGE; "OBTAIN PROPERTY ON CREDIT."

The obtaining by bankrupts of a license to do business as private bankers, by means of a written statement made to the comptroller of the state of New York, as required by statute, was not the obtaining of "property," within Bankruptcy Act, § 14b (3), Comp. St. § 9598, nor made to one from whom property was obtained on credit, and, although the statement was materially false it is not ground for denial of discharge.

2. BANKRUPTCY ⟸407(5)—FALSE STATEMENTS BARRING DISCHARGE.

The provision of Bankruptcy Act, § 14b (3), Comp. St. § 9598, authorizing refusal of discharge to a bankrupt who has "obtained property on credit from any person upon a materially false statement in writing made to such person for the purpose of obtaining such property on credit," especially in view of its legislative history, is not to be extended by construction.

3. BANKRUPTCY ⟸407(3)—FRAUDULENT CONCEALMENT WHICH WILL BAR DISCHARGE.

The deposit by bankrupts of money in bank in their own name cannot be considered a transfer or concealment to hinder, delay, or defraud creditors, which will bar discharge under Bankruptcy Act, § 14b (4), Comp. St. § 9598.

4. BANKRUPTCY ⟸408(½)—OFFENSES WHICH BAR DISCHARGE LIMITED TO ACTS MADE OFFENSES BY BANKRUPTCY ACT.

Bankruptcy Act, § 14b (1), U. S. Comp. St. § 9598, which bars discharge if bankrupt has "committed an offense punishable by imprisonment as herein provided," is limited to acts made offenses by Bankruptcy Act.

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

In the matter of Saul Oliner and Isidor Oliner, trading as Oliner Bros., bankrupts. On appeal from order refusing discharge. Reversed.

Robert P. Levis, of New York City, for appellants.

Samuel Hoffman, of New York City, for respondent.

Before WARD, ROGERS, and MANTON, Circuit Judges.

ROGERS, Circuit Judge. This appeal brings before the court the right of the bankrupts to their discharge. The court below, confirming the report of the special master, has denied to the bankrupts individually and as copartners a discharge.

The bankrupts were engaged in the business of private banking in the city of New York. It is alleged that they filed a false statement with the comptroller of the state of New York, in order that that official might permit them to continue in the private banking business and to accept and receive deposits for safe-keeping as well as for transmission.

It may be observed that obtaining property on credit on a materially false statement in writing made to a person for the purpose of obtaining credit from him was not made a ground for barring discharge in

any Bankruptcy Act of the United States until the present act was amended so to provide in 1903. Act Fed. 5, 1903, c. 487, 32 Stat. 797. The amendment then made was not only novel in the bankruptcy legislation of this country, but no such provision, it has been said, was to be found in the bankruptcy legislation of England.

The Bankruptcy Act, in making provision for the bankrupt's discharge, directs that the judge shall discharge the applicant after all the parties in interest have been fully heard and he has investigated the merits, unless the applicant has done certain enumerated things.

[1] It has been claimed that the bankrupts now before the court have done certain things which bar their discharge. Two objections to their discharge are made. The first specification of objection to be considered reads as follows:

"That heretofore, and on the 18th of December, 1913, the bankrupts herein made a statement in writing, which they submitted to the comptroller of the state of New York as of the 13th of December, 1913, in which statement they claimed that they had stocks and bonds of the value of $159,347.00, and that they had loans and bills receivable, not secured by collateral, amounting to $75,296.62. It is alleged that the said statement delivered by the bankrupts to the comptroller of the state of New York was delivered for the purpose of showing their true financial condition to the comptroller of the state of New York, in order that he might permit the said bankrupts to continue in the private banking business and to accept and receive deposits for safe-keeping as well as for transmission."

And the special master in his findings says:

"As to the false statement, the statement filed with the state comptroller enumerated certain equities in mortgages and various notes, aggregating upwards of $14,000, as good and collectible, and the officers of the receiver testify that, in liquidating the affairs of the bank, they have been able to collect only about $1,400 of those notes, and further this same witness testifies that the bankrupts' liabilities exceeded their assets over $100,000, and in the light of this testimony, in my opinion, the specification as to false statements has been sustained."

He adds:

"The amount of dividends payable to general creditors herein is so insignificant in amount that it seems impossible that the bankrupts could have made these financial statements to the state but a few weeks before bankruptcy, not knowing that they were inflated and much above the real value of the securities to which they referred. In my opinion, the specifications have been sustained, and the bankrupts should be denied their discharge."

Laws of the State of New York 1910, vol. 1, p. 614, c. 348, provide that no individual or partnership shall engage directly or indirectly in the business of receiving deposits of money for safe-keeping or for the purpose of transmission to another, or for any other purpose in cities of the first class, without having first obtained from the comptroller a license to engage in such business. In order to obtain such license, the applicant is obliged to file with the comptroller a written statement, which has to be verified, and which, among other things, shows the amount of the assets and liabilities of the applicant. If the applicant complies in all respects with the requirements of the law, and his statement is approved, the comptroller issues a license authorizing the licensee to carry on the business at the place described in the license

certificate, and upon the receipt of the certificate the licensee "shall cause such license certificate to be posted and at all times conspicuously displayed in the place of business for which it is issued, so that all persons visiting such place may readily see the same." Licenses so issued are revocable by the comptroller at all times for cause shown. Any person or partnership carrying on the specified business without a license is guilty of a misdemeanor.

And the Banking Law of New York makes it the duty of individual bankers to make a report to the state superintendent of banks, which report must be verified under oath to the effect that it is true and correct in all respects, to the best of the knowledge and belief of the persons verifying it. Birdseye, Cumming & Gilbert's Consolidated Laws, vol. 7, § 21. It also provides that a failure to make the report within a specified time, or to include therein the information required, should subject the delinquent to a forfeiture of $100 for every day that such report is delayed or withheld. And it goes on to say:

"If any * * * individual banker shall fail to make two successive reports, * * * such individual banker shall forfeit his privileges as such banker." Birdseye, Cumming & Gilbert's Consolidated Laws, vol. 1, p. 320, § 22.

Counsel for the opposing creditors refer to the above provisions, and ask whether the bankrupts did not, by reason of their license, obtain money and credit, and whether they did not hold and keep their license by regularly filing the quarterly reports which the Banking Act requires. The record fails to disclose what quarterly reports were filed with the superintendent of banking. The objection is confined to a certain specific report filed, not with the superintendent of banking, but with the state comptroller. But, however that may be, what is about to be said as to the statement filed with the state comptroller applies equally to a statement filed with the state superintendent of banking.

The Bankruptcy Act in section 14, subd. (b), Comp. St. § 9598, declares that the judge shall discharge the bankrupt unless he has "* * * (3) obtained property on credit from any person upon a materially false statement in writing made to such person for the purpose of obtaining such property on credit." If the statement made to the superintendent of banks comes within the provision quoted, the discharge must be denied.

Is the statement filed with the state comptroller within the terms of section 14, subd. (b), cl. 3, above set forth? That provision was considered in Firestone v. Harvey, 174 Fed. 574, 98 C. C. A. 420. The Circuit Court of Appeals for the Sixth Circuit, speaking through Judge Lurton, after quoting the language of subdivision 3 of section 14b, said:

"This ground for denying a discharge was evidently leveled particularly at the practice of making false statements of one's financial condition by a buyer or borrower, *for the purpose of obtaining from the person to whom such false statement is made*, in writing, the articles or money desired 'on credit.' The false statement in writing which is enough to deny a discharge implies a statement knowingly false, or made recklessly, without an honest belief in its truth, and with a purpose to mislead or deceive, and thereby obtain from the person to whom it is made property upon credit."

It was held in In re Tanner (D. C.) 192 Fed. 572, that the obtaining of a surety or indemnity bond by a bankrupt by means of a materially false statement is not the obtaining of "property" on credit, within the meaning of the provision of the clause under consideration.

[2] The provision was also considered by this court in In re Zoffer, 211 Fed. 936, 128 C. C. A. 434. We held in that case, in an opinion written by Judge Lacombe, and concurred in by Judges Coxe and Ward, that a false statement in writing, made by the bankrupt to the agent of a commercial agency, merely that the agency might fix a credit rating in its books, and not requested by any customer, is not ground for denial of a discharge. The court in its opinion quoted from the report of the judiciary committee of the Senate concerning the measure in which it was said:

"Any tendency to make the bankrupt act unduly harsh is to be avoided. It is a sufficient ground of opposition to discharge that the bankrupt has obtained property from a creditor by a materially false statement in writing, where that statement was specifically asked for by the creditor or by the creditor's representative. General statements to mercantile agencies, not specifically asked for by prospective creditors, ought not to be ground of opposition to discharge; it makes the provision too harsh, in the estimation of your committee."

We are unable to distinguish this case in principle from In re Zoffer. Neither the state comptroller nor the superintendent of banks, like the mercantile agency, obtained the report at the request of any depositor or prospective depositor. Neither of those officials was the representative of a creditor from whom any money or property was obtained.

The obtaining of a license from the comptroller of the state of New York, or from the state superintendent of banking, is not the obtaining of "property" within the meaning of the clause under consideration. If it be said that moneys deposited with bankers thus licensed are obtained from depositors, on the faith of the statement filed either with the comptroller or the superintendent of banking, the answer is:

(1) That there is no evidence that a single depositor ever knew or heard of the statement, or relied upon it.

(2) That under the Bankruptcy Act the statement must be made to the person—in this case the depositors—from whom the credit was obtained.

[3] The specifications of objection also set forth:

"That the bankrupts, while insolvent and knowing that they were insolvent, accepted and received from numerous persons moneys for safe-keeping and transmission, which they well knew that they could not repay or return without intent to defraud persons who so gave to them moneys for safe-keeping, transmission, or for any other purpose."

And the special master in his findings says:

"As to the receiving of money for transmission to foreign countries, the testimony shows that these moneys had been intermingled with the general assets of the estate, and at the time of the filing of the involuntary petition there was some money on hand in the banks, and especially the Clinton Bank. There were some notes due the Clinton Bank from the bankrupts, and conse-

quently the Clinton Bank charged those notes against the balance, which nearly completely consumed the fund. This is no defense to the specification. The money was not available for the uses for which it was deposited with the bank, and in my opinion the specification has been sustained."

If the above specification of objection comes within any of the clauses in section 14b, it is within clause 4 which is as follows:

"(4) At any time subsequent to the first day of the four months immediately preceding the filing of the petition transferred, removed, destroyed, or concealed, or permitted to be removed, destroyed, or concealed any of his property with the intent to hinder, delay, or defraud his creditors."

We may concede that the bankrupts received moneys for transmission to Europe, which were never transmitted. The bankrupts state that the sum so received was $5,167.50. Their explanation is that the breaking out of the war in Europe prevented the transmission. The master has found as a fact that these funds were not kept separate and apart from the other business assets. They were deposited in the Clinton Bank, and when the bankrupts failed that bank applied the funds on deposit to discharge the indebtedness due from the bankrupts to the bank. The deposit of these moneys in a bank in the name of the bankrupts certainly cannot be within clause 4 above cited, even though the funds went into their general account.

[4] Counsel for the opposing creditors in their brief call attention to the provision found in chapter 348 of the Laws of 1910 of the State of New York which reads as follows:

"29. C. * * * All moneys received for transmission to a foreign country by any licensee shall be forwarded to the person to whom the same is directed to be transmitted within five days after the receipt thereof, and every person who shall fail to so forward the same within the time specified, shall be guilty of a misdemeanor."

The inference seems to be that, because of the foregoing law of the state of New York, the defendants are subject to section 14, subd. (b), cl. 1, which prevents a discharge if the bankrupt "has (1) committed an offense punishable by imprisonment as herein provided." But surely it is quite unnecessary for us to say that, while the failure to transmit funds so received may be punishable as a misdemeanor under the laws of the state of New York, it is not made an offense punishable by imprisonment under any provision which can be found in the Bankruptcy Act. For that reason the failure to transmit is not within clause 1.

The order is reversed, with direction to grant the discharge.

GEISENBERGER & FRIEDLER et al. v. ROBERT YORK & CO. et al.

(Circuit Court of Appeals, Fifth Circuit. December 20, 1919.)

No. 3364.

1. CORPORATIONS ⟸309(5)—PAYMENT OF CORPORATION MORTGAGE DEBT BY CREDITOR, WHO IS DIRECTOR, ENTITLES HIM TO SUBROGATION.

   A creditor, who was also a director, who paid a note of a corporation secured by mortgage on land in Louisiana, *held* subrogated to the mortgage lien, under Civ. Code La. art. 2161, providing for such subrogation as of right, although he took an unsecured note for the amount.

2. CORPORATIONS ⟸309(5)—MORTGAGE TO DIRECTORS VALID.

   A mortgage given by a corporation to secure a loan made to it by two directors, as authorized by unanimous vote of the directors present at an annual meeting, *held* not invalid because such two directors voted for the resolution and their presence was necessary to constitute a quorum, where the directors present owned all the stock except one share, and it appeared that the transaction was fair and in good faith, and that the money was needed and used to pay other debts of the corporation.

3. CORPORATIONS ⟸309(5)—ASSUMPTION OF MORTGAGE IN CORPORATION SUCCEEDING MORTGAGOR VALID.

   A mortgage on property of a corporation, made to two of its directors, even though voidable by the corporation, *held* valid as against a corporation succeeding to its assets, which assumed it by unanimous vote of its directors, who were also sole stockholders.

Appeal from the District Court of the United States for the Western District of Louisiana; George W. Jack, Judge.

Suit in equity by Robert York & Co. and others against the Standard Hardwood Company and others. From the decree, Geisenberger & Friedler and others appeal. Affirmed.

The following is the opinion of Jack, District Judge:

On petition of plaintiffs, receivers were appointed for defendant company. Thereafter plaintiffs took a rule on the receivers to show cause why the mill and lands of the company should not be sold to satisfy certain mortgage notes held by the plaintiffs. The defendant company is the successor of the Brevard & Woods Stave Company, which purchased a large tract of land in Concordia parish, La., from the Farmer-Wren Land Company, for the price of $170,000, of which amount a part was paid by exchange of lands in Mississippi, $10,000 in cash, and for the balance four vendor's lien and mortgage notes were given, for $24,212.50 each. Plaintiffs allege themselves to be the owners of the three last maturing of these notes by purchase from the Farmer-Wren Land Company, and in addition they allege themselves the holders and owners of five notes of defendant company, for $20,000 each, aggregating $100,000 secured by a second mortgage on the lands.

Defendant receivers, in answer, admit that the plaintiff owns the two last maturing notes given the Farmer-Wren Land Company for $24,212.50 each, but they allege that the other note of this series was not purchased by plaintiffs but was paid by them, and that plaintiffs merely have an unsecured claim against the defendant for the amount of said note. The receivers while making no denial of the fact that the Yorks loaned the company $100,000 and more, denied the validity and legality of the $100,000 mortgage executed to secure this indebtedness, on the ground that at the meeting of the board of directors, which authorized the mortgage, only four of the five members were present, including the two Yorks, who were interested parties, and therefore they claim could neither vote on the resolution nor be counted to make a quorum.

It appears that the Brevard & Woods Stave Company was a Tennessee corporation, with a capital stock of $25,000, doing business in Mississippi. In 1907 Brevard, the president, sought to obtain a loan from J. B. & Robert York of St. Louis, who were engaged in buying and selling lumber. To induce them to make the loan the stockholders of the company sold them one-half of the outstanding stock. For part of this stock they paid par value, and for the remainder $1.25 on the dollar. Later the Yorks obtained one-fourth more of the stock, thus giving them a three-fourths interest. In July, 1914, a large tract of land in Concordia parish, La., was purchased and a hardwood mill thereon erected.

In December, 1915, on request of the stockholders, the board of directors passed a resolution changing the name of the company to the Standard Hardwood Company and increased the capital stock to $100,000. This change in the charter, however, it seems, was never legally perfected, and in January, 1918, after the appointment of the receivers the old board of directors rescinded the action. On January 11, 1916, at the annual meeting of the board of directors, the $100,000 mortgage was authorized. There were present at this meeting the two Yorks, L. E. Brevard, Gates, who was an employé of the Yorks, and Mrs. Brevard, wife of L. E. Brevard. These five constituted the entire board, and likewise were the sole stockholders; the latter two holding each only one share of stock. At this meeting, Robert York offered a resolution authorizing the president to give a second mortgage on the lands to J. B. & Robert York (a commercial partnership) to secure them for moneys advanced and to be advanced before the 1st of February, 1916. The resolution was seconded by J. B. York and unanimously adopted. On January 15, 1916, Brevard, as president, executed to the order of Robert York five notes, each for $20,000, payable in one, two, three, four, and five years, and on May 15th executed the mortgage, and a few days thereafter delivered the notes to J. B. and Robert York.

The company did not prosper. Larger capital was necessary to conduct its business. The Yorks conceived the idea of organizing a new company, with a larger capital stock, and transferring to it the assets of the Stave Company. Accordingly the Yorks and Brevard procured the organization of a Delaware corporation under the name of the Standard Hardwood Company. The three men named in the charter apparently acted merely as a matter of accommodation. They subscribed for only 10 shares of stock, for which they paid nothing, and which they later transferred to the two Yorks and Brevard, who became the sole stockholders and the first board of directors of the new company.

To the Standard Hardwood Company was sold and transferred the Louisiana property of the Brevard & Woods Stave Company. Their only other property at the time was some land in Mississippi worth about $3,000, which was mortgaged to the mother of Brevard for a debt of about that amount. The consideration of the sale was the assumption by the Hardwood Company of the balance due on the mortgage indebtedness of the Farmer-Wren Land Company, aggregating $72,637.50, the assumption of $100,000 of second mortgage notes given Robert York, the assumption of all accounts due by the Stave Company as of October 2, 1916, incurred by operations in Louisiana, and the issuance to the stockholders of the Brevard & Woods Stave Company of $25,000 of the stock of the Standard Hardwood Company; this being in effect an exchange of stock of the two corporations dollar for dollar. By another resolution the officers were directed to issue and sell to any future subscribers stock up to the full amount authorized by the charter, $100,000, but no stock was sold.

The Standard Hardwood Company took charge of the properties about the middle of October, 1916, and paid all bills of the Stave Company, which had been rendered by creditors. Practically all lumber thereafter manufactured was sold to the Yorks. The mill continued to lose money. Brevard in December, 1916, made a trip away to try to find a purchaser for the property, but was unsuccessful, and a few months thereafter the mill ceased operation. The Yorks resigned and transferred their stock to J. B. Coyle, trustee. Coyle was the bookkeeper of the Hardwood Company. On the resolution of J. B.

York, as president, February 20, 1917, Brevard was elected to succeed him, and on March 10th Coyle was elected a director. At the same meeting a resolution was passed providing that the company take steps to immediately dispose of the assets and liquidate the business.

The Farmer-Wren Company's Notes.

The Yorks claim to have purchased the three last maturing of the Farmer-Wren notes each for $24,212.50, and as to the last two there is no dispute; but it is contended by the receivers that the first of these three notes, due January 15, 1917, was not purchased by the Yorks, but was actually paid by them, the receivers claiming that Robert York had taken the company's note for $25,000 to cover the amount of the Farmer-Wren note, with interest, and had then paid the latter. Thus they claim the Yorks were the holders of the company's unsecured note, and not the Farmer-Wren mortgage note; in other words, that the Farmer-Wren mortgage note has been extinguished by novation.

It appears that in December, 1916, in anticipation of the maturity of the Farmer-Wren mortgage note, Brevard executed the company's note for $25,000 to the order of J. B. & Robert York, which he delivered to Robert York, who was then at the mill. Brevard testifies that it was his understanding that the Yorks would accept this note for the loan of the necessary money to pay off the mortgage note and that the latter would thus be paid. Robert York denies that there was any agreement that the Yorks would lend the money, but states that, it having been apparent that the Hardwood Company would not be able to pay the note when due, he had told Brevard it might be advisable for him to take the company's note to Memphis with him, to see what could be done relative to financing payment of the mortgage note due the following month, and that he was then acting in his capacity as vice president of the Hardwood Company; that accordingly the note was made out, and he took it to Memphis, and left it with the bookkeeper of J. B. & Robert York, with the following memorandum attached: "Hold unless we pay B. & W. note to Farmer-Wren Co. J. B. & R. Y."

The bookkeeper, he states, was instructed not to place the note to the credit of the Hardwood Company until further advised, unless the Yorks borrowed the money in their own name to pay the note. He testifies that he canceled by perforation the Hardwood Company's signature on the note about the middle of February, 1917. The note, however, was not returned to the company's office at Ashridge, La., until after the appointment of a receiver. The memorandum attached to the note was an instruction to York's bookkeeper, and was in effect to hold the note, making no entry in the books, unless York paid the Farmer-Wren note. York's testimony is that he obtained a few months' extension of the note, and then bought the note from the Farmer-Wren Company, and in this he is corroborated by Farmer. The note itself is indorsed in blank, and not marked "Paid" or "Canceled." No entry was made, either in the Hardwood Company's books or the books of J. B. and Robert York, of the $25,000 note. Whatever may have been the original intention of York as to the payment of the Farmer-Wren note, the weight of the evidence sustains his contention that he did not pay it, but purchased it.

[1] As a matter of fact, however, even had York paid the note and had it canceled, his position would not have been materially affected, for in that event he would have been subrogated to the rights of the Farmer-Wren Company under article 2161 of the Civil Code, which reads: "Subrogation takes place of right: 1. For the benefit of him who, being himself a creditor, pays another creditor, whose claim is preferable to his by reason of his privileges or mortgages." See, also, Walmsley v. Theus, 107 La. 416, 31 South. 869; Zeigler v. His Creditors, 49 La. Ann. 145, 21 South. 666.

The $100,000 Second Mortgage.

[2] That a corporation may borrow money from and grant a mortgage to one or more of its directors, where the interested directors deal absolutely fairly with the corporation and no advantage is taken, is well settled by both the federal and state jurisprudence. While such contracts will be closely

scrutinized by the courts, they will be sustained where they are in the interest of the company and are fair and equitable. The doctrine is well and succinctly stated in Thompson's Commentaries on Corporations, § 4068, quoted and approved in the case of Villere v. New Orleans Pure Milk Co., 122 La. 717, 48 South. 162: "The strict rule that directors cannot enter into contracts with the corporation does not seem practicable. It would operate to disable those who have already embarked their funds in a corporate enterprise, and given to it their personal attention, from assisting it in time of difficulty, except at the risk of doing so without security. A corporation might be in a sorry plight, indeed, if one who had already embarked his funds in it, and who, from the fact of his being one of its managers, is best acquainted with its needs and difficulties, should not be able to make a present advance of money to help it out of those difficulties."

In Thompson on Corporations (2d Ed.) vol. 2, par. 1227, it is said: "The American courts, with some exceptions already noted, take perhaps the more practical view that contracts entered into by directors with themselves as individuals are not per se void, but are merely voidable at the option of the corporation or of the stockholders, provided the disaffirmance is exercised within a reasonable time, all the circumstances of the case considered." See large number of authorities cited, state and federal.

And again, in paragraph 1256, Thompson says: "The rule granting relief to the corporation and stockholders where a director makes a contract with himself, or where he secures some advantage or profit, is not to be used to the injury of the director, where such contract is free from actual fraud. The rule was adopted for the purpose of securing justice, and not to work injustice. In attempting to prevent a wrong, it is not the intention of the law to substitute one wrong for another. Hence, certain limitations have been placed upon the operation of the rule, intended to guard against evil consequences as inequitable as those it was designed to prevent."

In the case of Sanford Tool Co. v. Howe, Brown & Co., 157 U. S. 312, 15 Sup. Ct. 621, 39 L. Ed. 713, the court upheld a mortgage given by the directors to themselves to secure them for indorsements made and to be made on the company's paper, holding that, although a corporation at the time of such mortgage might not then be possessed of assets at cash prices sufficient to cover its indebtedness, if it were in fact a going concern and expected to continue business, the mortgage would be upheld.

It is contended, however, by counsel for the receivers, that, while a mortgage may be given to a director to secure a loan, it must be first authorized by a vote of the board of directors at which a quorum was present exclusive of interested directors, and a majority of such voted for the resolution. They take the position that in the case at bar, only four of the five directors having been present, including the two Yorks, that the action of the board was absolutely void. This contention leads to the conclusion that, while one member of the board of directors might come to the corporation's relief by making it a loan and taking as security a mortgage, the entire board could not join in such a loan, because in that event there would be no disinterested directors whatever, much less a quorum, to authorize the contract.

This contention I do not think sound. Whether the loan be made by one or all of the directors, and the mortgage given to one or all of them, it is subject to the same rule. It is not absolutely void, but voidable, and will be closely scrutinized by the court, and if there be any fraud or advantage taken, or if it be not to the interest of the corporation, the courts will not enforce it. In the Sanford Tool Co. Case, just cited, the mortgage was made in favor of all five of the individuals composing the board of directors, who as directors authorized the mortgage to themselves.

In the case of Leavenworth County v. Railroad Co., 134 U. S. 688, 10 Sup. Ct. 708, 33 L. Ed. 1064, which was a suit to annul a mortgage, or deed of trust, from the Southwestern Co. to the Rock Island Co., the court said: "I am unable to see anything in the fact that some of the same men were found to be trustees in this deed and directors in the Rock Island Company, and that directors in the Southwestern Company were also directors in the Rock Island Company, which should block the course of justice, paralyze the power

of the court, and deprive the creditor corporation of all remedy for the enforcement of its lien." The court then proceeded to hold that the corporation and its directors had the right to enter into contracts between themselves, and the question was not: Could they do these things; but have the relations of the parties—trust relations, if, indeed, such existed—been abused to the serious injury of the company?

And so in my opinion, in the case at bar, the question is not whether the corporation could enter into the contract with the Yorks, even though it were necessary for them to participate in the directors' meeting in order to have a quorum, but whether the trust relations of the Yorks to the corporation were abused to the injury of the corporation, or its creditors. It is not disputed that the Stave Company received the $100,000 and more from the Yorks. At the time the mortgage was authorized Brevard testifies $89,000 of the amount had already been advanced and $11,000 more was put up with which was paid off other creditors. Brevard's mother, it appears, had a claim for $3,000, which was taken care of by a mortgage on other property. All other creditors not secured by mortgage were paid the accounts rendered, though there may have been due some of the mercantile creditors small amounts for the current month. Thus there was left only the indebtedness due the Farmer-Wren Land Company, the Yorks, and Mrs. Brevard. This mortgage on the property was granted while the company was a going concern, and over a year and a half prior to the application for the receivership.

Clearly, had the $100,000 been loaned by a third party, no objection whatever could have been made to giving him a mortgage, and, the transaction being free from fraud, or unfair advantage, there is no good reason why these directors, who came to the aid of the corporation, should not be given the benefit of their mortgage. That there was not a quorum of disinterested directors at the meeting authorizing the mortgage was due to the fact of the absence of Mrs. Brevard, wife of the president of the company, who held only one share of stock, which she did not pay for, and which was placed in her name merely as a matter of convenience to make her eligible as a director. It would, no doubt, have been the better course to have had her present, in which event it would not have been necessary for the Yorks to have participated in the meeting; but as the contract was not unfair, but, on the contrary, for the benefit of the corporation, enabling it to settle all of its indebtedness on open accounts and continue its business, the mere fact that the Yorks voted for the resolution would not be sufficient cause to annul the mortgage.

[3] The Standard Hardwood Company, as I have before stated, was but a reorganization of the original Stave Company. Its sole stockholders and directors were the two Yorks and Brevard. The three, both at a stockholders' meeting and at a directors' meeting, authorized the assumption of this $100,000 mortgage as a part of the consideration for the transfer of the Stave Company to the Hardwood Company of the Louisiana lands. Thus the original action of the board of directors of the Stave Company, which was voidable, was ratified by the unanimous vote of all of the directors and the stockholders of the reorganized company. True it is that the majority of the directors of the reorganized corporation were still interested; but they, with Brevard, constituted the sole directors and the sole stockholders, and certainly by their unanimous vote the former action of the directors might be ratified.

In Thompson on Corporations, vol. 2, par. 1257, it is said: "The contracts made by directors with themselves, are in some cases said to be void; but this word is used in the sense of voidable. The correct principle is that, unless such transactions and contracts fall within the prohibition of the statute, or of a rule of the common law, it is voidable either at the election of the corporation acting through its directors, or at the election of stockholders." See Hoyle v. Plattsburg R. R. Co., 54 N. Y. 314, 13 Am. Dec. 595; Buell v. Buckingham, 16 Iowa, 284, 85 Am. Dec. 516; Chouteau v. Allen, 70 Mo. 290; Nye v. Storer, 168 Mass. 53, 46 N. E. 402.

Acts of a minority of the directors, while void, may be ratified by the direct and express action of a duly assembled quorum. In re Portuguese Con-

solidated Mining Co., 45 Ch. Div. 16; Ashley Wire Co. v. Ill. Steel Co., 164 Ill. 149, 45 N. E. 410, 56 Am. St. Rep. 187. The evidence fails to disclose any unfair advantage taken by the Yorks of their position in the company. They continued to advance money to the corporation until it owed them about $89,000 on open account, and they then took the mortgage to cover this and about $11,000 more, which they advanced to pay off the other creditors. Had the corporation then gone out of business, no one would have lost anything. The mortgage, then, at the time it was given, was not prejudicial either to the company or to its creditors, but the company continued in business, and thereafter lost more money. It may be that the Yorks, after taking the mortgage on all of the company's business, about equal, with the prior mortgage, to its full value, should not have permitted the company to continue business at the risk of future creditors, when they themselves had been made secure. But that is a matter for the Legislature and not for the courts. Better business judgment might have prompted a liquidation of the company's affairs at the time of the mortgage; but the evidence does not disclose that the corporation was in such a straitened financial condition as would make it evident to its directors that its continued operation necessarily meant further loss.

For the reasons stated, I am of the opinion that the three first mortgage notes, of $24,212.50 each, and the five second mortgage notes, for $20,000 each, held by J. B. and Robert York, are valid obligations of the corporation, and that the property mortgaged should be sold by special master to pay the debts of the company, and by preference such mortgage indebtedness; plaintiffs at such sale to have the right, in event they bid in the property, to pay 90 per cent. of their bid in mortgage notes held by them, the remainder to be paid in cash. Fees of attorneys will be fixed later.

A decree in accordance with the views herein expressed will be prepared and entered.

L. T. Kennedy, of Natchez, Miss., for appellants.

John C. Theus, of Monroe, La., for appellees.

Before WALKER, Circuit Judge, and FOSTER and GRUBB, District Judges.

PER CURIAM. We concur in the conclusions reached by the court below in this case, and in the reasons in support thereof stated in the opinion rendered by the District Judge. This being so, discussion by us of the questions presented is deemed to be unnecessary and superfluous.

The decree is affirmed.

BENTALL v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. December 16, 1919.)

No. 5297.

1. CRIMINAL LAW ⊜24—NECESSARY INTENT IMPLIED FROM ACT.
   Where an act, to be criminal, must be knowingly and willfully done, not only a knowledge of the act is implied, but a determination, with a bad intent, to do it.
2. CRIMINAL LAW ⊜24—INTENT PRESUMED FROM NATURAL RESULT OF ACT IS REBUTTABLE.
   The presumption of wrongful intent of a defendant, based upon the natural result of his words or acts, is not conclusive, but rebuttable, and this rebutting evidence may take the form of testimony by defendant that he intended no such results.

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3. CRIMINAL LAW ⊂=772(5)—INSTRUCTION AS TO INTENT ERRONEOUS.

An instruction in a criminal case, which stated without qualification that a man could not say that he did not intend to do a certain thing, when such thing was the natural result of his act, *held* erroneous where a specific intent was essential to the crime charged, and defendant testified that he did not have such intent.

Carland, Circuit Judge, dissenting.

In Error to the District Court of the United States for the District of Minnesota; Page Morris, Judge.

Criminal prosecution by the United States against Jacob O. Bentall. Judgment of conviction, and defendant brings error. Reversed.

Seymour Stedman, of Chicago, Ill. (Thomas E. Latimer, of Minneapolis, Minn., on the brief), for plaintiff in error.

Alfred Jaques, U. S. Atty., of Duluth, Minn.

Before SANBORN, CARLAND, and STONE, Circuit Judges.

STONE, Circuit Judge. Conviction on two of three counts for violation of section 3 of the Espionage Act of June 15, 1917 (40 Stat. 219, c. 30), through utterances in a public speech.

While the indictment was challenged in the brief, counsel for plaintiff in error, in the oral argument, conceded its sufficiency. The indictment alleged the utterance of the objectionable words in the presence of two apprenticed seamen, Mersen and Ford. It is contended that the evidence failed to show the presence at the meeting of these two men. This claim is not well founded.

The charge is attacked for several alleged errors. The first is that the court, in the opening portions of the charge, made prejudicial statements. This portion of the charge is:

"I confess—I may almost say that I proudly confess—that at a time like this I have intense feelings. It is natural with one whose ancestor has given his life on the battlefields of the Revolution that at a time like this he should feel intensely, and on that account I have tried throughout this trial not to show or give any indication of what my opinion is as to the facts proved by this evidence."

This expression was unnecessary, and approached the objectionable. However, it was followed by a clear caution that the jury were the exclusive triers of the facts, and there were no other statements in the charge which accentuated the part just quoted. It is also urged that the charge was erroneous upon the matter of intent. The portion designated is:

"A man cannot say he did not intend to do a certain thing, when the natural consequence of his act is bound to be so and so."

[1, 2] The bearing of this upon the evidence is that the defendant not only denied making the statements alleged in the indictment, but he specifically denied that he ever, and particularly upon the date charged, intended to obstruct the recruiting or enlistment service, or to attempt to cause insubordination, disloyalty, mutiny, and refusal of duty in the military or naval forces. In other words, he denied

the criminal intent necessary to the crimes charged. This intent was a most material element, which must be found by the jury. The case of the government upon this point rested mainly, if not entirely, upon the words themselves, coupled with their utterance to a large crowd of people of various ages, some proven to be within the draft and enlistment ages. In its essence this proof rested upon the words themselves and their natural and probable effect upon such auditors. It is true that, when one knowingly does an act (including the utterance of words), the presumption arises that he intended the results which would naturally follow. Reynolds v. United States, 98 U. S. 145, 167, 25 L. Ed. 244. But where the act must, as here, be "knowingly and willfully" done to be criminal, not only a knowledge of the act is implied, "but a determination with a bad intent to do it." Felton v. United States, 96 U. S. 699, 702, 24 L. Ed. 875; Hicks v. United States, 150 U. S. 442, 449, 14 Sup. Ct. 144, 37 L. Ed. 1137. And the presumption of wrongful intent, based upon the natural result of the words or acts, while constituting strong evidence of the presence of such intent, is not conclusive, but rebuttable. Hicks v. United States, supra, 150 U. S. 447, 449, 14 Sup. Ct. 144, 37 L. Ed. 1137. This rebutting evidence may take the form of testimony by the defendant that he intended no such result. Hicks v. United States, supra, 150 U. S. 449, 14 Sup. Ct. 144, 37 L. Ed. 1137; Oakes v. State, 98 Miss. 80, 54 South. 79, 33 L. R. A. (N. S.) 207; State v. Marfaudille, 48 Wash. 117, 92 Pac. 939, 14 L. R. A. (N. S.) 346, 15 Ann. Cas. 584; Kerrains v. People, 60 N. Y. 221, 228, 19 Am. Rep. 158; Greer v. State, 53 Ind. 420; White v. State, 53 Ind. 595; People v. Farrell, 31 Cal. 576, 582; State v. Harrington, 12 Nev. 125, 135; 8 R. C. L. p. 181; 16 C. J. 81, §§ 48, 49; 1 Wharton's Crim. Evid. (10th Ed.) § 431; 1 Wigmore on Evid. § 581.

[3] Such evidence was introduced by defendant. The above language of the charge minimized, if it did not entirely eliminate, that evidence. This part of the charge was emphatic and clear, and in its entirety is:

"A man's intention in doing or saying a thing must be ascertained from what he does or says. A man cannot say he did not intend to do a certain thing, when the natural consequence of his act is bound to be so and so. He cannot then come in and say that he never intended to do that. A man ought to be and must be judged by the natural consequences of his acts, the natural and necessary consequences of his acts. If this use of the words naturally and necessarily produces that effect, then you must judge of the intention of the man by the words themselves."

It would be an absurdity to say that a party has the right to introduce evidence upon a vital element of fact, but that the court might thereafter tell the jury they must disregard such evidence when it has been introduced. Nor can this portion of the charge be fairly construed as a mere comment upon the evidence, which might be saved by a cautionary statement that the jury are not bound by the judge's opinion of such facts. Even the careful and able United States attorney who tried this case did not have the temerity to suggest such a view, and it would require a fertile imagination to see the jury taking such a view of these positive, unequivocal statements

by the court. It is true that the language was immediately used in connection with count 2, upon which there was acquittal, but the three counts were for acts similar in general character, all involving an intent based upon the motive of interfering with the government in the creation and maintenance of its military forces in war time; all were based on different expressions in one public address, and as to intent each covered by identical testimony on the part of defendant. It is not likely, if even it be possible, that the jury would segregate in their minds this general language and apply it only to the offense charged in count 2. Nor is the defect cured by other parts of the charge, some of which accurately, and others of which more nearly, stated the law in this regard. This definite, positive statement made to the jury, when it returned for reinstruction, must have impressed and influenced the jury.

Other assigned errors need no notice, as for this error the judgment must be and is reversed.

CARLAND, Circuit Judge (dissenting). I feel obliged to dissent from the opinion of the majority in this case. The defendant was allowed to testify as to his purpose and intention in using the language he did in a public speech. The record presents an aggravated violation of the statute. For the purpose of determining the guilt or innocence of the defendant, the trial court's comment upon the weight to be given to his testimony in regard to his intent was absolutely true. No court or jury ever gives any weight to the testimony of a defendant in regard to his intent in the circumstances mentioned by the court in its charge, and any finding of a court or jury based upon such evidence would make a criminal trial a farce. The judge, as has been said by high authority, was not occupying the position of a moderator at a town meeting, but was charged with the duty of taking care that the outcome of the trial should be just. The trial judge had the right to give the jury his opinion of the weight to be given to testimony in the case, provided he left the facts to the jury to decide. This he did in the following language:

"I wish to caution you in the outset, gentlemen of the jury, before I proceed to explain the indictment and give you the law governing this case, and to say to you, as a part of the law governing this case, that you are the exclusive judges of the facts which have been proved by the testimony. That is not for me; that is your exclusive province. You are to consider this testimony, and to say upon your oaths and consciences what facts the testimony shows, and then you are to say by your verdict whether these facts compel, under the rule, a conviction of this defendant.

"You are not to be influenced, or in any way governed, by anything which I may have said, or by any act or expression of my own, during this trial, in the determination of these facts. As I have already said, you are the exclusive judges on that subject."

The authorities cited in the majority opinion simply decide that, where a specific intent is one of the ingredients of a crime, the person charged with such crime may testify as to his intention. This the defendant in the case at bar was allowed to do. If a person is charged with having made an assault with intent to kill, or to do great bodily

harm, and the evidence shows that the person charged held in his hands a loaded shotgun, and at a distance of five paces took deliberate aim and discharged the gun at another person, the universal judgment of all reasonable men would be to the effect that his testimony that he did not intend to kill or to do great bodily harm was worthless, and any consideration given to the same would be a wrong committed against the administration of justice. To reverse the judgment in this case, because the trial judge stated an obvious truth, would be a greater error than any committed by the trial court.

The judgment should be affirmed.

KEYES v. ANDERSON.

(Circuit Court of Appeals, Eighth Circuit. December 16, 1919.)

No. 5335.

1. INDEMNITY ⇐8—CONTRACT TO INDEMNIFY BANK AGAINST LOSS FROM UNCOLLECTIBLE ASSETS COVERED FORGED OR PAID NOTES.
   A contract executed by directors and stockholders of a national bank, on a statement by the examiner that he regarded notes receivable shown on its books as of doubtful value and intended to report it insolvent, by which they bound themselves to indemnify the bank "against any loss whatever which said bank may hereafter sustain by reason of its inability to realize upon or collect in the full amount or value of the assets of said bank as shown by its books of account as of this date." *held* to cover notes so shown on the books, which were forged or which had been paid.

2. INDEMNITY ⇐3—CONSIDERATION FOR CONTRACT TO INDEMNIFY BANK.
   Contract by directors and stockholders of a national bank to indemnify it against loss from uncollectible assets, made to prevent closing of the bank by the Comptroller for insolvency, *held* based on sufficient consideration.

3. INDEMNITY ⇐3—DELIVERY TO COMPTROLLER OF CONTRACT TO INDEMNIFY BANK SUFFICIENT.
   Delivery to the Comptroller of a contract by directors and stockholders to indemnify a national bank against loss from uncollectible assets, made to prevent closing of the bank for insolvency, *held* sufficient.

In Error to the District Court of the United States for the District of Minnesota; Wilbur F. Booth, Judge.

Action at law by Paul C. Keyes, receiver of the First National Bank of Clarkfield, Minn., against Peter Anderson. From the judgment, plaintiff brings error. Reversed.

J. N. Johnson, of Canby, Minn., for plaintiff in error.

C. A. Fosnes, of Montevideo, Minn. (Ole Hartwick, of Granite Falls, Minn., on the brief), for defendant in error.

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

STONE, Circuit Judge. This is an action by the receiver of a national bank upon a contract for $66,579.95. The charge of the court

limited recovery to $770.14. From a recovery for such amount the receiver brings his writ of error.

[1] The entire sum asked in the petition was represented by notes held by the bank. Of these notes $770.14 were unpaid notes; the balance were notes which had been paid or forged by the cashier. The court eliminated recovery for the paid and forged notes, upon the theory that they were not included in the terms of the contract in suit. The one proposition here presented is whether such notes were within the contract, which is as follows:

"Bond.

"Whereas, the First National Bank of Clarkfield, Minn., a corporation created and existing under the laws of the United States, is in financial difficulty through negligence on the part of the management in not urging collection on maturing paper, and the bank examiner, acting as agent of the Comptroller of the Currency, has notified the undersigned directors and stockholders of said bank that the assets are of such nonliquid character that it may be unable to meet its obligations as they mature; and

"Whereas, the undersigned directors and stockholders of said bank are interested in protecting said bank and its depositors against loss in consequence of the doubtful character and value of its assets, and to prevent the insolvency of the bank:

"Now, know all men by these presents that we, the undersigned directors and stockholders of said First National Bank of Clarkfield, Minn., in consideration of the premises and of the sum of one dollar ($1.00) to each of us paid by the said bank, the receipt whereof is hereby acknowledged, do hereby, jointly and severally, covenant and agree to and with said bank that we shall and will indemnify and save said bank harmless against any loss whatever which said bank may hereafter sustain by reason of its inability to realize upon or collect in the full amount or value of the assets of said bank as shown by its books of account as of this date; and we further, jointly and severally, agree that we will, at any time hereafter, at the request of the cashier of said bank, or upon the demand of the Comptroller of the Currency, purchase from said bank any assets now owned or held by said bank which the said Comptroller of the Currency, or his agent, the national bank examiner, appointed to examine said bank, may designate as of doubtful value, and to pay to said bank therefore *in cash* the value or amount at which the said assets are now carried upon the books of the said bank.

"In witness whereof, we have hereunto set our hands and seals this 19th day of June, A. D. 1917. George J. Piersol. [Seal.]
"Peter Anderson. [Seal.]

"Witness: O. A. Carlson, N. B. Examiner."

Anderson contends that the forged and paid notes cannot be regarded as assets within the meaning of the contract, and that, even if this be not true, yet, as the contract indemnified only against such loss as the bank might suffer after the contract, there was no loss, since that paper was worth as much afterwards as it was at the time the contract was made.

The argument on the first contention is that the word "assets" does not include worthless paper, as it has no value, and therefore cannot be an asset. The case cannot turn upon such a view, but it must be determined by what the parties at the time of the contract meant that word should cover. An examination of the circumstances surrounding the making of the contract and of the object and purpose of the contract reveals the following:

The bank examiner had just made an examination of the bank, which convinced him that it was in such condition that he could not pass its solvency. This condition was brought about in his opinion by the doubtful value of a large portion of the notes held by it. These notes showed on the books of the bank at their face value as assets, and if in fact worth approximately what those books showed as their value, the bank was solvent. The examiner made known to three of the directors and officers, including Anderson, how he regarded these notes, and also his intention of reporting the bank as insolvent, unless such assets were fortified by a bond or contract guaranteeing their worth to be as represented on the books. It was for the sole purpose of establishing such a value for those notes that this contract was made. If it had not been made, and these assets so fortified, he would have reported the bank as insolvent, and Anderson understood that situation thoroughly at the time he signed the contract. Therefore what all of the parties intended to do through this contract was to place Anderson and his cosigner, Piersol, back of the value of those notes as shown on the bank books. The contract sufficiently expresses that intention by binding Anderson to "indemnify and save said bank harmless against any loss whatever which said bank may hereafter sustain by reason of its inability to realize upon or collect in the full amount or value of the assets of said bank *as shown by its books of account as of this date*" (italics ours).

Much emphasis is laid on the claim that Anderson did not know at the time the contract was made that any of these notes had been paid or forged, and were therefore worthless, and therefore that all he intended to guarantee was the payment of overdue notes. It is highly probable that he thought that was all that he was doing; but what the examiner insisted upon, what the contract was designed by all parties to do, and what it did do, was to assure the bank of assets to the value of the notes as represented upon its books. Under these circumstances it makes no difference whether or not Anderson knew the true character of the notes.

The second contention is clearly not justified. The entire situation, as above outlined, shows that what the parties intended was to remove the doubt and objection of the examiner by putting the credit of Anderson and Piersol back of the value of the notes as shown on the books. The examiner was not uneasy lest that value decrease, but he was critical whether it could be realized in cash. It was to meet that criticism that the contract was made.

[2] While not involved in this writ by the receiver, yet both parties have argued the sufficiency of the consideration for the contract. The permission to continue business and not to be reported as insolvent was a sufficient consideration.

[3] Anderson questioned below that any proper delivery of the contract had been made, because the bond had not been delivered to the bank. That point was not discussed here orally, though mentioned in the brief of counsel for Anderson. We are convinced that the delivery was sufficient. The contract was taken by the examiner in the name of the bank and for the protection of its depositors, credi-

tors, and stockholders. The original was forwarded to the Comptroller at Washington, and the two copies retained by the examiner. It is the business of the Comptroller's office, of which the examiner was a part, to make such examinations and to take such steps, within the law, as seem necessary to protect national banks, and those who deal with them. This contract was taken in pursuance of that power, and it was unnecessary that the contract be delivered to the bank.

The judgment is reversed, and the case remanded for proceedings not inconsistent with this opinion.

THE RATHLIN HEAD.*

SANDREN et al. v. ULSTER S. S. CO., Limited.

(Circuit Court of Appeals, Fifth Circuit. January 20, 1920.)

No. 3413.

SEAMEN ⊂=24—AMOUNT OF WAGES DEMANDABLE AT INTERMEDIATE PORTS; "ONE-HALF PART OF THE WAGES WHICH HE SHALL HAVE THEN EARNED."

Under Seamen's Act March 4, 1915, § 4 (Comp. St. § 8322), which gives a seaman the right to demand and receive at intermediate ports "one-half part of the wages which he shall have then earned," the amount to which he is entitled is one-half his gross earnings during the voyage to that time, less all prior payments.

Appeal from the District Court of the United States for the Eastern District of Louisiana; Rufus E. Foster, Judge.

Suit in admiralty by Karl Sandren and others against the steamship Rathlin Head; the Ulster Steamship Company, Limited, claimant. Decree for claimant, and libelants appeal. Affirmed.

W. J. Waguespack and Herbert W. Waguespack, both of New Orleans, La., for appellants.

Terriberry, Rice & Young, of New Orleans, La., for appellee.

Before WALKER, Circuit Judge, and GRUBB and JACK, District Judges.

GRUBB, District Judge. The appeal presents a single question involving the construction of section 4 of the Seamen's Act. Act March 4, 1915, 38 Stat. 1165 (Comp. St. § 8322). The applicable part of that section is as follows:

"Every seaman on a vessel of the United States shall be entitled to receive on demand from the master of the vessel to which he belongs one-half of the part of the wages which he shall have then earned at every port where such vessel, after the voyage has been commenced, shall load or deliver cargo before the voyage is ended."

The question presented is as to the proper method of computing the amount payable to seamen, at intermediate ports under this section, in cases in which previous payments or advances have been made. Appellants contend that from the total wages earned from the commencement of the voyage to the date of demand there should first be

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

*Certiorari denied 251 U. S. —, 40 Sup. Ct. 394, 64 L. Ed. —.

deducted all advances and payments; one-half of the remainder being the amount payable. The appellee contends, and the District Judge held, that the total wages should first be divided in two, and from the quotient should be deducted all advances and previous payments; the remainder, if any, being the amount demandable by the seaman.

There has been diversity of opinion among the District Courts as to which method is the proper one. The cases of The Ixion, 237 Fed. 142, and In re Ivertsen, 237 Fed. 498, hold in line with the contention of appellants. The cases of The Jacob N. Haskell, 235 Fed. 914, The London, 238 Fed. 645, The Delagoa, 244 Fed. 835, The Meteor, 241 Fed. 735, and The Thor, 248 Fed. 942, support the contention of the appellee. The case of The London, 238 Fed. 645, was affirmed by the Circuit Court of Appeals for the Third Circuit in an opinion reported in 241 Fed. 863, 154 C. C. A. 565, and a certiorari to the decree of the Circuit Court of Appeals was denied by the Supreme Court, 245 U. S. 652, 38 Sup. Ct. 11, 62 L. Ed. 532. In the case of Sandberg v. McDonald, Claimant of the Talus, 248 U. S. 185, 39 Sup. Ct. 84, 63 L. Ed. 200, the Supreme Court impliedly recognized the correctness of the method adopted by the District Judge in this case. The statement of facts contained in the opinion of the Supreme Court in that case recites that—

"The master then paid to them [the demanding seamen] a sum which, with the cash paid them and the price of the articles purchased as stated above, together with the advances made in Liverpool, equaled or exceeded the one-half of the wages then earned by each of them from the commencement of his service for the ship."

While the adequacy of the payment was questioned in that case on a different ground—i. e., the alleged invalidity of advances made to the seamen in Liverpool—the payments would have been insufficient (granting the present contention of appellants to be correct), even after the allowance of the Liverpool advances, and the Supreme Court, by its affirmance of the decree dismissing the libel, in view of the language quoted, in effect approved the method of computing the half wages demandable under the statute, which was adopted in that case in the court below, and which was that adopted in the District Court in this case.

The "one-half part of the wages which he shall have then earned" is literally one-half of the wages earned by the seaman to the date of demand, without deductions. The language of the act places emphasis upon wages earned, and not upon amounts due when demand is made. The statute does not concern itself with what is due as upon a partial or final settlement, but requires the payment of an amount proportioned upon earnings rather than upon balances due. While the statute does not expressly say that wages theretofore paid shall be taken into consideration in the computation, the absurdity of a contrary construction is enough to warrant the implication that they are to be considered. If the ascertainment, required by the act, was of the amount owing on a settlement, the ordinary method of computation would be to first deduct from gross earnings previous payments and allow one-half of the residue. But the statute says "one-half part of the wages which he shall have then earned." His gross earnings or total wages

must therefore be divided in two, in order to arrive at "one-half part of the wages which he shall have then earned," which is what the statute read literally accords him the right to demand. The implied condition to the demand is that he shall not have already received the whole or any part of the wages demanded. Otherwise, a double payment would result, and the act will not be construed so as to produce such an inequitable result. The implied condition makes it necessary to deduct from the half earnings, when so ascertained, all previous payments. The remainder is what the seaman is entitled to demand. The evident aim of Congress was to provide that the seaman should be entitled, pending the termination of the voyage, to demand and receive at intermediate ports of loading or unloading, with five-day intervals, a sum equal to one-half of his then earnings, when there was added to it all previous payments, and that the master should retain until the termination of the voyage the remaining half of the seaman's wages as an assurance against desertion.

It is urged by appellants that reference to the earlier laws, of which section 4 of the present Seamen's Act was merely amendatory, is persuasive of their contention. Section 4530 of the Revised Statutes and section 5 of the act of December 21, 1898 (30 Stat. 756), both use the word "due," instead of the word "earned." It is contended that the purpose of the substitution was merely to avoid the effect of seamen's articles, which postponed the maturing of wages until the termination of the voyage, and that it should not be given a wider meaning; i. e., that of making a change in the method of computation from that which obtained under the earlier laws and which was unfavorable to the seamen, since the Seamen's Act of March 4, 1915, was enacted in the interest of the seaman rather than that of the shipowner. We are referred to no cases construing the earlier laws as contended for, or citing any such practice as obtaining under them and have found none. The District Judge in the opinion in the case of In re Ivertsen, supra, assumed without citation of authority that the method that prevailed under the earlier laws was that which is here contended for by appellants. Conceding, without deciding, that the sole purpose of Congress in changing the word "due" to the word "earned" was that stated, still, unless the method of computation contended for by the appellants is shown to have been the prevalent one under the earlier laws, the argument advanced fails, for in that event no change in language in the amended law was needed to give it the construction given it in the court below.

Our conclusion is that the weight of authority and of reason is persuasive that Congress intended to provide by section 4 of the Seamen's Act of 1915, that the half of a seaman's wages should remain in the hands of the master until the voyage was ended, as a security against his leaving the ship, and that the seaman should be entitled to receive only a sum, which at the time demanded would represent one-half of his then earned wages, when there was added to it the total of all previous advances and payments.

The decree of the District Court dismissing the libel is therefore affirmed.

FIRST NAT. BANK OF EVANSTON, WYO., v. BANK OF WAYNESBORO et al.

(Circuit Court of Appeals, Eighth Circuit. December 8, 1919.)

No. 5274.

1. SALES ⟸473(1)—VENDOR UNDER CONDITIONAL SALE HAS TITLE SUPERIOR TO THAT OF BONA FIDE PURCHASER.
   The general rule that a vendee under a contract retaining title to personal property cannot, as against the vendor, convey good title even to a purchaser without notice, is in force in Utah.
2. FIXTURES ⟸20—VENDOR'S RIGHTS UNDER CONDITIONAL SALE CONTRACT SUPERIOR TO THOSE OF MORTGAGEE.
   In Utah, the rights of a vendor retaining title to machinery for manufacturing ice until the purchase price is paid are superior to those of a person holding a mortgage on the premises in which such machinery was installed by the vendee.
3. COURTS ⟸366(14)—STATE RULE OF DECISION GOVERNS IN CONDITIONAL SALE CONTRACT.
   Whether the rights of a conditional sale vendor are superior to those of a person holding a mortgage on the premises in which the vendee installed the purchased article will be determined according to the law of the state in which the case arises.

Appeal from the District Court of the United States for the District of Utah.

Suit by Raymond H. Ryan against the James Coal & Ice Company, the First National Bank of Evanston, Wyo., the Bank of Waynesboro, T. D. Ryan, and others. From that portion of a decree adjudging the Bank of Waynesboro and T. D. Ryan entitled to certain funds in the hands of the receiver, the First National Bank of Evanston, Wyo., appeals. Affirmed.

S. T. Corn, of Ogden, Utah, for appellant.

J. D. Skeen, of Ogden, Utah, for appellees.

Before SANBORN, Circuit Judge, and MUNGER and YOUMANS, District Judges.

YOUMANS, District Judge. The James Coal & Ice Company, bought machinery for an ice plant from Frick & Co. under an agreement that the title to the machinery should remain in Frick & Co. until the purchase price was fully paid. Appellees succeeded to the rights of Frick & Co. under that contract. The machinery was installed in a building especially constructed for the purpose, and was placed on a heavy concrete foundation and bolted thereto. It could be removed by unscrewing the nuts on the bolts. The James Coal & Ice Company afterwards contracted other debts, which it secured by mortgage on the ice plant as real estate. Among the debts thus secured was a note to appellant for $3,000. The note was executed April 22, 1913, and was a renewal note. The mortgage was executed April 30, 1913. There is a balance of $1,700 still due, and that balance is represented by a renewal note. The plant was sold at receiver's sale, and the proceeds arising therefrom are now in court for distribution. The question here

is whether appellant, as a purchaser without notice, has a claim under the mortgage superior to the claim of appellees under the contract retaining title. The court below held that the note secured by the mortgage was not entitled to priority.

In the case of Bierce v. Hutchins, 205 U. S. 340, 347, 27 Sup. Ct. 524, 525 (51 L. Ed. 828), the Supreme Court said:

"There remains the question whether the sale was conditional. Such sales sometimes are regulated by statute, and put more or less on the footing of mortgages. With the development of its effects there has been some reaction against the Benthamite doctrine of absolute freedom of contract. But courts are not Legislatures, and are not at liberty to invent and apply specific regulations according to their notions of convenience. In the absence of a statute, their only duty is to discover the meaning of the contract and to enforce it, without a leaning in either direction, when, as in the present case, the parties stood on an equal footing and were free to do what they chose. The contract says in terms that it is conditional, and that the goods are to remain the property of the seller until payment of the note given for the price. This stipulation was perfectly lawful."

In the case of Holt v. Henley, 232 U. S. 637, 640, 34 Sup. Ct. 459, 460 (58 L. Ed. 767), the Supreme Court said:

"We turn now to the claim of the mortgagees. This is based upon the clause extending the mortgage to plant that may be acquired and placed upon the premises while the mortgage is in force, coupled with the subsequent attachment of the system to the freehold. But the foundation upon which all their rights depend is the Virginia statute giving priority to purchasers for value without notice over Holt's unrecorded reservation of title; and as the mortgage deed was executed before the sprinkler system was put in, and the mortgagees made no advance on the faith of it, they were not purchasers for value as against Holt. York Manufacturing Co. v. Cassell, 201 U. S. 344, 351, 352 [26 Sup. Ct. 481, 50 L. Ed. 782]. There are no special facts to give them a better position in that regard. But, that being so, what reason can be given for not respecting Holt's title as against them? The system was attached to the freehold, but it could be removed without any serious harm, for which complaint could be made against Holt, other than the loss of the system itself. Removal would not affect the integrity of the structure on which the mortgagees advanced. To hold that the mere fact of annexing the system to the freehold overrode the agreement that it should remain personalty and still belong to Holt would be to give a mystic importance to attachment by bolts and screws. For, as we have said, the mortgagees have no equity, and do not bring themselves within the statutory provision. We believe the better rule in a case like this, and the one consistent with the Virginia decisions so far as they have gone, is that 'the mortgagees take just such an interest in the property as the mortgagor acquired; no more, no less.'"

In the case of Detroit Steel Co. v. Sistersville Brewing Co., 233 U. S. 712, 716, 34 Sup. Ct. 753 (58 L. Ed. 1166), the Supreme Court said:

"In Holt v. Henley, 232 U. S. 637 [34 Sup. Ct. 459, 58 L. Ed. 767], the court had to consider a similar question of priority in view of a Virginia statute like that of West Virginia upon which the petitioner relies, and, although in that case the conditional sale had not been recorded, it was held that the vendor was to be preferred. The main question now before us is whether this case is to be decided differently on the ground that the tanks were 'an essential indispensable part of the completed structure contemplated by the mortgage,' a question left open in the former decision. 232 U. S. 641 [34 Sup. Ct. 459, 58 L. Ed. 767]. The tanks were essential to the working of the brewery, and after they were installed the opening into the recess in which they stood was bricked up. It may be assumed that they became part of the realty as between mortgagor and mortgagee; but that is immaterial in equity,

however it may have been at the old common law. The question is not whether they were attached to the soil, but, we repeat, whether the fact that they were necessary to the working of the brewery gives a preference to the mortgagee. We see no sufficient ground for that result. This class of need to use property belonging to another is not yet recognized by the law as a sufficient ground for authority to appropriate it. If the owner of the tanks had lent them, it would be an extraordinary proposition that it lost title when they were bricked in. That it contemplated the ultimate passing of title upon an event that did not happen makes its case no worse, except so far as by statute recording is made necessary to save its rights. The common law knows no objection to what commonly is called a conditional sale."

[1-3] These three cases from the Supreme Court of the United States give full force to the general rule that a vendee under a contract retaining title to personal property cannot convey good title thereto, even to a purchaser without notice as against the vendor. This is the rule in Utah, and this case must be determined by the laws of that state. Hirsch v. Steele, 10 Utah, 18, 36 Pac. 49; Lippincott v. Rich, 19 Utah, 140, 56 Pac. 806; Walker v. Machine Co., 41 Utah, 255, 126 Pac. 308; Stores Co. v. Moon, 49 Utah, 262, 162 Pac. 622. The machinery could have been removed. In that respect the case is similar to the case of Holt v. Henley and the case of Detroit Steel Co. v. Sistersville Brewing Co.

The case of Triumph Electric Co. v. Patterson, 211 Fed. 244, 127 C. C. A. 612, was determined by the law of the state of Arkansas. The question there was whether the machinery involved was an irremovable fixture as defined by the decisions of that state. It was there held that under those decisions the machinery was an irremovable fixture. The case of In re Sunflower State Refining Co., 195 Fed. 187, 115 C. C. A. 139, was decided under the law of Kansas, which requires a conditional sale contract to be recorded.

There is no statute of Utah, nor decisions of its court of last resort, changing the general rule touching the point involved in this case. It follows that the decision of the lower court must be affirmed.

MURPHY v. BANK OF WAYNESBORO et al.

SULLIVAN v. SAME.

(Circuit Court of Appeals, Eighth Circuit. December 8, 1919. Rehearing Denied March 15, 1920.)

Nos. 5221, 5273.

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

Suit by Raymond H. Ryan against the James Coal & Ice Company, Harry L. Sullivan, as administrator, the Bank of Waynesboro, Charles S. Murphy and others. From those portions of a decree adjudging certain funds in the hands of a receiver should be paid to the Bank of Waynesboro and T. D. Ryan, Charles S. Murphy and Harry L. Sullivan, as administrator, appeal. Affirmed.

Joseph Chez, of Ogden, Utah (David L. Stine, of Ogden, Utah, on the brief), for appellant Murphy.

S. T. Corn, of Ogden, Utah, for appellant Sullivan.

J. D. Skeen, of Ogden, Utah (D. A. Skeen, of Salt Lake City, Utah, on the briefs), for appellees.

Before SANBORN, Circuit Judge, and MUNGER and YOUMANS, District Judges.

MUNGER, District Judge. These appeals are companions to the case of First National Bank of Evanston v. Bank of Waynesboro, 262 Fed. 754, — C. C. A. —, just decided, and seek a reversal of portions of the same decree. After the James Coal & Ice Company had installed the ice-making machinery, which it had received under the title-retaining contract, it executed a note for borrowed money and secured it by a mortgage, and Murphy is the owner of the note and mortgage and seeks to have a decree that his lien extended to the ice-making machinery, and that it was superior to the seller's claim under his contract.

Sullivan seeks the same relief, and as a basis therefor asserts that he has an interest in a mortgage executed by the James Coal & Ice Company after the ice-making machinery had been installed. The decree of the lower court denied to appellants the relief sought by them. What has been said in the case of First National Bank of Evanston v. Bank of Waynesboro necessarily determines these appeals and requires an affirmance of the decree.

Affirmed.

EDWARD HINES LUMBER CO. v. AMERICAN CAR & FOUNDRY CO.

(Circuit Court of Appeals, Seventh Circuit. May 15, 1919. Rehearing Denied September 24, 1919.)

No. 2664.

WHARVES ⊂⊃9—HOLDING OVER AFTER TERM NOT RENEWAL OR EXTENSION OF LEASE.

The holding over by a lessee of docks after the expiration of the written lease and the continued payment of rent, thus creating a tenancy from year to year, is not a renewal or extension of the lease, which contained no provision therefor; hence provision of lease that tenant would pay cost of rebuilding docks on extension or renewal of lease had no application.

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

Action at law by the Edward Hines Lumber Company against the American Car & Foundry Company. Judgment for defendant, and plaintiff brings error. Affirmed.

Certiorari denied 250 U. S. —, 40 Sup. Ct. 179, 64 L. Ed. —.

Charles T. Farson, of Chicago, Ill., for plaintiff in error.

William D. McKenzie, of Chicago, Ill., for defendant in error.

Before BAKER and EVANS, Circuit Judges, and ENGLISH, District Judge.

ENGLISH, District Judge. Plaintiff in error undertakes to collect from defendant in error cost of rebuilding certain docks. Suit is based upon a lease, which provided, first, plaintiff in error should become legally obligated to rebuild docks; and, second, the lease might be renewed or extended.

The declaration filed by plaintiff in error contained a full statement of the lease. The language of the clauses of the lease in question, necessary for the consideration of this case, are as follows:

"It is further understood and agreed that the party of the first part [plaintiff in error] is not to make any repairs to said docks during the continuance of this lease, and that if the party of the second part desires said docks improved or repaired that such repairs or improvements shall be made at its own expense.

* * * * * * * * * *

"If the first party shall become legally obligated to rebuild the docks than by action other than through the request of the second party, the first party shall bear the cost, but if thereafter this lease should be renewed or extended to second party for any further period, then second party will at the time of such renewal, repay to first party the entire cost of rebuilding said docks, together with interest thereon," etc.

The declaration further alleges that at the expiration of the lease no other or further lease or express agreement of any kind was entered into by and between the parties, but that defendant in error remained in possession of the premises and thereby a tenancy from year to year was created whereby the written indenture of lease was renewed or extended to the defendant in error for a further period.

A demurrer was interposed to the declaration, which raised two questions, the first of which relates to the construction to be given to an ordinance of the city of Chicago, which we need not consider. The second question is: Did the holding over by the defendant in error operate to "renew or extend the lease"? The lower court answered this question in the negative and entered an order sustaining the demurrer and dismissing the suit, which action of the court is brought here for review.

Liability of the defendant in error depends upon a renewal or extension of the lease. The lease covered a period of five years, terminating on the 30th day of April, 1912. At the expiration of said period no further lease or express agreement of any kind whatever was entered into between the parties. There was no provision in the lease for its renewal or extension, but defendant in error remained in possession, paying rent for the time it held over, and thereby, it is claimed, created a tenancy from year to year, and such tenancy from year to year is the basis for the contention by plaintiff in error that said lease was renewed or extended.

The defendant in error, as tenant of plaintiff in error, held over after the expiration of the term of the lease, and plaintiff in error acquiesced in such holding over, by accepting rent therefor. Such holding over constituted a tenancy from year to year. This tenancy from year to year was neither a renewal nor extension of the old lease, but was a new lease for each year for such holding over, similar in its provisions and covenants, except as to the term of years, to that of the old lease, so far as they were applicable to the new relation. This new relation springs out of a duty implied by law, rather than out of the contract. The renewal of the old lease implied the execution of a lease for the same term; and the extension of the old lease implied the continuation of same upon same conditions and covenants and for the same term. A tenancy from year to year, therefore, could not be either a renewal or extension of the old lease. Weber v. Powers, 213 Ill. 370, 72 N. E. 1070, 68 L. R. A. 610; 1 Wood on Landlord and Tenant, § 13; Kennedy v. City of New York, 196 N.

Y. 19, 89 N. E. 360, 25 L. R. A. (N. S.) 847; Herter v. Mullen, 159 N. Y. 28, 53 N. E. 700, 44 L. R. A. 703, 70 Am. St. Rep. 517; U. M. Realty & Impr. Co. v. Roth, 193 N. Y. 570–576, 86 N. E. 544; Tiffany on Landlord and Tenant, pp. 1472–1519; A. & E. Encyc. Law, vol. 18, p. 197; Hately v. Myers, 96 Ill. App. 217, 226.

Liability was conditioned, not upon the continued possession of the premises, but upon the renewal or extension of the written lease. A tenancy from year to year is neither a renewal nor extension of the prior lease.

The judgment is affirmed.

MONTOYA et al. v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. December 16, 1919.)

No. 5202.

1. CONSPIRACY ⟸43(5)—OVERT ACT NEED NOT BE ALLEGED.
An indictment under Criminal Code, § 19 (Comp. St. § 10183), for conspiracy to injure, oppress, threaten, and intimidate a citizen in the free exercise of a right secured to him by the laws of the United States, is not required to allege an overt act.

2. INDICTMENT AND INFORMATION ⟸110(3)—STATUTORY LANGUAGE SUFFICIENT.
An indictment which follows the language of the statute is sufficient in substance, and is not subject to attack, after verdict and judgment, on the ground that it is not sufficiently specific.

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

Criminal prosecution by the United States against C. C. Montoya and Anastacio Sereseres. Judgment of conviction, and defendants bring error. Affirmed.

A. B. Renehan, of Santa Fé, N. M. (M. C. Spicer, of Socorro, N. M., and Carl H. Gilbert, of Santa Fé, N. M., on the brief), for plaintiffs in error.

Henry G. Coors, Jr., Asst. U. S. Atty., of Albuquerque, N. M. (Summers Burkhart, U. S. Atty., of Albuquerque, N. M., on the brief), for the United States.

Before CARLAND and STONE, Circuit Judges, and ELLIOTT, District Judge.

STONE, Circuit Judge. Error by C. C. Montoya and Anastacio Sereseres from conviction for conspiracy to injure, oppress, threaten, and intimidate Rosetta M. Reed in the free exercise and enjoyment of his rights to make effectual a homestead entry.

The errors relied upon are insufficiency of the indictment, and insufficiency of the evidence. The indictment was under section 19 of the Criminal Code (Comp. St. § 10183). The portion of the statute here of moment is:

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

"If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States," they shall be punished.

The indictment outlines the homestead entry of certain described public lands by Reed, and that he was residing thereon for the purpose of complying with the laws respecting homestead entries, and securing a patent therefor, and that upon a certain date defendants and two others conspired "to injure, oppress, threaten, and intimidate" Reed in the free exercise and enjoyment of his right to reside upon, cultivate, and improve the land, and mature his title to it as a homestead. The accused challenges the sufficiency of this indictment on these grounds:

"(a) It does not aver an overt act.

"(b) It does not go into particulars of the crime.

"(c) It does not define the oppression, intimidation, injury, or threat which is pretended to have been exerted, and does not descend into particulars in these respects or any of them.

"(d) There was no specification of the manner in which the homestead entryman was to be oppressed, or injured, or intimidated, or threatened, in the right to make a homestead entry (which in fact had already been made), or in the right to reside, cultivate, and improve, or in the right to mature title, or to what end or purpose, if at all, whether to prevent the fulfillment of his duties as a homesteader, or to drive him away from the land, by ill treatment or unneighborliness, or by active interference with his possessory rights."

[1, 2] The statute does not require an overt act as an element of the crime. The conspiracy alone completes the crime. The other specifications may be generalized as objections that the indictment is not sufficiently specific. There was no attack upon this indictment before trial, and it is to be deemed sufficient, unless it is defective in substance. Dunbar v. United States, 156 U. S. 185, 191, 15 Sup. Ct. 325, 30 L. Ed. 390. The indictment closely follows the wording of the statute, and is therefore sufficient as to its substance, and is not subject to the attack made upon it after verdict and judgment. Smith v. U. S., 157 Fed. 721, 725, 85 C. C. A. 353.

A careful reading and study of the entire evidence is convincing of its sufficiency to sustain the verdict.

The judgment is affirmed.

NAKANO v. UNITED STATES.*

(Circuit Court of Appeals, Ninth Circuit. February 2, 1920.)

No. 3337.

1. WAR ⟸4—EVIDENCE OF DISORDERLY CHARACTER OF HOUSE ADMISSIBLE.
In a prosecution for keeping a house of ill fame within five miles of a military post, in violation of Act May 18, 1917, § 13 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 2019b), and order of Secretary of War pursuant thereto, evidence of soliciting by a woman on the premises, who lived there *held* admissible.

2. WAR ⟸4—EVIDENCE OF DISORDERLY CHARACTER OF HOUSE ADMISSIBLE.
In a prosecution for keeping a house of ill fame within five miles of a military post, testimony of an employé of the board of health that women found in the place were infected with venereal diseases *held* admissible.

3. CRIMINAL LAW ⟸1032(3)—OBJECTION TO INDICTMENT NECESSARY TO SECURE REVIEW.
After going to trial without objection, a defendant cannot raise the objection in the appellate court that the indictment was not signed by the district attorney.

In Error to the District Court of the United States for the First Division of the Northern District of California; Edward E. Cushman, Judge.

Criminal prosecution by the United States against S. Nakano. Judgment of conviction, and defendant brings error. Affirmed.

Marshall B. Woodworth, of San Francisco, Cal., for plaintiff in error.

Annette Abbott Adams, U. S. Atty., and Ben F. Geis, Asst. U. S. Atty., both of San Francisco, Cal.

Before GILBERT, MORROW, and HUNT, Circuit Judges.

GILBERT, Circuit Judge. The plaintiff in error was convicted under an indictment which charged him with keeping a house of ill fame within five miles of a military post, in violation of section 13 of the Act of May 18, 1917 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 2019b), and the order of the Secretary of War made in pursuance thereof.

[1] Error is assigned to the refusal of the court below to strike from the evidence the testimony of a policeman, who testified that on the premises of the plaintiff in error he arrested a certain woman who he said was a prostitute; that she was soliciting prostitution and living on the premises; that she was standing in the doorway of the hotel of plaintiff in error "and there was a white man came along Stockton street; she nodded to him and said, 'Come on in.'" Motion was made to strike out the last statement, on the ground that it was hearsay, and not made in the presence of the defendant. The evidence was clearly admissible for the purpose of showing that prostitution was being practiced on the premises. State v. Toombs, 79 Iowa, 741, 45 N. W. 300; Beard v. State, 71 Md. 275, 17 Atl. 1044, 4 L. R. A. 675, 17 Am. St. Rep. 536; State v. Littman, 86 N. J. Law, 453, 92 Atl. 580; People v. Claffy, 95 Misc. Rep. 400, 160 N. Y. Supp. 760.

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

*Rehearing denied April 5, 1920.

[2] It is contended that it was error to permit an employé of the board of health, whose duty it was to examine women arrested on immorality charges, with a view to isolate them and cure them if infected, to testify that he examined three of the women who were found on the premises of the plaintiff in error, and ascertained that they were all infected with venereal diseases. No authorities are cited for or against the admissibility of such testimony. We are not convinced that it was reversible error to admit it. The character of the women on the premises in question was proper to be considered in connection with the charge, and we think it was not beyond the proper range of proof to show, for the value which it might have, that the women had acquired the maladies common to prostitution. The charge of the court below is not before us. We may assume that the jury were properly instructed as to the probative value of such evidence.

[3] We find no merit in the suggestion that the indictment is fatally defective for failure of the district attorney to attach his signature thereto. No statute makes such a signature essential. The indictment was properly indorsed "A true bill" by the foreman, and was presented and filed in open court, and the plaintiff in error went to trial without directing objection to any formal defect. The objection was not raised in the court below, nor is it found in the assignments of error. It comes too late. United States v. McAvoy, 4 Blatchf. 418, Fed. Cas. No. 15,654; Frisbie v. United States, 157 U. S. 160, 15 Sup. Ct. 586, 39 L. Ed. 657.

The judgment is affirmed.

LIM CHAN v. WHITE, Commissioner of Immigration.*

(Circuit Court of Appeals, Ninth Circuit. February 2, 1920.)

No. 3377.

1. HABEAS CORPUS ⇐113(5½)—WAIVER BY IMMIGRANT OF RIGHT TO BOARD OF SPECIAL INQUIRY BY FAILURE TO CLAIM IT.
An alien denied admission by the United States cannot raise the question of his right to a board of special inquiry on appeal from a judgment in habeas corpus proceedings, where the right was not claimed before the immigration officers nor in the court below.

2. HABEAS CORPUS ⇐92(1)—COURT NEED NOT WEIGH EVIDENCE BEFORE IMMIGRATION OFFICIALS.
In habeas corpus proceedings by an excluded alien, the court is not required to weigh the evidence before the immigration officials, further than to determine whether there was substantial evidence to sustain their decision.

Appeal from the District Court of the United States for the First Division of the Northern District of California; Maurice T. Dooling, Judge.

Habeas corpus by Lim Chan against Edward White, Commissioner of Immigration for the port of San Francisco. From a judgment denying the writ, petitioner appeals. Affirmed.

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

*Rehearing denied April 5, 1920.

Geo. A. McGowan and Heim Goldman, both of San Francisco, Cal., for appellant.

Annette Abbott Adams, U. S. Atty., and Ben F. Geis, Asst. U. S. Atty., both of San Francisco, Cal., for appellee.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

GILBERT, Circuit Judge. The appellant made application to enter the United States as the minor son of a resident Chinese merchant lawfully domiciled therein. He was denied the right to enter for failure of proof of the alleged relationship. On appeal the Secretary of Labor affirmed the decision. The appellant petitioned the court below for habeas corpus, alleging that the hearing before the immigration officials was unfair. The writ was denied.

[1] On appeal to this court the appellant presents two points: First, that he was entitled of right to have the question of his admissibility determined by a board of special inquiry; and, second, that the evidence of his right to land was of such a positive and conclusive character that to disregard it was abuse of discretion on the part of the officials. To sustain the first point we are referred to the decisions of this court in Quan Hing Sun v. White, 254 Fed. 402, 165 C. C. A. 622, and Jeong Quey How v. White, 258 Fed. 618, — C. C. A. —, holding that Chinese persons claiming to be citizens of the United States are entitled to have the question of their right to enter determined by a board of special inquiry. In the present case there is no contention that the appellant is a citizen of the United States. No claim for a hearing before a board of special inquiry was made at any time in the proceedings before the immigration officials, nor was the right to it asserted in the petition for the writ, nor is its denial presented in the assignments of error. It is presented for the first time in a brief filed in this court. It cannot avail the appellant here. Passing by the question whether an alien may demand a board of special inquiry, the objection that the appellant was denied it is made too late. Jeung Bock Hong v. White, 258 Fed. 23, — C. C. A. —.

[2] Nor do we find that the testimony concerning the right of the appellant to enter the United States was of such a character as to establish conclusively that right or to indicate that there was such abuse of discretion in ordering the exclusion of the appellant as to justify review of the decision by habeas corpus. We discover many discrepancies between the testimony of the appellant and that of Lim Kee, who was alleged to be his father, discrepancies which may reasonably have caused the immigration officials to reject the claim that the asserted relationship existed. On petition for habeas corpus on the ground that the hearing was unfair, the court below was not required to weigh the testimony, or to go further into its investigation than to ascertain whether there was substantial evidence to support the decision. Low Wah Suey v. Backus, 225 U. S. 460, 32 Sup.

Ct. 734, 56 L. Ed. 1165; Whitfield v. Hanges, 222 Fed. 745, 138 C. C. A. 199; Katz v. Commissioner of Immigration, 245 Fed. 316, 157 C. C. A. 508.

The judgment is affirmed.

GUGGOLZ v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. February 20, 1920.)

No. 3333.

WAR ⊂⊃4—INDICTMENT UNDER ESPIONAGE ACT MUST ALLEGE THAT LANGUAGE WAS SPOKEN IN PRESENCE OF SOME PERSON.

An indictment for uttering profane, scurrilous, and abusive language about the form of government, the Constitution, and army and navy of the United States *held* not to state an offense under Espionage Act June 15, 1917, tit. 1, § 3, prior to its amendment by Act May 16, 1918, § 1 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 10212c), in the absence of averment that the language was uttered in the presence of any person who might be influenced thereby.

In Error to the District Court of the United States for the Northern Division of the Northern District of California; William C. Van Fleet, Judge.

Criminal prosecution by the United States against John C. Guggolz. Judgment of conviction, and defendant brings error. Reversed.

A. M. Seymour, J. M. Inman, and Downey & Downey, all of Sacramento, Cal., for plaintiff in error.

Annette Abbott Adams, U. S. Atty., of San Francisco, Cal., and Charles W. Thomas, Jr., Asst. U. S. Atty., of Sacramento, Cal.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

GILBERT, Circuit Judge. The plaintiff in error was found guilty under an indictment which charged that on or about the 11th of May, 1918, in violation of section 3, title 1, of the Act of Congress of June 15, 1917, as amended May 16, 1918 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 10212c), he did at a place named and while the United States was at war with the German government, unlawfully, willfully, knowingly, and feloniously utter disloyal, profane, scurrilous, and abusive language about the form of government of the United States, the Constitution of the United States, and the military and naval forces of the United States, which said language was intended by him to bring the form of government of the United States, the Constitution of the United States, and the military and naval forces of the United States into contempt, scorn, contumely, and disrepute, and did by word support and favor the cause of the Imperial German government, with which the United States is and was at the time at war, and opposed the cause of the United States in the said war. Then followed the words which the plaintiff in error was alleged to have uttered, and the charge that they were uttered with the intent to bring the form

of government of the United States, the Constitution of the United States, and the military and naval forces of the United States into contempt, scorn, contumely, and disrepute, and to favor the cause of the Imperial German government, and to oppose the cause of the United States in said war. Upon the trial is was developed, and the district attorney admitted, that the words so charged were uttered by the defendant in April, 1918, and consequently before the amendment of May 16, 1918.

The principal question in the case is whether the indictment charges facts upon which a conviction may be sustained under the terms of the original act of June 15, 1917. That act provides (section 3):

"Whoever, when the United States is at war, shall willfully make or convey false reports or false statements with intent to interfere with the operation or success of the military or naval forces of the United States or to promote the success of its enemies, and whoever, when the United States is at war, shall willfully cause or attempt to cause insubordination, disloyalty, mutiny, or refusal of duty, in the military or naval forces of the United States, or shall willfully obstruct the recruiting or enlistment service of the United States, to the injury of the service of the United States, shall be punished," etc.

The indictment fails to state a case under the first clause of the act, for it contains no information that the reports were made or conveyed to any person, or from which it may be seen that the statements were made or conveyed with the intention to interfere with the operation or success of the military and naval forces of the United States. It likewise falls short of charging the causing, or attempting to cause, insubordination, disloyalty, etc., in the military or naval forces, or obstructing the recruiting or enlistment service, for it fails to show that the statements were made within the hearing of any person, or that they could have reached those who were in the military service or who contemplated enlistment therein. In these respects the case is similar to Shilter v. United States, 257 Fed. 724, — C. C. A. —.

The judgment is reversed, and the cause is remanded, with instructions to discharge the plaintiff in error.

NORTHERN IDAHO & MONTANA POWER CO. v. A. L. JORDAN LUMBER CO.*

(Circuit Court of Appeals, Ninth Circuit. February 2, 1920.)

No. 3382.

1. APPEAL AND ERROR ⟸717—IN ACTION TRIED BY THE COURT, ITS OPINION CANNOT BE RESORTED TO, TO SUPPLY FINDINGS NOT MADE.
On error to review a judgment in an action at law tried by the court by stipulation, where no special findings were requested or made, the opinion of the court cannot be resorted to for such findings.

2. APPEAL AND ERROR ⟸544(1), 846(5)—REVIEW IN ACTION TRIED BY COURT.
Judgment in an action tried by the court by stipulation cannot be reviewed, if the complaint states a cause of action, in the absence of special findings or bill of exceptions presenting rulings made during the trial.

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

*Rehearing denied April 5, 1920.

In Error to the District Court of the United States for the District of Montana; George M. Bourquin, Judge.

Action at law by the A. L. Jordan Lumber Company against the Northern Idaho & Montana Power Company. Judgment for plaintiff, and defendant brings error. Affirmed.

B. S. Grosscup, of Tacoma, Wash., Sidney M. Logan and Logan & Child, all of Kalispell, Mont., and Grosscup & Morrow, of Tacoma, Wash., for plaintiff in error.

Henry C. Smith, of Helena, Mont., and T. H. MacDonald and J. E. Erickson, both of Kalispell, Mont., for defendant in error.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

GILBERT, Circuit Judge. The plaintiff in error seeks to reverse the judgment of the court below, rendered against it in a law action, in which a jury was waived and the cause was tried before the court. The plaintiff in error states in its brief that, while the writ challenges certain findings of the court for the reason that they are not supported by the evidence, it is mainly based on the assignment that on the facts found by the court, supplemented by the undisputed evidence, the judgment should have been for the defendant.

[1] On the trial no exceptions were taken to any ruling of the court, and no request was made for special findings, or for a finding in favor of the defendant in the action. The plaintiff in error refers to the opinion of the court below as containing special findings of fact, but the opinion cannot be resorted to for that purpose. Dickinson v. Planters' Bank, 16 Wall. 257, 21 L. Ed. 278; British Queen Min. Co. v. Baker Silver Min. Co., 139 U. S. 222, 11 Sup. Ct. 523, 35 L. Ed. 147; Saltonstall v. Birtwell, 150 U. S. 417, 14 Sup. Ct. 169, 37 L. Ed. 1128; York v. Washburn, 129 Fed. 564, 64 C. C. A. 132; Hayden v. Ogden Savings Bank, 158 Fed. 91, 85 C. C. A. 558; United States v. Sioux City Stock Yards Co., 167 Fed. 127, 92 C. C. A. 518; Gibson v. Luther, 196 Fed. 203, 116 C. C. A. 35.

[2] In the absence of a special finding, the judgment must be affirmed, unless the complaint fails to state a cause of action, or the bill of exceptions presents some erroneous ruling of the court in the progress of the trial. Norris v. Jackson, 9 Wall. 125, 19 L. Ed. 608. There being in the present case no ruling of the trial court, and no special finding of fact, but only a general finding, the latter must be accepted as conclusive, and this court can go no further than to affirm the judgment. Lehnen v. Dickson, 148 U. S. 71, 13 Sup. Ct. 481, 37 L. Ed. 373; Dunsmuir v. Scott, 217 Fed. 200, 133 C. C. A. 194; Pennsylvania Casualty Co. v. Whiteway, 210 Fed. 782, 127 C. C. A. 332.

The judgment is affirmed.

BURGESS v. STANDARD OIL CO.

(Circuit Court of Appeals, Seventh Circuit. January 6, 1920.)

No. 2697.

MASTER AND SERVANT ⊂=302(1)—MASTER NOT LIABLE FOR ACTS OF SERVANT NOT IN COURSE OF DUTY.

An employer *held* not chargeable with liability for acts or omissions of an employé sent to deliver a can of oil at a building in assisting an employé of the building at his request to operate an elevator on which the can was to be placed for carriage; such service having no relation to the duties of his employment.

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

Action at law by Anna Burgess against the Standard Oil Company. Judgment for defendant, and plaintiff brings error. Affirmed.

David S. Eisendrath, of Chicago, Ill., for plaintiff in error.

John A. Bloomingston, of Chicago, Ill., for defendant in error.

Before BAKER, EVANS, and PAGE, Circuit Judges.

PAGE, Circuit Judge. Plaintiff sued to recover damages for personal injuries, and prosecutes this writ of error because the trial court instructed the jury to return a verdict for the defendant.

Packages for the County Building, in Chicago, are taken in on an elevator, which, when not in use, is in the basement under metal doors, that are in and form a part of the sidewalk on Randolph street. It is claimed that defendant's teamster, arriving at the County Building with a can of oil, went into the basement to find some one to receive it. The chief engineer of the County Building sent him to McGlynn, a county employé. McGlynn asked the teamster to go up and give three raps on the metal doors, and said that he (McGlynn) would bring the elevator up and take the oil in. After hearing the teamster, as McGlynn supposed, stamp three times with his foot on the iron shutters, McGlynn immediately started the elevator upward, and that raised the metal doors, thereby injuring plaintiff, who was just walking over the doors.

The sole reason why the master is responsible for the wrongs of his servant is because he is doing the master's business. It is not necessary to cite authorities to show that, when he is doing a thing for somebody else, the master is not liable. Standard Oil Co. v. Anderson, 212 U. S. 215, 221, 29 Sup. Ct. 252, 53 L. Ed. 480. The utmost that De Lude had to do for the defendant, in connection with the elevator, was to place the can of oil upon its platform after it arrived at the sidewalk level. The charge here is that he undertook, on behalf of the defendant, that the defendant would protect the public against the operation of the elevator by the county's employé. This was not within the line of his duty, and the defendant is not liable.

The cases cited by plaintiff are nearly all coal hole cases, and differ essentially from the case here. In those cases the instrumentalities

used were necessary in the performance of the work undertaken and their use and operation were necessarily wholly within the control of the defendants.

If the injury was in fact caused by the negligence of the teamster in the manner charged, it was the personal negligence of the teamster, and not chargeable to the defendant.

The judgment of the District Court is affirmed.

UNITED STATES v. LONG BRANCH DISTILLING CO. et al.

(Circuit Court of Appeals, Fifth Circuit. January 28, 1920.)

No. 3396.

APPEAL AND ERROR ⊂=123—CASE NOT REVIEWABLE WHERE RECORD FAILS TO SHOW JUDGMENT.

A case in which the record shows the verdict of a jury, but no judgment thereon, is not reviewable on writ of error.

In Error to the District Court of the United States for the Southern District of Florida; Rhydon M. Call, Judge.

Action at law by the United States against the Long Branch Distilling Company and others. From the judgment, the United States brings error. Dismissed.

H. S. Phillips, U. S. Atty., of Tampa, Fla. (Fred Botts, Asst. U. S. Atty., of Jacksonville, Fla., of counsel), for the United States.

N. P. Bryan and L. R. Milton, both of Jacksonville, Fla., for defendants in error.

Before WALKER, Circuit Judge, and GRUBB and CLAYTON, District Judges.

PER CURIAM. The record in this case does not show a judgment which this court is given jurisdiction to review. It shows that a verdict was rendered in favor of the defendants in error, who in the trial court were defendants in an action at law, but does not show that there was judgment on that verdict.

Because of the failure of the record to disclose a judgment subject to be reviewed, the writ of error is dismissed.

E. H. FREEMAN ELECTRIC CO. v. WEBER ELECTRIC CO.*

WEBER ELECTRIC CO. v. E. H. FREEMAN ELECTRIC CO.

(Circuit Court of Appeals, Third Circuit. August 13, 1919. Rehearing Denied December 13, 1919.)

Nos. 2440, 2441.

PATENTS ⊂=328—VALIDITY AND INFRINGEMENT—ELECTRIC LAMP SOCKET.

The Weber patent, No. 743,206, for an incandescent electric lamp socket, claims 2 and 3, *held* void for lack of patentable novelty. Claims 1 and 4, as limited by their language, the proceedings in the Patent Office, and the prior art, *held* not infringed.

Appeal from the District Court of the United States for the District of New Jersey; J. Warren Davis, Judge.

Suit in equity by the Weber Electric Company against the E. H. Freeman Electric Company. From the decree, both parties appeal. Affirmed in part, and reversed in part.

For opinion below, see 253 Fed. 657.

Frank C. Curtis, of Troy, N. Y., for plaintiff.

Robert H. Parkinson, of Chicago, Ill., Livingston Gifford, of New York City, and David P. Wolhaupter, of Washington, D. C., for defendant.

Before BUFFINGTON and WOOLLEY, Circuit Judges, and MORRIS, District Judge.

MORRIS, District Judge. Weber Electric Company, the plaintiff, filed its bill in equity against E. H. Freeman Electric Company, charging infringement of United States letters patent No. 743,206, for improvements in incandescent electric lamp sockets, granted to August Weber, Sr., November 3, 1903, and by him assigned to the plaintiff. The claims in issue were 1 to 4, inclusive. From a decree adjudging claims 1 and 4 valid and infringed, and claims 2 and 3 invalid, both parties appealed.

The incandescent electric lamp socket, to which Weber's patent relates, is a sheet metal case consisting of a sleeve and a cap telescopically fitting over the end of the sleeve. The case thus formed incloses an insulating base with which the line wires entering through a central aperture in the cap are connected, and upon which is affixed a screw socket for receiving the screw-threaded shank of an incandescent lamp. The patent deals principally with interlocking means between the sleeve and cap, and with means to prevent rotative movement between sleeve and base when a lamp is being inserted in or removed from the screw socket affixed to the base. The claims in issue are set out at length, and plaintiff's structure described, in the opinion of the court below. 253 Fed. 657.

The plaintiff contends that claims 1, 2, 3, and 4 are infringed by defendant's keyless socket, and claims 1 and 4 by defendant's key socket, and, as cross-appellant here, alleges that the court erred in

adjudging claims 2 and 3 invalid, instead of valid and infringed. Each of these claims was held valid and infringed in a suit brought in the Southern district of New York by this plaintiff against National Gas & Electric Fixture Co. (D. C.) 204 Fed. 79, affirmed 212 Fed. 948, 950, — C. C. A. —. The defendant contends, however, that in view of the evidence as to the prior art presented in this, but not in the former, case, both claims 2 and 3 are invalid for want of patentable novelty. This new evidence consists, among other things, of British patent to the Edison & Swan Electric Light Co., Ltd., No. 6781 of 1895, British patent to Gover, No. 11,714 of 1897, and United States patent No. 575,322 to Benjamin, dated January 19, 1897. Each of these patents, as does Weber's, pertains to electric lamp sockets. The Edison & Swan patent states:

"The base *A* is grooved along each side, and the casing *G* which holds it has its two opposite sides indented as shown at *H*, so that the base *A* and the parts fixed in it are made to occupy the proper position relatively to the bayonet catch slot *K* by which the lamp base is held in the socket."

The Gover patent expressly provides:

"The two sides of the socket are indented so as to form internal protuberances *p* engaging in the grooves *i* of the insulator to prevent it from turning."

In these two patents the lamp is mounted directly upon the sleeve by means of bayonet slots instead of upon the base by means of the lamp support or screw socket as in Weber's; but in the Benjamin patent the lamp is mounted upon the base by means of a screw socket, the base being inclosed in a case or shell of two parts screwed together. Benjamin describes his means of preventing rotation between the case and base thus:

"Upon the interior of the shell or casing *a* two lugs or projections e^2e^2 are provided, which engage corresponding recesses a^9a^9 in the base *a* to prevent rotation of the base relatively to the casing."

To prevent unscrewing the sleeve and cap when screwing the lamp into or unscrewing it from the screw socket of the base Benjamin placed his projections within the cap instead of within the sleeve. Each of these three patents antedates the Weber invention. The means to prevent relative rotative movement between case and base called for by Weber's claims 2 and 3 consists of a "peripheral recess" in the base and "a sheet metal sleeve having a portion of its wall introverted to occupy said base recess." These claims deal only with means to prevent rotative movement between base and socket, and do not, as do claims 1 and 4, include means to automatically interlock with a snap action when the case members are telescopically joined, thereafter to remain interlocked until released by manually compressing the sleeve. The device described in each of the prior art patents accomplishes the same purpose by substantially the same means operating in substantially the same way as does the introverted portion of the case wall called for by Weber's claims 2 and 3; and this is true whether or not the claims be restricted to the specific device he describes. Consequently these claims lack novelty and fall within the

references to the prior art. We are therefore of the opinion that claims 2 and 3 of the Weber patent cannot be sustained, and that the court below did not err in so holding.

The defendant appellant by its assignments of error alleges that the court below erred in finding claims 1 and 4 valid and infringed. These claims were in issue and sustained in Weber Electric Co. v. National Gas & Electric Fixture Co. (D. C.) 204 Fed. 79, affirmed 212 Fed. 948, 950, — C. C. A. —; Weber Electric Co. v. Wirt Mfg. Co. (D. C.) 226 Fed. 481; and Weber Electric Co. v. Cutler-Hammer Mfg. Co. (unreported); affirmed 256 Fed. 31, — C. C. A. —. Claim 4 was in issue and sustained in Weber Electric Co. v. Union Electric Co. (D. C.) 226 Fed. 482. In view of these decisions, and because we think the plaintiff has failed to show that the defendant has used the particular devices to which the plaintiff can be considered entitled under these claims, assuming them to be valid, our discussion will be confined to the question of infringement.

Claims 1 and 4 call for "a cap adapted to telescopically receive the slotted end of said sleeve," to which claim 1 adds:

"Said members having interengaging parts *adapted to automatically interlock with a snap action when telescopically applied to each other.*"

And claim 4, after describing the interengaging parts, provides:

"Whereby said members are *adapted to automatically interlock with a snap action when telescopically applied to each other.*"

That the italicized words are words limiting and restricting the claims to such interengaging parts as will automatically interlock with a snap action when telescopically applied to each other is clear. Paper Bag Patent Case, 210 U. S. 405, 410, 28 Sup. Ct. 748, 52 L. Ed. 1122; The Corn Planter Patent, 23 Wall. 181, 218, 219, 23 L. Ed. 161; Dey Time Register Co. v. W. H. Bundy Recording Co. (C. C.) 169 Fed. 807, affirmed 178 Fed. 812, 102 C. C. A. 260; Long v. Pope Manufg. Co., 75 Fed. 835, 839, 21 C. C. A. 533. But the meaning of these words of limitation, and particularly of the words "when telescopically applied," remains to be ascertained. For this purpose resort may be had to the state of the prior art, the file wrapper and contents of the Weber patent in suit, Weber's patent No. 916,812, where the identical words are again used by him, and to the dictionaries.

The incandescent electric lamp socket in most general use before and at the time of Weber's invention was made in two parts, one sleeved over the other and united by a bayonet joint. To form this joint one member had an open end slot, longitudinal for part of its length and transverse the remainder. The other member was provided with a stud which entered and passed down the longitudinal part of the slot as the members were pushed together; then by a rotary movement of one member upon the other the stud entered the transverse part of the slot and locked the two parts, so as to prevent separation by a longitudinal movement. The members were held against reverse lateral motion by friction, or by the tightening of a screw forming the stud in one or more of the bayonet joints.

The chief object of Weber's invention was to provide an automatic

and positive locking connection between the sleeve and cap of the socket. His original application contained eight claims, but, as disclosed by the file wrapper and contents, certain claims were rejected by the patent office on patent to Oetting, No. 642,825, or to Kenney, No. 712,686. The Oetting device, as appears by the specification, was intended to do away with the bayonet joint as a locking means. It substituted therefor spring tongues formed within and as part of the sleeve, and bent flanges or lips on the spring tongues adapted to engage openings or slits in the flange of the cap. The lock so formed was positive in that it required deliberate effort to release it. The parts were adapted to interlock by simply slipping or pushing one within the other as contrasted to the bayonet joint locking movement, but the lock was not automatic, for manual depression of the spring tongues was necessary to permit the flange of the cap to pass over the protruding lips. In Kenney's device the opening in the sleeve consisted of bayonet slots, and bayonet slots with a bridge crossing the transverse portion of the slot at its intersection with the vertical portion, the bridged bayonet slots being designated in the patent as open-end slots and adjacent pockets with a bridge between them.

Radial inwardly projecting studs on the cap were designed to travel vertically in and to the lower end of the open-end slots or gates, thence laterally across the bridge and into the adjacent pockets, while additional radial projections on the cap were traveling in the vertical and transverse portion of the bayonet unbridged slots, and entering recesses within the periphery of the socket base to lock it in position. The radial projection entering the bridge bayonet slot was beveled on each side to permit its passing over the bridge by a lateral or rotary movement in locking and unlocking. Kenney's lock would not operate by the longitudinal assembling of the case members; it required a rotary movement; it was not positive, for it could become unlocked without a deliberate effort to accomplish that purpose, but it was automatic in that it could be locked without separate manipulation of the inter-engaging parts.

After the above-mentioned rejection of claims, the patentee amended his application and filed with the amendments remarks which indicate not only his understanding of the manner in which his device differed from those of Oetting and Kenney, but also his understanding of a "telescopic movement." Concerning his own device he says:

"The parts are permitted to be applied to each other by simply inserting one within the other, without manually compressing the inner member," etc.

As to the Oetting construction he states:

"The parts cannot be locked together by simple telescopic movement; it being necessary to manually depress the catches," etc.

He thus distinguishes from Oetting, not in the direction of the locking movement or in the positiveness of the lock, but in the automatic feature only. In so doing he treats the direction of locking movement as identical and describes it synonymously as "simply inserting one within the other" and as a "simple telescopic movement." Touching the Kenney socket Weber says:

"Kenney's device is adapted to unlock by simply rotating one member upon another in the same manner that the parts are locked together, no manual compression of the inner member being necessary."

Comparing this description with the Weber structure, we find that both locks are automatic; Weber's is positive; Kenney's is not. Weber's locks by "simply inserting one [member] within the other"; Kenney's by "simply rotating one member upon the other." The distinguishing features are the positiveness of the lock and the direction of locking movement. As "simply rotating one member upon another" is not "simply inserting one [member] within the other," it is not the movement described in Weber's remarks as "telescopic." It thus appears that "telescopic movement" is used by the patentee, not to describe a bayonet joint locking movement, but a movement in antithesis thereto. This is confirmed by the patentee's use of the words "when telescopically applied" in his subsequent patent, No. 916,812, which covered a device so constructed as to prevent relative rotary motion of the cap and sleeve both during and after their telescopic application. And we think these words apt and appropriate to define the straight longitudinal movement as distinguished from the bayonet joint movement, for such is their ordinary and usual acceptation.

Hawkins' Mechanical Dictionary, under "Telescopic Pipe Joint" says:

"The telescopic joint permits longitudinal extension and contraction."

The word "telescope" is defined by the Standard Dictionary thus:

"To drive together, so that one slides into another, like the sections of a spyglass or small telescope; to crush by driving together into or upon; to move like the sliding portions of a spyglass in closing."

Lexicographers have so uniformly defined this word that the meaning given by one may be accepted as imparting the thought of all. The verbs in this definition convey the idea of a longitudinal force impelling a direct onward or forward movement in contradistinction to lateral force and rotary motion.

But, even assuming that the words "when telescopically applied" are susceptible of a construction sufficiently broad to include the bayonet joint locking movement, the remarks, filed in the Patent Office by the patentee or on his behalf, distinguishing the Weber locking movement from that of Kenney, disclose that either Weber always intended and understood that these words should bear their usual meaning, and thus exclude the Kenney movement, or under stress of the Patent Office rejection he elected to so restrict their meaning. In either event the result is the same, namely, that having thus limited his claims to exclude the bayonet joint movement of Kenney, he is not now entitled, through the aid of the doctrine of equivalents or otherwise, to a construction that would embrace it.

The direction of the Weber locking movement has been heretofore considered by the courts, not, it is true, in cases in which the members of the socket alleged to be an infringement were adapted to interlock by a bayonet joint movement only, for such device appeared in the history of the Weber litigation for the first time in the court be-

low, but in cases in which the locking parts were adapted to interengage when applied to each other by a single, straight, longitudinal movement. In those cases the courts, construing the claims there in issue, and differentiating the Weber device from those of Kenney and Oetting, have held that the Weber locking movement is a straight longitudinal motion along the axial line of the two members of the socket, and that this constituted a feature distinguishing it from the Kenney device. In the Union Electric Co. Case, Judge Rellstab, referring to the Weber device, said:

"From this recital it will appear that in assembling the members nothing beyond telescopically applied pressure was necessary to effect interlocking."

And as to the Kenney device he said:

"No interlocking of the Kenney members could be effected automatically by telescopic pressure. A rotary movement of the members against each other was absolutely necessary to put the radial projections and the intermediate lugs into position to effect a locking engagement."

Judge Ray, in the National Gas & Electric Fixture Co. Case, referred to the interlocking of the two members of the Weber socket as taking place "as the two are pushed together." Judge Hand, in the Cutler-Hammer Mfg. Co. Case, said:

"I think it is established by the decisions of Judge Ray, Judge Rellstab, and the Circuit Court of Appeals, that the Kenney socket is locked by a rotative movement whereas the Weber socket is locked by a direct longitudinal thrust. * * * Judge Ray * * * said as to the Bray patent, No. 170,708, that the partial rotation required for disengagement was a distinguishing mark from the mode of operation of the Weber patent."

The Circuit Court of Appeals, in affirming Judge Hand, said:

"The vital point is that Weber's way is to engage by a straight thrust. * * *"

While the dominant feature of Weber's inventive idea may be the interlocking without handling or manipulating the catches as in Oetting, and the positiveness of the lock which requires manual compression of the slotted sleeve to unbolt it, as contended by the plaintiff, yet the protection afforded by the patent is no broader than its claims; and in view of the foregoing considerations we are of the opinion that the words "adapted to automatically interlock with a snap action when telescopically applied to each other," found in claims 1 and 4, limit those claims to such means or members as will so interlock when applied to each other by a straight longitudinal motion along the axial line of the two members of the socket.

As defendant's key and keyless sockets, charged to infringe claims 1 and 4, both lock with the bayonet joint movement and their locking means are not adapted to interlock when the members or means are telescopically applied to each other, we think the charge of infringement cannot be sustained.

The decree of the District Court is accordingly affirmed as to claims 2 and 3, and reversed on the issue of infringement as to claims 1 and 4, with directions to dismiss the bill, with costs to the defendant in this court and the court below.

UNITED STATES v. CLEVELAND, C., C. & ST. L. RY. CO. (two cases).

(District Court, N. D. Ohio, E. D. January 30, 1920.)

Nos. 9934, 10088.

1. CARRIERS ⟸37—LOCAL CARRIER NOT LIABLE UNDER TWENTY-EIGHT HOUR LAW FOR TRANSPORTING CATTLE TO YARDS FOR UNLOADING FOR WATER, FOOD, AND REST.

The receipt of live stock by a railroad company, whose line connected with one over which the stock was being shipped, but formed no part of the through route, and the transporting of such stock with due diligence to a reasonably convenient stockyard for unloading for feed, water, and rest, *held* not a violation of the Twenty-Eight Hour Law (Comp. St. § 8651), although the stock was confined longer than the time limited.

2. CARRIERS ⟸37—LIABILITY OF LOCAL CARRIER UNDER TWENTY-EIGHT HOUR LAW.

Where an interstate carrier of live stock has contracted with the owner of stockyards, near, but not on, its line, to unload, feed, water, and rest the stock in transit, a connecting carrier, which transports the stock from such through line to the yards is not responsible for delay in unloading by the stockyards company, which in such case is agent of the through carrier.

At Law. Action by the United States against the Cleveland, Cincinnati, Chicago & St. Louis Railway Company. Two cases. On demurrers to answers. Overruled.

E. S. Wertz, U. S. Atty., of Cleveland, Ohio.

Cook, McGowan, Foote, Bushnell & Lamb, of Cleveland, Ohio, for defendant.

WESTENHAVER, District Judge. These cases arose under the twenty-eight hour stock law act of June 29, 1906 (U. S. Comp. Stat. 1916, § 8651). Defendant has filed an answer to the first, fourth, and fifth causes of action in case No. 9934, and to the first and second causes of action in case No. 10088, and to these answers plaintiff has demurred generally.

All the answers set up the same defense in precisely the same language, varying only in describing the shipment and in one respect, presently to be noted, in the answer to the fourth and fifth causes of action in case No. 9934. All the shipments were made in interstate commerce from an originating point on the lines of the New York Central Railroad Company to the destination point, somewhere east of Cleveland, Ohio, in which routing and carriage the defendant's road formed no part. The answers, after admitting the shipments as alleged and that the cattle were confined in all cases for a continuous period in excess of 36 hours without being unloaded for rest, feed, and water, sets up a defense which can best be stated by quoting it:

"Further answering, defendant says that said cattle shipment originated on the lines of the New York Central Railroad Company, and was to be transported entirely over the lines of said railroad company to the city of New York, in the state of New York; that in the course of transportation of said cattle from Chicago, Illinois, to the city of New York, New York, over the lines of said railroad company, it became necessary for said railroad company to

unload said stock at Cleveland, Ohio, for the purpose of resting, feeding, and watering the same, in compliance with the laws of the United States governing the transportation of such stock; that said New York Central Railroad Company, not having any stockyards of its own, or on the line of its railroad, at Cleveland, Ohio, has contracted and arranged with the Cleveland Union Stockyards Company at Cleveland, Ohio, for the performance by it of such service, said Cleveland Union Stockyards Company being located on the line of the railroad of this defendant; that for the purpose of reaching the yards of said Stockyards Company this defendant permitted said New York Central Railroad Company to transport said cars of cattle to said stockyards, over the line of railroad of this defendant, from the point of connection between its railroad and that of said New York Central Railroad Company, defendant receiving for such service a switching charge in the sum of two dollars and fifty cents ($2.50); that said switching charge formed no part of the through rate charged for the transportation of said stock, and defendant's road, over which said service was performed, formed no part of the through route for the transportation of said stock from point of origin to destination thereof, and defendant was not a connecting carrier of said stock; that said stock was transported to said stockyards over defendant's tracks in the ordinary and usual time required for such service, and was delivered to said stockyards company at its said stockyards in sufficient time for said stock to be unloaded before the expiration of the period of thirty-six hours allowed by law for the continuous confinement of such stock without food, rest, or water; that any confinement of said stock beyond said period of thirty-six hours was due solely to the failure of said New York Central Railroad Company and of said Cleveland Union Stockyards Company, their agents and servants, to unload said stock within said statutory period; that the service provided and furnished by said Cleveland Union Stockyards Company in the unloading, feeding, watering, and resting of said stock was performed entirely for the benefit of said New York Central Railroad Company, and under contract or arrangement made directly between said Stockyards Company and said New York Central Railroad Company, this defendant not being a party to said contract; that it has not violated any of the provisions of the acts of Congress relating to transportation of such cattle and especially the act of Congress of June 29, 1906, referred to in the petition, and that it is not liable to the United States for any penalty under any of said acts of Congress."

The answers in case No. 10088 are precisely in these terms, and the answer in case No. 9934 to the fourth and fifth causes of action differ only in that, instead of alleging that the defendant permitted the New York Central Railroad Company to transport with its own crews said cars of cattle over defendant's line of railway to the Union Stockyards in Cleveland, Ohio, allege that such transportation was made by the defendant.

[1] I am of opinion that the facts stated in these several answers constitute a good defense, and that the demurrer thereto should be overruled. In exact principle, if not upon the exact facts, the question here involved is ruled by the following cases: United States v. Stockyards Terminal Railway Co. (8 C. C. A.) 178 Fed. 19, 101 C. C. A. 147; Northern Pacific Terminal Co. v. United States (9 C. C. A.) 184 Fed. 603, 106 C. C. A. 583; Merchants' Bridge Terminal Railway Co. v. United States (7 C. C. A.) 209 Fed. 600, 126 C. C. A. 422; United States v. Union Pacific Railroad Co. (8 C. C. A.) 213 Fed. 332, 130 C. C. A. 34. All these cases have been cited with approval in the recent case of United States v. Chicago, Milwaukee & St. Paul Railway Co. (8 C. C. A.) 250 Fed. 442, 162 C. C. A. 512. In this last case it is held that receipt by a connecting carrier of a stock shipment for

transportation, and not merely to be unloaded for feed, water, and rest, is a violation of this act, if done knowingly and willfully, but that this holding in no wise conflicts with the other cases cited, in which it is held that such receipt and transportation, if performed with due promptness, for the purpose of being unloaded for feed, water, and rest, is not an offense. It is further said that the distinction between the two lines of conduct and the reason therefor is well drawn in United States v. Lehigh Valley Railroad Co. (C. C.) 184 Fed. 971 (Holt, District Judge), affirmed without report (3 C. C. A.) 187 Fed. 1006, 109 C. C. A. 211.

These cases, it seems to me, settle the law that a terminal carrier, or any other carrier, may receive stock to be carried with due diligence to any reasonably convenient stockyard, for the purpose of being unloaded as required by law, without committing an offense; and this is true, even though the lines thus used may be part of a connecting line, which it is necessary to use in performing the original contract of interstate carriage.

[2] In the instant case, defendant as to three shipments merely permitted a section of its track to be used, and in two cases merely switched the shipment over its line from the New York Central Railroad Company's line to the Union Stockyards, with which the New York Central had a contract to feed, water, and rest cattle in compliance with this law. The defendant, as well as the Stockyards Company, was an agency availed of by the New York Central Railroad Company to comply with the law. Its lines did not form any part of the line of road over which the cattle were to be conveyed from one state to another. If the failure of the Stockyards Company to perform the labor of unloading the stock with due promptness is a matter of importance, this failure must be imputed, not to the defendant, but to the New York Central, whose agency it was, and on which the duty rests to comply with the law.

Two cases only are cited by plaintiff's counsel in support of its demurrer, namely, United States v. St. Joseph Stockyard Co. (D. C.) 181 Fed. 625, and United States v. Northern Pacific Terminal Co. (C. C.) 186 Fed. 947. Both are decisions by District Judges, and are in conflict with the Circuit Court of Appeals decisions already cited. The first named was overruled by the Circuit Court of Appeals (187 Fed. 104, 110 C. C. A. 432), and the second was upon tthe third and fourth propositions, the only ones in point, overruled in 209 Fed. 600, 126 C. C. A. 422.

The demurrers will be overruled. Exceptions may be noted.

In re HUDSON.

(District Court, S. D. Alabama. January 30, 1920.)

No. 2023.

BANKRUPTCY ⊂=407(5)—BORROWING MONEY BY MORTGAGING PROPERTY NOT OWNED NOT OBTAINING MONEY ON FALSE WRITTEN STATEMENT, BARRING DISCHARGE.

The giving by a bankrupt of a mortgage on property which he did not own, to secure a note for money borrowed, *held* not an obtaining of the money upon a materially false statement in writing, which bars discharge, under Bankruptcy Act, § 14b(3), Comp. St. § 9598; the debt being one which, under section 17a(2), Comp. St. § 9601, is not released by a discharge.

In Bankruptcy. In the matter of Richard B. Hudson, bankrupt. On motion to strike objection to discharge. Motion granted.

Lyons, Chamberlain & Courtney, of Mobile, Ala., for movant.

Wm. B. Inge and Roy R. Cox, both of Mobile, for respondent.

ERVIN, District Judge. This is a motion to strike the contest of the bankrupt's application for discharge on the ground that the objection to the discharge is not one of those enumerated in the Bankruptcy Act of July 1, 1898 (30 Stat. 544, c. 541). The objection is based upon subdivision b (3) of section 14 (Comp. St. § 9598), which reads as follows:

"The judge shall * * * discharge the applicant unless he has * * * obtained money or property on credit upon a materially false statement in writing, made by him to any person or his representative for the purpose of obtaining credit from such person."

The facts set up to support this contest are that the bankrupt, in order to secure a loan of money from the contesting creditor, evidenced by bankrupt's notes given at the time, gave such creditor a written mortgage upon a described automobile, and that the bankrupt owned no such automobile. An analysis of these facts will show that technically they do literally come within the provisions of subsection 3. The money was obtained and notes were given evidencing the loan, so that there was a credit then granted by the lender to the borrower, and the written statement contained a materially false statement, in that the borrower did not then own the automobile as stated in the writing, and the loan was made on the faith of such representation.

The question, however, is whether this was such an obtaining of money on credit as was contemplated by Congress when this provision was written. Counsel have been unable to find any case in which the state of facts set up herein has been discussed in this connection, nor have I, in the brief examination I have made, been able to find any such case; so I must consider the words as contained in the two sections herein referred to, and give to each the meaning which the import of the language suggests to me that Congress intended they should have.

The Bankruptcy Act was primarily written to cover ordinary mercantile dealings; so the words used in the act are to be given the construction and meaning ordinarily understood in mercantile dealings, and not the strict technical construction which they may be susceptible of. A loan upon given security is not ordinarily contemplated when merchants speak of obtaining money, goods, or property on credit. The fact that Congress used these words to denote the ordinary credit dealings between merchant and customer is indicated by the construction placed upon this subdivision by all the text-writers, such as Collier, Brandenburg, and Remington.

In discussing this provision, they all treat it as a provision intended by Congress to deny a discharge where the money or goods were secured on some representation by the borrower, such as the statements ordinarily given to the mercantile agencies—a statement of facts made as a basis of credit between a customer and a merchant. None of these writers, so far as I have been able to ascertain, have considered that the provision written in subdivision 3 goes further than this and covers a special loan secured by collateral pledged or mortgage given at the time, which loan may have been obtained upon a false representation of fact.

The fact that these writers have all so construed this provision, and have not conceived that it went far enough to include money or property obtained by false pretenses or false representations, is persuasive evidence that the language used by Congress was not intended to include such a state of facts, and is supported by the further fact that Congress wrote into the Bankruptcy Act, in section 17, the following:

"A discharge in bankruptcy shall release a bankrupt from all of his provable debts, except such as * * * (2) are liabilities for obtaining property by false pretenses or false representations, or for willful and malicious injuries to the person or property of another, or for alimony due or to become due, or for maintenance or support of wife or child, or for seduction of an unmarried female, or for breach of promise of marriage accompanied by seduction, or for criminal conversation."

It will be observed that the statement of facts in this case brings the parties directly under the first paragraph of subsection 2 of section 17, in that it was a liability or debt created by obtaining money by false pretenses or false representations, and hence the debt or liability so created would not be released by the discharge, even if granted. Congress would scarcely have provided that a debt or liability created by a given state of facts should be a ground for objecting to a discharge, and at the same time have excepted the debt so created from the discharge when granted. It is manifest that these two provisions, if so construed, would be inconsistent, because, if an obligation so created was excepted from the discharge when granted, it could hardly be a ground for objecting to the granting of the discharge, which would not cancel or release such debt or liability.

Again, it is hardly conceivable that Congress would have grouped a number of classes of obligations or debts and excepted them from release by the discharge, and yet have provided that a debt or obligation

so created in the manner specified by one of these classes only should be a bar to the release, and not have given the same effect to the debt created by the other enumerated classes. For instance, to construe it as contended by the objecting creditor, we would have a debt or obligation created by buying property under false pretenses or false representations, which would be a bar to any discharge; but, if the debt or obligation was created through willful or malicious injuries to the person or property of another, it would be merely excepted from the operation of the discharge when granted, but would be no ground for objection to the granting of any discharge whatever. I cannot conceive that Congress intended to draw such distinctions between the two classes of debts enumerated.

I am satisfied that what Congress intended to do was to except from the effect of the discharge one class of debts or obligations created by obtaining property under false pretenses or false representations, as these words are used in the various statutes of the various states, making this state of facts a crime, and that the words used in subsection 3 of section 14 were intended to be limited to such dealings between merchants or individuals, where a written statement of facts was made by the borrower as a basis of credit, as ordinarily understood in mercantile dealings, and that the language they have used, where given its ordinary meaning, does just what Congress intended.

I therefore hold that, where the facts set up bring the parties under the provisions of subdivision 2 of section 17, the debt or obligation is not released by the discharge, and hence such facts present no ground for objecting to the granting of a discharge.

A decree will therefore be entered, granting the motion to strike the objections.

THE M. J. RUDOLPH.

(District Court, E. D. New York. January 5, 1920.)

COLLISION ⇐102—MUTUAL FAILURE TO KEEP PROPER LOOKOUT.

Collision between a small tug crossing East River, but which, on nearing the Brooklyn side, had turned upstream and was moving nearly parallel with the piers, and an overtaking steam lighter, passing up, *held* due to faults of both vessels in failing to keep proper lookout.

In Admiralty. Suit for collision by Thomas F. Timmins and others, doing business as the Croton Water Company, owner of the tug Roach, against the steam lighter M. J. Rudolph. Decree for libelants for half damages.

Foley & Martin, of New York City, for libelants.

Park & Mattison, of New York City, for claimant.

CHATFIELD, District Judge. On July 29, 1918, at a little after five in the afternoon, a small tug, called the Roach, and belonging to the libelant, left Pier 7 on the Manhattan side of the East River, to go to a water hydrant at the end of a short pier located on the Brook-

lyn side of the East River, near where the Penn Annex Ferry slip formerly was located, and immediately north of the large Pier 4 at the foot of Fulton street, Brooklyn. The tide was running strong ebb, and the Roach, in order to avoid a tow coming down the river, headed across, so as to reach the protection of the Brooklyn shore, instead of going up along the New York shore until she could run straight across the river. The Roach passed on the New York side of a suction dredge located several hundred feet from the Brooklyn piers, and then took her course so as to run directly up the river toward the Brooklyn side of the span of the Brooklyn Bridge. She thus expected to reach a point where she could turn into the dock above Pier 4, as soon as she could observe the conditions at that pier, and yet before she would be struck by the strong rush of the tide under the Brooklyn Bridge.

Just behind her, passing up the Brooklyn side of the East River, was the deck lighter Rudolph, which has its pilot house located aft of its derrick mast and back of the cargo space upon the main deck. The captain of the Rudolph was in his pilot house while the deckhand and others working upon the boat were at various points principally near the stern of the boat on the starboard side. The captain of the Rudolph saw the Roach when the Roach was some 200 or 300 feet away from the end of Pier 4, and when she was pursuing a course slightly crossing that of the Rudolph, but in general heading up the East River. The deckhand of the Rudolph observed the Roach at about the same time as she was seen by the captain of the Rudolph, but gave no alarm, as the captain was cognizant of the Roach at the time

Apparently the captain of the Rudolph diverted his attention while the mast of the Rudolph obstructed the Roach from view, and while he was looking out of his starboard pilot house window at the Brooklyn shore, or at the men upon the starboard side of his own lighter, and the next any of the men on the Rudolph knew the Roach was almost across the bow of the Rudolph, and so near that, although the engines of the Rudolph were reversed, she struck the Roach, which was carried a little distance up the river, and rolled over, so that her captain and his engineer were forced to jump overboard and swim to the upper corner of Pier 4.

All of the parties locate the collision at 150 feet out from the face of Pier 4 and approximately near the middle of the pier. Evidently the Rudolph must have carried the Roach upstream a sufficient distance, so that the men swimming from the Roach could reach the upper side of that pier.

The testimony does not show definitely whether they would be carried down by the ebb tide, or may have been carried up somewhat by the eddy formed between the Brooklyn Bridge and Pier 4; but this is not of great importance in the case. The Roach was short its deckhand, who had not shown up that day for work, and it was therefore without a lookout. The captain of the Roach and the engineer on that boat were entirely oblivious of the presence of the Rudolph, which evidently was proceeding at twice the speed of the Roach, and thus was overtaking her, up to the moment of collision.

It is evident from the testimony that the captain of the Rudolph, as well as the lookout of the Rudolph, were negligent in failing to appreciate the approach of the Roach to the Brooklyn shore, and to realize that they were overtaking and passing a boat which was getting into dangerous proximity, even though it was proceeding, according to their assumption, on a course parallel to their own up through the Brooklyn Bridge. The configuration of the Brooklyn shore and the narrowness of the space under the Brooklyn Bridge made the courses of the Rudolph and the Roach converging, and the burden was upon the Rudolph, in overhauling the Roach, to pass her in safety. A whistle signal, or care on the part of the lookout, would have averted the collision.

But evidently the captain of the Roach has placed himself in a dilemma from which he cannot extricate himself. In order to avoid the conclusion that he was on a crossing course, and that he was approaching Pier 4 with the Rudolph on his starboard hand, and that he was at fault for failing to blow a two-whistle signal, he has insisted and strenuously explained that he was running parallel with the Brooklyn shore, and therefore was not on a course converging with that of the Rudolph.

An examination of the chart makes it plain that, if he were on a parallel course with that of the Rudolph, he would have been in no position to make the slip above Pier 4, as he explains that he was doing. He was running without lookout, in the absence of a deckhand. He kept no lookout himself, except to observe the boats apparently that were coming down through the Brooklyn Bridge. He allowed the Rudolph to get so close that the strong ebb tide, as it came through the Brooklyn Bridge, swept him in and directly across the bow of the Rudolph, without giving warning to that vessel of any need of space in which to execute the maneuver.

The Roach was a small boat, used as a water boat, and her captain estimates that, with an ability to make a speed of but 3 or 4 knots an hour, he could successfully buck the tide in the East River, which he estimates runs 15 knots an hour.

The collision in question is one which could have been easily avoided by careful observation and lookout on the part of either vessel. Both vessels were actually at fault, and they are fortunate in that the damage was not greater, and that the men who were forced overboard escaped without injury. Both should bear responsibility, and the libelant may have a decree for one-half of his damages.

THE AUSABLE.

(District Court, E. D. New York. November 21, 1919.)

SALVAGE ⇐13—ALLOWED FOR TOWING VESSEL DRIFTING IN PORT.

Two tugs, which in response to distress signals rendered service in moving a partially loaded steamer, which had dragged her anchor, and drifted over the anchor chain of another vessel, and was in danger of fouling her propeller, *held* entitled to salvage compensation.

In Admiralty. Suit by Leta D. Potter against the steamer Ausable. Decree for libelant.

Foley & Martin and J. A. Martin, all of New York City, for libelant.

Barry, Wainwright, Thacher & Symmers and John C. Prizer, all of New York City, for claimant.

CHATFIELD, District Judge. The facts seem to be that the Ausable was in a position where conditions had to improve or where considerable danger might have resulted. The Ausable was loaded heavily below decks. She was taking on a deck cargo from at least four barges alongside, and had been dragging her anchor, under the influence of the flood tide and the southeast wind. She reached a position where she was dangerously close to the Kenny, which was at anchor, but which apparently had insufficient crew on board even to drop back out of the way.

This occurrence happened on the 24th day of July, 1919, so that no likelihood of storm enters into the case. It was broad daylight until after the Ausable had been finally brought to an anchorage; the wind, if anything, had died down during the afternoon, and the Ausable was not moved until nearly high water. Her drifting had been checked or stopped by putting out a starboard anchor and then hauling in on the port anchor chain, so as to take up at least the amount which it had been lengthened during the previous night, and so as to bring the boat into a position where she would swing evenly with the tide from both anchors. According to the witness Bousak, she brought up on these anchors in such a position that her stern actually moved over the anchor chain of the Kenny back and forth, without fouling that anchor chain. Subsequently the Ausable must have settled back to some extent, for all of the other witnesses, including the captain of the Ausable, testified that the anchor chain of the Kenny led down forward of the rudder post and rudder of the Ausable, and, if the drifting of the Ausable had been stopped, there must have been something in the conditions of wind and tide which allowed the Kenny and the Ausable to move toward and away from each other, as well as for the Ausable to swing back and forth.

It seems more likely, from all the testimony, that during the afternoon the Ausable in some way worked into a position where she was actually against the chain of the Kenny, and in such a situation that the captain of the Ausable was justified in his assumption that she had better be moved from that position before the tide changed, and that

it was dangerous to turn over his own propeller, for fear that this anchor chain was actually afoul the propeller and was wound around it. It appears that the Ausable blew what were to be interpreted as distress signals, or signals for assistance. At first the captain intended his calls for the tug which had been handling the lighters, which had left for South Brooklyn shortly after noon, and which did not return until after the Ausable was finally at anchor. It appears that the captain of the Ausable blew these whistles and was looking for assistance for at least an hour and a half, and that he was finally answered by the Juno, a moderate sized tug ordinarily employed in bringing vessels in from outside the Hook. The captain of the Juno took charge of the Ausable at the request of the first officer in command of the Ausable, reached the conclusion that it was unwise to move the Ausable without further assistance, and called in the Emma J. Kennedy by an additional whistle that was equivalent to a distress whistle or call for assistance.

The Kennedy came from Staten Island, and with the Juno attempted to draw the Ausable away from proximity to the Kenny. This was accomplished by taking a hawser from the Ausable to the Kennedy. There is a dispute as to whether the Juno assisted in starting the Ausable away from the side of the Kenny, because some of the witnesses on the Ausable did not see any indications of working of the engines of the Juno. Under the circumstances, it makes very little difference, because the presence of the Juno made it possible to carry out the maneuver without risk, and, if the Juno used her own power, it would entitle her to little more compensation than if she had merely towed alongside in readiness. In any event, the engines of the Ausable were started as soon as the distance away from the Kenny was such that it was certain that the propeller was not fouled in the Kenny's chain, and after that the Ausable proceeded to what was thought a proper anchorage; but on testing this, and particularly upon the request of the first officer of the Ausable, the boat was moved further, which took a few moments of time, but does not enter into the question of salvage.

The whole operation indicates that if the Ausable had been left alone she might have swung clear when the tide changed, as apparently the danger was diminishing, instead of increasing, if the propeller did not get fouled in the anchor chain. But during the time that the Ausable was calling for assistance the situation was such that she certainly needed assistance, and the solicitation of a removal from danger was not that of obtaining a tow, but was evidently a seeking for help. The danger which she was in would be estimated more by the possible delay in undertaking her voyage, the difficulty of making any repairs to the loaded vessel, if her cargo had to be lightened so that her stern could be raised in order to get at the propeller, and the incident expenses of making any repairs at all, rather than the possibility of loss either of the boat or of her cargo. In fact, the danger from the standpoint of the value of the boat and of her cargo does not enter into the value of the services rendered. The situation is not one in which a percentage of either the value of the boat or her cargo

could be taken as a basis for compensation, nor should the mere value of the towing services rendered in taking the boat to an anchorage be the basis for compensation.

The Kennedy was a joint party in the undertaking, but, of course, did nothing except tow the boat. The Juno and her captain undertook the operation, assuming entire responsibility, which later was shared with the captain of the Kennedy; and yet, after the engines of the Ausable began to work, the services actually rendered for the next half hour were merely those of the ordinary towboat, whose captain was acting as pilot upon the steamer.

I think that makes it apparent that the award should not be judged from the standpoint of the towing service, nor from the standpoint of possible loss of the ship or her cargo. Taking into account the damages which the first officer of the Ausable had a fair reason to apprehend, and which he was endeavoring to avoid at the time that he sought to get his boat away from the Kenny, an award of $750 to the Juno and $250 to the Kennedy would be proportionate, and you may have a decree for that amount.

THE WERGELAND.

(District Court, W. D. Washington, N. D. September 20, 1919.)

No. 4095.

SHIPPING ⊂=149—CHARTERER MAY RECOVER FREIGHT EARNED IN VIOLATION OF CHARTER.

Where a schooner, under charter to carry a cargo of lumber which provided, "No goods to be laden on board otherwise than from charterers," after encountering a storm, in which she was compelled to jettison part of the cargo, returned to port of loading for repairs, where charterer tendered cargo to replace that lost, which was refused, but the vessel replaced it with other lumber at a higher freight rate, charterer *held* entitled to recover the excess freight so earned.

In Admiralty. Suit by Comyn Mackall & Co. against the motor schooner Wergeland; A. O. Anderson & Co., claimants. Decree for libelant.

Wm. H. Gorham, of Seattle, Wash., for libelant.

Grosscup & Morrow, of Tacoma, Wash., for respondent and claimants.

NETERER, District Judge. The schooner, under a charter party, loaded a full cargo of lumber for libelant at Port Blakely, Wash., and sailed for Sydney, New South Wales, on March 13, 1918. On the 15th of March, when about 100 miles west of Cape Flattery, the schooner encountered a storm and lost two masts, and approximately 200,000 feet b. m. of her deck cargo was jettisoned, and the schooner was compelled to seek a port of refuge, which proved to be the loading port, at which place a large part of the remaining cargo had to be discharged by reason of the damage sustained by the

vessel. Upon the schooner being repaired, the original cargo was again loaded, with the exception of 5,502 feet b. m., which was broken and destroyed in discharging and reloading. The charterer tendered sufficient cargo to replace the lost cargo at charter rate, but the owners refused to accept, except at an increased rate of freight, which was declined. The owners then shipped on their own account 164,152 feet b. m. of lumber.

The libelant seeks to recover the profit earned on the replacement cargo at the rate of $20.43 per thousand feet b. m.; this being the advance in freight rate at the time of shipment above the charter rate. The charter party contained this provision: "No goods to be laden on board otherwise than from charterers." The libelant contends that it had a right to replace the lost cargo at the charter rate, and further contends that the owner is guilty of a breach of charter party because of the provision stated, and is liable in damages to the market rate of freight as the market stood when the vessel sailed the second time, in excess of the charter rate. The owner contends that the empty space caused by the excepted peril belonged to the vessel, and not to the charterer.

The charterer having shipped a full cargo, including deckload, and the schooner having sailed on her voyage, and through perils of the sea lost a part of her deck load, the owners, by reason of the exceptions in the charter, were relieved from any liability for nondelivery of that part of the cargo so lost, and the charterers free from any liability for freight thereon. When the schooner sailed, both parties had complied with their respective obligations under the charter party, in delivering and accepting a full cargo; but, through the exigencies of a storm at sea, the vessel was again at the loading port with space for approximately 200,000 feet b. m.

It would appear that, while the policy of the law favors the full use and employment of vessels as a public good, in the absence of any prohibitory clauses in the charter party (1 Parsons, Ship. & Adm. 294), the parties are held, however, to all reasonable stipulations not inconsistent with the charter party, or such policy, where there is no intent or purpose to nullify the policy of the law. Such intent is absent in this case, as shown by the tender of cargo.

The libelant in this case had a right to insist upon the terms of the charter party, and not permit itself to be placed in a position where its cargo might be placed in competition with the cargo of the owner at the port of discharge, and that may have had an important bearing upon the venture of the libelant, and, as stated by the court in The Port Adelaide, 62 Fed. 486, 10 C. C. A. 505:

> "Under such a contract the master had no right, without the permission of the libelant, express or implied, to use the vessel upon any part of the voyage for carrying cargo for third persons. Having done so, however, and earned freight thereby, the libelant, if he saw fit to adopt the master's act, became entitled, upon the plainest principles of law, to the freight earned."

In the absence of stipulation, there would be no further duty upon charterers to tender replacement cargo, or on the owners to accept such tender. The space left vacant by the lost cargo would be at the

disposal of the owners, provided that the voyage was not thereby delayed. Weir et al. v. Girvin et al., 8 Aspinall, Maritime Cases, 471; same, on appeal, 9 Aspinall, Maritime Cases, 79.

The damage stipulated, in the event recovery was awarded, is $3,353.62, in which amount, together with interest, a decree may be entered.

UNITED STATES v. RAINE-ANDREWS LUMBER CO.

(District Court, N. D. West Virginia. January 3, 1920.)

No. 19.

1. COURTS ⟸347—ANSWER TO BILL CONSTRUED TO SET UP FRAUD AND MISTAKE, SO THAT EVIDENCE OF COMMUNICATIONS AND NEGOTIATIONS PRIOR TO EXECUTION OF CONTRACT WAS ADMISSIBLE.

Answer to bill by the United States to enjoin defendant, who had contracted in writing to sell cut-over land for a forest reserve, from removing timber, in which defendant set up that it was understood the right to remove virgin timber was reserved, *held* sufficient to raise the issue of fraud and mistake under the new equity rules, and so parol evidence of the communications prior to the execution of the agreement was admissible.

2. EVIDENCE ⟸428—PAROL ADMISSIBLE WHERE CONTRACT THROUGH FRAUD OR MISTAKE DOES NOT SHOW REAL AGREEMENT.

Where a written contract, through fraud or mistake, does not express the intention of the parties, parol evidence is admissible to show the real agreement.

3. UNITED STATES ⟸5—POLICY OF GOVERNMENT NOT TO WRONG CITIZENS.

It is the policy of the United States never knowingly to do wrong and injustice to any of its citizens.

4. WOODS AND FORESTS ⟸8—CONTRACT NOT RESERVING LANDOWNER'S RIGHT TO REMOVE VIRGIN TIMBER RESULT OF MISTAKE.

In a suit by the United States to enjoin a landowner, who sold a large quantity of cut-over lands for a forest reserve, from removing about 100 acres of virgin timber, *held* that, under the evidence, the failure of the consummated contract and deed to reserve to the landowner the right of removal was the result of mistake, due to representations of the officials of the forestry department, so evidence of communications between the parties prior to the contract, etc., was admissible.

5. EVIDENCE ⟸ 441(1)—PAROL EVIDENCE ADMISSIBLE TO SHOW SEPARATE AND INDEPENDENT CONTEMPORANEOUS CONTRACT.

In a suit by the United States to enjoin defendant, who had contracted to sell cut-over lands for a forest reserve, *held*, that there was an independent contemporaneous contract, whereby defendant was to be entitled to cut a small amount of virgin timber still on the lands to be sold, so evidence of communications between the parties prior to the contract was admissible.

6. WOODS AND FORESTS ⟸8—VENDOR OF CUT-OVER LANDS HAVING RIGHT TO REMOVE VIRGIN TIMBER FROM FOREST RESERVE.

Where the government's forester, who handled the negotiations for cut-over lands for a forest reserve, declined to agree to defendant's reservation, for two years, of the right to remove the virgin timber on about 100 acres of a large tract, which was agreed to be sold, but stated that the matter should be handled by permits for a reasonable time after the government acquired title, defendant's failure to remove the timber within two years after the contract was made did not deprive it of its

right of removal thereafter, the government not having acquired title for some time, and the permits not having been issued, for the agreement by the forester was an independent contemporaneous contract.

In Equity. Suit by the United States against the Raine-Andrews Lumber Company. On final hearing of application for injunction. Temporary restraining order dissolved, and bill dismissed.

On the 10th day of October, 1919, the United States presented its bill against the defendant, wherein it charges that on or about the ——— day of ———, 1919, it instituted against it in this court proceedings to condemn 5,614.92 acres of land under the Weeks Forestry Act, and that such proceedings are pending and undetermined; that the United States purchased this tract under contract with defendant dated October 5, 1915 (a mistake—should be October 5, 1914), a copy of which contract is exhibited; that under this agreement it purchased the land in fee, subject to reservation of coal and mining rights and easement for nine years for a railroad to be maintained by defendant to remove the timber from other lands owned by it; that plaintiff has caused the lines and corners to be marked as set out on plat filed; that "since the order of the said court appointing viewers" the defendant company, at points set forth in the bill as identified by the plat, has gone on said tract of land and cut at least 200,000 feet of valuable timber, and is threatening to cut at least a million and a half of other timber within a radius of not to exceed a mile and a half from the point where it is now cutting, which timber it is converting to its own use, against the plaintiff's rights. Further allegations as to such cutting, the alleged willful and unlawful character thereof, and the necessity for injunction are made. The prayer of the bill is for immediate injunction and decree for threefold damages in value for all timber so removed.

The day after the filing of this bill, without notice to defendant, a temporary restraining order for ten days was granted, notice was required to be given, and the motion for temporary injunction was set down for hearing at Wheeling on October 21st following. On that date the defendant appeared and by agreement of parties the restraining order was continued in force until November 13th, at Philippi. By subsequent agreement it was continued, from time to time, until December 8, 1919, at Martinsburg, when and where the evidence was taken and full hearing of the cause had, and the court took time to consider of its judgment in regard thereto.

In the meantime, however, on November 15th, the defendant filed its answer, in which it admits the allegations of the bill that condemnation proceedings have been instituted and are pending; that the contract under date of October 5, 1914, was executed; that since viewers in the condemnation proceedings were appointed it has cut 241,070 feet, and removed to its mill 128,305 feet, of timber from the land. It asserts its right for such action, and for the right to further cut and remove some million and a half other timber therefrom, for substantially the reasons that it was never contemplated by the parties that the uncut-over timber on the land should be sold by it, but only the surface of the land was so sold, and by independent agreement such timber and the right to cut and remove it was to be reserved to it.

Upon the hearing, the evidence was almost wholly documentary in character, the material parts of which are herein set forth, and from which the rights of parties must be determined. On August 12, 1913, the Forest Service of the Department of Agriculture procured from the defendant a proposal to sell to the United States 32 parcels of land (24 in Randolph and 8 in Tucker counties, this state) aggregating about 13,200 acres.

This proposal, made upon the government's printed blank form, set forth: "When timber is cut off, we will remove all the buildings, machinery, etc., which right we reserve in the proposal, except, if sale is made, we will let any three houses that you may select remain on the ground. We will reserve all timber for a period of ten years, with privilege of extension if we are compelled to shut down for strikes, fires, or something beyond our control." Also this: "If the timber rights on whole acres are reserved for 10 years and the

mineral rights are reserved on whole acres, we will sell for $4 per acre." And this: "Said land is free and clear from incumbrances, excepting about 400 acres, title to which is now pending in the Supreme Court."

On August 22, 1913, the department's Forest Examiner in charge wrote a letter to defendant, in which, after acknowledging receipt of this proposal to sell, he says:

"It is the policy of the National Forest Reservation Commission not to accept lands on which the timber cannot be removed within two or three years, except at a very low price, on account of the fact that purchase by the government relieves the owners of taxes, cost of protection, and a large share of the carrying cost of the investment. Therefore I think it unlikely that your offer can receive favorable consideration unless you would be willing to consider a lower price than $4 per acre. The mineral reservation would be satisfactory, but it would be necessary to fix definitely the minimum diameter limits to which you will cut."

To this letter defendant, under date of August 25th, after acknowledging its receipt, replied:

"Would advise that the costs you refer to would only be a small item. In this state timber and land are assessed separately and we are assessed $2 an acre for cut over lands. You have timber in this section which you are protecting, and this additional amount should not add materially to the cost of protection, especially with our co-operation."

On September 12th following the Forest Examiner wrote to the government's local supervisor at Elkins a letter in which he says:

"The two objectionable features of the proposal of the Raine-Andrews Lumber Company were that, while they had 7,000 acres of cut-over land and only 5,000 acres of merchantable forest yet remaining, they desired a cutting period of ten years, with the privilege of further extension in case they were compelled to shut down. A ten-year period is too long for a tract of 5,000 acres. I believe that a thousand acres a year should be about the minimum allowance. Moreover, it was evident, from the wording of the proposal, in which it was stated that 'the timber rights are reserved on the whole number of acres,' that the company expected to recut the 7,000 acres of cut-over land. This would mean that the government might carry this 7,000 acres for a period of nine years, and that the vendors during the tenth year would have the right to cut all the merchantable timber on this area at that time. If this land could be offered, releasing the 7,000 acres of cut-over land immediately, and cutting the 5,000 acres to a diameter of at least 12 inches for oak and poplar (if it is hardwood land), the proposal would merit consideration at the price of $4 at which it is offered. I hope you can take the tract up with the owners again on this basis, and see if it is possible to obtain a modified proposal."

On September 25th following the local examiner or supervisor replied to this letter as follows:

"I have had an opportunity on September 23d to talk over with Mr. T. W. Raine, of the Raine-Andrews Lumber Company, their offer of 13,200 acres of land, 8,200 of which has already been cut over and the remainder, 5,000 acres, is still in virgin forest. The company does not wish to recut the 7,000 from which the merchantable timber has been removed, and in case of sale to the government this acreage, together with 1,200 acres of burned brush land could be delivered at once. I dare say the wording of the proposal was a little misleading, when 'the timber rights are reserved on the whole number of acres.' Mr. Raine meant that the timber rights were reserved on the whole number of acres (5,000) still to be cut over.

"As far as shortening the period of cut, they cannot do it with the mill of the capacity now in operation. The mill has a capacity of about 15,000,000 board feet per year. The company has just finished the cut on a 1,000-acre tract which yielded 35,000,000 feet, and it took nearly 2½ years to complete this cut. From this you can see that, to remove the timber from at least 1,000 acres per year, the company would require a mill of double the capacity of the one now in operation. The timber on the 5,000 acres will average about 25,000 to 30,000 board feet per acre. For the amount of material to be removed a ten-year limit is quite reasonable.

"I took up the question of a diameter limit, but the company could not be expected to adhere to a diameter on the 5,000 acres, which is composed of spruce, hemlock, birch, maple, beech, basswood, ash, cherry, and cucumber. Timber, averaging 25,000 board feet per acre in the spruce and hemlock type, is usually all large trees that can be cut, excepting an occasional beech and some small spruce, and these are cut to a 4-inch limit.

"I accompanied Mr. C. D. Cushing in making a preliminary examination of the tract. We did not have an opportunity to examine the best of the cut-over lands, nor the heaviest stands and best soil in the virgin portion of the tract. Mr. Cushing placed a value of $4 per acre on the land from just what he had seen. Portions within this 13,200 acres could be sold readily for $10 per acre.

"At my request Mr. Raine will make out another proposal, stating clearly just what reservations he will make and including their share in co-operation with the government in fire patrol."

On October 8th following the inspector in charge at Washington wrote to the local one at Elkins as follows:

"Your letter of September 25th is received. In order that we may better consider the proposal in this case when it is resubmitted, please let us know the condition of the land that has already been cut over. We cannot give much weight to the forest fire protection in which this company will co-operate, since this will be largely for their own benefit in the protection of their own timber. I do not believe, however, that the proposal will be considered at a price of $4, unless the company is willing either to reserve occasional seed trees of ash, cherry, and basswood, which are the most valuable species of the hardwood land, or to agree to cut those species to some diameter limit where this is possible. What proportion of this land would you say was occupied by spruce and hemlock, and what proportion by hardwoods? The soil of the spruce type is generally extremely gravelly, rocky, or sandy, and has invariably been given a much lower value than the hardwood lands. In the White Mountains the usual value for the spruce type has been about $1 an acre. If the company could be induced to reduce their offer to $3 an acre, there would be a much greater probability of its being favorably considered."

To this the local examiner on October 17th replied:

"The hardwood lands of this company, consisting of approximately 6,000 acres have already been cut over. The company is now operating in the spruce and hemlock type, which contains a small proportion of birch, beech, maple, cucumber, ash, cherry, and basswood, along with the heavy stand of spruce and hemlock. This type will average upwards of 30,000 board feet per acre. In the hardwood portion of the tract fires have occurred nearly every spring and fall, and there are about 2,000 acres burned over. On the whole, the hardwood lands are in good condition, and are restocking rapidly to a young growth. Several boundaries of the hardwood land have been sold from the original tract, after being cut over, at the rate of $10 per acre, to be used for agricultural purposes. Local owners of adjacent lands place a value of more than $4 per acre on the entire tract after the timber is removed. The mixture of hardwoods in the spruce and hemlock type increases the soil value, and in this tract it is worth double in value of the soil in the pure spruce stands. I believe $2 per acre is the lowest value placed on any lands in Randolph county, although some lands deserve a much lower value.

"Mr. Raine has not resubmitted the proposal. It is hardly probable that the company could be induced to offer their lands at $3 per acre."

And again on November 10th he wrote:

"The Raine-Andrews Lumber Company have resubmitted their proposal for the sale of their lands to the government. In this proposal they have included only the lands that have been cut over, amounting to 6,482 acres, and reserve the timber rights on 100 acres for two years. The land is offered at a rate of $4 per acre, which is a reasonable price for this class of land. I expect that other portions of their holdings in this section may be acquired as fast as they are cut over. The proposal, with a map showing the lands offered is inclosed."

The second proposal inclosed with map reduced the negotiations to the cut-over lands aggregating 6,482 acres, and is likewise made upon the govern-

ment's form therefor. It is dated November 5, 1913. It describes the lands by reference to the survey map and contains the following:

"At the red letter 'A' inclosed by dotted lines is a tract of 400 acres in dispute, case pending in the Supreme Court of this state. At black letter 'B' are about 100 acres of uncut timber that we want to reserve for two years; also a right of way along the Glady Fork, from Evenwood to Gladwin, will be reserved until we finish cutting our timber in this section, which will be about eight years."

It also contains the following:

"If the timber rights on 100 acres are reserved for two years, and the mineral rights are reserved on 6,482 acres, will sell for $4 per acre."

On November 12, 1913, the Forest Inspector in charge at Washington thereupon wrote the defendant as follows:

"Your proposal of November 5th, in which you offer 6,482 acres of land largely cut over, situated in Randolph county, W. Va., to the government under the Weeks Law at $4 an acre, is received.

"An examination will be made of this land at the earliest convenience of Mr. W. A. Hopson, Elkins, W. Va., the representative of the Forest Service on the Monongahela area, and you will be advised whether the tract can be recommended for purchase to the National Forest Reservation Commission at $4 an acre."

On the same date he wrote the local examiner at Elkins as follows:

"The offer of the Raine-Andrews Lumber Company of their 6,482-acre tract at $4 an acre seems to be at a reasonable price. The map which they submit, however, shows that their railroad runs about 18 miles through the very center of this tract. For this reason I imagine that the problem of fire protection would be very difficult to handle in connection with its administration. If the railroad is incorporated, it will have to conform to the state laws in regard to equipment of locomotives and in clearing up the right of way to reduce the danger from forest fires. If it is not incorporated, I think it will be desirable to have some understanding with them in regard to what measures they will take in order to reduce the danger from fire along the railroad. This point I believe should be taken up with Mr. Wm. L. Hall, when he makes his trip to the Monongahela area to see if it is possible to reach some understanding with the lumber company in regard to what preventive measures they will assume."

Correspondence, not necessary to quote here, between the local examiner and the defendant, indicates that the former's examination and report to the department required something like seven months' time. On June 17, 1914, the examiner in charge at Washington sent to the local one both a telegram and letter. The letter contains the following:

"I wired you to take an option on this 6,400 acres contained in the last proposal of the Raine-Andrews Lumber Company at $4 an acre, and to let us have a summary of the report showing the valuation of the tract and the map as soon as possible. The complete report can be sent in later. It is desirable, however, that we get a summary of it, in order to be able to decide several days before the Commission meets upon the desirability of bringing the tract before the Commission. If we can secure the complete report by June 20th, this will give us several days for copying it for the meeting.

"While it was understood, in submitting their proposal, that the minerals would be reserved, if you can do so, we would like for you to limit the period of mineral reservation to 20 years, with the understanding that, in case commercial deposits are not located for development within that time, the mineral rights shall lapse. This, however, is not necessary, but it is desirable."

The local examiner replied on June 18th as follows:

"Your telegram of June 17th is received. Mr. T. W. Raine, of the Raine-Andrews Lumber Co., is now in Pennsylvania, and will pass through Elkins on Saturday on his way to Evenwood. Mr. Presyz, his manager, has confirmed the option at $4 per acre. The map and report will be forwarded on June 19th."

On June 20, 1914, he wrote a letter to T. W. Raine, and sent copy thereof to the Assistant Forester at Washington, in which he says:

"I am inclosing an option prepared in duplicate to cover the 6,000 acres of land in Randolph and Tucker counties, West Virginia, belonging to the Raine-Andrews Lumber Company, at the price of $4 per acre, with the minerals reserved to the vendor for a period of 20 years. Please have the proper officers of the company execute the original copy of the option before a notary public in the presence of witnesses and return it in the inclosed envelope. The duplicate copy is for the files of the company.

"In returning the option, will you please send a certified copy of the minutes of the meeting of the directors of the company, showing the authority of the officers to sign the option, or a copy of the by-laws of the company covering this point."

On June 22, 1914, Raine, in a letter to the local examiner at Elkins, set forth a list of the different kinds of timber and amounts, in 1,000 feet board measure, cut from the lands offered for sale to the government, showing an aggregate of 76,775,000 feet so cut. This statement concludes thus:

"There is still 800,000 feet on these lands of saw timber which would make about 77½ million feet."

T. W. Raine answered the local examiner's letter of the 20th on the 23d, as follows:

"I have sent option to Mr. Andrews, our president, to sign, and will send it to you as soon as it returns. There is no reservation in it for right of way for the railroad. This will have to be reserved, and revert to the government after we are through here."

On June 24, 1914, Assistant Forester Hall wrote T. W. Raine as follows:

"The National Forest Reservation Commission at its meeting to-day approved for purchase under the Weeks Law the 6,000 acres of land belonging to the Raine-Andrews Lumber Company, in Randolph and Tucker counties, West Virginia, at $4 an acre. The government desires to purchase this land, and a purchase agreement will therefore be prepared and sent you for signature within a few days."

And on July 7th he wrote him:

"We have not received the option covering the 6,000 acres of land of the Raine-Andrews Lumber Company which you wired us on June 23d was on the way. We are awaiting this option in order to prepare the purchase agreement for the tract and will be glad to have you submit it as soon as possible.

"In the proposal which is dated November 5, 1913, you mention your desire to reserve for two years the timber on 100 acres, together with a railroad right of way for the time which would be required to remove your timber in that section. I have been informed since that you are cutting the timber on the 100 acres, and if this is so you will probably have completed its removal before the title to the tract can pass to the government in which case there is no need to mention a reservation of the timber.

"As to the right of way, I should be glad to know whether it would be satisfactory to you to retain your railroad right of way under a form of a free annual permit granted by the government. In this way it would not be necessary for you to retain an easement for it, and I am sure the retention of the right of way under annual permit would be quite as satisfactory to yourselves."

And on July 8th:

"The option given the Secretary of Agriculture on the 6,000 acres of land, more or less, belonging to the Raine-Andrews Lumber Company in Randolph and Tucker counties, West Virginia, is received.

"I am inclosing a voucher to cover payment for the option. Please sign the voucher at the point indicated and return it in the inclosed envelope, and a check will be sent you."

T. W. Raine, on July 11th, wrote the Assistant Forester as follows:

"Replying to yours of 7th in regard to purchase of 6,000 acres of Raine-Andrews lands, forwarded to me here. You no doubt have the option by this time, as I sent it to Mr. Hopson at Elkins the 6th. The delay was caused by having to send it to New Bethlehem, Pa., to have our president sign it, and have seal attached. As to the timber, will remove all of it the coming winter. As to the right of way for railroad, an annual permit from the government

would be satisfactory, if it was arranged to be given every year until our timber is exhausted, which, at full capacity, will take seven years. Another year will be required to ship out the timber, and take up the rails."

And on July 16th the Assistant Forester wrote Raine:

"Your letter of July 11th from Avonia, Pa., is received. We shall draw up the contract for your land without reference to the reservation of the timber or the railroad, and when title passes to the land a permit will be issued to you, covering the right of way, which permit can be renewed from year to year until the right of way is no longer needed by your company or its successors. Inasmuch as the timber will all be removed before title is likely to pass to the government, no mention will be made in the agreement concerning the timber reservation."

And on the same day he sent to the Solicitor for the Department of Agriculture the following memorandum:

"The National Forest Reservation Commission at its meeting on June 24th approved for purchase a tract of 6,000 acres of land, more or less, in Randolph and Tucker counties, West Virginia, belonging to the Raine-Andrews Lumber Company, at the price of $4 per acre, with the minerals reserved. Please prepare an agreement to cover the purchase of this land. The option held by the government is inclosed for your information. Maps showing the boundaries of the tracts are also inclosed herewith.

"In preparing the agreement, please omit reference to the right of way and the reservation of the timber on 100 acres cited in the option, as these matters will be handled under permits. In connection with the reservation of the minerals, the agreement should provide for a bond in the sum of $3,000. A copy of the by-laws of the Raine-Andrews Lumber Company, showing the authority of the officers to sign the agreement, is also inclosed."

And on August 8th he wrote the defendant company as follows:

"Reference is made to my letter of June 24, 1914. I am inclosing for execution the agreement in quadruplicate to cover the purchase of the 6,000 acres of land in Tucker and Randolph counties, West Virginia, belonging to the Raine-Andrews Lumber Company, at the price of $4 per acre.

"Please have the proper officers of the company sign all four copies of the agreement before a notary public, having their signatures witnessed, and return them in the inclosed envelope. One copy of the agreement will be sent you for the information of the vendor, after it has been approved by the Secretary of Agriculture.

"In returning the agreements, please inclose a certified copy of the resolution of the board of directors, giving the officers of the company authority to execute it, or a certified copy of the by-laws of the company covering this point."

On August 24th T. W. Raine replied as follows:

"On my return home today I found your letter of the 8th inst., with agreement inclosed to be executed by our company to cover the purchase of the 6,000 acres of land in Tucker and Randolph Co. This agreement is all right, with the exceptions of article 1. In our reservation mentioned, you have omitted the reservation for railroad right of way to stand until we finished cutting our other timber lands. I received a letter from you stating that this could be arranged by yearly permits. This would be satisfactory, but some mention should be made of it in this article 1.

"As soon as this is arranged by you, I will have the agreement properly executed and forwarded to you at once."

And on September 24th the Assistant Forester replied:

"Your letter of August 24th is received. The Raine-Andrews tract was approved by the National Forest Reservation Commission without reservations except as to the minerals. However, the Secretary of Agriculture has been granted some latitude in matters of detail such as this, and if you will add at the end of paragraph 1 in all copies of the agreement a reservation covering the easement for the railroad right of way along Glady fork I will recommend that the Secretary of Agriculture approve the agreement. I suggest the following wording:

"Also reserving to the vendor, its successors and assigns, for a period of eight years from the date of this instrument, an easement for the right of way of the logging railroad through the property along Glady Fork."

This is substantially the correspondence between the parties preceding the contract of sale, which bears date October 5, 1914. This agreement, a true copy of which is filed with defendant's answer, it will be noted, was prepared by the government's solicitor, and does not contain any reservation of the timber uncut. It provides that the vendor company should furnish abstract of title, a safe conveyance of the property, with right to the government to institute condemnation proceedings, if not satisfied as to such title. Subsequent correspondence may be properly added as follows:

October 7, 1914, the Acting Assistant Forester sent to the Department Solicitor the following memorandum:

"I am returning herewith for the approval of the Secretary of Agriculture the agreement, in quadruplicate, covering the purchase of the 6,000 acres of land, more or less, in Randolph and Tucker counties, West Virginia, belonging to the Raine-Andrews Lumber Company. The agreement has been signed by the vendors. The addition to page 2 of the agreement, regarding the easement for the railroad right of way, is acceptable to the Forest Service, if stated in the proper form."

On same date he wrote to F. L. Andrews as follows:

"The agreement to cover the purchase of the 6,000 acres of land in Randolph and Tucker counties, West Virginia, belonging to the Raine-Andrews Lumber Company, has been received. The addition to page 2 of the agreement, regarding the easement of the railroad right of way, is acceptable to the Forest Service. A copy of the agreement will be sent you for the information of the company, after it has been approved by the Secretary of Agriculture."

And on October 16, 1914, to T. W. Raine this:

"I am inclosing by registered mail an executed copy of the agreement covering the purchase of 6,000 acres of land in Randolph and Tucker counties, West Virginia, from the Raine-Andrews Lumber Company, under the provisions of the Weeks Law. This copy of the agreement is to be retained for the information of the vendor."

On January 27, 1915, the local Forest Examiner in charge made to the department this report:

"Report on Trespass.

"Monongahela Trespass — Elkins, W. Va.,
"Timber — January 27, 1915.
"The Raine-Andrews Lumber Co.

"1. The Raine-Andrews Lumber Company, of Evenwood, W. Va., lumber operators. Reputation good. Financial standing good. The company is responsible for the trespass.

"2. (a) (1) The trespass began on October 28, 1914. It terminated December 23, 1914. The trespass was continuous. Dates were determined from the company and from J. E. Hilleary, the contractor, cutting and skidding the timber. (2) The trespass occurred on lands under contract for purchase from the Raine-Andrews Lumber Co. The trespass area covers about 30 acres and lies south of Woodford run on the west side of Glady fork, nearly adjacent to the Glady and Alpena railroad, and about six miles north of Evenwood. (See map submitted with this report.) (3) Trespass occurred by resuming operations through a previous logging contract that J. E. Hilleary made with the company three years ago, to log the timber lying to the west of Glady fork and south of Woodford run.

"Under this contract, Mr. Hilleary has removed all of the timber called for in the contract excepting approximately 175,000 board feet, of hardwoods. During the summer of 1914, after this tract was approved for purchase, which was June 30, 1914, Mr. T. W. Raine, treasurer and general manager of the Raine-Andrews Lumber Company, spoke to Mr. Hilleary about picking up the logs he had skidded from the tract, but were not in reach of the company's log loader, and asked him to clean up the job. Mr. Raine did not mean that he should continue cutting any more timber, but that all the logs and a few cords of bark should be placed closer to the railroad. At the time that the

trespass began Mr. Raine was attending to business in Pennsylvania, and the men left in charge approved the further cutting of timber by Mr. Hilleary. On his return from Pennsylvania, Mr. Raine called at this office, on December 21st and acknowledged that the timber cut by Hilleary was not included within the 100 acres of timber asked to be reserved in the proposal submitted November 5, 1913. In the sale contract, there is no mention made of the reservation of this timber, for it was understood that the timber on the 100 acres would be removed before the final title was passed.

"The amount of timber cut in trespass is as follows:

Ash	2,000
Cherry	1,000
Maple	84,000
Chestnut	10,000
Birch, beech and others	33,585
Total	130,585

"The timber was of good quality and estimated to be worth $3.50 per thousand on the stump, and at the railroad $9.50 per thousand, for the contractor received $6 per thousand for cutting and skidding. The logs were the only material removed. The logs have all been removed to Evenwood and sawed in the mill. The men engaged in removing the timber were John E. Hilleary, Alpena, W. Va., French Stalnaker, Rich Mountain, W. Va.; Luther Kerns, Wymer, W. Va.; Ike Smith, Wymer, W. Va.; Brancon Summerfield, Bowden, W. Va.

"3. Trespass was not connected with any authorized use of the National Forests. The company formerly owned these lands, but overlooked reserving the timber on this portion, when the lands were offered for sale to the government. The facts in this case show that the trespass was committed unintentionally on the part of the contractor. The area upon which the trespass occurred was examined by Forest Guard Joseph Schmidlen, Alpena, W. Va., on December 4, 9, 26, 1914.

"5. (a) (1) The trespass should be settled on an innocent basis, for the reason that the contractor, J. E. Hilleary, was not notified that he should not continue cutting on his former contract; also Mr. Raine had not instructed his assistants in the exact location of the timber he wished to reserve. Mr. Raine stated that he did not know that Hilleary was cutting timber until his return from Pennsylvania. In settlement for the timber and tie trespasses (see report on tie trespass), Mr. Raine offers to exchange about 35 acres of timber, uncut, lying to the north of lot 14, and to the west of a boundary of land owned by Nathaniel Carr, and on lands under contract for sale to the government. (See map.) This 35 acres of timber is part of the 100 acres of timber Mr. Raine reserved in the proposal of November 5, 1913. The other portion of the 100 acres of timber is at the head of Ash lick and Five lick runs and is now being removed. The 35 acres of timber offered in exchange contains, according to Mr. Raine, 200,000 board feet of hardwoods, consisting of red oak, basswood, chestnut, and others, and is worth about $5 per thousand on the stump. In order to determine the amount and value of this timber, it will be necessary to make an estimate of the same. The timber trespass amounts to $407.05, with the timber valued at $3.50 per thousand on the stump, while the tie trespass amounts to $100.56, with the ties valued at 12 cents per tie, making a total of $507.61 required in settlement of the two trespasses. It is recommended that the exchange of timber on the 35 acres of uncut timber be accepted, provided the stand is found sufficient in quantity and value to make up for the timber and ties removed in trespass. By accepting this timber in exchange the company will be relieved of the reserved timber and will have no further cause to cut timber in the future on lands sold to the government. The company should be allowed six months in which to lop the tops and larger limbs.

"W. A. Hopson, Forest Examiner in Charge."

On March 25, 1915, the Assistant Forester wrote defendant as follows:

"Reference is made to the interview of December 21st of Mr. T. W. Raine, of the Raine-Andrews Lumber Company, with Mr. W. A. Hopson, the represen-

tative of the Forest Service, representing two timber trespasses by the Raine-Andrews Lumber Company on land now under purchase contract with the United States, the contract having been signed by the Secretary of Agriculture, October 10, 1914.

"Mr. Hopson's reports on these trespasses show that they took place between June 30, 1914, and December 23, 1914, and involved cutting at a point east of Glady fork and about three-fourths of a mile south of Gladwin and on the west slope of Middle Mountain, of 838 ties, having a stumpage value of $100.56, and the cutting at a point south of Woodford run of 130,585 feet B. M. of hardwood timber, having a total value of $407.05, giving an aggregate value of the timber cut in both trespasses of $507.61.

"Mr. Hopson has recommended that there be accepted in settlement of the amount involved in these trespasses certain timber reserved by the Raine-Andrews Lumber Company in their sale to the government amounting to 190,384 feet B. M. This timber is situated on an area of about 50 acres in lots 22 and 23, Randolph county, near the Myleus lands, and is located approximately as shown on the inclosed plot within the dotted lines and marked virgin timber. Since these trespasses were committed through inadvertence, it would seem an equitable method of settlement if this timber were transferred by the Raine-Andrews Lumber Company to the government conformably to Mr. Hopson's recommendation. Please inform me if this method of adjustment will suit the company."

To which on April 13th following T. W. Raine replied:

"Replying to yours of March 25th in regard to Mr. Hopson's report of trespasses and Mr. Raine's proposition of leaving standing timber: In lieu of this trespass, beg to say that we do not consider there has been any trespass, excepting as to the 838 ties, being a stumpage basis of 12 cents, and would enter our protest to this stumpage as being excessive. If you will refer to your letter of January 7, 1914, to our Mr. Raine, which we interpret as meaning that we are privileged to cut 100 acres of timber on these lands, to be taken off during the winter of 1914–1915. Unless there had been an exact location of this 100 acres, we do not consider that there is any trespass, unless we had cut in excess of 100 acres; but in order to appease Mr. Hopson our Mr. Raine proposed to leave standing the virgin timber as indicated on the plat inclosed with your letter of March 25th, which accordingly we hereby confirm, and this matter of adjustment will suit us."

For reasons not disclosed, resort was not made to a direct conveyance by the defendant to the United States for the land, but condemnation proceedings were instituted in 1919, and are now pending as set forth in the bill.

S. W. Walker, U. S. Atty., and H. H. Byrer and C. W. Campbell, Asst. U. S. Attys., all of Martinsburg, W. Va., and J. P. Wenchal, Asst. Sol. Department of Agriculture, of Baltimore, Md., for the United States.

W. E. Baker, of Elkins, W. Va., for defendant.

DAYTON, District Judge (after stating the facts as above). [1] There are several propositions proven in this cause beyond all doubt or controversy. Among others: (a) That the government did not originally have any intent or purpose to buy the uncut virgin timber on this large tract of land; (b) that it did not, at any time, indicate any purpose to claim it prior to the agreement entered into October 5, 1914; (c) that this agreement was wholly prepared by its government solicitor under instructions from the forestry division having the preliminary negotiations in charge; (d) that this lumber company had no purpose or design of selling the timber on the uncut-over land, estimated to be worth to it, by reason of the merchantable timber stand-

ing thereon, $45 per acre, to the government at the very modest price of $4 per acre.

Since procuring this agreement to sell, the government has, however, upon somewhat technical grounds, claimed, and by this proceeding is now seeking to secure, this timber, which it did not in fact purchase. Its position substantially is that the agreement is not ambiguous in its terms; that they are ample to include and constitute a complete sale of this uncut timber as part of the land sold, and, in the words of Justice Clifford in Walden v. Skinner, 101 U. S. 577, at page 584, 25 L. Ed. 963:

"When an agreement is reduced to writing by the act and consent of the parties, the intent and meaning of the same must be sought in the instrument which they have chosen as the repository and evidence of their purpose, and not in extrinsic facts and allegations."

Under this rule of law the counsel for the government has filed exceptions to the answer of the defendant, so far as it attempts to defend, relying upon negotiations and communications had prior to the execution of the agreement by the parties. I announced at the trial my purpose to overrule these exceptions, and now confirm such purpose for two reasons: First, because I am constrained to think that the allegations of this answer, under the simplified pleading provided for by the new equity rules (198 Fed. xix, 115 C. C. A. xix), were sufficient to raise the issue of fraud and especially mistake in the execution of the contract; and, second, were also sufficient to base the plea that a separate, independent, and contemporaneous contract had been made between the parties touching this uncut timber.

[2] The power and duty of equity courts to relieve for reasons of fraud and mistake are very generally recognized, and citation of authorities in support therefor would ordinarily be unnecessary; but inasmuch as the courts have varied as to the strictness of the rules governing as to what mistakes will be relievable—some holding they must be mutual on the part of both parties to the agreement—I quote the rules so clearly and satisfactorily set forth by Justice Clifford in Walden v. Skinner, supra, which are binding on federal courts:

"Courts of equity afford relief in case of mistake of facts, and allow parol evidence to vary and reform written contracts and instruments, when the defect or error arises from accident or misconception, as properly forming an exception to the general rule which excludes parol testimony offered to vary or contradict written instruments. Where the mistake is admitted by the other party, relief, as all agree, will be granted, and if it be fully proved by other evidence, Judge Story says, the reasons for granting relief seem to be equally satisfactory. 1 Story, Eq. Jur. § 156.

"Decisions of undoubted authority hold that where an instrument is drawn and executed that professes or is intended to carry into execution an agreement, which is in writing or by parol, previously made between the parties, but which by mistake of the draftsman, either as to fact or law, does not fulfill or which violates the manifest intention of the parties to the agreement, equity will correct the mistake, so as to produce a conformity of the instrument to the agreement; the reason of the rule being that the execution of agreements fairly and legally made is one of the peculiar branches of equity jurisdiction, and if the instrument intended to execute the agreement be from any cause insufficient for that purpose, the agreement remains as much unexecuted as if the party had refused altogether to comply with his

engagement, and a court of equity will, in the exercise of its acknowledged jurisdiction, afford relief in the one case as well as in the other, by compelling the delinquent party to perform his undertaking according to the terms of it and the manifest intention of the parties. Hunt v. Rousmaniere's Adm'rs, 1 Pet. 1, 13 [7 L. Ed. 27]; Same v. Same, 8 Wheat. 174, 211 [5 L. Ed. 589].

"Even a judgment, when confessed, if the agreement was made under a clear mistake, will be set aside, if application be made, and the mistake shown, while the judgment is within the power of the court. Such an agreement, even when made a rule of court, will not be enforced, if made under a mistake, if seasonable application be made to set it aside, and, if the judgment be no longer in the power of the court, relief, says Mr. Chief Justice Marshall, may be obtained in a court of chancery. The Hiram, 1 Wheat. 440, 444 [4 L. Ed. 131].

"Equitable rules of the kind are applicable to sealed instruments as well as to ordinary written agreements; the rule being that if by mistake a deed be drawn plainly different from the agreement of the parties, a court of equity will grant relief by considering the deed as if it had conformed to the antecedent agreement. So if a deed be ambiguously expressed in such a manner that it is difficult to give it a construction, the agreement may be referred to as an aid in expounding such an ambiguity; but if the deed is so expressed that a reasonable construction may be given to it, and when so given it does not plainly appear to be at variance with the agreement, then the latter is not to be regarded in the construction of the former. Hogan v. Insurance Co., 1 Wash. [C. C.] 419, 422 [Fed. Cas. No. 6,582].

"Rules of decision in suits for specific performance are necessarily affected by considerations peculiar to the nature of the right sought to be enforced and the remedy employed to accomplish the object. Where no question of fraud or mistake is involved, the rule with respect to the admission of parol evidence to vary a written contract is the same in courts of equity as in those of common law, the rule in both being that, when an agreement is reduced to writing by the act and consent of the parties, the intent and meaning of the same must be sought in the instrument which they have chosen as the repository and evidence of their purpose, and not in extrinsic facts and allegations. Proof of fraud or mistake, however, may be admitted in equity to show that the terms of the instrument employed in the preparation of the same were varied or made different by addition or subtraction from what they were intended and believed to be when the same was executed.

"Evidence of fraud or mistake is seldom found in the instrument itself, from which it follows that unless parol evidence may be admitted for that purpose the aggrieved party would have as little hope of redress in a court of equity as in a court of law. Even at law, all that pertains to the execution of a written instrument or to the proof that the instrument was adopted or ratified by the parties as their act or contract, is necessarily left to extrinsic evidence, and witnesses may consequently be called for the purpose of impeaching the execution of a deed or other writing under seal, and showing that its sealing or delivery was procured by fraudulently substituting one instrument for another, or by any other species of fraud by which the complaining party was misled and induced to put his name to that which was substantially different from the actual agreement. Thoroughgood's Case, 4 Coke, 4.

"When the deed or other written instrument is duly executed and delivered, the courts of law hold that it contains the true agreement of the parties, and that the writing furnishes better evidence of the sense of the parties than any that can be supplied by parol; but courts of equity, says Chancellor Kent, have a broader jurisdiction and will open the written contract to let in an equity arising from facts perfectly distinct from the sense and construction of the instrument itself. Pursuant to that rule, he held it to be established that relief can be had against any deed or contract in writing founded on mistake or fraud, and that mistake may be shown by parol proof and the relief granted to the injured party whether he sets up the mistake affirmatively by bill or as a defense. Gillespie v. Moon, 2 Johns. (N. Y.) Ch. 585, 596 [7 Am. Dec. 559]."

[3-5] In its verified answer (the bill was verified and by it answer under oath was not waived) the defendant says:

"Respondent further states that it would never have signed said contract of sale at $4 per acre in fee without having therein a specific reservation of its right to cut and remove all merchantable timber from said tract, which said timber alone was worth at least $45 per acre, but for the letter of July 16, 1914, from Wm. L. Hall, Assistant Forester for the United States Department of Agriculture, hereinbefore set out, wherein he states: *"We shall draw up the contract for your land without reference to the reservation of the timber. * * * Inasmuch as the timber will all be removed before title is likely to pass to the government, no mention will be made in the agreement concerning the timber reservation."* But relying implicitly upon said letter protecting its timber rights, it caused said contract to be executed on October, 5, 1914.

"Respondent further states that, although said contract was executed on October 5, 1914, more than five years ago, the title thereto has never been approved or said land taken up by the plaintiff, by reason of which it has suffered the loss of more than 30 per cent. interest upon the purchase price, been compelled to pay taxes thereon for five years, and if it should be denied the right to remove the balance of the merchantable timber therefrom, it would suffer a great injustice, and much pecuniary loss, as the merchantable timber remaining uncut thereon is worth at least $5 per thousand feet on an average, as alleged in paragraph No. 9 of plaintiff's bill."

I am constrained to believe this statement to be strictly true. Its very statement of substantially undisputed fact as to the value of the timber involved is impressive, and it would be hard to conceive why such value would be surrendered by a company managed by men of business sense and capacity. In the first proposal to sell the full acreage of 13,200 acres owned by it, the company proposed to reserve the timber with a 10-year limit to cut and remove it. This was objected to by the government forester, who, assuming that 7,000 acres of the whole had been cut over, expressed his belief "that 1,000 acres a year should be about the minimum allowance" for cutting a remainder of 5,000 acres uncut. The capacity of defendant's mill was not equal to this, and the result was that, at the local examiner's request, Mr. Raine, for the defendant, undertook to submit a second proposal, and upon notice to this effect the government's forester at Washington wrote its local agent:

"I do not believe, however, that the proposal will be considered at a price of $4, unless the company is willing to reserve occasional seed trees of ash, cherry, and basswood"

—meaning, manifestly, refrain from cutting such. And he added:

"If the company could be induced to reduce their offer to $3 per acre, there would be a much greater probability of its being favorably considered."

In reply the local examiner stated the hardwood lands (that would supply seed trees of ash and cherry) had already been cut over, and that "several boundaries from the original tract, after being cut over, had been sold for agricultural purposes at the rate of $10 per acre." The second proposal confined the negotiation to the cut-over land substantially, but set out that timber on 100 acres thereof uncut was to be reserved for two years, and agreeing:

"If timber rights on 100 acres are reserved for two years, and the mineral rights are reserved in 6,482 acres, will sell for $4 per acre."

It will be thus seen that the company had gone in this paper to the limit—offered to limit the uncut area to a total area of 100 acres within the limits of the 6,482-acre boundary—and that this proposition had come to the final word, so far as the company was concerned, as regards the sale of the uncut timber; and it was so regarded by the government officials in charge of the negotiations, for we hear nothing further, during the seven months taken by them to make examination of the land, in regard to any further reductions in the timber reservations, and when the assistant forester had prepared the three months option dated June 27, 1914, he inserted in it the reservation for two years of the uncut timber on 100 acres. Had the forester seen fit to prepare the final agreement of sale in accord with this option which he himself prepared, or had prepared, and had inserted in it the option clause in regard to this timber reservation, there is no doubt the ruling of the Supreme Court of Appeals of this state in the cases of Null v. Elliott, 52 W. Va. 229, 43 S. E. 173, Adkins v. Huff, 58 W. Va. 645, 52 S. E. 773, 3 L. R. A. (N. S.) 649, 6 Ann. Cas. 246, Electro Co. v. Montgomery, 70 W. Va. 754, 74 S. E. 994, and Deer Creek Lumber Co. v. Sheets, 75 W. Va. 21, 83 S. E. 81, cited and so confidently relied on by counsel for the government, would have been decisive. The agreement to sell in that event would have restricted the removal of the timber to a specific and limited period of two years from the date of the agreement.

Several very vital deductions are to be drawn from these cases—among others: (a) That in order to forfeit the right of the owner to his timber the contract must fix a specific period of time within which the timber must be cut and removed, and this period of time must have elapsed. This for the reason that "such a provision as this in timber contracts is held to be a condition of the sale, and not a covenant to remove, and that the purchaser only takes such of the timber as he may cut and remove in the specified time; otherwise it remains the property of the landowner as part of the land." Null v. Elliott, supra. It is very clear from these cases that where, in the contract, no specified period of time for removal is set forth, this rule is wholly inapplicable. In such case there is a severance, whereby the seller remains the owner of the timber, and the buyer becomes owner of the land surface, as so commonly illustrated in this state, where coal is sold from under the land and the surface is retained.

Incidentally it may be noted that this Null Case was really decided independent of all these considerations, on the ground that equity had no jurisdiction; the plaintiff Null having, if any at all, a complete remedy at law. That ruling, if applied here, would dismiss and end the government's case. I do not apply it, however, and make no point as to it other than to mention it, for that, as I construe the subsequent case of Pardee v. Lumber Co., 70 W. Va. 68, 73 S. E. 82, 43 L. R. A. (N. S.) 262, it overrules this ruling in the Null Case, and I think rightly so. A second deduction from the Null and other cases, relied on as above set forth, is (b) that the right of equity to reform or rescind these timber contracts for fraud or mistake is fully recognized; and (c) in the Adkins-Huff Case, 58 W. Va. at page 649, 52 S. E. 773, 3 L. R. A.

(N. S.) 649, 6 Ann. Cas. 246, citing and approving Johnson v. Moore, 28 Mich. 3, the right of equity to uphold and enforce an independent simultaneous contract as to the timber reserved is also fully recognized.

But the forester did not see fit to include in the final agreement to sell the option's clause in regard to the timber reservation, but instead wrote the defendant, under date of July 7th, ten days after the option had been prepared (dated June 27th):

"In the proposal which is dated November 5, 1913, you mention your desire to reserve for two years the timber on 100 acres, together with a railroad right of way for the time which would be required to remove your timber in that section. I have been informed since that you are cutting the timber on the 100 acres, and if this is so you will probably have completed its removal before the title to the tract can pass to the government, in which case there is no need to mention a reservation of the timber."

This was a clear recognition of the defendant's right to the timber and its right to remove it, with no definite fixed date to do so. But this was not all; on July 18th he wrote defendant:

"We shall draw up the contract for your land without reference to the reservation of the timber or the railroad, and when title passes to the land a permit can be renewed from year to year until the right of way is no longer needed by your company or its successors. Inasmuch as the timber will all be removed before title is likely to pass to the government, no mention will be made in the agreement concerning the timber reservation."

Here was a clear recognition of the right of the defendant to cut and remove the timber until title should pass to the government, and an implied promise, if not so cut by that time, permit would be granted it to do so afterwards, as in the case of the use of the railroad across the land. And this implied promise is made certain by the fact that, on the very same day he wrote this letter to the defendant, he sent a memorandum of directions to the department's solicitor as to how the final agreement was to be drawn, in which he says:

"Please prepare an agreement to cover the purchase of this land. The option held by the government is inclosed for your information. Maps showing the boundaries of the tracts are also inclosed herewith. In preparing the agreement, please omit reference to the right of way and the reservation of the timber on 100 acres cited in the option, as these matters will be handled under permits."

When it is borne in mind that all these writings, the two proposals, the option, and the final agreement to sell, were prepared under the direction of the government's officers, and that the consummation of the purchase was only to pass when title deed was declared to be satisfactory to the government's Attorney General, it seems to me their terms should be construed more liberally in favor of the grantor defendant—in short, constitute an exception to the general rule to the contrary. And this is strengthened by the very general and very proper understanding that the government will never knowingly do wrong and injustice to any of its citizens. For reasons not disclosed, the Attorney General has never approved of the government's taking title direct from the defendant. For near five years or more it has delayed securing title by condemnation proceedings, only having instituted such proceedings a few months ago. During all this time—to be

accurate, since June 27, 1914, the date of its option—defendant's large tract of land has been tied up in a degree of uncertainty as to whether it would be taken by the government or not. It has been deprived of all right to sell and convey to others. It has lost the use in the way of interest on the very moderate price at which it agreed to sell, something over $8,500, and now is confronted with a demand that its purchase price be abated, or it be required to pay the government damages for the cutting of something over 240,000 feet of lumber at threefold its value, or over $3,600, which it believed, and had good reason to believe, it owned and had right to cut, and also be deprived of the value of at least 800,000 feet more of timber, worth $4,000, which it believes and insists it never sold, and the government agreed it should have the right to cut and remove.

I cannot reconcile myself to hold that the contentions of the government to this end would be in accord with equity and good conscience. On the contrary, I am constrained to reach the conclusion that the defendant by the final contract never intended to sell this timber on 100 acres of the uncut-over land; that its execution of this contract, so carrying on its face and by its terms such conveyance, was done by it by mistake at least, being directly led to do so by the representations of the government official agents having the negotiations in charge; that these representations in fact, taken together, as disclosed by the documentary evidence in the cause, fully constituted an independent, separate, and contemporaneous contract whereby the defendant was to have the right to this timber on 100 acres uncut over, and the right to cut and remove the same any time before the government took over the legal title, and a reasonable time thereafter by its permit. This conclusion is not shaken by the argument of counsel that, because the defendant in its option agreed to limit the time of removal to two years, and by the fact that Raine wrote they were going to cut the timber the following winter, that forfeiture of its right to such timber has thereby accrued in the government's favor.

[6] It could be argued very plausibly that the two-year limit clause in the option should relate to the two years following either the date of the option, the date of the final agreement, or the date when the government should finally take legal title to the land. But such argument becomes wholly de trop, because this clause of the option was not accepted by the government's forester; but, on the contrary, he constituted the limit, by his separate, independent, and contemporaneous contract, to be until the title to the land shall have passed to the government, and a reasonable time thereafter by permit, if necessary.

The bill admits that title has not yet passed to the government, but sets forth that condemnation proceedings to secure the same are pending.

It follows that the temporary restraining order must be dissolved, and the bill dismissed.

KENNEDY et al. v. CAROLINA PUBLIC SERVICE CO.

(District Court, N. D. Georgia. January 31, 1920.)

1. CORPORATIONS ⟸67—DECREASING OUTSTANDING STOCK VALID WHEN NOT INVOLVING AMENDMENT OF CHARTER.
The provisions of Delaware Corporation Law, § 26, prescribing the procedure for amendment of the charter of a corporation "by increasing or decreasing its authorized capital stock," or changing the preference given to any one or more classes of preferred stock, *held* not applicable to the action of stockholders in decreasing the amount of common and preferred stock outstanding, within the charter limits, and which involved no amendment of the charter.

2. CORPORATIONS ⟸67—METHOD OF REDUCING CAPITAL STOCK STATED.
Delaware Corporation Law, § 28, providing that any corporation organized thereunder may by two-thirds vote of stockholders reduce its stock by retiring or reducing any class of stock, by purchase or requiring holders to accept a less number of shares in exchange, *held* to prescribe such methods of reduction in the alternative, limited by the nature of the stock to be reduced, and not to permit the corporation to adopt either method, regardless of the reason or justice of the action.

3. CORPORATIONS ⟸67—METHOD OF REDUCING PREFERRED STOCK CONTROLLED BY PROVISIONS OF CERTIFICATE.
Under Delaware Corporation Law, § 28, providing that any corporation organized thereunder may reduce any class of its stock by vote of two-thirds of its stockholders, by requiring holders to accept a less number of shares in exchange, or by retirement of a stated number of shares, a solvent corporation having both common and preferred stock, the former the greater in amount, *held* not authorized by vote of two-thirds of all stockholders, voting together, to require preferred stockholders to surrender their shares and accept a less number, when their certificates provided for their retirement by purchase at a stated premium.

4. CORPORATIONS ⟸156—EARNINGS APPLIED TO ARREARAGE OF CUMULATIVE DIVIDENDS ONLY AFTER CURRENT DIVIDEND IS PAID.
Where dividends were in arrears on cumulative preferred stock, net dividends earned in a current period *held* equitably applicable first to payment of the dividend for that period, leaving arrearages payable only from any surplus.

In Equity. Suit by Henry B. Kennedy and others against the Carolina Public Service Company. Decree for complainants.

Charles T. & L. C. Hopkins, of Atlanta, Ga., for plaintiffs.
Evins & Moore, of Atlanta, Ga., for defendant.

SIBLEY, District Judge. The Carolina Public Service Company was organized under the Corporation Law of Delaware in 1912, the certificate of incorporation authorizing a capital stock of $1,000,000 common stock and $1,000,000 preferred stock, and fixing as the minimum capital on which business might be done $2,500 of common stock. In point of fact, $500,000 in value of preferred stock and $750,000 of common stock was issued.

On August 20, 1918, dividends on the preferred stock, which were 6 per cent. cumulative dividends, being in arrears for nearly five years, a meeting of the stockholders was held, pursuant to call of the directors, at which more than two-thirds of the preferred stock and two-

thirds of the common stock, voting separately, adopted a resolution which in substance released the obligation for dividends up to January 1, 1919, reduced the preferred stock from 5,000 shares to 3,000 shares and the common stock from 7,500 shares to 6,000 shares.

Certain holders of preferred stock dissented from this action and brought this bill to annul it. Pending the litigation the directors are averred to have declared a dividend of 3 per cent. as earnings for the six months from January 1, 1919, to July 1, 1919, on the preferred stock. A supplemental bill was filed by the petitioners, claiming judgment for 30 per cent. on their original stock as the total accumulated unpaid dividends on it.

Exceptions to the master's report are now to be decided and a decree to be entered involving the following propositions:

[1] 1. The meeting of stockholders did not conform to the procedure prescribed by section 26 of the Delaware Corporation Law (Rev. Code Del. 1915, § 1940). The action taken was invalid if that section is applicable. The section declares the procedure by which any corporation, created under this act or otherwise, should amend the corporation's charter—among other changes, "by increasing or decreasing its *authorized* capital stock." It is further provided:

"If any *such proposed amendment* would alter or change the *preference* given to any one or more classes of preferred stock *authorized* by the certificate of incorporation, or would increase or decrease the *amount* of *authorized* stock of such class or classes of preferred stock, or would increase or decrease the par value thereof, then the holders of the stock of each class of preferred stock so affected by the amendment shall be entitled to vote as a class upon such amendment whether by the terms of the certificate of incorporation such class be entitled to vote or not."

Evidently it is only when the *authorized capital* as fixed by the certificate of incorporation is to be changed that an amendment of this certificate is necessary. No such change was proposed in this case. The authorized capital fixed by the certificate was within the limits $1,000,000 to $2,500 for the common stock and $1,000,000 to nothing for the preferred stock. Within these limits any amount of either stock could be issued that the directors saw fit, and the action taken by the stockholders' meeting did not go outside these limits. In point of fact the call for the meeting stated, not that the authorized capital was to be changed, but that the stock "issued and outstanding" was to be reduced. Not only was no amendment of the charter necessary, but no amendment was contemplated, and in my opinion whether section 26 was followed as to procedure or not is entirely immaterial.

[2, 3] 2. Section 28 (Rev. Code Del. 1915, § 1942) provides:

"Any corporation *organized under this chapter* may reduce its capital stock *at any time* by a vote of, or by the written consent of, stockholders representing two-thirds of its capital stock, and after notice of the proposed decrease has been mailed to the address of each stockholder at least twenty days before the meeting is held for that purpose."

This provision evidently applies to a change in the capital actually employed and represented by certificates of stock actually outstanding, within the limits authorized by the charter. The procedure here pre-

scribed appears to be appropriate for the purpose undertaken at the stockholders' meeting and to have been substantially carried out. The questions made are: (a) Is this section appropriate to a case of preferred stock, where no mention of reduction is made in the company's certificate of incorporation or its certificates of preferred stock? and (b) if it be applicable, does it authorize what was done in this case?

As to the first point, although section 13 (Rev. Code Del. 1915, § 1927) declares, "Unless its original or amended charter or certificate of incorporation shall so provide, no corporation shall create preferred stock," yet since this certificate did provide for preferred stock, all the provisions relating thereto in the Corporation Law become a part of this charter, especially section 28, which in terms states "any corporation organized under this chapter," might exercise the powers it confers. I should have thought, in view of the fact that no separate vote for each class of stock to be affected is provided here as in section 26, that this section would refer only to reductions of common stock; but this provision occurs:

"A decrease of capital stock issued may be effected by retiring or reducing *any class* of the stock, or by drawing the necessary number of shares by lot for retirement, or by the surrender by every shareholder of his shares, and the issue to him in lieu thereof of a decreased number of shares, or by the purchase at not above par of certain shares for retirement, or by retiring shares owned by the corporation or by reducing the par value of shares."

Since any class of stock may be thus affected, preferred stock may be. We are then met with the remarkable situation in which, without qualification, a single meeting of all the stockholders of every class may, by a two-thirds majority, destroy any class, if, as contended by this corporation, any method of dealing with the stock may be adopted that is above stated. For instance, if four-fifths of the stock be common stock and one-fifth preferred stock, that meeting, by a two-thirds vote might reduce the preferred stock to one-half or one-fourth its previous par value, with consequent decrease of dividends, by simply exchanging the old certificates for new. Unless the corporation happened to be entirely unable to pay its preferred stock on dissolution, such action would amount to a gift by the meeting from the property belonging to the preferred stockholders to the common stockholders, and a gift until dissolution of a corresponding interest in the earnings of the corporation. As regards the common stockholders, the preferred stockholder is really an incumbrancer on the assets of the corporation, and so remarkable a power could hardly have been intended to be given a stockholders' meeting.

The law must be construed, not only by what has happened in this case, but what might happen in other cases. While it is true that, this charter and these certificates of stock having been made since the law and under its provisions, no question of impairment of contract thereby could arise, nor would it be a case in which, without due process of law, one is deprived of his property, yet the law, charter, and certificate should at least be construed together as one contract, and a meaning given to them, if possible, that is not so unreasonable as that contended for in this case. This I think may be effected by holding that

the statute intended, if such a class of stock as preferred stock was to be retired, that it should be done under the provisions stated in the stock, if any. In this case those provisions are that the stock should be paid for at 105, together with all accrued unpaid dividends. If, instead of retiring it, this class was to be reduced, similar considerations of reason and justice would require that the reduction be likewise paid for. It may be that there would be a power of retiring or reducing such stock, otherwise than as provided in the certificate, if, in point of fact, the stock was not fairly worth so much, under the provision, "by purchase at not above par of certain shares for retirement." Purchase here, however, would seem to imply a consent on the part of the seller, as well as a willingness to buy on the part of the corporation, manifested through its stockholders' meeting.

I am clear that the action taken in this meeting of reducing the stock of each preferred stockholder by two-fifths, with the corporation still a going concern and able to earn profits, as was immediately afterwards demonstrated, with no consideration given them by the corporation therefor, cannot be upheld as reasonably intended by the entire contract, evidenced by the certificate of stock, the certificate of incorporation, and this statute. It is conceded that the accrued dividends could not be so given away by the action of the meeting. There is nothing, in principle, to distinguish the effort of the meeting to cancel the dividends from their effort to cancel two-fifths of the stock. It appears in this record that the greater number of the preferred stockholders were also common stockholders, and this fact may have had a large influence in procuring the action that was taken; a loss in the preferred stock being offset by an advantage in the common stock.

The statute, therefore, in permitting these several ways of retiring or reducing stock, must be taken to offer them as alternatives, limited by the nature of the stock to be retired or reduced, and not to be applied indifferently, at the will of the corporation, to any sort of stock, regardless of the reason and justice of the action. It is to be noted that the common stock was reduced only one-fifth, while the preferred stock was reduced two-fifths, so that not even relative proportions were observed in the reduction. It is not apparent, however, to me that, had the reduction been in the same ratio, there would be any change in the case.

3. The petitioners, having in no wise consented, and not appearing to have estopped themselves in any way, are entitled to be recognized by the corporation, both as respects their rights to dividends and their holdings of stock, just as though the August 20, 1918, meeting had never occurred, and a decree enjoining treatment otherwise will be entered.

[4] 4. As respects claim made that all unpaid accumulated dividends should be adjudged against the corporation by reason of the 3 per cent. dividend declared from profits between January 1, 1919, and July 1, 1919, the pleadings do not justify that result. While it appears that the declaration of a 3 per cent. dividend on a reduced preferred capitalization of $300,000 must mean that $9,000 has been declared as earnings during 1919, it does not follow that the petitioners

are entitled, merely on this account, to have the entire arrearages of dividends adjudged them out of this fund. It may be, since the action of the meeting of August 20, 1918, was a unit, both as to dividends and with reference to the reduction of the stock, and since the proxies signed therefor was an agreement to both propositions conjoined, they may be binding in no respect, since the object sought has proven at least partly abortive, and the action of the meeting may be subject to be rescinded and the agreement contained in the proxies to be canceled, under all the circumstances, so that each stockholder will be remitted to his original status. Such would appear to be a more just conclusion of the matter than that a few stockholders, by opposing the action of the large majority, should get, not only what they would have gotten, had the majority not so acted, but very much more beside, contrary to the expectation of that majority in taking the action that they did. It does not certainly appear that any issue was presented or joined as to who or how many were entitled to dividends under the old stock, together with the plaintiffs. It is now too late, by amendment, to join such an issue and thresh it out, especially in view of the uncertainties above pointed out as to the real rights of all the stockholders in view of this decision of the court.

Again, this dividend was declared from earnings since January 1, 1919, and, if they were truly such, it would appear to be more equitable that all preferred stockholders entitled to dividends during the period that the earnings were made should participate in the distribution of these earnings, rather than that the earnings should be appropriated to accumulated dividends on some of the stock in former years. The provision for accumulation of dividends would apparently work most equitably by declaring from each year's earnings the 6 per cent. due for that year, and then only carrying any surplus to previous years in which dividends had not been paid. It is true that all such arrearages must be paid before the common stock is paid anything, but not necessarily true that the accumulated dividends should be paid, whether due to few or many, before the current dividends should be met from the current profits.

Leave will be given in the decree to enter judgment for 3 per cent. dividend declared since January 1, 1919, or, at the option of petitioners, they may withdraw all issues concerning dividends and make them the subject of a full and adequate separate proceeding.

STAFFORD v. BALTIMORE & O. R. CO.

(District Court, N. D. West Virginia. November 21, 1919.)

No. 890.

MASTER AND SERVANT ⊂=88(1)—SECURING EMPLOYMENT BY FRAUD DEFEATS RECOVERY FOR INJURY.

In an action by a brakeman for personal injury, a plea alleging that plaintiff, being over the age prescribed, and also unable to pass the physical examination required by defendant's rules, procured another, who

was competent to make application and take the examination, and by means of the certificate so obtained fraudulently secured the position, *held* good on motion to strike.

At Law. Action by Thomas J. Stafford against the Baltimore & Ohio Railroad Company. On motion to strike out defendant's special plea No. 1. Denied, and case dismissed on motion of plaintiff.

Reese Blizzard, C. M. Hanna, and R. E. Bills, all of Parkersburg, W. Va., for plaintiff.

B. M. Ambler and J. W. Vandervort, both of Parkersburg, W. Va., for defendant.

DAYTON, District Judge. This plea presents such an extraordinary statement of facts as to render the legal questions involved in the motion to strike it out extremely perplexing. It, in brief, says: The defendant company had certain established rules governing employment by it of men in the capacity of brakemen. They had to be within a certain age. They had to appear before its medical examiner and undergo a physical examination, which would show them to be of such physique and in such condition of health as to fit them, in the judgment of such examiner and the employing officers of the company, to properly perform the important and dangerous duties of brakemen in its service. No one could secure this service without coming within the rules laid down for such physical examination. That plaintiff, knowing these rules, being over the required age and physically unable to pass the required medical examination, secured one Reardon, a man within the required age and physically fit, to assume his (Stafford's) name and be examined, and under Stafford's name to secure such certificate or report from the medical examiner and enabled Stafford, upon securing it from Reardon and presenting it to the company's employing officer, to secure the employment of brakeman, in which employment, so fraudulently obtained, he was injured.

In this suit, brought by him, the question immediately arises: (a) What relation became established by reason of Stafford's fraud on the one part and the railroad's acceptance of his service on the other? Is Stafford to be considered, under the circumstances, a servant of the company, or as a licensee or a trespasser? In a note to Bist v. London & Southwestern Ry. Co., 8 Ann. Cas. 1, more than 250 cases from England, Canada, United States Federal, and 35 states are cited in support of the general rule:

"That a servant accepting employment with knowledge of the master's rules or regulations is under obligations to conform fully to such rules or regulations so long as they are really maintained in force, and that by a failure or refusal to observe such rules or regulations he takes upon himself the risk of the consequences of his disobedience, and is, as a matter of law, guilty of negligence which defeats his right to hold the master liable for an injury *to which such negligence contributes as a proximate cause.*"

I have not undertaken to examine *all* of these cases, but have examined a large number of them. In a very recent case, decided May 19, 1919, No. 241, October Term, 1918, Donatto Fillippon, Petitioner, v. Albion Vein Slate Co., 250 U. S. 76, 39 Sup. Ct. 435, 63 L. Ed. 853, on

writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit, a negligence case against an employer by its employé for injury sustained, the Supreme Court says "the case was governed by the law of Pennsylvania, where the injury was received and the trial took place," under Rev. Stat. § 721 (Barnes' Fed. Code, § 1282 [Comp. St. § 1538]), and cites Pennsylvania decisions as controlling.

I find no case in which the Supreme Court of Appeals of West Virginia has established the rule of law to govern the exact question in point here. I do find that in the recent case of Blagg v. Baltimore & Ohio R. Co. (W. Va.) 98 S. E. 526, the Supreme Court of Appeals of this state, in determining the status of one, not an employé, who used a walkway over its tracks accustomed to be used by its employés, and was killed by a passing locomotive, to be that of a mere licensee, entitled to no higher duty on the part of the company than due to a trespasser, cites favorably the case of Norfolk & Western Ry. Co. v. Bondurant, 107 Va. 515, 59 S. E. 1091, 15 L. R. A. (N. S.) 443, 122 Am. St. Rep. 867. In this Virginia case it was held that a minor, who, by misrepresenting his age, obtained employment from a railroad company as student fireman, is entitled only to the degree of care due to trespassers, or at most bare licensees, although his infancy in no way contributed to his injury. The court there held the all-controlling question to be what the relation of the injured party was to the railroad, and such relation, having been shown to have been established by reason of the injured party's fraudulent representations, was held void so far as his right to claim damages as an employé.

Much the same question arose in Kirkham v. Wheeler-Osgood Co., 39 Wash. 415, 81 Pac. 869, 4 Ann. Cas. 532. In that case recovery was upheld in a case where a boy under 14 had contracted to work in a sash factory, contrary to the law of the state forbidding such employment; he having represented himself to be 14 when he was in fact but 12 years of age. The court justified the recovery solely on the ground that the plaintiff was an infant at the time he contracted to work; "that infants are liable for torts—that is, for pure torts, such as injuries to person or property. On the other hand, by the great weight of authority, infants are not liable for torts connected with or growing out of contracts and the doctrine of estoppel in pais does not apply to them." The strong impression arises from an examination of this decision that it designs to hold that, while the infant, making the contract of employment, by reason of his infancy is not estopped, a man of mature age would be by reason of his fraud or misrepresentations in securing the contract of employment. In McDermott v. Iowa Falls & S. C. Ry. Co. (Iowa) 47 N. W. 1037, the Supreme Court of Iowa takes a different view of the matter when it says:

"An instruction directed the jury, in effect, that if the defendant was misled by the deceased as to his age, and induced to believe he was not a minor, the fact should be considered by the jury, and, if deceased's age led to the injury, plaintiff cannot recover. The instruction is right. If no injury resulted from the deception practiced upon defendant, it cannot complain."

This ruling is in direct conflict with the Virginia Bondurant Case and the other cases cited therein, in that it makes the cause of injury

and not the status of the injured person the fundamental and crucial test, and to a degree is in conflict with the principle, as also is the Kirkham (Washington) Case, laid down by our state Supreme Court of Appeals in Williamson v. Jones, 43 W. Va. 562, 27 S. E. 411, 38 L. R. A. 694, 64 Am. St. Rep. 891, where it was held:

"An infant of years of discretion, by intentional fraudulent conduct, will be barred, under the doctrine of estoppel *in pais*, from asserting her title to either real or personal property against one misled thereby."

The Court of Appeals of New York, in Hart v. N. Y. Cent. & H. R. R. Co., 205 N. Y. 317, 98 N. E. 493, takes the extreme opposite view when it says:

"Notwithstanding that the deceased, by his misrepresentation, evaded the rule of the defendant forbidding the employment of minors, he was actually in its service, and therefore was entitled to the protection of an employé accorded by the law."

Further consideration of this question of a minor's misrepresentation of his age will be found in notes to Braasch v. Michigan Stove Co., 20 L. R. A. (N. S.) 500, and Lupher v. Atchison, T. & S. F. R. Co., 25 L. R. A. (N. S.) 707.

Another line of cases establishes, with less confusion and conflict, the principle that one who voluntarily assumes to act as servant for another cannot recover for personal injuries as if he were in fact such servant, and one who, having no interest in the work, voluntarily assists the servant of another, cannot recover from the master for an injury caused by the negligence of such servant, because he cannot impose a higher duty on the master than a hired servant could impose. See 26 Cyc. 1287; Langan v. Tyler, 114 Fed. 716, 51 C. C. A. 503 (2d Circuit); Everhart v. Railroad Co., 78 Ind. 292, 41 Am. Rep. 567; Church v. Railroad Co., 16 L. R. A. 861; and others cited by counsel for defendant in their brief.

A very interesting case is that of Rhodes v. Railroad Co., 84 Ga. 320, 10 S. E. 922, 20 Am. St. Rep. 362, which makes a minor's right to recover as a volunteer dependent upon his capacity to protect himself with the presumption arising that if under 10 years of age he did not have such capacity, and if over 14 he does have it. The case further holds that—

"To constitute a servant, there must be some contract, or some act on the part of the master, which recognizes the person as a servant."

This principle, if upheld, may be important in the solution of the question here, for that it may be shown under the plea here that a contract was made in fact with Reardon, who took the examination, met the company's rules and requirements, and who by reason thereof alone was contracted with to enter into the condition of servant with the company; that, on the other hand, no contract of employment was in fact consummated with Stafford, but he in fact was a volunteer of full age and mental capacity to contract, but not physically qualified to be accepted and contracted with. In such view, a number of questions, such as consent to the substitution, for example, might arise on trial

that could not be determined in advance on this motion to reject the plea.

But, when it is all said, the conclusion is inevitable that all the authorities that I can find are more or less irrelevant; that the question is one of first impression, that of a man over (not under) age, and charged to be physically incompetent under the rules of the company, securing by the fraudulent personation of another a service of danger and responsibility, and, notwithstanding his fraud and deceit, seeking to hold the defrauded company responsible for an injury sustained by him in a place where he had no legal or other right to be. Had he not committed the fraud on the company, he would not have been injured. The force of the reasoning in the Virginia and other cases cited by it, to the effect that he can secure no benefit by reason of his fraud, grows stronger against his claim than in the case of a minor, for whose protection the law specially provides.

The force of the moral side of the question bears strongly, too, in the same direction. Railroad brakemen fill very responsible place in railroad operation. Not only the corporation, but the public also, are vitally interested in his physical and other ability to protect both lives and property from destruction. Without further discussion, it seems to me clear, whatever principle may be applied, that it cannot be here relied on to the extent of rejecting this plea offhand, and forbidding the matters set up in it, if proven, from becoming pertinent to the issues to be determined on the trial.

The motion to reject the plea will be overruled.

NOTE.—At the January term, 1920, of court, following the filing of this opinion, on motion of the plaintiff, and at his costs, this case was dismissed.

MANNERS v. FAMOUS PLAYERS-LASKY CORPORATION.

(District Court, S. D. New York. December 11, 1919.)

1. CERTIORARI ⊂=47—PENDENCY NOT STAY OF SUIT BY DEFEATED PARTY INVOLVING CONTRACT IN SUIT.

Pendency of certiorari proceeding in the Supreme Court to review a decree construing a contract *held* not to act as a stay in suit, by party defeated below against a third person, based on his construction of the contract.

2. COPYRIGHTS ⊂=48—LICENSE CONTRACT CONSTRUED; "ALTERATIONS, ELIMINATIONS, OR ADDITIONS."

A provision of a contract granting exclusive license to produce a play, which includes also motion picture rights, that no "alterations, eliminations, or additions" shall be made without the author's consent, *held* to apply to motion picture productions, and while alterations made necessary by the different method of production may be made without the author's consent, such as constitute a substantial deviation from the locus of the play, or the order and sequence of the development of the plot, may not.

In Equity. Suit by J. Hartley Manners against the Famous Players-Lasky Corporation. Decree for complainant.

David Gerber, of New York City, for plaintiff.

Nathan Burkan and Elek J. Ludvigh, both of New York City, for defendant.

MAYER, District Judge. This is a suit to restrain the production and release of the motion picture "Peg o' My Heart" and the making of additions thereto and alterations thereof. On January 19, 1912, plaintiff entered into a contract with one Morosco, which was modified in certain particulars by a supplemental agreement dated July 20, 1914.

A litigation arose between the parties as to whether Morosco had acquired the motion picture rights, and, in a suit brought by plaintiff against Morosco, the court dismissed plaintiff's bill, holding that Manners had conveyed these rights to Morosco. The details of this controversy will be found in Manners v. Morosco (D. C.) 254 Fed. 737, affirmed 258 Fed. 557, — C. C. A. —. Thereafter the Supreme Court allowed a writ of certiorari (250 U. S. —, 39 Sup. Ct. 494, 64 L. Ed. —), and the cause is now on the calendar of the Supreme Court awaiting a hearing, a motion to advance having been opposed by Morosco and having been denied by the Supreme Court.

Under paragraph "Eleventh" of the supplemental agreement, supra, it was provided:

"Eleventh.—Said Morosco is hereby expressly authorized to lease, sublet, assign, transfer, or sell, to any person or persons, firm, or corporation whatsoever, any of his rights acquired under said original agreement or this supplemental agreement; it being expressly understood and agreed that no such leasing, subletting, assignment, transfer, or sale shall in any way release or discharge said Morosco from his personal liability to pay to said J. Hartley Manners the royalties in amounts, manner, and at the time, as specified in said original agreement and in this supplemental agreement."

On December 14, 1918 (a day after the decree dismissing the bill against Manners was filed), Morosco granted to this defendant—

"the exclusive right to reproduce" Peg o' My Heart "in the form of motion pictures or of a photoplay, and to publicly represent and cause to be represented such reproduction in the United States and Canada."

In view of Manners v. Morosco, supra, defendant, so far as appears from this record, is entitled to reproduce the play in motion pictures.

[1] The pendency of the certiorari proceedings between Manners and Morosco does not in any manner act as a stay in this suit between Manners and this defendant. The suggestion that the court, as matter of respect and courtesy, should wait until the Supreme Court shall have decided Manners v. Morosco, is not pertinent.

The production of a motion picture by these defendants will not render moot the question pending in the Supreme Court; for if the Supreme Court should reverse, Manners will have his appropriate remedies against Morosco, and could make this defendant (if the picture were produced) respond to an appropriate accounting.

[2] There is thus left for determination the question arising out of paragraph "Seventh" of the agreement between Manners and Morosco, which reads as follows:

"No alterations, eliminations, or additions to be made in the play without the approval of the author."

This paragraph is not only a part of the original agreement, but, under the terms of the supplemental agreement, with other paragraphs, it was "in all respects ratified, confirmed, and approved." It cannot be held, therefore, that this paragraph Seventh refers only to the spoken play, but, on the contrary, it applies as well to a motion picture reproduction of the spoken play.

At the outset it is necessary to determine the proper construction of this paragraph. It is obvious that a spoken play cannot be literally reproduced on the screen. The screen must convey by pantomimic action and legends, or concise statements, whether by way of narrative or dialogue, the subject-matter and action of the play. Therefore an alteration, elimination, or addition, which is faithfully consistent with the plan and sequence of the play, cannot be held to be an alteration, elimination, or addition prohibited under the seventh paragraph without the consent of the author. On the other hand, the author and playwright, by virtue of the contract expressed in the seventh paragraph, is entitled to the exercise of the veto by that paragraph secured, in respect of any part of the motion picture which constitutes, within the intent of the parties, an alteration, elimination, or addition.

To illustrate: The scene in Westminster Abbey, described in Arnold Bennett's "Buried Alive," might very well be a part of a motion picture, although eliminated in the spoken play known as "The Great Adventure." Klein v. Beach (D. C.) 232 Fed. at page 246. Any person, seeing the picture, would realize that such a portrayal of Westminster Abbey would probably not be practicable in the spoken play, and yet the Westminster Abbey scene might very well be not construed as an addition or alteration, because of the reference to it in the dialogue of the play.

In the case at bar the scene of the play is confined to the Chichester house at Scarborough, England. The plot and incidents of the play are so familiar to the litigants and counsel that, in the interest of brevity, it is unnecessary to set them forth in this opinion. Early in the play the fact of the death of Kingsworth, the uncle of the heroine, is made known, and the solicitor also describes the provisions of Kingsworth's will. In the motion picture an imaginary scene is displayed, in which Kingsworth is making his will, and in which Jerry (Sir Gerald Adair), the hero of the play, and the solicitor are present. One of the valuable features of the play is the mystery surrounding Jerry's identity, and the fact that he is one of the executors of the Kingsworth will. This feature of surprise is eliminated from the motion picture, whereas in the play it is well concealed, and the fact that Jerry is an executor does not become known until almost the end of the play.

The question before the court is not whether this order or sequence in the motion picture is as good or better than the order or sequence of the play. The point is that it is such an alteration as, under the seventh paragraph, could not be made without the consent of the author. In the motion picture there would be no doubt in the mind of

the audience from the start as to who Jerry is, and there is very little doubt, if any, as to what will happen. One of the most important factors in any play is the suspense. To attain this method and result successfully involves one of the problems of play writing, and not infrequently a play fails because the audience learns too early what the end will be, and what part or relation each actor bears to the ultimate climax or denouement. This element of surprise has been admirably done in the spoken play by plaintiff, and no doubt was one of the reasons contributing to the remarkable success of the play. A different situation might have been presented, if the play opened in the manner devised by the plaintiff, and if, in the course of the dialogue between the solicitor and the Chichesters, the screen had interpolated a scene showing the making of the will, but eliminating Adair therefrom to such extent, at least, as would not disclose his identity.

In the motion picture the so-called English-Irish controversy is emphasized quite out of proportion to the references in the spoken play. In the play, Peg's references to her father are incidental to a portrayal of her own character and her devotion to her father. The play has no political purpose or significance. In the last analysis, it is a charming, clean love story, with a whimsical, wholesome young girl as the heroine, and a manly, aristocratic young Englishman as the hero. Indeed, plaintiff opens his play book with the quotation:

> "Oh, there's nothing half so sweet in life
> As Love's young dream."

One of the contrasts developed in the play is that of a young girl whose father was of Irish birth, and whose mother was English, and who had lived part of her life in America, suddenly coming to the surroundings of an English home. This contrast is the means of introducing some of the comedy of the play, and, naturally, some of its dramatic interest. In the play the girl comes from America. In the motion picture she comes from Ireland. This departure is adopted probably in order to give opportunity for the picture to display various scenes in Ireland. Some of these scenes are very attractive, especially the peasant scenes, and would, no doubt, be pleasing to the spectator; but most of them are foreign to the theme of the play, and are in no way needed to illustrate the action of the play. Certain pictures are introduced which do not appear in the play and delay the action of the story. One of these is the scene of Peg with her tutor, and the unnecessary introduction of a scene from Antony and Cleopatra.

It is impractical to analyze the motion picture, scene by scene, and compare it with the spoken play. The writer of the scenario evidently had in mind the kind of presentation which pleases the audience of a motion picture play, and to that end departed from the sequential expeditious course of the spoken play. To illustrate that it is not necessary to follow the play literally, I may observe that I should not regard the ballroom scene in the picture as in violation of paragraph seventh. This scene, which forms a pleasant picture, does not detract from the theme or continuity of the story, and, if anything, might be regarded as a helpful illustration.

But the point is that, in view of the fact that the parties contracted as set forth in the seventh paragraph, there cannot be a substantial deviation from the locus of the play or the order and sequence of the development of the plot. If these substantial features are retained, then such pictures as may be necessary to explain the action of the play, and as may be necessary in substitution for dialogue, may be entirely proper, and not in violation of the seventh paragraph. The case is probably sui generis, for doubtless in most contracts the producer will insist upon a reasonably free hand, if he intends to reproduce the play in motion pictures.

For the reason, therefore, that the provisions of paragraph Seventh have not been adhered to, plaintiff is entitled to a decree restraining the production of the motion picture in question.

Submit decree on three days' notice.

HEATH v. PORT OF PARA et al.

(District Court, S. D. New York. January 29, 1920.)

CORPORATIONS ⇐474—PLEDGEES OF BONDS HELD "BONDHOLDERS" AND ENTITLED TO VOTE AT A MEETING OF SAME.

Under the terms of a deed of trust securing an issue of corporation bonds, pledgees of bonds pledged by the corporation to secure its own debts *held* "bondholders," and entitled to vote at a meeting of bondholders held pursuant to provisions of the deed of trust to determine future action.

In Equity. Suit by George B. Heath against the Port of Para, the National Trust Company, Limited, as trustee, and the Empire Trust Company, as trustee. On application of the Empire Trust Company, trustee, for instructions.

This is an application by Empire Trust Company, as trustee, as to the course to be pursued at the meeting of the holders of bonds issued under the deed of trust of which Empire Trust Company is trustee, in respect of the acceptance of votes by or on behalf of bonds issued under said deed of trust pledged by defendant Port of Para, and for other and appropriate relief.

The Empire Trust Company is the trustee under what is known as the second division deed of trust, dated March 1, 1909, and made by defendant Port of Para to secure an issue of £5,000,000 of 5 per cent. 60-year bonds, hereinafter referred to as second division bonds. Bonds of the par value of £4,996,000 have been certified by the trustee and issued by Port of Para. Of these there have been £3,736,089 par value issued to the public and £1,259,911 issued as security for loans to the following named companies or corporations:

Bank of Scotland	£312,000
Madeira-Mamoré Railway Company	156,000
Para Construction Company, Limited	156,000
Société Générale and Banque de l'Union Parisienne, jointly	635,911
	£1,259,911

In due course and in accordance with the provisions of the deed of trust, a meeting of the holders of the second division bonds is about to be held, and at such meeting various resolutions will be submitted, which, to be effectively passed, will require certain majorities of said holders of bonds. The meeting in question is expected to deal with important matters involving the future of

the Port of Para, as well as the financial arrangements and relations of said corporation with its creditors, whether bondholders or otherwise.

The defendant Port of Para takes the position that it desires that the holders of the pledged bonds shall vote said bonds, if such course is proper, and calls attention to the fact that, if the bonds were reduced to possession, the result would involve considerable loss to defendant Port of Para. The French bank creditors who hold the bonds, in order to assist the reorganization or readjustment of the financial affairs of defendant Port of Para, prefer to continue the present status, if they have the right to vote on the pledged bonds at the meeting above referred to. Some changes apparently have taken place in respect of the holdings of the Bank of Scotland, but a decision in regard to the status of these creditor banks which have appeared will govern all similarly situated.

Masten & Nichols, of New York City, for plaintiff.

Olin, Clark & Phelps, of New York City (W. G. Murphy, Jr., of New York City, of counsel), for defendant Empire Trust Co.

Sullivan & Cromwell, of New York City (William Nelson Cromwell and Philip L. Miller, both of New York City, of counsel), for respondents Banque de l'Union Parisienne and Société Générale pour Favoriser la Developement du Commerce et de l'Industrie en France, appearing specially, and for defendant Port of Para.

David T. Davis, of New York City, for defendant Madeira-Mamoré Ry. Co.

George W. Schurman, of New York City, for National Trust Co., appearing, but not participating.

MAYER, District Judge (after stating the facts as above). The meeting which is about to be held will be conducted according to what is known as "the second schedule," attached to and a part of the deed of trust. This is a form of procedure familiar in English deeds of trust, whereby a meeting of bondholders is held and such meeting conducted generally in accordance with procedure outlined in the deed of trust.

The deed of trust securing these second division bonds defines the expressions "the bonds" and "the bondholders" as follows:

"'The bonds' means the bonds of the company of each and every series issued hereunder and for the time being outstanding and entitled to the benefit of the security hereby created. 'The coupons' means the interest coupons attached to the bonds.

"'The bondholders' means the bearers for the time being of the bonds, or the registered holders for the time being if the bonds be registered under the provisions of these presents."

It is undisputed that Port of Para had the right to raise money by way of pledging its bonds, as well as by way of selling them. Worth v. Marshall Field & Co., 240 Fed. 395, 397, 153 C. C. A. 321; William Firth Co. v. South Carolina Loan & Trust Co., 122 Fed. 569, 573, 59 C. C. A. 73. The deed of trust specifically contemplates such use of its bonds. Paragraph 32 provides as follows:

"32. Should the company pledge any bonds secured hereunder or otherwise deliver or deposit any bonds so as to entitle the company to redeem or get back the same and should the company redeem or get back the bonds so pledged or otherwise delivered or deposited then the company may from time to time *reissue* the same or any of them or surrender to the trustee for

cancellation the said bonds or any of them and the trustee shall cancel the same and shall certify and deliver to the company or its order an amount of bonds secured hereunder equal to those canceled and the last-mentioned bonds or the bonds so reissued shall be secured hereby equally with all other bonds issued or to be issued hereunder and without preference or priority one over another *and the holders thereof from time to time shall be bondholders hereunder* and shall be entitled to all the rights security and advantages given hereby."

It is to be noted that there is a specific provision that bonds redeemed from pledge may be "reissued." This shows that bonds issued by way of pledge are lawfully issued and outstanding bonds of the company. The provision that bonds so reissued shall be secured equally with all other bonds issued or to be issued, and that the holders thereof shall be bondholders, was clearly inserted (the mortgage being largely in the English form) in order to avoid the result of the decision in In re Perth Electric Tramways, Ltd., [1906] 2 Ch. 216, in which it was held that debentures which have been issued by way of pledge to secure a debt of the issuing company cannot be reissued after having been redeemed from the pledge.

The deed of trust nowhere makes any distinction whatever between pledgees of the bonds from the company and purchasers of bonds from the company. From the intent to be gathered from the whole structure of the instrument, and applying familiar rules of construction, it seems plain that in such circumstances as are here disclosed, a pledgee from the company of its own bonds was intended to be a bondholder within the meaning of the word "bondholder" as defined in the deed of trust. If the contrary had been the intention, the word "owner" or some other apt word could have been used.

Under the provisions of the deed of trust as appropriately construed, there is no reason why there should not be accorded to the holder of a corporate bond, who, as here, holds such bond "by way of pledge from the issuing corporation for the corporation's own debt" every right of a bondholder consistent with the right of the corporation to redeem. Both purchasers and pledgees of bonds from the corporation are creditors secured by the security of the bonds, and where voting rights are given to the bonds, and thereby it is intended to confer on the bondholders the power to deal with the security by majority vote, pledgees of this character of pledge are equally interested with purchasers in having a voice in dealing with the security in question.

It is plain that the corporation in such circumstances would not have the power to vote, and it may fairly be assumed that it was intended that the voting power should reside somewhere, and there is no reason why this voting power should not be possessed by a pledgee, where the pledge is of the character hereinabove described.

It is unnecessary, for purposes of decision in this case, to determine what the rights of a pledgee would be who holds a collateral pledge in the ordinary course of business under some familiar form of collateral note, nor is it necessary to determine the rights of a pledgee of corporation stock pledged by a corporation to secure its own debt. Yet, while the precise question here under consideration has perhaps not been the subject-matter of judicial decision, the view

here expressed seems to be supported, to some extent, at least, either directly or inferentially, by Vail v. Hamilton, 85 N. Y. 453, and Burgess v. Seligman, 107 U. S. 20, 2 Sup. Ct. 10, 27 L. Ed. 359. In Brewster v. Hartley, 37 Cal. 15, 99 Am. Dec. 237, the case went off, among other grounds, on the point that the company had no right to pledge its stock. In Thomas v. International Silver Co., 72 N. J. Eq. 224, 73 Atl. 833, the case arose under a New Jersey statute (P. L. 1896, p. 277, § 38) which prohibited corporations from voting their stock directly or indirectly, in certain circumstances.

It must be remembered that a pledgee of bonds of a corporation pledged by the corporation to secure its own debt is not a trustee. In voting on such bonds the owner thereof is not voting directly or indirectly for the corporation. When he votes on such bonds, he is voting like any other creditor in his individual interest and to protect his individual debt.

As the character of the meeting of bondholders to be held in pursuance of the provisions of the deed of trust is, among other things, to give the bondholding creditors of the corporation full opportunity to determine by appropriate vote what their future financial relations with the corporation shall be, it is well within the intent of the deed of trust and its whole procedural plan that the holders of bonds pledged as these were, should have every opportunity to vote in the same manner as the outright owners of bonds have their rights.

Such a course, in my opinion, safeguards the rights of all concerned, does no injustice to the other bondholders, and prevents an unnecessary and perhaps heavy loss to the corporation which would occur if the pledgees, in order to assert their rights, were compelled to reduce the bonds to possession.

In view of the foregoing conclusions, the trustee is instructed to accept the vote of the owners of these pledged bonds at the meeting to be held. In order, however, to avoid any question which might result, if these votes were not separately counted or tallied, the trustee is instructed to keep a record of the votes cast by the owners of the pledged bonds referred to.

An order will be filed in accordance herewith.

THE FRANKMERE.

(District Court, E. D. Virginia. February 12, 1920.)

No. 2034.

SHIPPING ⊂=51, 58(1)—EFFECT ON CHARTER OF REQUISITIONING FOR WAR PURPOSES.

The requisitioning and taking over by the British government early in the war of a British ship, then under a three-year time charter containing the usual restraint of princes clause, *held* to terminate the charter, and the charterer *held* not entitled to damages for breach of charter, nor to recover the excess of hire received by the owner from the British government over the charter rate.

In Admiralty. Suit by the Gans Steamship Line against the steamship Frankmere and the Palace Shipping Company, Limited, as claimant. Decree for respondents.

Haight, Sandford & Smith, Edward Sandford, and Warton Poor, all of New York City, and Hughes, Little & Seawell, of Norfolk, Va., for libelant.

Kirlin, Woolsey & Hickox and John M. Woolsey, all of New York City, and Hughes, Vandeventer & Eggleston, of Norfolk, Va., for respondents.

Frederic R. Coudert and Howard Thayer Kingsbury, both of New York City, for British Embassy, as amici curiæ.

WADDILL, District Judge. The libel in this case was filed to recover damages for alleged breach of a charter party entered into between the Palace Steamship Company, Limited, owner of the British steamship Frankmere, and the libelant, under the following circumstances:

On the 28th day of October, 1913, in the city of New York, the Palace Steamship Company chartered under the ordinary time charter, for a period of 3 years from the delivery of the steamer, at the rate of £1,600 per month, less 2½ per cent. address commissions, making the net amount payable by the charterers for its use the sum of £1,560 per month. The steamship was delivered on the 30th of November, 1913, and the charter party provided that the charterers should have an option of 45 days more or 45 days less than the 3-year period in order to round up voyages. The flat 3-year period expired November 30, 1916, and under the overlap of the original charter party the charterers would have had the right, under their option, to keep the vessel 45 days longer, as above mentioned. The ship entered at once in the transatlantic trade on November 30, 1913, and so continued from that date until the 4th day of May, 1915, when she was requisitioned by the British admiralty. On the 7th day of May, 1915, upon coming out of dry dock at Genoa, over the protest of the libelant, duly made to the respondent, the ship was formally taken possession of by the British government, and thenceforth continuously

used by it in the then pending war, for a period subsequent to the expiration of the life of the charter.

The libelant claims, in effect, that the ship was taken possession of by the government, with the assent of the owner, and over the libelant's protest, and that as a result heavy damages were sustained by the libelant, the charter hire of vessels having immensely increased after the charter party was entered into, and that for the 20 months and 6 days that it was deprived of the use of the ship, it would have received a charter rate of £6,397 per month, and was accordingly damaged to the extent of £4,797 per month, or £96,896 sterling, or its equivalent in United States money of $465,110, at least, and for the recovery of which this libel was filed. Libelant moreover urges in argument that during the remainder of the charter period, after the requisition by the government, the respondent operated the ship under the requisition for the benefit of the libelant, subject to the payment of the regular charter hire, which libelant tendered to the respondent; its claim being that the difference between said amount and that paid by the government belonged to the charterer, and was the least amount for which a recovery should be had.

The charter party in question contained the usual "restraint of princes" clause, as follows:

"20. The act of God, the king's enemies, epidemics, pirates, ice, blockade of rivers, robbers by land or sea, restraint of Princes, rulers or people, perils of the sea, collisions, strandings, patent defects in the hull, boilers, machinery or appurtenances, loss or damage from machinery, boilers, or steam, or from explosions, heat or fire on board, in the hulk of the craft, or shore, jettison, barratry, any act, neglect or default whatsoever of pilots, master or crew in the management or navigation of the ship, and all and every danger and accident of the sea, rivers and canals or navigation of whatever nature or kind are excepted throughout this charter."

The question presented turns upon (a) whether or not the ship was commandeered, as contemplated by this provision of the charter party; and (b) what effect such commandeering had upon the contractual relation of the parties.

Considering the first proposition, the suggestion is made that the vessel was taken by the British government with the consent, if not the connivance, of the owners; that the commandeering was not legally made, and that the ship could not have been lawfully taken at Genoa, outside of the dominion of the British government, and within the 3-mile limit of the Italian coast. Neither of these positions appear to the court to be well taken. In the first place, while doubtless, having regard to the hazardous exigencies of the existing war period, the owners may have been willing that their ship should be commandeered, still the testimony does not warrant the inference that anything improper was done in this respect on their part, further than arose from their surrendering the vessel when demanded by the constituted authorities. At the time, its resistance, either from a business, sensible, or a patriotic standpoint, could not have been thought of for a moment.

The taking of the vessel by the government, under the facts and circumstances of this case, seems to have been in all respects lawful

and complete, without any bad faith on the part of the owner, and the same occurred at a time when there was every indication that the commandeering was for the period at least covered by the life of the charter, and which the result proved. As to the taking of the vessel at Genoa, while technically the government might not have been able to enforce its decrees and orders as long as the ship remained in harbor there, still she could never have left there, without, upon reaching the high seas, being immediately seized and taken. Had this course been pursued, the charterer's interest would not have been promoted, and the owners, in every probability, would have received nothing whatever from the use of the ship.

Considering the effect of the commandeering upon the rights of the parties under the charter, in the light of the excepting vis major clause therein, and whether there was a frustration of the contract, it may be said that the same is not free from doubt, and that much contrariety of opinion exists in the authorities on the subject. Two recent decisions in cases of breach of charters party, arising during the recent war and under circumstances substantially as here, one by Judge Learned Hand, of the Southern district of New York, in the case of Earn Line S. S. Co. v. Sutherland S. S. Co., Ltd., 254 Fed. 126, and the other by Judge Rose, of the Maryland district, in The Isle of Mull, 257 Fed. 798, have been recently rendered. The courts are directly at variance; Judge Rose holding that the charterer is entitled to the advanced hire during the life of the charter, and Judge Learned Hand taking the contrary view.

To these two opinions, as well as to the authorities therein cited, special reference is made, as containing great learning and throwing much light upon the question. Judge Rose, in an exceedingly vigorous and able opinion, strongly adheres to the view that pending the life of the contract, any advance in rates arising from the taking of the ship, should belong to the charterer, as distinguished from the owner. The equity of this position cannot well be gainsaid, certainly in many cases. Having relation, however, to the status of the parties, the court cannot accept this view. Their rights should be determined in the light of their relation under the contract, having regard as well to what might have taken place thereunder, assuming the view contended for to be correct, as to what actually occurred. The respondent was the owner of the vessel; the libelant had no right to or interest in her, save as arose under the terms of the contract. Anything that lawfully put an end to the contract terminated the libelant's rights thereunder, and such an event was, in terms, contemplated and provided for in the contract. Each party, in entering into it, was anxious to have just such a vis major clause as this one contained, looking to possibilities or eventualities which might arise thereafter.

The wisdom, if not the necessity, of such a clause all recognize, and was strikingly illustrated here. Before half of the term of the contract had expired, the most frightful war theretofore known had broken out, in which much of the world was engaged, and especially the country of the shipowner, its very existence being seriously imperiled,

and the restraint of princes clause, providing for the termination and annulment of the contract in such contingency, became acutely of the essence of the contract. The state of the war at that time, and the condition of the country and of the world, made it manifest to both parties that the commandeering would continue long past the life of the contract. This it actually did, and the contract was thereby frustrated when the government took possession of the ship, and the rights of the charterer were absolutely ended and terminated, and those of the owner, subject, however, to the paramount power of the government to use the ship, without consulting the desire of the owner, revived, as though the charter had never been entered into. It so happens that the government did pay a much higher requisition rate than the owner was to receive under the charter party, but that was a mere coincidence. It might just as readily have been less, or indeed nothing at all; and, as seen, the owner was dispossessed of his property without his consent, or consultation with him as to its worth or value, and it should not, because it happened to be more than was actually received from the charterer, be required to give the excess to one whose interest therein, or contractual relations therewith, had been terminated.

No one would say, had the government paid less hire than the owner had been receiving, that the charterer could have been held for the difference. Nor can it be successfully claimed that, if the commandeering had not continued during the life of the contract, the charterer could either have been required to complete the contract for the unexpired term or pay the owner the hire therein provided for. The charterer's rights in the res existed only by virtue of the charter party. One whose rights have been terminated, as here, cannot be heard to complain of any inequity or injustice that arises. The happening of the very thing that occurred was anticipated in the making of the contract. In this instance, charter rates had increased; but had they decreased, and the government had chosen to seize the vessel, as it did here, the charterer would have been the only person that could have protected itself from the disastrous consequences of such a situation, as it might have gone upon the market and hired tonnage at a much cheaper rate; whereas the owners would have been entirely at the mercy of the government, in what it chose to pay.

No general discussion or citation of authorities will be entered upon, save to refer to the decisions of Judges Hand and Rose, supra, and to the cases cited by them; the court's opinion being, under the circumstances here, that the charter party was frustrated, and the rights of the libelant thereunder terminated.

The court's conclusion is that the libelant is not entitled to recover in this case, whether its claim be treated as for damages generally for breach of the contract, or specifically for the excess paid by the government to the owner, over and above the sum the respondent would have received from the libelant, and accordingly the libel should be dismissed.

SIMSON et al. v. KLIPSTEIN.

(District Court, D. New Jersey. January 30, 1920.)

1. PARTNERSHIP ⊂⊃20—WHETHER ASSOCIATION IS TRUST OR PARTNERSHIP DEPENDS ON INSTRUMENT CREATING IT.
Whether an association is a trust or partnership depends on whether the instrument creating it vests the power to control its management. Where such power is in trustees it is a trust, but where vested in the shareholders it is a partnership, without regard to whether or not they have ever exercised such power.

2. PARTNERSHIP ⊂⊃20—ASSOCIATION HELD PARTNERSHIP.
An association formed under articles providing that the legal and equitable title to all property should be in two trustees, with power to carry on business, make contracts, and buy and sell property, but that the beneficial interest should be in certificate holders, who were given power to amend or change the articles, *held* a partnership.

3. PARTNERSHIP ⊂⊃198—RIGHT TO SUE BY AGENT.
Where the articles of an association constituting a partnership named two trustees, in whom was vested the legal and equitable title to all property, with general power to buy and sell, such trustees *held* agents of the partners, who were certificate holders, and entitled under the law of New Jersey to maintain a suit in their own name on behalf of the association relating to its property.

4. COURTS ⊂⊃311—CITIZENSHIP CONFERRING JURISDICTION ON FEDERAL COURT.
Jurisdiction of a federal court on the ground of diverse citizenship depends on the personal citizenship of the parties to the record, and not on the citizenship of the persons whom they represent.

At Law. Action by Leslie N. Simson and George W. Hunter, trustees, against Ernest C. Klipstein. On motion to dismiss for want of jurisdiction. Denied.

McCarter & English, of Newark, N. J., for plaintiffs.
Frederick Seymour, of New York City, and Borden D. Whiting, of Newark, N. J., for defendant.

DAVIS, District Judge. Defendant in the above-stated cause moved to dismiss the same on the ground that this court is without jurisdiction because one of the necessary parties plaintiff and the defendant are both citizens of the state of New Jersey. The defendant further asks permission to take testimony to establish the citizenship of the said necessary party and for an order adding the name of said party plaintiff to the complaint.

[1] On March 15, 1916, the plaintiffs, Simson and Hunter, by an instrument purporting to be a declaration of trust, called "Articles of Association of Midvale Chemical Works," established a proposed trust and constituted themselves trustees thereof. Their plan contemplated that, as trustees of the Midvale Chemical Works, the name of the proposed trust, persons would give to them money, in return for which they would issue certificates entitling the holders thereof to share in the profits resulting from their management of the enterprise upon which they were to embark with said money. The certifi-

cate holders were the beneficial owners of the money contributed by them, in that they were to share in the profits earned and in the final distribution of the assets of the association, in accordance with the terms of the articles of association. According to said terms, however, the legal and equitable title to the property is vested in the said trustees.

The trustees purchased at Elizabeth, N. J., some considerable real estate and established and operated a factory thereon, wherein aniline oil, etc., was manufactured. On May 31, 1917, the "Midvale Chemical Works, by George W. Hunter, Leslie N. Simson, trustees," entered into an agreement with the defendant for the sale to him of said real estate and factory for the sum of $150,000, and also for the personal property, including the raw materials on hand, an inventory of which, the plaintiffs allege, showed it to be worth about $45,000 in addition. The defendant entered into possession of the property, but it developed that the said trustees could not give a clear title to the real estate and the defendant refused to accept a deed for the same. During the time title to said real estate was being determined by litigation in the Court of Chancery of New Jersey, the defendant continued in possession of the property and operated the factory. For his alleged failure to pay for the personal property and raw materials, for his refusal to remove from the premises at the termination of the litigation in accordance with the terms of an agreement entered into while litigation was going on, and for damages alleged to have been done to the said property while in possession of defendant, plaintiffs brought this action against him to recover the sum of $141,870.78. The defendant is before this court on motions as aforesaid.

Whether or not an association is a trust or partnership depends upon the instrument creating it. Real estate trusts, such as this claims to be, have arisen principally in Massachusetts and Missouri. Upon a careful examination of the articles of association of the Midvale Chemical Works and of the cases bearing upon this question, I am of the opinion that the Midvale Chemical Works is a partnership. The test is the power of control of the management of the association. If the certificate holders have the power of control, the association is a partnership; if they have not, and the power of control is in the trustees, it is a trust. "The distinction," said Judge Morton, in the case of In re Associated Trust (D. C.) 222 Fed. 1012, "between the two turns upon the provisions of the trust agreement or declaration. In cases where by the declaration of trust, the shareholders are given substantial control of the management of the trust property, the trust is held to be a partnership; in cases where shareholders have no such control, the trust is held, for the purposes of taxation, to be of the same sort as the usual testamentary trust, and not to be a partnership." Hoadley v. County Commissioners, 105 Mass. 519; Whitman v. Porter, 107 Mass. 522; Gleason v. McKay, 134 Mass. 419; Phillips v. Blatchford, 137 Mass. 510; Ricker v. American Loan & Trust Co., 140 Mass. 346, 5 N. E. 284; Mayo v. Moritz, 151 Mass. 481, 24 N. E. 1083; Williams v. Boston, 208 Mass. 497, 94 N. E. 808; Williams

v. Milton, 215 Mass. 1, 102 N. E. 355. In the last case cited, Judge Loring, in distinguishing the cases, said the difference—

"lies in the fact that in the former cases the certificate holders are associated together by the terms of the 'trust' and are the principals whose instructions are to be obeyed by their agent, who for their convenience holds the legal title to their property. The property is their property. They are the masters. While in Mayo v. Moritz, on the other hand, there is no association between the certificate holders. The property is the property of the trustees, and the trustees are the masters. All that the certificate holders in Mayo v. Moritz had was a right to have the property managed by the trustees for their benefit. They had no right to manage it themselves, nor to instruct the trustees how to manage it for them. As was said by C. Allen, J., in Mayo v. Moritz, 151 Mass. 481, 484 [24 N. E. 1083]: 'The scrip holders are cestuis que trust, and are entitled to their share of the avails of the property when the same is sold,' and that is all to which they were entitled. In Mayo v. Moritz the scrip holders had a common interest in the trust fund in the same sense that the members of a class of life tenants and the members of a class of remaindermen (among whom the income of a trust fund and the corpus are to be distributed respectively) have a common interest. But in Mayo v. Moritz there was no association among the certificate holders just as there is no association, although a common interest among the life tenants or the remaindermen in an ordinary trust."

It was held in New Jersey that the mere sharing in profits would make persons partners as to third parties, even though there was no intention to become partners. Sheridan v. Medara, 10 N. J. Eq. 469, 64 Am. Dec. 464; Voorhees v. Jones, 29 N. J. Law, 270. Later this rule seems to have been modified, so that profit sharers must have the power of control, in order to constitute them partners. Wild v. Davenport, 48 N. J. Law, 129, 7 Atl. 295, 57 Am. Rep. 552. It is not necessary that the power of control should be actually exercised for partnership to exist. It is sufficient if the power is given, though never exercised. In re Associated Trust (D. C.) 222 Fed. 1012, supra. This would follow as a necessary corollary from the statement that whether or not a partnership exists, rather than a trust, depends upon the terms of the creative instrument, the trust declaration, for it could not be determined from the examination of such instrument whether or not the power given by it had been exercised.

[2] Power of control in the case at bar is given to the certificate holders in the articles of association. By articles X and XI a meeting may be called at any time, and the certificate holders may amend any and all of the articles of the association, except in three particulars, not essential to the substantial control of the association or the management of the property thereof. In article II, it is provided that:

"The trustees shall have the power to contract and carry on in the name of and for the association any business which could be lawfully conducted or carried on by an individual, and, in the conduct of such business, may use and invest any funds of the association and shall have full general power and authority to buy, sell, pledge, mortgage, grant, convey and exchange property of every description, real, personal or mixed," etc.

Suppose at one of their meetings provided for in article XI, the certificate holders should pass a resolution amending article II, line 1, by striking out the word "trustees" and substituting in lieu thereof

the words "certificate holders," the trustees would be practically stripped of their control and operation of the enterprise.

In article XXI, it is provided that:

"The trust here created shall terminate at the expiration of 21 years after the death of the last survivor of the above named trustees," etc.

If in one of their said meetings the certificate holders should pass a resolution amending the said article, so that the trust should terminate forthwith, the trustees would be powerless and the trust would come to an end. The trustees have no vote in such matters, nor have they, so far as the facts before me disclose, any capital of their own in the enterprise to protect. It is evident that the power of control of the management is in the certificate holders, and may at any time be exercised by them, notwithstanding any opposition the trustees might offer. The certificate holders are associated together by the terms of the creative instrument. The association is therefore a partnership, and not a trust.

[3] Does it thereupon follow, as contended by the defendant, that the names of the certificate holders should be added as parties plaintiff, one of whom, it is alleged, is a citizen of New Jersey, which fact ousts this court of jurisdiction? It should be noted that the association is a partnership, the certificate holders themselves being the partners, and not, as defendant seemed to think, partners with the trustees, who are not certificate holders. There is, therefore, no trust here, and strictly speaking no trustee. The so-called trustees represent the certificate holders. The certificate holders are principals, and the trustees, the plaintiffs, are their mere "managing agents." By whatever name, however, they are designated, there can be no doubt that they have full authority to represent the certificate holders and bind them in all transactions touching the property. It will be recalled that by article II the "trustees" "have full general power and authority to buy, sell, pledge, mortgage, grant, convey, and exchange property of every description, * * * and do all things necessary to the conduct of the business which they may undertake." It is further provided in article IV that:

"The trustees shall be deemed the absolute owners of all the property of the association and both the legal and equitable title to all such property shall be vested absolutely in them."

The defendant in all his dealing with the plaintiffs, has regarded and accepted them as accredited authoritative agents of the certificate holders, with full power to deal as they pleased with the property contributed by said certificate holders. That the present plaintiffs are the proper parties plaintiff in a suit in equity in New Jersey touching said property was decided in the case of Simson et al. v. Klipstein, 88 N. J. Eq. 229, 102 Atl. 242. The parties plaintiff and defendant were the same in that case as in the instant case and the same questions which are raised here as to proper parties were raised there, and decided against the defendant. In view of the powers conferred upon the so-called trustees or "managing agents" by the articles of the association,

the recognition by the defendant of their full and unquestioned authority of the association, and the decision of the Court of Chancery of New Jersey holding that the plaintiffs are the proper parties plaintiff in a suit touching said property, I am of the opinion that Simson and Hunter are proper parties plaintiff, and have full power and authority to represent the certificate holders in this proceeding.

[4] It is settled that the jurisdiction of federal courts depends upon the personal citizenship of the parties to the record, and not upon the citizenship of the parties whom they represent. Memphis St. Ry. Co. v. Bobo, 232 Fed. 708, 710, 146 C. C. A. 634. To put it in another way, representatives may stand upon their own citizenship in federal courts, irrespective of the citizenship of the persons whom they represent—such as executors, administrators, guardians, trustees, receivers, etc. The evil which the law, prohibiting the creation of federal jurisdiction by assignments, intended to obviate, was the voluntary creation of federal jurisdiction by simulated assignments made for that sole purpose. But assignments or conveyances by operation of law creating legal representatives are neither within the mischief nor reason of the law. New Orleans v. Gaines, Administrator, 138 U. S. 595, 606, 11 Sup. Ct. 428, 34 L. Ed. 1102; Mexican Central R. R. Co. v. Eckman, 187 U. S. 429, 434, 23 Sup. Ct. 211, 47 L. Ed. 245. The plaintiffs are "managing agents," having the legal and equitable title to the property in question, and are proper parties to the record, and so come within the above exception.

It appears from the complaint that Simson is a citizen of New York, and Hunter of Missouri, while the defendant is a citizen of New Jersey. This cause of action, therefore, being a controversy exceeding, exclusive of interest and costs, the sum or value of $3,000, is properly in this court, and the motions of the defendant are denied. The defendant may have 20 days, after the entry of order, within which to answer.

In re WELDON.

(District Court, N. D. Iowa, Cedar Rapids Division. January 14, 1920. Supplemental Order, February 2, 1920.)

No. 943.

1. BANKRUPTCY ⟸410—TIME FOR FILING APPLICATION FOR DISCHARGE.
Under Bankruptcy Act, § 14a (Comp. St. § 9598), a court of bankruptcy is without jurisdiction to grant a discharge on an application therefor filed more than 18 months after adjudication, unless such time is extended because of bankrupt being in the military service, under Act March 8, 1918, § 205 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 3078¼e).

Supplemental Order.

2. BANKRUPTCY ⟸410—TIME FOR FILING APPLICATION FOR DISCHARGE; EFFECT OF SOLDIERS' RELIEF ACT.
That bankrupt's attorney entered the military service and turned over the case to another attorney, who neglected to file application for discharge until more than 18 months after adjudication, *held* not to vest the court with jurisdiction to entertain it by virtue of Soldiers' and Sailors' Civil Relief Act March 8, 1918, c. 20, § 205 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 3078¼e).

In Bankruptcy. In the matter of Patrick Weldon, bankrupt. On application for leave to file petition for discharge. Referred.

J. M. Dower, of Marengo, Iowa, for bankrupt.

REED, District Judge. The application by the bankrupt for leave to file a petition for discharge recites:

"That the bankrupt was adjudicated a bankrupt in this court on the 14th day of March, 1918; that within the last month he presented to the referee in bankruptcy an application for discharge, but the referee refused to file the same, because it was not presented within 12 months after the adjudication."

[1] This application is signed and sworn to by the attorney for the bankrupt on the 25th day of September, 1919, and is indorsed, "Filed September 27, 1919, by J. C. Stoddard." The original petition is signed by the bankrupt on August 21, 1919, and appears to have been verified by him before a notary public on that date. When it was filed with the clerk, if at all, does not appear, but appears to have been filed with the referee on the 7th day of October, 1919. If filed on the 25th or 27th day of September, 1919, both of these dates would be more than 18 months after March 14, 1918, the date of the adjudication. Twelve months after the adjudication would expire on March 14, 1919, and 6 months after that date would be September 14, 1919, and the earliest date the petition seems to have been presented to or filed with the deputy clerk, if at all, was September 25 or 27, 1919, which is more than 18 months after the adjudication.

Section 14a of the Bankruptcy Act reads in this way:

"Any person may, after the expiration of one month and within the next twelve months subsequent to being adjudged a bankrupt, file an application for a discharge in the court of bankruptcy in which the proceedings are pending;

if it shall be made to appear to the judge that the bankrupt was unavoidably prevented from filing it within such time, it may be filed within but not after the expiration of the next six months." (Comp. St. § 9598.)

When must the bankrupt file his petition for a discharge to be entitled to the benefit of the Bankruptcy Act? This question was answered in Re Walters (D. C.) 209 Fed. 133, as follows:

"After the expiration of one month and within the next 12 months" after the adjudication, and if prevented for unavoidable reasons from so doing within said 12 months, then within the next 6 months thereafter, thus making the 12 months period begin, "not from the date of the adjudication, but from the expiration of one month thereafter."

If this is correct, then the bankrupt for unavoidable reasons may file his application within 1 month after the expiration of 18 months from the date of the adjudication, or within 19 months thereafter. In that case the adjudication was on September 18, 1912, the application for discharge was filed on October 6, 1913, more than 1 year after the adjudication, but within 1 month thereafter. There was a showing of unavoidable delay in filing the petition, but without determining whether or not that showing was sufficient the court allowed the application to stand and set the same for hearing, thus allowing the petition for discharge to be filed after the expiration of 12 months from the date of the adjudication without a showing of unavoidable reasons for not filing it within the 12 months. The decision holds, correctly as we think, that the application may be filed as of right only after the expiration of one month, and within the next 12 months subsequent to the adjudication, but holds that such 12 months period dates not from the adjudication, but from the expiration of 1 month thereafter. That the 12 months period dates from the adjudication is clear, I think, from the language of the act, which reads:

"If it shall be made to appear to the judge that the bankrupt was unavoidably prevented from filing" the petition "within such time [obviously the twelve months period], then it may be filed within, but not after the expiration of, the next 6 months"—meaning obviously within 18 months after the adjudication, and not one month.

In Re Fahy, 116 Fed. 239, Judge Shiras, of this district, held that after the expiration of 18 months from the date of the adjudication the court is without jurisdiction to entertain a petition for the bankrupt's discharge. This view is followed in Re Wagner, 139 Fed. 87, by Judge Hawley in the district of Nevada, wherein he cites In re Wolff (D. C.) 100 Fed. 430; In re Knauer (D. C.) 133 Fed. 805; In re Anderson (D. C.) 134 Fed. 319; In re Lewin (D. C.) 135 Fed. 252; Kuntz v. Young, 131 Fed. 719, 65 C. C. A. 477. See, also, In re Daly (D. C.) 205 Fed. 1002, and In re Daly (D. C.) 224 Fed. 263, all of which hold to the same view. Kuntz v. Young, above, was decided by the Court of Appeals of this circuit.

The application for leave to file petition for discharge recites:

"Your petitioner, Patrick Weldon, respectfully states that he was adjudicated a bankrupt in this court on the 14th day of March, 1918; that within the last month he presented to the referee application for his discharge, but

that said referee refused to file the same, for the reason that the same was not presented within the 12 months period; that one James P. Gaffney, of Williamsburg, Iowa, was applicant's original attorney in said bankruptcy proceedings, and that he afterwards entered the military service, and upon his entering into the service he gave Attorney J. M. Dower general instructions to look after said proceedings in behalf of said bankrupt; that the statutory period for filing said petition for discharge was overlooked by petitioner and Attorney Dower, and that the failure to file said petition within the statutory time is due to that, and to no ulterior reason; and that petitioner would have filed the application within the statutory time, had his attention been called to it, and that his failure to file the same is due to the fact that Attorney Dower did not call his attention to said time limit. Wherefore petitioner respectfully asks that an order be granted, directing the referee to file said petition, and for such other orders as may be proper in the premises. [Signed] Patrick Weldon, Applicant, by J. M. Dower, His Attorney."

This is signed and sworn to by J. M. Dower on the 25th day of September, 1919, before a notary public.

This may be an attempt to allege that the bankrupt was in the military service of the United States during the 12 months period for filing a petition for discharge; but the allegation is so indefinite that it is uncertain whether it alleges that the bankrupt or his attorney was in the military service, and the reason for the failure to file the application within the time required by the Bankruptcy Act.

By the act of Congress approved March 8, 1918, known as the Soldiers' and Sailors' Civil Relief Act (chapter 20, § 100 et seq. 40 Stat. pp. 440, 449 [Comp. St. 1918, Comp. St. Ann. St. Supp. 1919, § 3078¼a et seq.]), it is provided that in any court of the United States, or of any state or territory therein, in which is brought or pending any suit against a person in the military service of the United States as specified in said act, to establish a civil liability or to recover a judgment or order of any kind against such person in the military service of the United States, may in the discretion of the court, either upon its own motion, or upon the application of such person, or in his behalf, be temporarily suspended or otherwise stayed or disposed of during the pendency of the present war or until such time as it may determine.

In his certificate in this case the referee states that on the 24th day of November, 1919, the time fixed for the appearance of creditors to object to the application for leave to file said petition, came on for hearing, and there was no appearance against the same; and it further appearing from the application asking leave to file the petition that the reasons or cause of delay in filing the same within the time fixed by the bankruptcy laws was owing largely to the absence of the bankrupt or his attorney serving in the United States army; and it appearing that none of the creditors having availed themselves or himself of the right to appear and object to the allowance of the petition for discharge, the referee finds that the reason for failure to file the petition for discharge is sufficient, and that the nonappearance of the creditors to object to the discharge places them in default. He therefore recommends that the bankrupt be allowed to file the petition for discharge, notwithstanding the expiration of the time within which it is required to be filed under the Bankruptcy Act, and recommends that the petition for discharge be allowed and the discharge granted.

The referee does not set out the testimony, if any was taken by him, and reports his conclusion only. There is nothing, therefore, upon which the conclusion can be reviewed or set aside. The reference to the referee could rightly be only to take the testimony and find the facts as a special master, for the judge only can determine whether or not the bankrupt is entitled to a discharge; and inasmuch as under the terms of the Soldiers' and Sailors' Civil Relief Act the court may suspend or delay the final order in the matter, the order will be that the application for leave to file the petition for discharge be suspended or stayed, and the matter referred back to the referee to permit the bankrupt to show, if he can do so by competent testimony, that he was unavoidably delayed from filing his petition for discharge within the 12 months period after the adjudication because of being in the military service of the United States within the 12 months period after the adjudication in bankruptcy, and the matter suspended until such question can be determined, and the application for discharge thus delayed beyond the 12 and 18 months period; and it is accordingly so ordered.

Supplemental Order.

[2] As ordered in the memorandum filed in this proceeding on January 14, 1920, the matter was referred back to the referee, as special master, to hear the application of the bankrupt for leave to file a petition for discharge after the expiration of more than 18 months from the date of the adjudication in bankruptcy. The referee, as special master, has taken the evidence in support of the bankrupt's application for leave to file the petition for discharge, has found the facts and reported the same, with his conclusion that leave shall be granted the bankrupt to file the application, and that a hearing should be had upon the bankrupt's petition for discharge.

The facts as found by the special master are: That the bankrupt did not file the petition for discharge until more than 18 months after the adjudication in bankruptcy, and without showing any grounds therefor other than that he did not know that the petition for discharge was required by the Bankruptcy Act to be filed within one year after the adjudication, and not later than 18 months thereafter, without showing that he was unavoidably prevented from filing the petition within 12 months, and not later than 18 months after the adjudication. The adjudication in bankruptcy, as shown by the bankrupt's petition for discharge, was on March 14, 1918. Some time in July, 1918, the bankrupt's original attorney in the proceedings enlisted or was drafted in the military service of the United States, and then turned over the matter pertaining to said bankruptcy to Mr. J. M. Dower, another attorney, for further attention to the matter, who the proofs show had forgotten, or for some other reason overlooked, the fact that a petition for discharge must be filed in the bankruptcy court within 12 months after the adjudication, and not later than 18 months thereafter. It is needless to say that the fact that the bankrupt did not know that the petition for discharge must be filed within the 12 months, and not later than 18 months after the adjudication, is no ground for permitting the petition

for discharge to be filed more than 18 months after the adjudication, and the court is without jurisdiction to entertain such petition after the expiration of 18 months after the adjudication. In re Fahy (D. C.) 116 Fed. 239.

The facts as found by the special master show without any dispute that the bankrupt was never in the military service of the United States; that it was his original attorney who entered that service, and the bankruptcy proceedings were turned over by him to Mr. Dower, who presented to the court the application of the bankrupt for leave to file such petition more than 18 months after the adjudication. If the bankrupt himself had entered the military service of the United States during the 12 months period after his adjudication, or after 18 months even, there might be some reason for saying that the act of Congress approved March 8, 1918, known as the "Soldiers' and Sailors' Civil Relief Act," might be ground for relieving the bankrupt from his failure to file the application within the statutory time; but, without determining whether or not it would be ground for so relieving him, his failure to file the petition for more than 18 months after the adjudication is conclusive against his right to a discharge in this proceeding. It follows that the application for leave to file the petition for discharge must be denied, and the discharge also denied.

It is ordered accordingly.

UNITED STATES v. WELLS et al.

(District Court, W. D. Washington, N. D. July 31, 1917.)

No. 3671.

1. CONSPIRACY ⟸43(6)—INDICTMENT SUFFICIENT.
An indictment under Criminal Code, § 37 (Comp. St. § 10201), charging conspiracy to violate section 211 (Comp. St. § 10381), by sending through the mails indecent matter of a character tending to incite murder and assassination, *held* sufficient, without setting out the matter.

2. CONSPIRACY ⟸43(11)—INDICTMENT CHARGING FORCIBLE RESISTANCE OF CONSCRIPTION SUFFICIENT.
An indictment charging conspiracy to oppose by force the authority of the United States and to resist such authority by mutiny and armed force, by circulating after declaration of war with Germany printed matter set out, advising forcible resistance to conscription, *held* to charge an offense, although at the time the Selective Draft Act (Comp. St. 1918, Comp. St. Ann. Supp. 1919, §§ 2044a–2044k) had not been enacted, but was pending in Congress.

Criminal prosecution by the United States against Hulet M. Wells, Sam Sadler, R. E. Rice, and Aaron Foslerman. On demurrer to indictment. Overruled.

Clay Allen, U. S. Atty., and Ben L. Moore, Asst. U. S. Atty., both of Seattle, Wash.

Vanderveer & Cummings and Mark M. Litchman, all of Seattle, Wash., for defendants.

NETERER, District Judge. The defendants are charged with conspiracy in five counts. Count 1 charges a conspiracy under section 37 of the Penal Code to violate section 211 of the Penal Code (Comp. St. §§ 10201, 10381), and charges that they printed, prepared for distribution, etc., a certain circular, set out in hæc verba in the indictment, which, with some omitted portions, is as follows:

"No Conscription!

"No Involuntary Servitude!

"No Slavery!

"'Neither slavery nor involuntary servitude * * * shall exist within the United States.'

"The above is a part of the Constitution of the United States. The President and Congress has no authority to set it aside. * * * For the President and Congress to do so is to usurp the powers of autocrats, and if unresisted means the abandonment of democracy and the destruction of the Republic. * * * Wake up! Stand by us now, for when we have become an army we will have ceased to think and we will shoot you if told to shoot you! Just so it is expected that we will shoot and kill our brothers in other lands. * * * Resist! Refuse! * * * Better be imprisoned than to renounce your freedom of conscience. * * * Tell them that we are refusing to register or to be conscripted, and to stand by us like men. * * * If we are to fight autocracy, the place to begin is where we first encounter it. * * * If we must fight and die, it is better to do it upon soil that is dear to us. * * * Better mutiny, defiance and death of brave men with the light of

the morning upon our brows, than the ignominy of slaves and death with the mark of Caln and our hands spattered with the blood of those we have no reason to hate * * *"

—it being the object of such conspiracy by force and violence to prevent the enforcement of any law of the United States relative to enlistment and mobilization of the army of the United States. The conspiracy is alleged to have been entered into on or about the 1st day of May, 1917. Count 2 charges a conspiracy to violate section 211 by mailing indecent matter of a character to incite murder and assassination. Count 3 charges a conspiracy to oppose by force the authority of the United States. Count 4 charges a conspiracy to resist by mutiny, bloodshed, and armed force any enforcement of the laws of the United States. Count 5 charges a conspiracy to prevent, hinder, and delay the enforcement of the Selective Service Law by force, etc.

Demurrer is filed to each count in the indictment, on the ground that—

"Each and all of them do not recite facts sufficient to constitute an offense against the United States."

[1] It is urged by the defendants that the government should set out in count 2 what letters, pamphlets, etc., were referred to, and in what respect they were indecent in character, intended to incite murder and assassination, and in what manner and for what purpose it was proposed to accomplish the object of the conspiracy.

The gist of the offense is the conspiracy, and the object of the conspiracy is to violate section 211, which makes penal the posting of any matter therein prohibited. This court, in U. S. v. Dahl, 225 Fed. 909, held that an indictment need not set out the particular Chinese aliens who were sought to be imported, in an indictment charging a conspiracy to violate that section of the Immigration Law, but it was sufficient to refer to Chinese aliens generally as are not entitled to come into the United States. The Circuit Court of Appeals affirmed this conclusion in 234 Fed. 618, 148 C. C. A. 384. In that case the defendant's attention was called to a particular class of aliens in that the indictment was definite and specific. In this indictment count 2 charges that the printed matter was of a character to incite murder and assassination. This differentiates the matter from other matters included in the section, and brings it specifically within the amendment of March 4, 1911, which provides that the—

"term 'indecent,' within the intendment of this section, shall include matter of a character to incite arson, murder or assassination."

This designation of the character of the documents is, I think, sufficient, and it is not necessary that the matter be set out in the indictment. Williamson v. United States, 207 U. S. 425, 28 Sup. Ct. 163, 52 L. Ed. 278.

[2] The remaining counts may be discussed together. On April 6, 1917, 40 Stat. 1, the Congress passed the following:

"Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, that the state of war between the

United States and the Imperial German government which has thus been thrust upon the United States is hereby formally declared; and that the President be, and he is hereby, authorized and directed to employ the entire naval and military forces of the United States and the resources of the government to carry on war against the Imperial German government; and to bring the conflict to a successful termination all of the resources of the country are hereby pledged by the Congress of the United States."

Prior to the adoption of the Selective Service Act on the 18th day of May, 1917 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, §§ 2044a–2044k), the law did provide for a militia of the United States, which was classified by the National Defense Act of June 3, 1916, section 57 of which provides:

"The militia of the United States shall consist of all able-bodied male citizens of the United States and all other able-bodied males who have or who shall have declared their intention to become citizens of the United States, who shall be more than 18 years of age and, except as hereinafter provided, not more than forty-five years of age, and said militia shall be divided into three classes, the national guard, the naval militia, and the unorganized militia." Comp. St. § 304.

And it is made the duty of the President, whenever the United States is in danger of invasion from any foreign nation, to call forth such number of the militia as may be deemed necessary by Act Jan. 21, 1903, 32 Stat. 776, as amended May 27, 1908 (35 Stat. 400 [U. S. Compiled Stat. Ann. 1916, vol. 4, p. 4296]). The President was directed by Congress to employ the "entire naval and military forces to carry on war against the Imperial German government." I think, therefore, that it is immaterial whether the Selective Service Act had been passed or not at the time, except as to count 5, if the tendency of the matter was to resist or oppose by force the authority of the United States. Section 6 of the Penal Code (Comp. St. § 10170) provides that:

"If two or more persons * * * subject to the jurisdiction of the United States * * * oppose by force the authority thereof, or by force * * * hinder or delay the execution of any law of the United States * * *"

—they shall be punished. Persons are not denied the right of petition, nor the privilege of criticism, or to say or do anything not in itself unlawful, to prevent the passage of a law, or secure the repeal of one already passed. But after a law is passed it is every man's duty to conform his acts in accordance with the provisions of the law, and he may not, for the purpose of creating sentiment against the wisdom of the law, do anything with intent to procure the violation of the law, in his advocacy of its unwisdom, or for the purpose of repeal. It must be apparent that persons may not advise others to "resist," "refuse," or to "mutiny, defiance, and death," especially after the adoption of the "war status" resolution by the Congress April 6, 1917, and prior to the Selective Service Act of May 18, 1917. There is a wide difference between bona fide criticism or petition, and instigation of others to resistance by force, as charged.

Count 5 charges a conspiracy to violate the Selective Service Act passed May 18, 1917, and sets forth overt acts, some of which were performed prior to the adoption of the act. The defendants contend

that it is impossible to conspire to violate a law prior to its passage, and that the doing of an overt act after the passage of the law would not carry with it the conspiracy entered into prior to the passage of the act. I think this position is reasonable and logical. U. S. v. Crafton et al., Fed. Cas. No. 14,881. However reprehensible an act charged may be, it may not be carried forward and made to offend against a law subsequently passed. But the objection is obviated by the allegation in this count that:

"After said law had been duly enacted, continued in their said conspiracy to prevent, hinder, and delay by force the execution of the law of the United States, in that it was their purpose then and there to resist, and by mutiny, armed resistance, and by bloodshed to oppose the authority of the United States in the execution of said mentioned act. * * *"

The demurrer is overruled.

UNITED STATES v. FULD STORE CO.

(District Court, D. Montana. January 21, 1920.)

No. 3509.

GAME ⊂=4—MIGRATORY BIRD TREATY ACT NOT RETROACTIVE.

Migratory Bird Treaty Act July 3, 1918, § 2 (Comp. St. Ann. Supp. 1919, § 8837b), providing that it shall be unlawful to possess, offer for sale, or sell any migratory bird included in the terms of the treaty between the United States and Great Britain of August 16, 1916, "or any part, nest, or egg of any such bird," *held* not to apply to plumage of such birds lawfully acquired before its enactment.

Information by the United States against the Fuld Store Company. Dismissed.

E. C. Day, U. S. Atty., and W. W. Patterson, Asst. U. S. Atty., both of Helena, Mont.

BOURQUIN, District Judge. The information (and exhibits of it a part) charges (1) that before the Migratory Bird Treaty Act of July 3, 1918 (40 Stat. 755 [Comp. St. Ann. Supp. 1919, §§ 8837a–8837j]), defendant owned and possessed aigrettes of heron plumage, and continued to own and possess them months thereafter; and (2) that months after said act defendant offered said aigrettes for sale. Defendant, without counsel and by one of its officers, answered the charge is true, and that it would "leave it to the court." A plea of guilty was tentatively entered. It is believed, however, that the information sets out no offense. Accordingly the plea is ordered withdrawn, and, as though demurred to, the information is dismissed.

The treaty (39 Stat. 1702) includes herons as migratory nongame birds, declares for a continuous close season in their behalf, and provides for legislation to execute its purposes. The act provides "that unless and except as permitted by regulations" by it authorized to be

made by the Secretary of Agriculture, "it shall be unlawful to hunt, * * * kill, possess, offer for sale, sell, offer to purchase, purchase, * * * at any time or in any manner, any migratory bird included" in the treaty, "or any part, nest, or egg of any such bird." It also provides for seizure and confiscation of the things so denounced. There is no regulation purporting to apply to plumage antedating the act, and it is very doubtful if there can be.

Pretermitting whether plumage manufactured into aigrettes is "any part" of a bird within the intent of the act, or by merger and transformation into a new article has lost its identity as plumage or part of a bird, the act appears prospective, to protect birds in the future, to make killing them in the future a crime, and incidentally to make possession or offer of sale of any part of the birds unlawfully killed (that is, killed in the future) also a crime. To kill is made unlawful, and to possess or sell the fruits of such unlawful killing alone is also made unlawful. This is the most reasonable construction of the act, in view of associated words and the circumstances, and perhaps the only construction which will sanction the act's validity. Before the act, herons were lawfully killed and their plumage lawfully possessed and sold. Much of this plumage had been converted into aigrettes, artistic, beautiful, useful, and ornamental—harmless and valuable. They had entered into the domain of commerce, and the stock of private property, and were possessed by many persons. An intent on the part of Congress to virtually outlaw and destroy such property ought not to be assumed, unless very clear and the only reasonable construction of the act; for it is very doubtful if Congress has any such power.

In harmless, useful, and valuable property there is a vested right of possession, use, enjoyment, and sale—a liberty of action, of which owners cannot be arbitrarily deprived without compensation. The "due process" clause of the Constitution well may forbid. See Eberle v. Mich., 232 U. S. 706, 34 Sup. Ct. 330, 58 L. Ed. 803; U. S. v. Jin Fuey, 241 U. S. 401, 36 Sup. Ct. 658, 60 L. Ed. 1061, Ann. Cas. 1917D, 854; Barbour v. State, 249 U. S. 454, 39 Sup. Ct. 316, 63 L. Ed. 704, Apr. 14, 1919; Hamilton v. Distilleries & Warehouse Co., 251 U. S. 146, 40 Sup. Ct. 106, 64 L. Ed. ——, Dec. 15, 1919; Ruppert's Case, 251 U. S. 264, 40 Sup. Ct. 141, 64 L. Ed. ——, Jan. 5, 1920. And it would be at least interesting to learn that the department's agents are embarked on a campaign to seize these ornaments from women's hats and hair, and how they propose to accomplish it.

Furthermore, such construction, denouncing as a crime possession and sale of this theretofore lawful private property, would expose the act to serious question as an ex post facto law within constitutional inhibition. Taking immediate effect, it would instanter convert many law-abiding citizens into criminals, change the law to their great disadvantage, and not for any act of theirs subsequent to the law, so far as possession goes, but only because they theretofore had acted and thereafter remained inactive. All this can be avoided by construction that the act relates only to birds and parts of birds killed

subsequent to the act, a permissible and more reasonable construction, and in principle always to be preferred to avoid grave doubts of the validity of the law otherwise.

True, treaties and laws to execute them may sometimes extend beyond congressional power, but, even as are acts and enactments of the war-making and all other powers, treaties and executory laws are subject to constitutional limitations. Doe v. Braden, 16 How. 657, 14 L. Ed. 1090. And the treaty is silent upon birds and parts of birds theretofore and lawfully killed and possessed. It does not require that they be regulated, and so, creates in Congress no power to deal with them. See U. S. v. Jin Fuey, supra. That in game laws it is generally provided that it is unlawful to possess game in the close season, though lawfully acquired in the open season, is not analogous. There the game is acquired subject to a known condition that to retain possession into the close season is unlawful. Note, too, such laws have not been construed to include possession of stuffed game, mounted heads, ornaments, and the like.

That some incidental advantage in administration of the law would accrue from a construction that it applies to birds and parts of birds killed before its date avails nothing, in the face of the language of the act, of the settled principles of construction, and of the strong and controlling reasons otherwise.

UNITED STATES ex rel. LAMBERT et al. v. PEDARRE.

(District Court, E. D. Louisiana, New Orleans Division. January 26, 1920.)

No. 15972.

1. COURTS ⟸284—ACTION ON FEDERAL COURT JUDGMENT NOT NECESSARILY A FEDERAL QUESTION.
That an action is based on a judgment of a federal court does not of itself raise a federal question, which gives jurisdiction to another federal court.

2. COURTS ⟸264(1)—FEDERAL COURT WITHOUT ANCILLARY JURISDICTION OF LAW ACTION ON JUDGMENT OF FEDERAL COURT.
A federal court is without ancillary jurisdiction of an action at law on a judgment of a court of another district against the surety on the bond of a contractor given under Act Feb. 24, 1905 (Comp. St. § 6923), and in favor of a subcontractor, where the real parties are citizens of the same state and the amount involved is less than $3,000.

At Law. Action by the United States, on the relation of John M. Lambert and others, against Henry R. Pedarre. Dismissed.

Hall, Monroe & Lemann and Walter J. Suthon, Jr., all of New Orleans, La., for plaintiffs.

Edward Dinkelspiel and John C. Davey, both of New Orleans, La., for defendant.

FOSTER, District Judge. This is a suit by citizens of Louisiana against another citizen of Louisiana to recover $1,415.07 on a judgment rendered by the United States District Court for the Southern District of Mississippi in proceedings entitled United States ex rel., etc., v. O. E. Gibson, No. 6737 on the docket of that court. The defense is that the judgment has been paid. The jury was waived in writing and the matter submitted to the court.

The material facts are these: Gibson obtained a contract from the United States to build a levee in the Southern district of Mississippi. Pedarre was one of the joint and several sureties on the bond given to the United States under the provisions of Act Cong. Feb. 24, 1905, c. 778 (Comp. St. § 6923), with the usual provision for the security of furnishers of labor and materials on the work. The plaintiffs in this case, doing business as a partnership under the name of Lambert Bros., contracted with Gibson for the hire of certain teams. They exacted of him a bond for their own security, separate and distinct from the bond signed by Pedarre, and on this bond the National Surety Company was surety. Gibson defaulted in his payments to certain furnishers of material, including Lambert Bros. A suit was brought in the Southern district of Mississippi on the original bond. Lambert Bros. intervened in that suit and obtained judgment against the sureties for the amount due them on their subcontract, $1,457.70. Previously they had filed suit in the civil district court for the parish of Orleans, La., against the National Surety Company, and obtained a final judgment prior to their intervention. This judgment the National Surety Com-

pany subsequently paid, and obtained a subrogation from Lambert Bros. to all their rights against the sureties on the original bond. The instant suit is brought in the name of Lambert Bros., but for the benefit of the National Surety Company, without that company being named in the pleadings.

As the parties are all citizens of Louisiana, and the amount involved does not exceed $3,000, the question of jurisdiction obtrudes itself at the outset, as this is a question that the court must consider and decide whether it is raised by the parties or not. Judicial Code, § 37 (Comp. St. § 1019); Rosenbaum v. Bauer, 120 U. S. 459, 7 Sup. Ct. 633, 30 L. Ed. 743.

[1] It is contended by plaintiffs that the United States is presumed to be the real plaintiff in this suit, and therefore this court has jurisdiction, regardless of diversity of citizenship or amount involved. Undoubtedly in the original suit in the Southern district of Mississippi the United States is to be considered the real party plaintiff, but this is on the theory that the government is interested in seeing that all parties furnishing labor or materials necessary for the completion of the work be paid. The United States has no such interest in the instant case, which is purely a controversy between sureties. It is settled that the mere fact that a suit is based on a judgment of the United States court does not of itself raise a federal question (Metcalf v. Watertown, 128 U. S. 586, 9 Sup. Ct. 173, 32 L. Ed. 543), and furthermore there is not sufficient amount involved in this case to give the court jurisdiction. If it be considered that the suit is one under the act of 1905, then it could only be brought in the district where the contract was performed, the Southern district of Mississippi, and that court has ample jurisdiction to bring the parties before it and enforce its judgment in some appropriate way. U. S. v. Congress Construction Co., 222 U. S. 199, 32 Sup. Ct. 44, 56 L. Ed. 163.

[2] The question then remains as to whether this court has ancillary jurisdiction to enforce the judgment of the District Court for the Southern District of Mississippi. I do not think it was the intention of Congress to require the laborer or materialman, obtaining a judgment against the surety on a bond given under the act of 1905, to go elsewhere to enforce the judgment. There are cases holding that courts of the United States have ancillary jurisdiction in equity and bankruptcy in aid of another federal court; but the instant suit is at law, and has all the elements of an original proceeding. If it is necessary to sue upon the judgment obtained under the provisions of the act of 1905 at the domicile of the sureties, it seems to me that jurisdiction would be governed by the statute limiting the general jurisdiction of the District Courts.

As there is neither diversity of citizenship nor sufficient amount involved to give this court jurisdiction, the case must be dismissed.

TRAVELERS' INS. CO. et al. v. PRINCE LINE, Limited, et al.

(District Court, S. D. New York. January 5, 1920.)

ADMIRALTY ⊂=1—STATE CANNOT CREATE MARITIME CAUSE OF ACTION BY WORKMEN'S COMPENSATION ACT PROVIDING FOR ASSIGNMENT OF RIGHTS OF INJURED EMPLOYÉ.

An assignment under Workmen's Compensation Act N. Y. (Consol. Laws, c. 67) § 29, of a claim against a third person for death or injury of a workman on payment of compensation under the act by an insurer, *held* not to confer on the assignee a right of action under the maritime law.

At Law. Action by the Travelers' Insurance Company and the Associated Operating Company against the Prince Line, Limited, and the Asiatic Steamship Company. On demurrer to complaint. Demurrer sustained.

Amos H. Stephens, of New York City (William L. O'Brion, of New York City, of counsel), for plaintiffs.

Kirlin, Woolsey & Hickox, of New York City (Cletus Keating and V. S. Jones, both of New York City, of counsel), for defendants.

MAYER, District Judge. The amended complaint, to which the demurrer is interposed, alleges that one Patterson, a stevedore employed by the plaintiff Associated Operating Company, was killed on October 22, 1914, by the negligence of the defendants while working on the steamship Chinese Prince, then lying in navigable waters; that the dependents of Patterson filed an election to take compensation under the New York state Compensation Law (Consol Laws, c. 67), and that the plaintiff Travelers' Insurance Company, the insurer of Associated Operating Company, pursuant to the provisions of the state Compensation Law, paid compensation to dependents of Patterson and received from the dependents an assignment of their cause of action. A copy of the assignment is attached to the complaint and states that it is in pursuance of the New York state Compensation Law.

The theory of plaintiffs is that the action does not seek to enforce a liability created by the Workmen's Compensation Act to pay compensation without regard to fault, but the liability is predicated on the violation by defendants of an obligation imposed by the general maritime law, to wit, to have the ship and its appliances in safe condition when turned over to the stevedores to load.

In this connection, the plaintiffs contend that section 29 of the Workmen's Compensation Law referred to in the complaint, which is the section under which the assignment to the plaintiffs was executed, created a cause of action of which plaintiffs may avail. At the time when the cause of action accrued, arising out of Patterson's death, the state of New York was without power to legislate regarding maritime contracts. Southern Pacific Co. v. Jensen, 244 U. S. 205, 37 Sup Ct. 524, 61 L. Ed. 1086, L. R. A. 1918C, 451, Ann. Cas. 1917E, 900.

The only possible theory upon which plaintiffs could recover would

be if the state statute created an assignable cause of action irrespective of and unrelated to the Workmen's Compensation Act. A mere reading of the statute demonstrates that its whole machinery was connected with the carrying out of the Workmen's Compensation Act and that the assignment was in relation thereto. When, therefore, plaintiffs were out of court because of the Jensen Case, their position was not helped by the assignment executed under and by virtue of section 29 of the Workmen's Compensation Act. That section reads as follows:

"Sec. 29. If an employé entitled to compensation under this chapter be injured or killed by the negligence or wrong of another not in the same employ, such injured employé, or in case of death, his dependents, shall, before any suit or any award under this chapter, elect whether to take compensation under this chapter or to pursue his remedy against such other. Such elections shall be evidenced in such manner as the commission may [by] rule or regulation prescribe. If such injured employé, or in case of death, his dependents, elect to take compensation under this chapter, the awarding of compensation shall operate as an assignment of the cause of action against such other to the State for the benefit of the state insurance fund, if compensation be payable therefrom, and otherwise to the person, association, corporation, or insurance carrier liable for the payment of such compensation, and if he elect to proceed against such other, the state insurance fund, person, association, corporation, or insurance carrier as the case may be, shall contribute only the deficiency, if any, between the amount of the recovery against such other person actually collected, and the compensation provided or estimated by the chapter for such case. Such a cause of action assigned to the state may be prosecuted or compromised by the commission. A compromise of any such cause of action by the employé or his dependents at an amount less than the compensation provided for by this chapter shall be made only with the written approval of the commission, if the deficiency of compensation would be payable from the state insurance fund, and otherwise with the written approval of the person, association, corporation, or insurance carrier liable to pay the same. Wherever an employé is killed by the negligence or wrong of another not in the same employ and the dependents of such employé entitled to compensation under the chapter are minors, such election to take compensation and the assignment of the cause of action against such other and such notice of election to pursue a remedy against such other shall be made by such minor or shall be made on behalf of such minor by a parent of such minor, or by his or her duly appointed guardian, as the commission may determine by rule in each case."

The argument of learned counsel for plaintiffs is ingenious, but not convincing, and it seems to me entirely plain that the demurrer must be sustained, and as a consequence that the complaint must be dismissed.

PRESTON v. DURHAM et al.

(District Court, N. D. Georgia. January 21, 1920.)

COURTS ⟸328(2)—AMOUNT INVOLVED IN SUIT ON JUDGMENT IS AMOUNT OF JUDGMENT.

The amount involved in a suit on a judgment, for the purpose of determining federal jurisdiction, is the amount of the judgment, and not the amount of the original debt upon which it was rendered.

In Equity. Suit by C. M. Preston, trustee, against C. F. Durham, D. M. Elrod, and the Fidelity Mutual Life Insurance Company. On motion to dismiss. Denied.

G. E. Maddox, of Rome, Ga., and J. Hodge McLean, of Chattanooga, Tenn., for plaintiff.

W. Carroll Latimer and Smith, Hammond & Smith, all of Atlanta, Ga., for defendants.

NEWMAN, District Judge. This is a suit on a judgment obtained in Hamilton county, Tenn., which is for the sum of $3,286.75. A motion is made now to dismiss the suit, upon the ground that the jurisdictional amount is not involved. The contention is that we must take the original debt as it stood prior to its being merged into a judgment in the state court of Hamilton county, Tenn., as a criterion for determining whether jurisdiction exists.

The suit, of course, must be for over $3,000, exclusive of interest and costs, and that amount is involved here, if we allow the amount of the judgment, and do not go behind that to find the character and amount of the original debt. I do not care to go into an extensive discussion of this subject, as contained in the argument of counsel before the court, and in the full briefs of counsel for the parties respectively. The law on this subject appears to be correctly laid down in 20 Am. & Eng. Enc. of Law (2d Ed.) p. 599, as follows:

"Where a cause of action has been prosecuted or reduced to judgment, the cause of action is swallowed up and merged in the judgment, which is a higher and superior sort of security. The effect of the merger is that the matter which gave rise to the litigation can never again be the basis of an action"—citing a large number of authorities from various state and federal courts.

I think this authority establishes a general rule on this subject, which should control here in determining the amount involved, so as to determine the jurisdiction of the court. Clearly the suit is on the judgment itself, and the judgment is for more than $3,000, exclusive of interest and costs, as it now stands. Whether or not, in some cases where a judgment is sued on, it may be necessary to go behind the judgment for the purpose of ascertaining the character or kind of debt originally involved, as indicated in some of the cases we have seen, is unnecessary to be passed upon or determined now, as that is

not involved here. The sole question here is the amount, and not the character, of the debt.

What any judgment obtained here in this suit on the Tennessee judgment will cover, it is unnecessary now to decide. Whether or not the prayer of the plaintiff that he "be decreed a lien on the property described in said bond for titles, and that" he "be entitled to have said lien foreclosed, and the property described in said contract and bond for titles be held subject to the payment of the amount so to be decreed in his favor," is meritorious and can prevail, is not now to be determined, but is for hearing on the merits.

The motion to dismiss the bill, on the ground that the necessary jurisdictional amount is not involved, is overruled and denied.

SHAMROCK TOWING CO. v. MANUFACTURERS' & MERCHANTS' LIGHTERAGE CO. et al.

(District Court, E. D. New York. February 9, 1918.)

ADMIRALTY ⇐32—SUITOR HAS RIGHT TO ELECT DISTRICT OF SUIT WHERE JURISDICTION IS CONCURRENT.

As between districts having concurrent jurisdiction, it is not an abuse of process for a suitor in admiralty to select the one in which he can obtain security, and whether the districts are distant from each other or adjoining is immaterial.

In Admiralty. Action in personam, with clause of foreign attachment, by the Shamrock Towing Company against the Manufacturers' & Merchants' Lighterage Company and the Hax Trading Company. On motion to dismiss libel. Denied.

Alexander & Ash, of New York City, for libelant.

Foley & Martin, of New York City, for respondents.

CHATFIELD, District Judge. The purpose of choosing this district was to obtain security. While concurrent jurisdiction exists between the districts, this does not give the right to obtain security in the district where personal service could be had. The possibility of levying upon the vessel does not give the right so to do. Hence it is not abuse of process to go into an adjoining district any more than it would be to go to a more remote district.

Motion denied.

SAUNDERS v. LUCKENBACH CO., Inc.

(District Court, S. D. of New York. February 3, 1919.)

No. 65-99.

1. SEAMEN ⊂⊃2—RIGHT OF INJURED SEAMEN TO CARE AND MAINTENANCE.
A steamship in the transatlantic merchant service during the war did not cease to be a merchantman, nor its crew merchant seamen, with the right to maintenance and care in case of injury, because the vessel carried an armament of two guns, manned by a naval crew, for protection against submarines.

2. SEAMEN ⊂⊃11—INJURED SEAMAN'S RIGHT TO CARE AND MAINTENANCE.
Decree affirmed, holding that the fact that a seaman received fifty per cent. additional wages as a "war risk bonus" did not deprive him of the right to maintenance and care for a reasonable time after termination of the voyage, while being treated for an injury received during a submarine attack on the vessel.

In Admiralty. Suit by Drew B. Saunders against the Luckenbach Company, Incorporated. Decree for libelant.
Decree affirmed 262 Fed. 849, — C. C. A. —.

Silas B. Axtell, of New York City, for libelant.
Peter S. Carter, of New York City, for respondent.

HOUGH, Circuit Judge. The material facts seem to be as follows: Libelant became first assistant engineer on an American steamship owned by respondent. The vessel was engaged in the merchant service; her crew, including libelant, was shipped in the usual manner before the commissioner, and so far as the contract between the parties hereto (and therefore between libelant and his ship) is concerned, as expressed by writings in evidence, there was nothing about it out of the common, except the rate of wage.

As to this, it was agreed on the face of the articles that, in addition to wages, libelant and his mates were to receive a "war risk bonus of 50 per cent." of their wages, and also that both wages and bonus should, in the event of loss of the vessel, continue to be paid until the crews had again reached the United States, provided that such return was not delayed beyond two calendar months.

[1] On the voyage to France the vessel was attacked by a German submarine, but the steamship was armed with two guns, manned (a fact of which judicial notice is taken) by a naval gun crew. A running fight ensued, lasting for several hours, and terminated only by the arrival on the scene of the U. S. S. Nicholson, whereupon the attacking German vessel submerged and disappeared. It does not appear that the arming of the steamship was otherwise than voluntary on the part of her owners. My inference from the evidence is that quite properly and lawfully, but for the sake of gain, the ship reverted to the habits of merchantmen historically known as existing well into the last century; i. e., the habit of going armed in order to resist attempted capture by anything but superior force.

One may assume that the owners were entirely ignorant that in arming their vessel they were reverting to the custom of years ago, but I think it must follow from this fact that the steamship did not cease to be a merchantman, and her crew did not cease to be merchant seamen, because she carried an armament of two guns and a detachment of naval gunners.

The libelant was on duty in the engine room during this engagement. A shell from the submarine struck some portion of the superstructure, or possibly the machinery, and pieces of metal (whether shell fragments, shrapnel, or pieces of the ship's structure is not of importance) descended into the engine room and struck libelant.

From the evidence it is plain that he received a slight wound in the foot and another in the calf of one leg. He says that a rib or two were broken, and pieces of shrapnel struck him in the back. He undoubtedly shows evidence at present of having had at least one rib broken at some time, and he has two small discolorations on his back not far from his spine. The testimony leaves me in great doubt as to whether these present discolorations have any relation to the attack by the submarine, or whether he did have any rib broken at that time. My doubt on the latter point is that it is not possible that he should have done as much work as he did for days after the fight if his rib or ribs had been actually fractured.

I find the fact to be that neither Saunders nor his fellow officers considered at the time that he was much hurt. The surgeon of the Nicholson came aboard, attended to his foot, looked him over, and left him evidently as fit to keep a "throttle watch," which seems to be an engine room term for sitting down in the engine room and giving orders without moving about. His vessel went to Havre, and he was seen by a French shore doctor, who seems to have been satisfied with the way he was getting on. She then went to a Welsh port and coaled, thence to Queenstown, and so on back to New York, where the crew was paid off. During all this period Saunders continued to do partial duty, but was not looked upon as well by his mates. He made no complaint on arrival at New York, did not ask to go to the hospital, but repaired to a lodging house in this city, where he says he has kept a room, present or absent, for the last two years, and employed a doctor of his own. He did no work for four months, and since that time has been little at sea, but has, he says, with difficulty performed mostly harbor jobs, and not even that continuously. He says he is much better than when he left respondent's ship, but his appearance, method of speech, and general demeanor is entirely consonant with the medical testimony from both sides of this case that he still is in an excited and nerve-shaken condition. I find no difficulty in agreeing with one of the testifying physicians that in common parlance the man is hysterical.

The testimony of the chief engineer is that "he appeared to be an A-1 man in every way" before the attack of the submarine. I find that he did not receive during said attack any wound or laceration of tissue that in the least accounts either for his present condition or for his

history during the year and a quarter that has elapsed since the submarine attack. Under a good physical exterior, beneath the physique of a vigorous man of middle age, I have no doubt that this libelant concealed a nervous system or a vital connection between nerve and brain of an inferior character, and that the excitement and shock of battle, plus slight physical injuries, have used him up in a way that a better organized man would never experience.

But just as some men have bones that break more easily than others, or have skulls so thin that they may be killed by a blow that would not hurt most of us, so there are men whose systems are such that they receive injury through the brain and nervous system in ways that are mysterious. I think this libelant is such an unfortunate. But he worked no deception; he was guilty of no wrongdoing himself. He appeared to be perfectly fit to go to sea; however annoying (to use a somewhat frivolous word in such a connection) it may be to have on board a vessel in wartime a man who is so easily hurt as Saunders, I do not think that he is thereby put outside the pale of that measure of protection which every ship owes to the seamen on board of it for all hurt, injury, or disaster not caused by their own willful wrongdoing.

In my opinion everything was done for Saunders that could have been done. Surgery could not help his defective nervous system. He was not and is not suffering from what is commonly called (by laymen) "shell shock"; yet he has suffered and is suffering from the results of the explosion of a shell, and he was therefore entitled to a reasonable period of care and maintenance after the voyage on which he was hurt terminated.

[2] I think this is the result of our local cases on this point, especially The Bouker No. 2, 241 Fed. 831, 154 C. C. A. 533, and cases cited, unless one or all of the following matters change the law: First, he was injured in a fight; second, he and all the other members of the crew were covered by war risk insurance under the recent statute; and, third, he was getting from respondent 50 per cent. additional to a high wage as a "war risk," and he was injured by reason of the war risk that he was thus paid for taking. So far as the governmental insurance was concerned, the policy did not cover the kind of injury that Saunders received, and I fail to see how a man can be said to be affected as to a given risk by insurance as to another and entirely different risk. Therefore I think there is nothing in this defense. The other two defenses are really the same, and present the point that the dangers of crossing the ocean were perfectly well known in October, 1917; that Saunders knew them, and took his chances for pay, and therefore he ought not to ask anything from his shipowners, because he took no hurt, except one of which he had assumed the risk.

With considerable doubt, and quite conscious that I may be influenced by very deep-rooted views of the extent and nature of sea perils, and a firm belief that the union between crew and ship ought always to be maintained with loyalty on both sides, and should

extend on the one hand to the care of the ship as "long as two planks hang together," and on the other hand to the care of the seamen in every way naturally arising out of their dangerous and honorable employment, I am of opinion that Saunders and his mates engaged to assist the owners of the steamship in an adventure full of peril, and yet it was all sea peril; war had only increased the dangers of the seas, not changed their kind. Even to-day almost every deep-sea bill of lading contains the exception against pirates, robbers, enemies, and capture; they are among the oldest perils of the merchantmen. To be sure, the seamen received high wages; but the shipowners, on the other hand, received high freights. The nature of the engagement between ship and crew remained the same. Only the probabilities of hurt were increased, but neither by express contract nor by any provision of law is the duty of care and maintenance taken away from the ship. Indeed, I think it would require express statutory provision to relieve a ship of this obligation.

I am not aware of any authority on this point, but to me it follows logically, as well as humanely, from the accepted and well-established doctrine. Thus I think libelant is entitled to a decree. What he needed was rest; possibly with better advice he would have gotten along very much faster; but he felt himself sufficiently rested and recuperated to go to work in four months. From his own statement, I think the very moderate cost of his living was not to exceed $80 a month. The evidence as to his doctor's bill and medicament charges is very vague. I find it impossible to accept the estimate of $100 for what libelant calls "medicine." On the whole, I think that for doctors and medicines $50 is as much as the testimony will warrant. The cost of maintenance is much higher than when libelant in The Bouker No. 2 fell ill; of this cognizance is taken. The evidence only affords an opportunity to estimate. My estimate is that $300 would be a fair price for a four months' rest.

For that amount and costs libelant may have decree.

SAUNDERS v. LUCKENBACH CO., Inc.

(Circuit Court of Appeals, Second Circuit. December 10, 1919.)

No. 56.

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

Suit in admiralty by Drew B. Saunders against the Luckenbach Company, Incorporated. Decree for libelant (262 Fed. 845), and respondent appeals. Affirmed.

Carter & Carter, of New York City (Peter S. Carter, of New York City, of counsel), for appellant.

S. B. Axtell, of New York City (A. Lavenburg, of New York City, of counsel), for appellee.

Before WARD, ROGERS, and MANTON, Circuit Judges.

PER CURIAM. Decree affirmed.

DOREMUS v. UNITED STATES.*

(Circuit Court of Appeals, Fifth Circuit. February 17, 1920.)

No. 3412.

1. POISONS ⊜4—KNOWINGLY SELLING NARCOTICS ON PRESCRIPTION ISSUED TO GRATIFY APPETITE VIOLATION OF LAW WHICH PHYSICIAN AIDS AND ABETS.
Notwithstanding Harrison Narcotic Act, § 2 (Comp. St. § 6287h), exception (b), excepting sales of the prohibited drugs on the written prescription of a registered physician, a sale by a druggist, who knows that the prescription was issued to gratify the holder's appetite, and not to cure disease or alleviate suffering, violates the law, and the physician issuing the prescription, knowing it is to be filled by a druggist having such knowledge, aids and abets the violation.

2. POISONS ⊜2—NEGLIGENT FAILURE TO INQUIRE NOT SUFFICIENT TO RENDER DRUGGIST GUILTY FOR FILLING PRESCRIPTION WRONGFULLY ISSUED.
Knowledge by a druggist that a prescription under the Harrison Narcotic Law was issued to gratify the holder's appetite, and not to cure disease or alleviate suffering, is essential to guilt, and negligent failure to inquire will not take the place of knowledge.

3. CRIMINAL LAW ⊜1059(2)—EXCEPTIONS TO CHARGE HELD NOT TO RAISE POINT RELIED ON.
On a trial for aiding and abetting violation of the Harrison Narcotic Law, exceptions to the charge on the ground that there was no evidence of the facts hypothesized by the court in its instruction respecting knowledge, and that knowledge was immaterial when the sale was made on the prescription of a registered physician, did not raise the point, presented on appeal, that the charge authorized conviction, though the druggist had no actual knowledge, if he negligently failed to make inquiry.

4. CRIMINAL LAW ⊜1111(1)—RECORD IS CONTROLLING AS TO REQUEST FOR INSTRUCTION AND FAILURE TO EXCEPT TO MODIFIED INSTRUCTION.
Where the record shows that a charge as modified was given at defendant's request, and that no exception was reserved to the giving of the modified charge, the court is controlled thereby.

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

*Certiorari denied 252 U. S. —, 40 Sup. Ct. 483, 64 L. Ed. —.

5. CRIMINAL LAW ⟸1172(6)—INSTRUCTION ALLOWING CONVICTION WITHOUT PROOF OF ACTUAL KNOWLEDGE WAS HARMLESS, WHERE ACTUAL KNOWLEDGE CONCLUSIVELY APPEARED.

On a trial for abetting a violation of the Harrison Narcotic Law by a druggist, an instruction erroneously authorizing a conviction, though the druggist had no actual knowledge that a prescription was wrongfully issued, was not ground for reversal, where reasonable men could have drawn but the one inference that the druggist had such actual knowledge.

6. CRIMINAL LAW ⟸1172(1)—CONVICTION SUSTAINED WHERE ERROR IN CHARGE WAS HARMLESS AS TO CERTAIN COUNTS AND SENTENCE JUSTIFIED ON SUCH COUNTS.

Where defendant was charged with abetting violations of the Harrison Narcotic Law by different druggists, and an error in the charge was harmless as to certain of the counts, and the sentence would have been sustained by a single transaction, the judgment will not be reversed, though with respect to another count the error was not harmless.

In Error to the District Court of the United States for the Western District of Texas; Duval West, Judge.

C. T. Doremus was convicted of offenses, and he brings error. Affirmed.

C. A. Davies and Haltom & Haltom, all of San Antonio, Tex., for plaintiff in error.

Hugh R. Robertson, U. S. Atty., of San Antonio, Tex.

Before WALKER, Circuit Judge, and GRUBB and JACK, District Judges.

GRUBB, District Judge. The plaintiff in error was convicted in the District Court of the United States for the Western District of Texas, for alleged violations of the Harrison Narcotic Law (Act Cong. Dec. 17, 1914 [Comp. St. §§ 6287g–6287q]), under an indictment containing 12 counts. Conviction was had under the first ten counts. The plaintiff in error was a physician and duly registered as such with the collector of internal revenue and had paid the tax. He was charged with having unlawfully and willfully aided and abetted certain named druggists in making illegal sales of morphine and cocaine, by giving the persons to whom the sales were alleged to have been made prescriptions, which were by them presented to the druggists and filled by the druggists. The filling of the prescriptions was alleged to constitute the illegal sales, which the plaintiff in error was charged with having aided and abetted. The persons to whom the prescriptions were issued were at liberty to have them filled by any druggist selected by them.

There was no preconcert between the physician and druggists charged. It was charged that the plaintiff in error contemplated that his prescriptions would be filled by druggists who knew that they were issued to gratify the appetite of addicts for the drugs, and not for the alleviation of suffering or the cure of disease. The illegality in the sale is charged to have consisted in the fact that the sale was made neither to one who had or was entitled to have an order blank, nor was it made upon the prescription of a physician within the meaning of

exception (b) of section 2 of the Harrison Act. That exception is as follows:

"To the sale, dispensing or distribution of the aforesaid durgs by a dealer to a consumer under and in pursuance of a written prescription issued by a physician * * * registered under this act."

[1] The indictment is questioned upon the idea that it alleged that the drugs were furnished by the druggists upon written prescriptions of the plaintiff in error, a registered physician, who had paid the tax, and hence that they were within the terms of the exception, and that, as no crime was committed by the druggist, no aiding and abetting could be charged against the physician. The indictment also charged in effect that the prescriptions were issued by the physician with the purpose of gratifying the appetite of the addict, and with no intent to cure disease or alleviate suffering, and that this was known to the druggist when he filled the prescription. The question is presented whether a prescription issued under such circumstances is covered by the exception. This question has been determined by the Supreme Court in the case of Webb v. United States, 249 U. S. 96–99, 39 Sup. Ct. 217, 63 L. Ed. 497. The Supreme Court answered the following question, which was certified to it, in the negative:

"If a practicing and registered physician issues an order for morphine to an habitual user thereof, the order not being issued by him in the course of professional treatment in the attempted cure of the habit, but being issued for the purpose of providing the user with morphine sufficient to keep him comfortable by maintaining his customary use, is such order a physician's prescription under exception (b) of section 2."

The Supreme Court said:

"As to question 3 [the one just set out]—to call such an order for the use of morphine a physician's prescription would be so plainly a perversion of meaning that no discussion of the subject is required. That question should be answered in the negative."

If a prescription issued under such circumstances is not a prescription protected by exception (b) of section 2 of the act, then the druggist who fills it, knowing the purpose and circumstances under which it was issued, makes a sale in violation of the law; i. e., one not on an order blank, and not in pursuance of a prescription. The physician who issues the prescription for the purpose mentioned, knowing it is to be filled by a druggist who knows of its illegality, aids and abets the druggist in violating section 2 of the act by the making of an illegal sale. The cases of United States v. Doremus, 249 U. S. 86, 39 Sup. Ct. 214, 63 L. Ed. 493, and Webb v. United States, 249 U. S. 96, 39 Sup. Ct. 217, 63 L. Ed. 497, sustain the indictment.

The motion of the plaintiff in error for a directed verdict was properly denied, for the reasons given for sustaining the indictment.

[2, 3] Plaintiff in error also complained of the court's oral charge and of the action of the court in modifying a requested instruction of the plaintiff in error. These two complaints present a single question. The court charged the jury that if the druggists who filled the prescriptions—

"either had knowledge of the facts mentioned or had such information, gained from facts and circumstances surrounding the transaction as that it would be their duty, under the circumstances and situated as they were, to exercise a reasonable degree of precaution such as a reasonably prudent person, desirous of obeying the law, would adopt under like or similar circumstances surrounding them, if those circumstances were such as to put a reasonably prudent person upon notice and inquiry as to whether the sale was lawful or unlawful, then it was the duty of the said Pfeiffers, sellers, to have followed up such inquiry, and if you believe that if such inquiry had been made and if followed up would have brought knowledge of the unlawful purpose home to the Pfeiffers, sellers, then you would be authorized to infer the knowledge of the unlawful purpose on their part."

The charge applied the same rule to Prochnow and Luckenbach, who were the other druggists. The quoted portion of the court's charge placed too severe a duty on the druggists and wrongly defined imputed knowledge. The druggists were under no affirmative duty to make inquiry. Knowledge was essential to guilt on their part. It might be shown by direct proof or inferred from circumstances. But, if it was established in neither way, guilt would not exist. A negligent failure to inquire would not take the place of knowledge. The question remains whether the error in the court's charge is a reversible one. We think it is not. In the first place, the grounds of exception did not present to the District Judge the infirmity that is now insisted upon. Those grounds are (1) that there was no evidence before the court which tended to show that the Pfeiffers, or either of them, were prudent or imprudent, and the jury were not informed as to what surroundings and circumstances there would have to be to make it the duty of the said Pfeiffers, or either of them, to exercise a reasonable degree of precaution in ascertaining whether the prescription had been issued for a lawful or unlawful purpose; and (2) because exception (b) section 2 of the Act of December 17, 1914, only requires that the druggist or dealer in dispensing said drugs do so in pursuance of a written prescription issued by a physician registered under the act, and no other knowledge upon the part of the druggist is required by law. The two grounds are entirely different from the ground now relied upon. The first implies that the District Judge's definition of knowledge or what legally constitutes it was correct, but that there was no evidence to support the definition. The District Judge's attention was not called by the exception to the infirmity in his definition of knowledge. The second ground of the exception we have already held to be unwarranted, under a proper construction of exception (b).

[4, 5] The plaintiff in error requested a written instruction, which omitted all reference to knowledge. The District Judge supplied the omission by inserting in it a reference to knowledge as defined in his general charge. The plaintiff in error objected and protested to the modification of the written instruction, but the record shows that the charge as modified was given at the request of the plaintiff in error, and that no exception was reserved by him to the giving of the modified charge. Whatever the fact in this respect may have been, we are controlled by the record. The plaintiff in error also requested a written instruction defining knowledge properly, which the court declined to give. No exception, however, was reserved to the refusal

to give this requested charge. We have less hesitancy in reaching the conclusion that the question was not properly preserved, because we are impressed that the error in the court's charge caused the plaintiff in error no substantial injury, and should not avail to reverse the judgment under the terms of the Act of Congress approved February 26, 1919 (40 Statutes at Large, 1181 [Comp. St. Ann. Supp. 1919, § 1246]), which amend section 269a of the Judicial Code.

The plaintiff in error introduced no proof. The inquiry as to whether the druggists knew the character of the prescriptions issued by the plaintiff in error and which were filled by them, depended upon the proper inference to be drawn from circumstances established by undisputed testimony. If it was one upon which the minds of reasonable men could not differ, an infirmity in the court's definition of knowledge could not have been harmful to plaintiff in error. We think from the facts proven reasonable men could have drawn but the one inference, viz., that the druggists, Prochnow and Luckenbach, must have known when they filled plaintiff in error's prescription that they were not given to treat disease or to alleviate suffering, but to gratify the appetites of the persons to whom they were given. We are led to this conclusion as to Prochnow and Luckenbach from the undisputed facts that the plaintiff in error issued prescriptions only for narcotics; that many of the alleged patients were described in his prescriptions as addicts, and had the physical appearance of such; that the prescriptions were issued to the same persons repeatedly and over long periods of time and without diminution in the quantity prescribed, indicating that no cure by reduction was intended by the plaintiff in error. It is inconceivable that a pharmacist would be ignorant of the character of the prescriptions in view of the course of business established by the evidence. The druggists concerned conducted their business in person.

[6] With reference to the Pfeiffers reasonable minds might have reached different conclusions as to their knowledge or want of knowledge of the character and purpose of the prescriptions. The transactions in which they participated were fewer and less conclusive. The plaintiff in error was convicted because of transactions through the Pfeiffers, Luckenbach, and Prochnow. He was sentenced to prison for two years, without fine. One transaction would have sustained the sentence. If he was rightfully convicted because of the prescriptions filled by Luckenbach and Prochnow, or either, the sentence must be sustained, though it were not defensible if it was required to be based on transactions with the Pfeiffers. We think the judgment of conviction under the counts which related to prescriptions filled by Prochnow and the Luckenbachs should be sustained, notwithstanding an error in the charge of the court in defining the term, knowledge.

As the conviction on those counts warrants the sentence imposed by the District Court the judgment of the District Court is affirmed.

MARINE NAT. BANK et al. v. SWIGART.

(Circuit Court of Appeals, Sixth Circuit. February 3, 1920.)

No. 3343.

1. BANKRUPTCY ⟸440—APPEAL AND NOT ERROR PROPER IN REVIEW OF ORDER DENYING ADJUDICATION WITHOUT JURY TRIAL.
Under Bankruptcy Act, § 25a (Comp. St. § 9609), authorizing an appeal as in equity from an order denying an adjudication, an appeal, and not a writ of error, is the proper remedy, though a jury was demanded, where the demand was withdrawn and a hearing had without a jury.

2. BANKRUPTCY ⟸467—BOTH LAW AND FACTS REVIEWABLE ON APPEAL FROM ORDER DENYING ADJUDICATION.
On appeal from an order denying an adjudication in bankruptcy on a hearing by the court after withdrawal of a demand for a jury, the whole case is open for review on both the law and the facts.

3. BANKRUPTCY ⟸467—FINDING THAT PROPERTY WAS NOT TRANSFERRED WITH INTENT TO DEFRAUD CREDITORS MUST BE ACCEPTED UNLESS EVIDENCE PREPONDERATES AGAINST IT.
On appeal from an order denying an adjudication in bankruptcy, a finding that a transfer of property to corporations organized by the alleged bankrupt was not with intent to hinder, delay, or defraud creditors, must be accepted, unless the evidence decidedly preponderates against it.

4. BANKRUPTCY ⟸91(2)—EVIDENCE HELD TO SHOW THAT TRANSFER WAS NOT TO DEFRAUD CREDITORS.
Evidence *held* to support findings that the president of an insolvent jewelry corporation, who transferred farm lands to corporations organized by him, had reason to believe, from negotiations with creditors, that he would not be held on his contingent liability as guarantor of the company's debts, and did not intend to hinder, delay, or defraud his creditors.

5. BANKRUPTCY ⟸396(5)—HOMESTEAD INTEREST DOES NOT PASS TO TRUSTEE.
A homestead interest in lands in Ohio, though mortgaged, does not pass to the owner's trustee in bankruptcy.

6. BANKRUPTCY ⟸143(8)—WIFE'S DOWER INTEREST DOES NOT PASS TO TRUSTEE.
A wife's dower interest in lands in Ohio, though mortgaged, does not pass to the husband's trustee in bankruptcy.

7. BANKRUPTCY ⟸57—TRANSFERS OF EXEMPT INTERESTS WILL NOT SUPPORT CHARGE OF FRAUD NECESSARY TO ACT OF BANKRUPTCY.
Creditors of an alleged bankrupt could not complain of the transfer of a homestead interest of the alleged bankrupt and a dower interest of his wife to corporations organized by him, and the fraudulent intent necessary to render such transfer an act of bankruptcy could not be predicated thereon.

8. FRAUDULENT CONVEYANCES ⟸41—TRANSFER TO CORPORATION ORGANIZED BY DEBTOR NOT NECESSARILY FRAUD.
A transfer of property by a debtor to a corporation organized by him is not a fraud merely because an incorporation is employed.

9. FRAUDULENT CONVEYANCES ⟸64(1)—ULTIMATE QUESTION IS ONE OF FACT AS TO ACTUAL INTENT.
While, in determining whether a transfer of property was with intent to defraud creditors, the court should consider the nature and necessary result of the transfer, the ultimate question is one of fact as to the actual intent.

Appeal from the District Court of the United States for the Western Division of the Northern District of Ohio; John M. Killits, Judge.

Proceeding by the Marine National Bank and others to have John Swigart adjudicated a bankrupt. From an order denying an adjudication, petitioners appeal. Affirmed.

Harry C. Cotter, of Toledo, Ohio, for appellants.

E. J. Marshall and R. R. Taylor, both of Toledo, Ohio, for appellee.

Before KNAPPEN, DENISON, and DONAHUE, Circuit Judges.

KNAPPEN, Circuit Judge. Appeal from an order refusing to adjudge appellee a bankrupt. After asking a jury trial, appellee waived that right in open court, and hearing was had without a jury.

[1, 2] The question whether appeal or error is the proper remedy is more or less important as affecting the scope of our review, notwithstanding section 4 of chapter 448 of the Act of September 6, 1916 (39 Stat. p. 727 [Comp. St. § 1649a]), forbids dismissal of appeal or writ of error merely because the other remedy should have been taken. In our opinion appeal is the proper remedy. The statute (B. A. § 25a [Comp. St. § 9609]) expressly gives a right of appeal "as in equity" from an order denying an adjudication of bankruptcy. It is only when a jury is had that writ of error is needed to enable review of rulings upon the trial. Loveland on Bankruptcy (4th Ed.) pp. 1439 and 1441; Elliott v. Toeppner, 187 U. S. 327, 23 Sup. Ct. 133, 47 L. Ed. 200. The fact that appellee, after having demanded a jury, withdrew his demand, does not alter the case. The necessity for writ of error relates only to an actual, not a potential, trial by jury. Upon this appeal the whole case is open for review, on both law and facts. Elliott v. Toeppner, supra; Merchants' Bank v. Cole (C. C. A. 6) 149 Fed. 708, 79 C. C. A. 414. The limitation upon the scope of review recognized in Edwards v. La Dow, 230 Fed. 378, 383, 144 C. C. A. 520, as applicable to that suit at law, where waiver of jury was not in writing, has no application to the hearing of this petition for adjudication in bankruptcy, on which a jury is not required, unless specially claimed.

Turning to the merits: Appellee was the principal stockholder in and the president of the John Swigart Company, a wholesale jewelry and optical firm at Toledo. On June 27, 1918, the company, being heavily in debt and embarrassed, transferred its stock and assets to one Hickok, as common-law trustee, so called. A committee of creditors was thereupon organized. Appellee had personally indorsed or guaranteed notes aggregating more than $150,000 for money borrowed from banks by the Jewelry Company, of which about $99,000 remained unpaid after July 1, 1918. The books of the Jewelry Company showed charges against him in upwards of $22,000, which were valid and unpaid, and he had some other debts. The small stockholders in the Jewelry Company (some of whom were also creditors as well as employés) seem to have been dissatisfied with the trustee's conduct of the business, and to desire a slower liquidation, in the hope of saving something for their stock. There seem to have been threats of interference with existing conditions, by injunction or bankruptcy. In these circumstances, the creditors' committee agreed with appellee and the small stockholders upon a compromise method of liquidating

the affairs of the Jewelry Company, embracing appellee's retirement from participation in the business and the continuance therewith of the then force of salesmen and employés, a slower liquidation and the cutting down of overhead expenses, and the appointment of four additional trustees to assist Mr. Hickok, with full authority to liquidate the business and sell the property on such terms as the majority of the trustees should determine. This course it was hoped would realize for creditors a maximum of 70 per cent. of their claims; the amount so realized, whether 70 per cent. or less, "to be regarded as a settlement and compromise figure, in full discharge of all claims and demands which creditors have against the company or against John Swigart personally." Should the 70 per cent. figures be reached, the trustees were to convey back to the company the remaining property "as consideration for the services of the employés" referred to.

On July 27, 1918, the creditors' committee, by letter, informed creditors of the situation, including the proposed method of liquidation; and in submitting the plan for approval or disapproval by creditors in practical effect announced the committee's approval of the plan and advised its acceptance, stating that appellee's property was so badly incumbered that "any equities there may be are doubtful and hard to reach," that the proposed plan would produce more than bankruptcy (stated to be the only alternative), and the committee's conclusion that appellee's indorsements were "substantially worthless." On July 31st, the J. S. Farming Company was incorporated under the Michigan statutes (by appellee, his wife, and one Marguerite Jamieson) with a capital stock of $10,000, represented by 100 shares of $100 each; and appellee and his wife conveyed to that company on the last-named date three parcels of farming land in Michigan, aggregating 478 acres, each parcel subject to a mortgage or mortgages which in all aggregated $57,600 of principal (of which $40,000 was a second mortgage on all three parcels, securing appellee's guaranty of a debt of the Jewelry Company), besides upwards of $1,500 accrued interest and taxes, together with farming tools, machinery, and equipment, wagons, vehicles, and nine horses, upon the farms and belonging to appellee. Mrs. Swigart also conveyed to the Farming Company 43 head of cattle, then upon the land and claimed to be owned by her. In full payment for these conveyances the Farming Company issued to appellee 35 shares of the capital stock, to Mrs. Swigart 60 shares, and to Marguerite Jamieson 5 shares; the latter presumably for qualifying purposes.

On the same 31st of July the J. S. Realty Company was organized under the Ohio statutes by appellee, his wife, Marguerite Jamieson, and two others; also with a capital stock of $10,000, consisting of 100 shares, of the par value of $100 each; and on August 3, 1918, appellee and his wife conveyed to the Realty Company a large number of parcels of real estate in Lucas county, Ohio (two parcels being in Toledo), each of these parcels being incumbered by a mortgage or mortgages aggregating $42,800 of principal. In all the Ohio property Mrs. Swigart had a dower interest, and in one of the Toledo parcels appellee had a homestead interest. In payment for these conveyances

the Realty Company issued to appellee 33 shares of its capital stock, to Mrs. Swigart 60 shares, to Marguerite Jamieson 5 shares, and to each of the other incorporators one share each, these 7 shares being issued presumably for qualifying purposes. In each of these two new corporations Mr. and Mrs. Swigart were elected to the two principal offices. The property so conveyed by appellee to the Farming Company and to the Realty Company was all that appellee then had. A small minority of the Jewelry Company's creditors accepted the proposed settlement.[1] On August 14th petition in bankruptcy was filed against the Jewelry Company, and thereafter it was adjudicated bankrupt.[2] On August 17th appellee and his wife transferred to Messrs. Marshall & Fraser (the counsel under whose supervision the Realty and Farming Companies were formed) all the shares of the capital stock of both the Farming Company and the Realty Company received by them respectively. This transfer was made as security for the payment of the transferees' "reasonable charges and disbursements * * * for services in connection with the affairs of" appellee and the Jewelry Company. On September 14, 1918, petition was filed in the court below for adjudication of appellee as a bankrupt, the sole act of bankruptcy alleged being the conveyances to the Farming Company and the Realty Company before referred to, and the receipt in return therefor of the issued capital stock in those corporations, with alleged intent thereby to hinder, delay, and defraud appellee's creditors.

[3] On the hearing of this petition appellee's insolvency and the statutory amount of debts were conceded for the purposes of the issue; and there being the statutory number of petitioning creditors, the only ultimate question left for decision was whether appellee, in conveying the Michigan farm property and the Toledo and other Ohio real estate to the respective corporations, upon the sole consideration of a portion of the capital stock of those corporations received therefor, intended to hinder, delay, or defraud his creditors. Lansing Boiler, etc., Works v. Ryerson (C. C. A. 6) 128 Fed. 701, 703, 63 C. C. A. 253, 255. The District Judge, after careful consideration of the testimony, as indicated by his written opinion, reached the conclusion that such intention was not proved, but that in fact "the proof tends to preponderate on the other side." The testimony having been taken in open court, we must accept this conclusion of fact unless the evidence decidedly preponderates against it. Carey v. Donohue (C. C. A. 6) 209 Fed. 328, 333, 126 C. C. A. 254. And if this conclusion of fact is accepted the order refusing adjudication must be affirmed.

Apart from the conclusion that previous to the issue of the committee's letter of July 27, 1918, careful examination had been made into the affairs of both appellee and the Jewelry Company, at a largely at-

[1] Appellee's attorney testified, without dispute, that favorable responses were received from 25 or 30 creditors of all classes, who assigned their claims, and that "the returns came in a very satisfactory manner, and except for the interference of Mr. Hickok and his determination to force immediate sale the plan of July 27th could and would have been carried through."

[2] The trustee in bankruptcy disposed of all the Jewelry Company's assets in bulk. It is stipulated that that estate will pay creditors approximately 70 cents on the dollar.

tended meeting of that company's bank creditors and by the creditors' committee which was appointed by that meeting, the substantial conclusions reached by the trial judge, so far as seem presently material, are: (a) That when the transfers of the equities were made appellee "had every reason to believe he would not be held upon his contingent liability and was justified in assuming that the creditors would release him personally"; (b) that appellee's explanation that the conveyances of the Michigan and Ohio real estate to the new corporations were made "to conserve the speculative equities in those properties and to make possible the continuance of the dairy business on the Michigan farm" did not appear to be fanciful; and that there appeared nothing reprehensible in appellee's "attempt to save for himself, if possible, through the corporate combination of the tag ends of his properties, what, because of the exigency due to bankruptcy administration, was not salvable for his creditors"; (c) that the "transaction was done openly after a discussion of the purpose with Swigart's creditors"; (d) that there was no satisfactory evidence of the value of Mrs. Swigart's property conveyed to the new corporations, viz. her herd of dairy stock and her dower interest in the Ohio properties, and that it was thus impossible to say that there was "such a disproportion between the interests in the corporations reserved by Swigart and those given to his wife as to itself be a badge of fraud."

Weighing these conclusions by the light of the trial court's opportunity to judge of the credibility of witnesses, we cannot say that the evidence decidedly preponderates against them in material respects. If the testimony of both appellee and his attorney is to be fully credited, the conclusions seem justified. The question of the intent of the conveyances must at the last be referred to appellee's good or bad faith. On this subject the District Judge said:

"Mr. Swigart was on the stand and he exhibited then a state of mind with reference to his affairs as they stood in July and August of last year which compels the conclusion that he was acting at all times in the best of faith with his creditors, and we find no justification in the facts before us for the belief that he was moved at the time by a fraudulent purpose, or even by the despairing debtor's last effort to thwart the lawful exercise of the right of his creditors to immediately proceed against his properties."

This declaration of appellee's apparent credibility is entitled to much consideration.

[4] Referring to conclusion (a): Appellee's attorney testified that he had an understanding with the representatives of the creditors that the latter would accept 70 cents on the dollar and release appellee, and that at the conferences with the creditors' committee three members named, who represented and assumed to speak for all merchandise creditors, repeatedly assured him that the signing of the form of consent by the creditors was a mere matter of form and that such signatures would be furnished "whenever the matter was nearing completion," although it was of course understood that "the matter would have to be submitted to creditors"; and appellee testified that "everybody had agreed to accept 70 per cent., and there was no misunderstanding about that." No member of the creditors' committee

was produced on the trial, and there was no oral testimony disputing that of appellee and his attorney.[8]

As to conclusion (b): The actual value of the equities in real estate transferred to the new corporations is not highly important, except as it bears upon the question of good or bad faith. The burden of showing this value, as an element of alleged bad faith, would seem to be on the petitioning creditors. There was no testimony from either side of the actual value of the lands, except by a witness for petitioning creditors, who (we think naturally) failed to impress the court as having "much qualification." But there was direct testimony on the part of appellee and his attorney, which, if believed, would justify a conclusion that the value of the equities was regarded as small and speculative, and practically valueless to creditors through bankruptcy or other hostile proceeding, although it was regarded as sufficiently promising to justify an attempt to preserve it from such dissipation, and it appears by express testimony that by purchasing more cattle, through the aid of chattel mortgage, and by careful operation the value and income of the equities has been substantially bettered. We do not construe appellee's testimony that in his statement of assets and liabilities he included "the amount available from the farm at $32,000" as attributing to it that value above all encumbrances. The statement seems more naturally to mean that he thought the farm not worth enough to pay more than $32,000 of the $40,000 second mortgage (covering all three parcels of the Michigan lands) given to secure appellee's guaranty of one of the debts due to creditors. Nor do we think that the language of appellee's attorney cited by appellant's counsel necessarily means that creditors and their rights did not enter into the transaction.

[5-7] While there are considerations tending to discredit conclusion (c), there was oral testimony by appellee's attorney which, if believed, would justify the conclusion; and this oral evidence was evidently believed.

Conclusion (d) is amply sustained by the record. Mrs. Swigart's ownership of the cattle must be treated as established, and it is unquestioned that the herd had substantial value. Neither appellee's

[8] The letter of the small stockholders to creditors of August 12 (subsequent to the conveyances in question) stated that appellee had turned over all his Jewelry Company stock to a trustee for other stockholders. While the cancellation of Swigart's debit account on the books of the Jewelry Company is not mentioned in the letters to creditors (or in express terms in the testimony) as a feature of the proposed settlement, the natural presumption would be that it was intended—from the considerations: (a) That Swigart's $40,000 second mortgage (nearly double the book charges) secured the Jewelry Company's debt alone, and the Company would thus owe him for whatever was paid thereon; (b) Swigart's undisputed testimony that the offered 70 per cent. was to cover "my liability to any of said creditors under and by virtue of indorsement or otherwise"; (c) the statements in the Committee's letter to creditors already referred to; (d) the statements in the stockholders' letter that Swigart has "nothing worth going after"; and (e) the improbability that Swigart would turn his stock in the Jewelry Company over to the smaller stockholders and still remain liable to the company for the book charges against him.

homestead interest in the Toledo property nor Mrs. Swigart's dower interests in the Ohio lands, although mortgaged, passed to the trustee in bankruptcy. In re Hays (C. C. A. 6) 181 Fed. 674, 678, 104 C. C. A. 656; In re National Grocer Co. (C. C. A. 6) 181 Fed. 33, 104 C. C. A. 47, 30 L. R. A. (N. S.) 982; In re Baker (C. C. A. 6) 182 Fed. 392, 104 C. C. A. 602. Creditors cannot complain of the transfer of those interests to the new corporations, nor can fraudulent intent be predicated upon such transfers. It cannot, from this record, be stated with any degree of confidence that the shares of corporate stock transferred to Mrs. Swigart were of greater value than the three classes of interests just referred to, or that appellee received stock of less value than his equities in the property transferred (as existing at the time), excluding therefrom the three classes of items mentioned.

[8, 9] If, when the transfers were made to the Farm and Realty Companies, respectively, appellee actually and in good faith believed that his release from contingent liability on the debts of the Jewelry Company was as good as given—that its giving was a mere matter of form—it is not a far cry (as the case is presented here) to a conclusion of lack of bad faith in organizing the new corporations and making the transfers complained of. The situation would be in principle more or less analogous to that declared in Merchants' Bank v. Cole, supra, 149 Fed. 708, 79 C. C. A. 414, where a conveyance was held not intended to hinder, delay, or defraud creditors where the grantor, although in fact heavily indebted contingently, supposed such liability had been extinguished. It is true that a court of equity will look through the fiction of a corporation formed for the purpose of accomplishing a fraud under the disguise of the fiction. First Nat. Bank v. Trebein, 59 Ohio St. 316, 52 N. E. 834; Stark Elec. Co. v. McGinty Contracting Co. (C. C. A. 6) 238 Fed. 657, 663, 151 C. C. A. 507. But fraud is not committed merely because an incorporation is employed. The Trebein Case (cited by appellants) is readily distinguishable in its facts from the instant case, in that in the Trebein Case the contingent liability was known to exist at the time the conveyance under consideration was made. It is also true that in determining the question of intent a court should take into consideration the natural and necessary result of the transfer. Bean v. Standard Co. (C. C. A. 6) 131 Fed. 215, 65 C. C. A. 201. But the ultimate question is still always one of fact, viz. actual intent, and "that intent must be established by proof, fraud must be shown, and the good faith of the transaction must be successfully impeached." Merchants' Bank v. Cole, supra, 149 Fed. at page 711, 79 C. C. A. 417; Coder v. Arts, 213 U. S. 223, 242–244, 29 Sup. Ct. 436, 53 L. Ed. 772, 16 Ann. Cas. 1008; Lansing, etc., Works v. Ryerson, supra, 128 Fed. at page 703, 63 C. C. A. 253; Johnson, etc., Co. v. Bardsley (C. C. A. 8) 237 Fed. 763–767, 150 C. C. A. 517.

Taking into consideration the entire record, and giving due weight to the absence of testimony material to the issue and as to which petitioning creditors had the burden of proof, as well as the conclusions adopted by the trial judge after seeing and hearing the witnesses, we

cannot say that the evidence decidedly preponderates against the ultimate conclusion reached below.

The order denying adjudication of bankruptcy is accordingly affirmed.

SHEARER v. FARMERS' LIFE INS. CO.

WIBLE v. SAME.

(Circuit Court of Appeals, Eighth Circuit. December 2, 1919.)

Nos. 5372, 5373.

1. CONTRACTS ⟸264—EQUITY GRANTS RESCISSION AS RESTORATION TO INJURED PARTY, BUT REQUIRES HIM TO DO EQUITY.

Equity grants rescission of a contract obtained by fraud as a means of restoring the parties to their original situation, but will not permit it to be made a means of injustice, and will require the defrauded party to do equity to the other.

2. INSURANCE ⟸33—BUYER OF STOCK OF CORPORATION WHOSE VALUE IT HAD DESTROYED MUST PAY ACTUAL VALUE TO OBTAIN RESCISSION.

Where an insurance company was induced by fraud to purchase stock of another company, and had destroyed the value of the stock by transferring the assets and business of the latter company to itself, equity, on granting rescission, will require the buyer to pay the actual value of the stock at the time of its purchase.

3. APPEAL AND ERROR ⟸931(1)—PRESUMPTION IS THAT FINDINGS AND CONCLUSIONS OF TRIAL COURT ARE CORRECT.

The presumption is that the findings and conclusions of the trial court were right, and they will not be disturbed on appeal, unless the record shows a material mistake of fact or serious error of law.

4. INSURANCE ⟸33—WHERE AGENTS OF INSURANCE COMPANY BUYING STOCK OF ANOTHER KNEW OF FACTS AFFECTING ITS VALUE, BUYER CANNOT CLAIM MISREPRESENTATION.

Where the agents of an insurance company, who purchased stock of another company, knew of a report by an insurance commissioner discounting the value of certain securities owned by the latter company, the buying company had sufficient notice to put it on inquiry, and cannot rely on misrepresentations as to the value of those assets.

5. INSURANCE ⟸33—PROOF OF MATERIAL MISREPRESENTATION OF VALUE OF ASSETS OF INSURANCE COMPANY HELD TO WARRANT RESCISSION OF STOCK PURCHASE.

Where the evidence showed that an insurance company, whose stock plaintiff purchased, listed among its assets many notes and mortgages given to it without valuable consideration to enable it to deposit with the insurance department the required amount of securities, and that the security of some of them was insufficient, of which facts the purchaser had no notice, there was sufficient evidence of intentional misrepresentation to sustain a decree of rescission.

6. CORPORATIONS ⟸487(1)—EQUITY WILL DECREE RESCISSION OF ULTRA VIRES CONTRACT ONLY IF CORPORATION DOES EQUITY.

A corporation which has made an ultra vires contract can obtain a rescission thereof in equity only on condition of doing equity to the other party, which necessitates restoration of consideration.

7. APPEAL AND ERROR ⟸1054(1)—ERRONEOUS ADMISSION OF EVIDENCE NOT FATAL, IF THERE IS SUFFICIENT COMPETENT EVIDENCE TO SUPPORT DECREE.

The erroneous admission of evidence in an equitable suit for a rescission of a contract does not invalidate the decree, if there was sufficient

competent and relevant evidence to sustain the charge of material misrepresentations inducing the contract.

8. INSURANCE ⊂=33—ESTOPPEL OF INSURANCE COMPANY TO RESCIND PURCHASE OF STOCK.

An insurance company, which purchased stock of another company and transferred the business and assets of the latter company to itself, is not estopped to rescind its contract for the purchase of the stock for fraud, where the evidence did not show that it had knowledge of the fraud before it transferred the assets and business to itself.

9. INSURANCE ⊂=33—RIGHT TO SHARE IN REMAINING ASSETS HELD NOT TO ESTABLISH EQUITY OF RESCISSION ON SURRENDER OF STOCK.

Where an insurance company had purchased stock in another, induced by fraud, and had transferred to itself the assets and business of the latter, except the assets deposited with the state insurance department, the right to participate in the deposited assets does not render equitable a rescission on reconveyance of the stock, since the value of the stock represented by the other assets of the company and its outstanding business cannot be restored.

10. CORPORATIONS ⊂=537—INSUFFICIENCY OF ASSETS OF INSURANCE COMPANY TO EQUAL PAR VALUE OF STOCK DOES NOT ESTABLISH INSOLVENCY.

An insurance company, whose assets exceeded its liabilities, and which was able to pay those debts as they matured, is not insolvent, though the excess of its assets over its liabilities was less than the par value of its outstanding stock.

Appeals from the District Court of the United States for the Western District of Missouri; Joseph W. Woodrough, Judge.

Separate suits by the Farmers' Life Insurance Company against W. F. Shearer and against John Wible. Decrees for complainant, and defendants appeal. Reversed, with instructions to render modified decrees for complainant.

J. Herbert Smith and William G. Holt, both of Kansas City, Mo. (James K. Cubbison and Amos Townsend, both of Kansas City, Mo., on the brief), for appellants.

W. F. Zumbrunn, of Kansas City, Mo. (H. A. Hicks, of Denver, Colo., on the brief), for appellee.

Before SANBORN, Circuit Judge, and MUNGER and YOUMANS, District Judges.

SANBORN, Circuit Judge. These are appeals from decrees of rescission of contracts between the appellants and the appellee, by means of which the appellee, the Farmers' Life Insurance Company, secured and retains all the assets of the Anchor Life Insurance Company, in which the appellants Shearer and Wible, were the controlling stockholders when the contracts were made. A brief statement of the situation of the parties when the contracts were made and at this time since the decrees, and a history of their transactions, is necessary to an understanding of the questions at issue.

In September, 1914, the Anchor Life Insurance Company, a corporation of the state of Kansas, was conducting its insurance business in Kansas City. It had issued its policies to the amount of about $1,600,000, and the annual premiums payable thereon were about $49,000. Under the statutes of Kansas this company was required to maintain

a deposit of securities with the officers of that state to the amount of $100,000, the par value of its 1,000 shares of capital stock, in order to secure permission to conduct its business in that state, and to the amount of about $25,000 more to maintain a legal reserve to secure the payment of its policies. Its insurance had so increased that it was difficult for it to maintain the required deposits, and Mr. Jones, an examiner for the insurance department of Kansas, after examining the securities of the company, had filed a report in the insurance department to the effect that there should be deducted from the value of its assets, which were $160,814.06, as shown by its report of December 31, 1913, $30,000 on account of two mortgages, aggregating $30,000, made by one Wade, $9,000 on account of eight mortgages, for $1,250 each, and $29,500, the value stated in that report of $41,000, face value, of the bonds of the Williamsville, Greenville & St. Louis Railway Company, making in all a deduction of $68,500, leaving the value of the company's assets $92,314.06, and showing an impairment of its capital to the extent of $34,554.94, according to the report of Jones. Shortly after the filing of this report, the superintendent of insurance notified the company that it must deposit securities sufficient to remove this impairment, or he would be compelled to apply for a receiver of its property at the end of 30 days.

In September, 1914, the Farmers' Life Insurance Company, a corporation of the state of Colorado, was conducting a life insurance business at Denver in that state. Its capital stock was $1,000,000, divided into shares of the par value of $3 each. The aggregate amount of the insurance it had written was about $850,000, or about one-half of that which had been written by the Anchor Company. The evidence tends to show that it is necessary for a life insurance company to have about $5,000,000 of insurance to enable it to maintain its required deposits, pay its expenses, and conduct a profitable business from its income; and, as the addition to insurance which a company has itself written of insurance already written by other companies does not materially increase its overhead expenses, and increases its insurance much faster than to solicit and to write it, the Farmers' Insurance Company was endeavoring to buy such insurance of other companies, by purchasing them or their property and reinsuring their risks. Mr. Royce was the superintendent of its agents. He had been bank examiner of the state of Kansas, was well acquainted with Mr. Lewis, the superintendent of insurance of Kansas, had secured the admission of the Farmers' Company into that state, and was well qualified to examine, ascertain, and state the value of the assets of insurance companies. He, Mr. Temple, the secretary or attorney of the Farmers' Company, and Mr. O'Shaughnessy, one of its agents, went from Denver to Kansas City in September, 1914, to secure the insurance and other property of the Anchor Company for the Farmers' Company. Before they went, some of them had seen a copy of the report of the Anchor Company of December 31, 1913, and before any contract was made by them, or the Farmers' Company, some of them had notice of the contents of Mr. Jones' report, of the worthlessness of the Wade mortgages, for $30,000, and of the railroad bonds,

for $41,000, par value, and of the fact that notice had been given to the Anchor Company that an application for a receiver of its property would be made shortly, unless it speedily deposited securities to remove the reported impairment of its capital. They endeavored to acquire the insurance and assets of the Anchor Company, by arranging an exchange of the stock of the Farmers' Company for that of the Anchor Company at the rate of 15 shares of the former for one share of the latter. Mr. William F. Shearer owned 135 shares and was the president of the Anchor Company. Mr. John A. Wible owned 351 shares of that company's stock and was its secretary. They controlled the insurance, the property, and the business of the Anchor Company.

The agents of the Farmers' Company conferred and negotiated with them from some time in September until November 16, 1914, to obtain their stock for the Farmers' Company and their assistance in getting the other stock of the Anchor Company for it, to the end that that company might have the Anchor Company and all its insurance, income, and assets. The result of these negotiations was that between November 13 and November 17, 1914, the Farmers' Company made contracts with Shearer to pay him for his 135 shares of Anchor stock $27,000, $13,500 in 1,350 shares of the stock of the Farmers' Company and $13,500 in notes which that company had received for the sale of its stock; that the Farmers' Company did and would pledge 1,350 shares of its stock and the 135 shares of stock of the Anchor Company bought by it of Shearer as collateral security for the payment of the stock notes; and that the stock and the stock notes secured thereby should be and they were delivered to Townsend and Smith in trust to secure the performance of these agreements. The Farmers' Company at the same time made agreements with Mr. Wible to pay him for his 351 shares of Anchor stock $62,500, $5,000 in cash, $17,500 in three mortgage notes, for $3,500, $6,000, and $8,000, respectively, which notes were secured on Wible's property and were owned by the Anchor Company, and $40,000 in stock notes owned by the Farmers' Company and made by the purchasers of its stock; that the Farmers' Company would and did pledge 4,000 shares of its stock and the 351 shares of the stock of the Anchor Company bought by it of Wible as collateral security for the payment of the $40,000 of stock notes; and that the stock so pledged and the notes so secured should be and they were delivered to Townsend and Smith in trust to secure the performance of these contracts. The stock pledged by these contracts, the notes secured thereby, and their proceeds were prior to the decrees placed in the custody of the court below and constitute a part of the subject of this litigation. These contracts gave the Farmers' Company unrestricted control and possession of the insurance and other assets of the Anchor Company.

At the time these contracts were made the Farmers' Company hired Shearer and paid him $2,500 to assist it in exchanging its stock with other holders of Anchor stock at the rate of 15 for 1, in getting the Anchor Company insurance over to the Farmers' Company, and inducing the Anchor Company's policy holders to reinsure in the Farmers' Company, and in acquiring all the other assets of the Anchor Company.

All this was practically accomplished by the early part of January, 1915. The Farmers' Company acquired, including the stock of Shearer and Wible, more than 95 per cent. of all the stock of the Anchor Company, by the use of this stock caused the substitution of its agents, Royce, O'Shaughnessy, and others for Wible, Shearer, and the other officers and directors of the Anchor Company, and made a contract of reinsurance of the Anchor Company's policy holders which the great majority of them accepted, while those that did not accept generally abandoned their policies, so that all the value of the property of the Anchor Company was secured and appropriated to its own use by the Farmers' Company.

On January 15, 1915, after all this had been done, the Farmers' Company gave notice to Shearer and Wible that, on account of their misrepresentations of the value of the assets of the Anchor Company during the negotiations for the contracts, it elected to rescind its contracts with them and offered to return the shares of Anchor stock it had secured from them and other stockholders, to abrogate its contract of reinsurance of the Anchor Company's policy holders made on December 11, 1914, and to return everything of value it had received, upon the return to it of the consideration it paid therefor. In March, 1915, it brought these suits, one against Shearer and the other against Wible, for rescission of the contracts on the grounds: (1) That 50 shares of Shearer's 135 shares were an overissue; (2) that Shearer and Wible represented the value of the assets of the Anchor Company to be much greater than it actually was, especially the value of some of its mortgage securities, and of the $41,000, face value, reported worth $29,500, of the bonds of the Williamsville Railway Company, and that the contracts were beyond the powers of the Farmers' Company. It prayed that all the contracts be avoided, and that the defendants Shearer and Wible and the trustees be decreed to deliver and pay over to it all they had received under the contracts, except the 135 shares of Anchor stock delivered to it by Shearer and the 351 shares delivered to it by Wible, and that they have such other orders and decrees as might seem meet.

The defendants answered. In their answers they denied the equities of the complaints, alleged that the Farmers' Company had investigated and had notice of the character and value of the assets of the Anchor Company before it made its contracts, alleged that the Farmers' Company had failed to perform them, that it had failed to return any of the property it received under them, that it was unable to return the property of value which it had received thereunder, and prayed for specific and general affirmative equitable relief.

The court below rendered decrees in favor of the Farmers' Company. At the time of the entry of the decree in the suit against Shearer, there were in the custody of the court in his case stock notes unpaid of the face value of $3,375, $10,367.37, the proceeds of such notes paid, 1,350 shares of stock of the Farmers' Company, and 135 shares of stock of the Anchor Company. The court adjudged that this cash, these notes, and the 1,350 shares of the stock of the Farmers' Company be delivered to the Farmers' Company, that the defendant

Shearer pay the costs of the suit and have nothing but the 135 shares of stock of the Anchor Company, from which the complainant had extracted and appropriated to itself everything of value. At the time of the entry of the decree against Wible, there were in the custody of the court in that case stock notes unpaid of the face value of $17,872.50 and $24,483.42 in cash, the 4,000 shares of stock of the Farmers' Company, and the 351 shares of stock of the Anchor Company. The court decreed that these notes and this cash and the 4,000 shares of stock of the Farmers' Company be delivered to it, that Wible reassign to it the $8,000 note and mortgage which had been assigned to him pursuant to the provisions of the contracts between him and the Farmers' Company, that the Farmers' Company recover $5,975 from him, that if he should fail to make such reassignment, or to pay the $5,975, the 351 shares of stock of the Anchor Company should be sold, and its proceeds should be applied to pay the judgment against Wible and the costs of the suit, and that execution issue against him to enforce the decree. It is from these decrees that Shearer and Wible have appealed.

[1] The basic reason for the rescission of a contract by a court of equity is that, where it has been obtained by fraud, deceit, or other unlawful act of one of the parties, their restoration as near as may be to their respective situations before the contract was made generally gives the most equitable relief to the injured party at the expense of the least loss to the perpetrator of the wrong. The grant of such relief is and always ought to be conditioned by the application to its terms and to the measure of its extent of the equitable principles that he who seeks equity must do equity, that a court of chancery may and it should condition its grant of relief to the complainant whenever possible with the preservation and enforcement of the equities of the defendant, that it may, in a case in which the rules and principles of equity demand it, condition the grant of relief sought from it by the complainant with the enforcement of a claim or equity held by a defendant, which the defendant could not enforce in any other way, Farmers' Loan & Trust Co. v. Denver L. & G. Co., 126 Fed. 46, 51, 60 C. C. A. 588, 593; Burnes et al. v. Burnes et al., 137 Fed. 781, 791, 70 C. C. A. 357, 367; and that a court of equity may and should so mold its decrees as to do equity and avoid inequity, Jones v. Missouri-Edison Electric Co., 144 Fed. 765, 766, 777, 778, 779, 781, 75 C. C. A. 631, 632, 643, 644, 645, 647; Central Improvement Co. v. Cambria Steel Co., 201 Fed. 811, 812, 824, 827, 120 C. C. A. 121, 122, 134, 135, 136, 137; Union Central Life Ins. Co. v. Drake, 214 Fed. 536, 538, 548, 131 C. C. A. 82, 84, 94; United States v. Debell, 227 Fed. 775, 779, 142 C. C. A. 299, 303.

[2] The facts disclosed by the pleadings and the decrees, that the Farmers' Company and the appellants made the contracts rescinded on the agreed basis that the property of the Anchor Company was worth $184,731, and the stock of the appellants therein $89,700, the fact that it is not claimed that the property or stock of the Anchor Company was worthless, or that the Farmers' Company received no substantial value or benefit therefrom, but the complainant only urges

that they were worth much less than the agreed estimate; and the fact that Shearer and Wible will come out of these transactions under the decrees below, when executed, without anything of value, while the Farmers' Company will have retained all it had before the contracts were made, and will have added thereto and retained all the value that the Anchor Company and the appellants as its stockholders had, without paying or being required to pay anything therefor—have brought these principles of equity jurisprudence forcibly to mind, have suggested the questions: What was the real value of the property of the Anchor Company and of the stock of Shearer and Wible when the contracts were made? May not decrees be lawfully made which will relieve the Farmers' Company of their contracts to pay more than the value of the appellants' stock, and yet avoid depriving the appellants of all its value? and have induced a patient examination of the evidence in an endeavor to find a fair value of the property of the Anchor Company and of the stock of the appellants at the time the contracts were made.

There is testimony scattered through the more than 600 closely printed pages of the records of the trials of these cases relating to the value of about 60 separate securities claimed to have been the property of the Anchor Company at some time. The evidence relative to each one of these securities has been extracted, collected together, considered, and a conclusion has been deduced therefrom as to the ownership of that security by the Anchor Company and as to the value of it on November 15, 1914. The first contracts were made November 14, 1914, and the second contracts on November 16, 1914. As to some of these securities the proof on these questions is not clear or conclusive, but an appeal in equity invokes a trial of the case de novo, and the Supreme Court has admonished that, although the proof in a suit in equity be uncertain and its effect doubtful, it is still the duty of a court of equity to decide the issues presented on the evidence furnished to it, in accordance with the best judgment it can form thereon. This has been done as to each of these securities. Time and space will not permit the review or statement of the details of the evidence regarding them. Suffice it to say that the Williamsville Railway bonds, reported at $29,500, and the Wade mortgages, reported at $30,000, according to the report of December 31, 1913, and the so-called donation notes and mortgages, for which the Anchor Company gave no valuable consideration, but which it deposited with the state officers to comply with their requirements, have been found worthless on November 15, 1914. The three mortgage notes—for $3,500, secured on Wible's property at 1832 Washington street, Kansas City, Mo.; for $6,000, secured on his property at Twenty-Fifth and Washington streets, Kansas City, Mo.; for $8,000, secured on his property at 1221 Garfield avenue, Kansas City, Mo.—which Wible and the Farmers' Company agreed that he should take in part payment of the $62,500 it agreed to pay him for his Anchor stock, have in view of that fact, and of the other evidence regarding them, been found to have been worth on November 15, 1914, respectively, $4,285, $6,270, and $8,000 aggregating $18,555.83, and this amount has been deducted from

the determined value of his 351 shares of stock on that date in ascertaining the amount which he ought in equity to receive in addition to these mortgage notes and their securities.

The result of the consideration in the way which has been described of all the evidence regarding each of the mortgages, securities, and bonds claimed to have been owned by the Anchor Company on November 15, 1914, is that those owned by it on that date were worth $85,716.25, that its written insurance was worth $19,000, that it owned cash items in addition to the above amounting to $4,000, that the real value of its property was $108,716.25, that the value of the 135 shares of its stock owned by Shearer was $14,676.69, and that the value of the 351 shares thereof owned by Wible was $38,159.40.

There is testimony tending to show that the Farmers' Company paid Wible $5,000 in cash in part payment for his stock, and that he paid to the trustees holding the securities $2,000 thereof. The difference, $3,000, and the value on November 15, 1914, of the three mortgage notes Wible was to take in part payment for his stock, $18,555.83, have been deducted from the value of that stock, $38,159.40, and the conclusion is that the balance, $16,603.57, and the three mortgage notes and their securities, were on November 15, 1914, equal to the real value of Wible's stock in the Anchor Company on that day. In view of these findings and conclusions, the effect of the decree in Shearer's case will be to restore to the Farmers' Company the 1,350 shares of its stock, the stock notes, and the proceeds thereof, and to settle and confirm in it the title to $^{135}/_{1000}$ of all the assets of the Anchor Company, which was worth $14,676.14 on November 15, 1914, without the receipt by him of anything of value therefor, for his 135 shares of Anchor stock were rendered worthless by the transfer of all the property of that company to the Farmers' Company before suit was brought against him; and the effect of the execution of the decree in Wible's case will be to restore to the Farmers' Company the 4,000 shares of its stock, the stock notes delivered to the trustees, and the proceeds thereof, to deprive Wible of the entire value of his stock, which was $38,159.40 on November 15, 1914, and to vest the title of the property it represented irrevocably in the Farmers' Company, without his receipt of any substantial consideration therefor.

These decrees cannot be sustained. They conflict with the principles of equity jurisprudence, that he who seeks equity should do equity, and that a court of equity should so mold its decree, if possible, as to avoid inequity as well as to do equity. These decrees unnecessarily inflict upon Shearer and Wible an injustice and inequity not less flagrant than that from which they relieve the Farmers' Company. What, then, ought a court of equity to do? It ought as nearly as possible to do equity. Its province is not the infliction of punishment. It is to hold the scales even, and to grant to all alike their just dues. To such a court the Farmers' Company has elected to appeal for relief, and not to a court of law for its damages, as it might have done; and such a court ought to render such decrees as will justly adjudge and settle all the equities of each of the parties to this litigation.

The decrees below should be reversed. A decree should be render-

ed in Shearer's case to the effect: (1) That the contracts between him and the Farmers' Company be set aside; that the proceeds of its stock notes be paid over to it; that its unpaid stock notes and its 1,350 shares of stock pledged to secure their payment, and the 135 shares of the stock of the Anchor Company, which are worthless, be conveyed and delivered to it; that all this be decreed and done on condition, but not otherwise, and on no other condition, that within 60 days, or such other short time as shall be allowed by the District Court, after the entry of the decree, the Farmers' Company pay to Shearer $14,676.14, the value of his stock on November 15, 1914, and interest thereon at 6 per cent. per annum from that date to the date of such payment; that in case such payment is made within the time prescribed the Farmers' Company have the relief which it is above declared entitled to, on the condition there stated, and recover of Shearer the cost of its suit. (2) That in case the Farmers' Company fails to make such payment within the time fixed in the decree, all the proceeds of the stock notes in his case be forthwith paid over to Shearer, in part payment of the $14,676.14 and interest to the time of payment; that the 1,350 shares of the stock of the Farmers' Company pledged to secure the payment of the stock notes in his case be sold under the direction of the court; that the proceeds of such sale be applied, first, to the payment of the costs of the suit, and, second, to the payment of the unpaid remainder of the $14,676.14 and interest; that the surplus, if any, of such proceeds of the sale after such payments are made, be paid over to the Farmers' Company; and that, in case there still remains a part of the $14,676.14 and interest unpaid, Shearer recover the amount of such deficiency of the Farmers' Company and have execution to collect it.

In Wible's case the agreement was that he should take, in part payment of the $62,500 agreed to be paid for his stock, $5,000 in cash and at their face value three mortgage notes, for $3,500, $6,000, and $8,000, respectively, owned by the Anchor Company and secured by mortgages on three different tracts, respectively, of Wible's real estate. The note for $3,500, which was secured on his property at 1832 Washington street, Kansas City, Mo., and was worth $4,285, on November 15, 1914, was delivered to Wible on November 16, 1914. The mortgage was foreclosed, the mortgaged property was bid in at the foreclosure sale by Shearer for Wible, the time for redemption expired without any redemption, the trustee who made the sale duly conveyed the property to Shearer, but the Farmers' Company by claim and notice to Shearer prevented him from conveying it to Wible, and he has never made such a conveyance. The Farmers' Company refused to deliver to Wible the mortgage note for $6,000, secured on his property at Twenty-Fifth and Washington streets, Kansas City, Mo., which was worth $6,270.83 on November 15, 1914. The Farmers' Company delivered to Wible the mortgage note for $8,000, secured on his property at 1221 Garfield avenue, Kansas City, Mo., which was worth $8,000 on November 15, 1914. The Farmers' Company paid Wible $5,000 in cash on November 16, 1914, and Wible paid $2,000 to the receiver in his case,

so that the Farmers' Company is entitled to credit for $3,000, on account of these cash transactions.

A decree should be rendered in Wible's case to the effect that the contracts between him and the Farmers' Company be set aside; that the proceeds of the stock notes in his case be paid over to it; that its unpaid stock notes, and its 4,000 shares of stock pledged to secure the payment of the stock notes in Wible's case, be conveyed and delivered back to it; that the title to the property at 1832 Washington street, Kansas City, Mo., acquired from the foreclosure of the mortgage for $3,500 be conveyed to and vested in the Farmers' Company; that the title to the mortgage note for $8,000 to any amounts collected from it and any rights pertaining to or derived from the ownership thereof be conveyed to and vested in the Farmers' Company and that the 351 shares of Anchor stock be surrendered and delivered to it; that all these things be decreed and done on condition, but not otherwise, and on no other condition, that within 60 days, or such other short time as may be fixed by the District Court, the Farmers' Company pay to Wible $35,159.40, which was the value of his stock, $38,159.40, less the $3,000 cash credit specified above, and interest on said $35,159.40 at 6 per cent. per annum from November 15, 1914, to the day of such payment; that in case such payment is made within the time prescribed the Farmers' Company have the relief it is above declared to be entitled to on the condition there stated, and that it recover the costs of this suit; that in case the Farmers' Company fails to make such payment within the time fixed by the decree: (a) Then that the right and title to and the possession of the $8,000 mortgage note, the mortgage or trust deed securing its payment, and all the proceeds and property derived and derivable therefrom be decreed to be quieted in Wible; (b) that the Farmers' Company cause the $6,000 mortgage note, the mortgage or trust deed securing it, and all the proceeds and property derived or derivable therefrom, to be conveyed to and vested in Wible, and that the title thereto be quieted in him; (c) that the Farmers' Company convey, assign, and release to Wible all its right and claim to the mortgage note for $3,500, the mortgage or trust deed securing the payment thereof, and all the proceeds and property derived or derivable therefrom, that it cause Shearer to convey to Wible the property mortgaged or conveyed by the trust deed to secure that note, and that the title to that property and to the note and mortgage relating thereto be quieted in Wible; (d) that in case the provisions of paragraph (a) above are performed and become effectual within 120 days after the entry of the decree, or such other short time as may be fixed by the District Court as to the $8,000 mortgage note, the security therefor, and the proceeds and the property derived and derivable therefrom, then the sum of $8,000 shall be deducted from the $35,159.40 above mentioned as of the date of November 15, 1914; that in case the provisions of paragraph (b) above are performed and become effectual within 120 days after the entry of the decree, or such other short time as may be fixed by the District Court, as to the $6,000 mortgage note, the security therefor, and the proceeds and property derived and derivable therefrom, then $6,270.83 more shall be deducted from that

$35,159.40 as of November 15, 1914, and in case the provisions of paragraph (c) above are performed and become effectual within 120 days after the entry of the decree, or such other short time as may be fixed by the District Court, as to the $3,500 mortgage note, the security therefor, and the property derived and derivable therefrom, and especially as to the title of the property derived from the foreclosure of the trust deed securing that note, which title is now in Shearer, then $4,285 more shall be deducted from the $35,159.40 as of the date of November 15, 1914; that all the proceeds derived from the stock notes in Wible's case, or such part thereof as may be required to pay in full the costs of this suit and the $35,159.40 and interest thereon at 6 per cent. per annum from November 15, 1914, to the time of payment, or, in case any reduction or reductions therefrom are made pursuant to the last preceding paragraphs relating to such reductions, then to pay the remainder of said $35,159.40 after such reductions are made, and the interest on such remainder from November 15, 1914, to the day of its payment, be paid over to Wible and applied, first, to the payment of the costs of the suit, and, second, to the payment of $35,159.40 and interest, or, in case such reductions are made, to the payment of the unpaid remainder thereof and the interest thereon; that, after such payment has been made, the unpaid stock notes, the 4,000 shares of stock of the Farmers' Company, and the 351 shares of the stock of the Anchor Company be sold under the direction of the court, and the proceeds thereof be applied to the payment of the unpaid remainder of the $35,159.40 and the interest thereon, and the remainder of such proceeds, if any, be paid to the Farmers' Company; that in case the $35,159.40 and interest, or any part thereof, still remains unpaid, then that Wible recover the amount of such balance unpaid of the Farmers' Company and have execution against that company to collect it.

What has been said regarding the decrees that should be rendered in these cases is not intended to, nor does it, limit the power or discretion of the court below to vary the decrees and orders to be rendered after the filing of this opinion, from those indicated above, so far as such variations relate to the times, forms, and terms to be used in attaining the indicated result. It has been said to disclose the result desired and the general character of the decrees by which it is thought that result may be reached in accordance with the rules and principles of equity jurisprudence.

[3] The view of the chief contentions of counsel for the respective parties which has led to the conclusions which have been stated is this: The record contains no finding of facts and no opinion of the court below, so that there is nothing but the decrees it rendered to indicate its findings of fact or its conclusions of law. The legal presumption is that its findings and conclusions were right, and they ought not to be disturbed by an appellate court, unless the record proves that the District Court made a material mistake of fact or committed a serious error of law. The evidence fails to satisfy that there was an overissue of 60½ shares of the stock of the Anchor Company, and that this 60½ shares was a part of Shearer's 135 shares, as alleged by the

Farmers' Company, the decree is not appropriate to such a finding, and the conclusion is that the District Court did not so find, and that it ought not to have so found.

[4] The decrees convince that the court below found that Shearer and Wible by their acts and words made material false representations to O'Shaughnessy, Royce, and Temple, or to one or more of them, during the negotiations for the purchase from Shearer and Wible of the property and stock of the Anchor Company, as to the value of the mortgage notes of the Anchor Company and the securities for the payment thereof, and that these misrepresentations induced the Farmers' Company to make the contracts challenged. A careful reading, analysis, and study of the evidence has failed to convince that there was any mistake in this finding of fact. On the other hand, the evidence establishes the facts that O'Shaughnessy, Royce, and Temple were the agents of the Farmers' Company throughout the negotiations for and the making of the contracts, that the notice to and knowledge of each of them of the financial condition of the Anchor Company and of its securities was under the law notice to and the knowledge of the Farmers' Company, that they or one or more of them and that company had such notice before the contracts were made of the Jones report and of the worthlessness of the bonds of the Williamsville Railway Company, and of the Wade mortgages, as would have led a person of ordinary prudence in their situation to full knowledge thereof; that notwithstanding this notice, and their knowledge of the impairment of the capital of the Anchor Company and the receivership that threatened it, these agents and the Farmers' Company urged Shearer and Wible with importunity to make the contracts, which the latter never solicited.

[5] But neither the Farmers' Company nor its agents had adequate notice of the fact that there were many thousands of dollars of notes and mortgages among those which Shearer and Wible by their acts and words during the negotiations held out as good security of the Anchor Company, so far as they knew, which they knew had been given to the Anchor Company without any valuable consideration received by the makers, and merely to enable that company to deposit them with the insurance department of Kansas, and thereby make a showing of an amount of security owned by it sufficient to meet the requirements of the laws of that state. Nor did the Farmers' Company have adequate notice of the insufficiency of the security of some of the mortgage notes so held out. There was therefore sufficient evidence of intentional misrepresentation of the character and value of some of the mortgage securities to have sustained decrees of rescission of the contracts, if Shearer and Wible could have been substantially restored to their respective financial situations before the contracts were made.

[6] Counsel for the Farmers' Company insist that the contracts were ultra vires of the Farmers' Company, and seek their rescission on that ground. Conceding, but neither admitting nor deciding, that the contracts were beyond the powers of that company, it certainly has the power to ask, and is now asking, this court for the same

equitable relief it prays on account of the misrepresentations. The right to this relief in equity on account of its lack of power to make the contracts is conditioned, however, by the same duty on its part to do, and on the part of the court to require it to do, equity as is its right to relief on the ground of false representations. It is therefore unnecessary to discuss or decide the question whether or not the contracts were beyond its powers. It is not irrelevant to note, however, that, if they were, the Farmers' Company is not without fault. The primary duty rested upon it to know its powers, and not to exceed them, and its taking of all the value of the stock of Shearer and Wible in the Anchor Company without the lawful power to do so, and its persistent attempt to hold it by decrees in equity because it had no such power, does not appeal to the conscience of a chancellor with compelling force.

[7] Counsel for Shearer and Wible complain of the admission in evidence of the report of the Anchor Company of December 31, 1913. Conceding that its admission was erroneous, and that there was much other evidence erroneously admitted, an examination of the record nevertheless discloses the fact that there was sufficient competent and relevant evidence in this case to sustain the charge of the material inducing misrepresentations to which reference has been made, and the findings and conclusions of this court in this regard rest upon the latter evidence.

[8] Counsel for Shearer and Wible argue that the Farmers' Company should be denied any relief because it was guilty of laches, because it waived its right to rescind, and because it is estopped from rescinding. These defenses are of the same nature, and rest in reality upon the single ground of estoppel. The facts invoked to sustain this estoppel are that the contracts were made between November 13 and November 16, 1914; that about November 16, 1914, Shearer's 135 shares and Wible's 351 shares in the Anchor Company were surrendered to the Farmers' Company, transferred on the books of the Anchor Company and certificates issued to O'Shaughnessy and Royce, the agents of the Farmers' Company, who thereafter held and voted them for that company; that Shearer and Wible resigned, and O'Shaughnessy and Royce were elected president and secretary of the Anchor Company; that the latter's board of directors passed under the exclusive control of the Farmers' Company, as did the possession and management of all its property and business; that on December 11, 1914, it made a sale of its insurance policies, premiums due and to become due thereon, and of all its securities then held by the superintendent of insurance or the state treasurer of Kansas for the legal reserve only upon its policies of insurance and such of its additional assets as should be necessary to make up the full legal reserves upon all said policies, except the mortgage securities made by E. J. Lutz; that the Farmers' Company assumed and agreed to reinsure all its policies; that the Anchor Company's board of directors adopted a resolution to the effect that the best interests of the stockholders of the Anchor Company required that it be dissolved, that it discontinue its business, and that its president and secretary should make applica-

tion to the superintendent of insurance for permission so to do; that at the annual meeting of its stockholders, which commenced on January 5, 1915, and was adjourned to February 4, 1915, resolutions were unanimously passed, for which the stock formerly owned by Shearer and Wible was voted by its holders, the agents of the Farmers' Company, to the effect that the contract of sale and reinsurance of December 11, 1914, be ratified and approved, that the company should liquidate its affairs, that its board of directors should take such action as should be necessary so to do, and that it should apply to the superintendent of insurance for a delivery to it of the securities held by him over and above the legal reserve; and that the Farmers' Company first gave notice of its intention to rescind the contracts with Shearer and Wible on January 15, 1915, and commenced its suits on March 29, 1915. These facts, it must be admitted, strongly show the disposition on the part of the Farmers' Company to hold, and use for its own benefit, all the property of the Anchor Company, and establish a persuasive equity in the latter's favor. But the evidence in the record fails to prove when the Farmers' Company first received notice of the false representations of Shearer and Wible relative to the donation notes and mortgages, and relative to the inadequacy of some of the other securities, and a careful review of the entire evidence has failed to convince that the Farmers' Company was barred from all relief in a court of equity by either laches, waiver, or estoppel.

[9] Counsel for the Farmers' Company contend that the decrees below may and ought to be sustained, notwithstanding its inability to restore all the property it received under the contract. While conceding that the general rule is that the rescission of contracts in equity should not be adjudged, unless the parties may be substantially restored to their financial situations before the contracts were made, either by the return of the property itself or a substantial equivalent therefor, they assert that this has been or will be done under the decrees below. They write in their brief that the return to Shearer and Wible of the stock they held in the Anchor Company would restore to them all of their share of the securities of that company deposited with the treasurer of Kansas to obtain and secure its license to do an insurance business in that state. Counsel for Shearer and Wible, on the other hand, write in their brief that the Farmers' Company took over all the property of the Anchor Company of every kind and nature, appropriated it all to its use and benefit, retains it, and that it completely put the Anchor Company out of business.

No evidence is cited in the brief for the Farmers' Company to the effect that the securities deposited by the Anchor Company to secure or retain its license were at the time of the hearing below, or that their proceeds were, or are now, or ever will be, available for distribution to Shearer and Wible as stockholders of the Anchor Company if the contracts are rescinded by the decrees of the court, and the stock which they formerly owned in that company is reconveyed and delivered to them. On the other hand, there is conclusive evidence that as long ago as February 4, 1915, the Farmers' Company, which then owned more than 90 per cent. of the stock of the Anchor Company,

caused the latter stockholders to adopt the resolution directing its board of directors to discontinue its business, to take down its deposited securities so far as it could do so, and to liquidate its affairs, that its business was discontinued, that its offices were closed, and its movable property taken to the offices of the Farmers' Company in Denver. A careful consideration of the evidence and the lack of evidence on this subject in the record compels the finding that the Farmers' Company has by the use of the Anchor Company and its stock appropriated to itself all the securities of the Anchor Company and the exclusive benefit thereof, whether they were deposited with the treasurer or superintendent of the state of Kansas, and that neither they nor their proceeds are or would be available for distribution to Shearer and Wible, if the contracts were avoided and the stock they formerly owned in the Anchor Company were reconveyed and delivered to them, and that this stock is worthless. Moreover, if those securities not requisite for the reserve were available or are available for restoration, still the great value of that stock would yet be lost to Shearer and Wible. The Anchor Company's insurance business cannot be restored, its policies, premiums, stockholders, are irrevocably beyond reach, its business is gone, and it cannot be regained.

[10] Counsel for the Farmers' Company assert, and opposing counsel deny, that Shearer and Wible and the Anchor Company were insolvent when the contracts were made and thereafter. There is no proof in these cases that either of them is, or ever was, insolvent. A corporation is not insolvent when the value of its property is far greater than the amount of its liabilities, and it is able to pay its debts when they mature, although the excess of the value of its property above its liabilities may be much less than the par value of its stock; and the finding here is that Shearer, Wible, and the Anchor Company were solvent.

There is no logical escape from the conclusion that neither the Farmers' Company nor the court can do equity in either of these cases by the restoration to Shearer and Wible of the stock in the Anchor Company which they owned, because the value of that stock when these contracts were made was $52,836.09, and its value now is nothing. That value then was the value of the share of the value of the property of the Anchor Company represented by that stock. All the property of the Anchor Company has been taken and appropriated to itself by the Farmers' Company, and it cannot restore it. It cannot bring back to that company its business, its policies, its stockholders, its contracts of insurance, its premiums payable therefor, its agents; and the only way in which a court can grant just and equitable decrees for the Farmers' Company in these cases is on the condition that it requires that company to do justice to Shearer and Wible.

Let the decrees in these cases be reversed, and let decrees be rendered therein in accordance with the views expressed in this opinion.

In re ROSENFELD.

(Circuit Court of Appeals, Second Circuit. November 12, 1919.)

No. 14.

1. BANKRUPTCY ⟸414(3)—EVIDENCE ON OPPOSITION TO DISCHARGE SHOWING OMISSION OF LIABILITY FROM FINANCIAL STATEMENT WAS UNINTENTIONAL.

Where a bankrupt, who was illiterate, directed his bookkeeper to make up a financial statement, and the bookkeeper omitted a liability which did not appear in the books, *held* that, though the statement was furnished one who extended credit, evidence was insufficient to show that the bankrupt intentionally and willfully obtained credit on a statement which he knew was false, and hence discharge should not be denied.

2. BANKRUPTCY ⟸404(1)—STRICT CONSTRUCTION OF ACT IN FAVOR OF DISCHARGE.

The Bankruptcy Act is very liberal toward a bankrupt as to discharge, and, the purpose of the act being to release honest debtors from the burden of their debt, the act, in so far as it relates to discharge, should be given a strict construction in favor of the bankrupt.

3. BANKRUPTCY ⟸407(5)—FALSE STATEMENT MUST BE INTENTIONAL TO WARRANT DENIAL OF DISCHARGE; "FALSE."

Under Bankruptcy Act, § 14b, subd. 3 (Comp. St. § 9598), providing that the bankrupt shall be discharged, unless he has obtained money or property on credit upon a materially false statement in writing, the word "false" means more than untrue, and implies a purpose to deceive, and so, to prevent a discharge, the statement must be intentionally false.

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

Hough, Circuit Judge, dissenting.

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

In the matter of Isaac Rosenfeld, bankrupt. Gross, Engel & Co. filed objections and specifications in opposition to the application for discharge. From an order granting the discharge, they appeal. Affirmed.

Rosenthal & Heermance, of New York City, for appellants.

H. Howard Babcock, of New York City, for appellee.

Before WARD, ROGERS, and HOUGH, Circuit Judges.

ROGERS, Circuit Judge. The question presented involves the right of the bankrupt to his discharge. The bankrupt, at the time of the filing of the petition against him, was in business as a manufacturing retail furrier, which amounts to little more than a workman. This work he carried on in the city of New York. He was born in Russia, and came into this country 11 years ago, and when he was 20 years of age. He does not read English, and never attended school in the United States. After working for a firm of furriers for 6 years, he entered a partnership, and in 1913 started in business for himself. On January 10, 1915, he made a general assignment, and on March 11, 1915, a petition in bankruptcy was filed against him. The schedules which he filed showed 28 creditors and the claims of unsecured creditors aggregated $3,500.

[1] On the return day of the bankrupt's application for discharge, the firm of Gross, Engel & Co. filed objections and specifications in opposition to the application. No other creditors made any objection to his discharge. The claim of Gross, Engel & Co. amounts to $761.45, and the objection alleged is that credit was obtained upon a materially false statement in writing made by the bankrupt on or about February 20, 1914, to the Fur Merchants' Credit Association, of which Gross, Engel & Co. was a member. It is said that he then made a financial statement in which he understated his liabilities and overstated his assets. A failure to keep proper books of account, and concealment and mutilation of such books with intent to conceal his financial condition was also included in the specification of objections, but this last charge was abandoned. The question whether the bankrupt is entitled to a discharge depends on whether or not the financial statement, above mentioned, was materially and intentionally false, and whether or not he obtained property from the specification creditors on credit induced by the statement.

The false statement upon which the objection to the discharge is based is the omission of an unpaid debt arising from a loan made to the bankrupt in 1913 by one Fabricant. The matter was referred to a special commissioner for examination and report. Testimony was taken at some considerable length. The commissioner in a very careful report, "made after considerable reflection," reached the conclusion that the omission of the Fabricant loan from the statement was not deliberate or intentional upon the part of the bankrupt, and that at the time it was made the bookkeeper did not know of the existence of the omitted loan. He also stated that it was not established to his satisfaction that, in view of the dealings of the parties and the relations existing between the bankrupt and the specification creditors, the credit extended by Gross, Engel & Co. to the bankrupt was induced by the statement above mentioned. This conclusion was reached by the commissioner, notwithstanding the testimony of Engel, who was in charge of the credits of his firm's customers, and who had testified that he relied upon the bankrupt's statement.

The bankrupt testified that he instructed his bookkeeper to prepare a financial statement, "just according to what the books show, what I owe, and what people owe me, just right"; that after the statement was prepared he did not read it, because he did not know how to read; that the statement was prepared by his bookkeeper; that he asked the bookkeeper whether it was all right, and was assured it was; and that he trusted the bookkeeper and signed it. He was asked if he had any intention of leaving out the statement as to his debt to Fabricant, and he replied that he had not.

The bookkeeper testified that he made out the statement, and then showed it to Rosenfeld and asked him to sign it; that Rosenfeld said, "Do you know it is all right?" and that he (the bookkeeper) replied, "It is all right," and he never questioned his honesty. Again the bookkeeper said:

"When I brought this paper or other papers to him, he didn't know anything about the figures. He would say, if this is all right, Brookman, and I

said, 'Yes; that is all right.' If I drew a check or anything, he never doubted me; he had that confidence in me to let me make the figures out."

A careful examination of the testimony has led the majority of this court, as it did the District Judge, and the special commissioner, to the conclusion that while the statement was untrue which the bankrupt made, and which the objecting creditor says he relied upon, nevertheless the omission from the statement of any mention of the debt due to Fabricant was not due to any intention to deceive. The bookkeeper, who made up the statement, knew nothing about the Fabricant debt. The transaction took place before he took charge of the books, and there was nothing on the books concerning it; and the bankrupt supposed the item was on the books, and told the bookkeeper to make up the statement from the books. Several months after the statement was signed the bookkeeper swears to a conversation he had with the bankrupt about the Fabricant debt: "I said," he testified, "you owe $2,000;" and he said, "I do;" and I said, "I didn't see it in the books; it ought to be in the books;" and he said, "Wasn't it there when you came;" and I said, "No, it wasn't there when I came;" later on he said, "It is carelessness; when you came in here on these premises I had no bookkeeper;" and he said, "With my own money I started to do business before I opened any books; I may have explained it to you to put it down; I am not denying I owe the man anything; so I believe I put it down." And the bankrupt, when on the stand, was asked whether he had any intention of giving a false statement, and he answered: "No; it wasn't necessary for me; I had all the credit I wanted."

[2, 3] Any person who has been adjudged a bankrupt is entitled to apply for his discharge; and Bankruptcy Act, July 1, 1898, c. 541, § 14b, 30 Stat. 550 (Comp. St. § 9598), provides that the judge shall discharge the applicant unless he has—

"* * * 3. Obtained money or property on credit upon a materially false statement in writing, made by him to any person or his representative for the purpose of obtaining credit from such person."

When an application for the discharge is presented it may be opposed by a party in interest. In this case it is opposed by one from whom it is claimed that the bankrupt obtained property upon a materially false statement. That the party opposing is in this case "a party in interest" is of course conceded. The Bankruptcy Act is very liberal towards the bankrupt as to his discharge; and the act in so far as it relates to his discharge is to be given a strict construction in favor of the bankrupt. The purpose of the act is to release honest debtors from the burden of their debts.

The question then arises as to what is meant by a false statement. Does the word "false" mean simply untrue, or does it mean willfully and intentionally untrue? The answer is that the word as used in this connection means designedly untrue. Bouvier's Law Dictionary says of the word "false":

"Applied to the intentional act of a responsible being, it implies a purpose to deceive."

Black's Law Dictionary, referring to the word "false," says that—

"In law, this word means something more than untrue; it means something designedly untrue and deceitful, and implies an intention to perpetrate some treachery or fraud."

Webster's New International Dictionary defines "false representation" as "an untrue representation willfully made to deceive another to his damage."

In Gilpin v. Merchants' National Bank, 165 Fed. 607, 91 C. C. A. 445, 20 L. R. A. (N. S.) 1023 (1908), the Circuit Court of Appeals for the Third Circuit overruled the decision of the District Judge in which he held that the word "false" in the section of the Bankruptcy Act now under consideration meant no more than "not true." The opinion of the Circuit Court of Appeals was written by Judge Gray, who said:

"The bankrupt, who has made to a creditor, for the purpose of obtaining credit, a false statement—that is, one intentionally and knowingly untrue—is unworthy of the privilege of a discharge under the act, and the court will act upon information brought to it of such an act by any party in interest."

In Sallies v. Johnson, 85 Conn. 77, 82, 81 Atl. 974, 976 (Ann. Cas. 1913A, 386), it is said:

" 'False' may mean untrue, or it may mean designedly untrue, implying an intention to deceive. When applied to the representations of one inducing an act to another's injury it implies a purpose to deceive."

And see Wood v. State, 48 Ga. 192, 297, 15 Am. Rep. 664; State v. Smith, 63 Vt. 201, 210, 22 Atl. 604; Williams v. Territory, 13 Ariz. 27, 108 Pac. 243, 27 L. R. A. (N. S.) 1032; United States v. Twenty Boxes of Cheese (D. C.) 163 Fed. 369, 371; Remington on Bankruptcy (2d Ed.) vol. 3, § 2560.

In view of the conclusion, the majority of the court has reached that the omission from the financial statement made in December, 1915, of the Fabricant loan made in January, 1913, was due to the bankrupt's inability to read the statement prepared for him by his bookkeeper, and not to any intention to deceive, the order granting the discharge is affirmed.

HOUGH, Circuit Judge (dissenting). The law suggested by this record requires little comment. Falsity of statement, barring discharge, must be intentional untruth, as we have already held. In re Kerner, 250 Fed. 993, 163 C. C. A. 243.

The facts are rather interesting, for the bankrupt reveals himself as that not unknown commercial danger—an extremely intelligent man of no education, who perfectly knows how to deceive, and pleads his illiteracy as an excuse when found out. His present success is regrettable, and I dissent.

AMMON & PERSON v. NARRAGANSETT DAIRY CO., Limited.

NARRAGANSETT DAIRY CO., Limited, v. AMMON & PERSON.

(Circuit Court of Appeals, First Circuit. November 18, 1919.)

Nos. 1404, 1405.

1. TRADE-MARKS AND TRADE-NAMES ⟸31—EXTENT OF RIGHTS ACQUIRED.
   The adoption of a trade-mark does not, at common law, project the right of protection in advance of the extension of the trade, or operate as a claim of territorial rights over areas into which it may thereafter be deemed desirable to extend the trade.
2. TRADE-MARKS AND TRADE-NAMES ⟸31—USERS IN DIFFERENT TERRITORY EACH ENTITLED TO PROTECTION.
   Where two users of the same or a similar trade-mark occupy essentially different territory, each is entitled to its exclusive use in its own territory as against the other, regardless of which was the earlier user.
3. TRADE-MARKS AND TRADE-NAMES ⟸35—SALE OF TANGIBLE PROPERTY DOES NOT CARRY TRADE-MARK.
   Sale by a collector of the plant, product, and material of an oleomargarine manufacturer, forfeited under Act Aug. 2, 1886, § 17 (Comp. St. § 6229), does not carry the business, good will, or trade-mark.
4. TRADE-MARKS AND TRADE-NAMES ⟸38—ABANDONMENT; ADOPTION BY ANOTHER.
   That one of two users of the same trade-mark had the right to its use in its own territory does not entitle a third party, on the abandonment of its business by such user, to adopt its trade-mark as against the other user, which is extending its trade into such territory.
5. TRADE-MARKS AND TRADE-NAMES ⟸98—INFRINGEMENT; RECOVERY OF PROFITS.
   To entitle the owner of a trade-mark to recover profits from an infringer, it has the burden to prove that defendant has made profits attributable in whole or in part to its use of the trade-mark.

Appeals from the District Court of the United States for the District of Rhode Island; Arthur L. Brown, Judge.

Suit in equity by Ammon & Person, a corporation, against the Narragansett Dairy Company, Limited. From the decree, both parties appeal. Affirmed.

For opinions below, see 252 Fed. 276; 254 Fed. 208.

George J. Hesselman, of New York City (Eliot G. Parkhurst and Edwards & Angell, all of Providence, R. I., and Pennie, Davis, Marvin & Edmonds, of New York City, on the brief), for Ammon & Person.

Alexander Churchill, of Providence, R. I. (Wilson, Churchill & Curtis, of Providence, R. I., on the brief), for Narragansett Dairy Co., Limited.

Before BINGHAM, JOHNSON, and ANDERSON, Circuit Judges.

ANDERSON, Circuit Judge. This is a trade-mark infringement case. The plaintiff is a wholesale dealer in oleomargarine, organized as a corporation under the laws of New Jersey, with headquarters at Jersey City. It and its predecessors in title have used since 1891 the trade-mark "Queen of the West" on oleomargarine sold by them. In

this name the word "Queen" is obviously the dominant part, as the court below held.

[1] The defendant is a Rhode Island corporation, organized in August, 1915. It manufactures and sells oleomargarine at Providence, R. I. The Narragansett Dairy Company (not the defendant) applied the trade-name "Queen" to oleomargarine manufactured and sold by it at Providence during the period 1909 to August, 1915. On August 31, 1915, the oleomargarine and other tangible assets of the old Narragansett Company were seized by the collector of internal revenue, under a warrant of distraint for nonpayment of taxes, and sold. This property was bought in by one Matthews, and transferred on the same date to the defendant company, which at once began and has continued the manufacture of oleomargarine at the same place, selling it under the trade-mark "Queen." While the plaintiff has registered "Queen" as its trade-mark, we agree with the court below that the case must be determined on common-law principles, and that no rights now in question have been acquired out of registration.

The earlier Narragansett Company adopted the use of the word "Queen" in good faith and with no intent to infringe upon any rights of the plaintiff. Both the plaintiff and the old company sold their goods as their own to their own customers. There is no evidence of any confusion of goods or of any unfair competition.

It thus appears that up to September, 1915, two concerns were carrying on the same general line of business, partly in the same territory, each operating under trade-marks likely at some time to confuse the purchasing public, but each in fact reaching its own customers, and without any real confusion in the trade.

The District Court held that "the plaintiff's right to an injunction is not free from doubt, but seems justified in order to prevent confusion likely to arise in the natural expansion of trade. * * * The plaintiff's equity rests upon its showing a prior use of the trade-mark 'Queen of the West' and of the trade-name 'Queen.'"

The court below also held that it was "unnecessary to determine whether the defendant has succeeded to the rights, if any, of the earlier Narragansett Company." An injunction was granted, but the plaintiff's prayer for an accounting for profits and damages was denied. Both parties appealed.

The decision of the District Court was made on December 12, 1918. On December 9, 1918, the Supreme Court had decided the case of United Drug Co. v. Rectanus Co., 248 U. S. 90, 39 Sup. Ct. 48, 63 L. Ed. 141, with a most illuminating opinion by Mr. Justice Pitney. This case was not cited by the District Court, and would not, in the natural course of events, be in print or otherwise available for its guidance.

The legally significant facts in the Rectanus Case are, we think, substantially on all fours with the case at bar. In that case, it appeared that as early as 1877 Mrs. Regis, at Haverhill, Mass., had adopted the word "Rex" as a trade-mark for certain medicines prepared by her. These medicines were thereafter sold by her and her successor in title, the United Drug Company, under this trade-mark in Massachusetts

and neighboring states. In 1883, Rectanus, a druggist of Louisville, Ky., applied the same name "Rex" to certain medicines prepared and sold by him in Louisville, and later in other parts of Kentucky. In the course of the expansion of the trade of the United Drug Company, the two concerns, using the same trade-name for competing products, came into collision in Kentucky. The plaintiff claimed an exclusive right on the ground of prior use. The District Court sustained the plaintiff's contention. 206 Fed. 570. The Court of Appeals reversed the District Court and ordered the bill dismisesd. 226 Fed. 545, 141 C. C. A. 301. The decree of the appellate court was affirmed by the Supreme Court. The principles held controlling in that case are thus stated, 248 U. S. 96, 39 Sup. Ct. 50, 63 L. Ed. 141:

"The entire argument for the petitioner is summed up in the contention that whenever the first user of a trade-mark has been reasonably diligent in extending the territory of his trade, and as a result of such extension has in good faith come into competition with a later user of the same mark, who in equal good faith has extended his trade locally before invasion of his field by the first user, so that finally it comes to pass that the rival traders are offering competitive merchandise in a common market under the same trade-mark, the later user should be enjoined at the suit of the prior adopter, even though the latter be the last to enter the competitive field and the former have already established a trade there. * * *

"The asserted doctrine is based upon the fundamental error of supposing that a trade-mark right is a right in gross or at large, like a statutory copyright or a patent for an invention, to either of which, in truth, it has little or no analogy. Canal Co. v. Clark, 13 Wall. 311, 322 [20 L. Ed. 581]; McLean v. Fleming, 96 U. S. 245, 254 [24 L. Ed. 828]. There is no such thing as property in a trade-mark except as a right appurtenant to an established business or trade in connection with which the mark is employed. The law of trade-marks is but a part of the broader law of unfair competition; the right to a particular mark grows out of its use, not its mere adoption; its function is simply to designate the goods as the product of a particular trader and to protect his good will against the sale of another's product as his; and it is not the subject of property except in connection with an existing business. Hanover Milling Co. v. Metcalf, 240 U. S. 403, 412–414 [36 Sup. Ct. 357, 60 L. Ed. 713].

"The owner of a trade-mark may not, like the proprietor of a patented invention, make a negative and merely prohibitive use of it as a monopoly. See United States v. Bell Telephone Co., 167 U. S. 224, 250 [17 Sup. Ct. 809, 42 L. Ed. 144]; Bement v. National Harrow Co., 186 U. S. 70, 90 [22 Sup. Ct. 747, 46 L. Ed. 1058]; Paper Bag Patent Case, 210 U. S. 405, 424 [28 Sup. Ct. 748, 52 L. Ed. 1122].

"In truth, a trade-mark confers no monopoly whatever in a proper sense, but is merely a convenient means for facilitating the protection of one's good will in trade by placing a distinguishing mark or symbol—a commercial signature—upon the merchandise or the package in which it is sold.

"It results that the adoption of a trade-mark does not, at least in the absence of some valid legislation enacted for the purpose, project the right of protection in advance of the extension of the trade, or operate as a claim of territorial rights over areas into which it thereafter may be deemed desirable to extend the trade."

[2] We think these principles are applicable and must control the respective rights of the plaintiff and of the earlier Narragansett Dairy Company. While it is true that both these concerns were operating to some degree in the same territory, and that their markets were not, in the territorial sense, "remote," yet on this record we must find that neither concern had to any substantial degree invaded the other

concern's commercial or market territory. As already pointed out, the markets—the customers—of the two concerns were essentially separate. The plaintiff had not occupied the oleomargarine market in the territory in which the earlier Narragansett Dairy Company was, in good faith and without knowledge of the plaintiff's trade-mark, manufacturing and selling its product under the trade-name "Queen." It follows, we think, that if the case at bar were to be determined on the basis of the status obtaining between the plaintiff and the earlier Narragansett Dairy Company, the bill would have to be dismissed. In other words, in order to prevail, the plaintiff must now show that it has greater rights against this defendant than it had against the earlier Narragansett Company. It was not entitled, we think, to prevent the earlier company from continuing the use of the name "Queen" in its own commercial territory.

[3] This conclusion makes it necessary to consider and determine what the court below held it unnecessary to determine, to wit: "Whether the defendant has succeeded to the rights, if any, of the earlier Narragansett Company." If the defendant has so succeeded, we think, under the Rectanus Case, supra, the bill should be dismissed. But on consideration of the record we think it clear that the defendant has not succeeded to the rights of the earlier Narragansett Company to use the trade-mark "Queen"; and, so holding, we reach the same result reached by the court below. The salient facts bearing on this point may be briefly outlined.

The statute under which the collector of internal revenue proceeded against the defendant contains no mention of trade-marks, good will, going concern value, or any other sort of intangible property. It provides that the delinquent taxpayer "shall forfeit the factory and manufacturing apparatus used by him, and all oleomargarine and all raw material for the production of oleomargarine found in the factory and on the factory premises, and shall be fined," etc. Act Aug. 2, 1886, c. 840, § 17, 24 Stat. 212 (Comp. St. § 6229). As this is a penal statute, it cannot be extended by construction. No attempt was made by the collector to sell any trade-mark, good will, or other intangible assets. The schedule of property sold by the collector to Matthews and transferred by Matthews to the new corporation contains no mention of trade-mark, good will, or other intangible property. The old corporation has not been dissolved. It is, so far as this record shows, still legally alive. The sale of its tangible property simply killed its business; and it abandoned thereafter all attempts to preserve its good will, including any right in its trade-marks previously used. The case is in these respects like the Jaysee Corset Co. Case (D. C.) 201 Fed. 779, where, subsequent to the sale of the chattels of a bankrupt, the trustee in bankruptcy attempted to sell the good will and trade-marks of the bankrupt's former business. Judge Hough said:

"In due course of time the trustee sold the goods and chattels of the bankrupt, but made no attempt to sell the good will of the bankrupt's business, nor the trade-mark; nor did he sell the business as a going concern. The effect of these proceedings by the trustee was to kill the good will and destroy the

trade-mark; for it is admitted that this particular kind of trade-mark cannot pass, except in conjunction with the good will of a business. What has become of the bankrupt's business? It stopped by bankruptcy, was killed by the trustee's sale, and the present intended action on the part of the trustee is an attempt to galvanize it into life again, something which cannot be done."

This pungent statement is really nothing but an assertion of the same doctrine laid down by Mr. Justice Pitney in United Drug Co. v. Rectanus, 248 U. S. 97, 39 Sup. Ct. 50, 63 L. Ed. 141:

"There is no such thing as property in a trade-mark, except as a right appurtenant to an established business or trade in connection with which the mark is employed."

Where the business goes, the trade-mark goes, whether in life or to death.

[4] Indeed, defendant's counsel make no serious attempt to show that the defendant is the legal successor of the earlier Narragansett Dairy Company, or that it in any way derived any legal title to the trade-mark "Queen" by reason of its purchase of the earlier company's tangible assets and assumption of the contracts outstanding at the time of the sale by the collector of internal revenue. Counsel base their claim rather on the ground that the plaintiff's failure to enforce as against the earlier company an exclusive right to this trade-mark permitted the defendant or any other newcomer to use the infringing name. This is not the sound view. The plaintiff, as the original adopter of the trade-mark "Queen," or in which "Queen" was the dominant word, would have been entitled to enjoin any other later infringing user of that word, had it not been for the equal equity accruing to the earlier Narragansett Company out of its adoption, in good faith, of essentially the same name, and continued use thereof in a market essentially separate from that of the plaintiff. The failure of the plaintiff prior to 1909 to occupy exclusively the field subsequently occupied in part by the earlier Narragansett Company did not, when that earlier company abandoned its business, open the door to the defendant or to any other volunteer to use the plaintiff's trade-mark, or any colorable imitation thereof, at least in a territory then in part occupied by the plaintiff and a field in which its business was expanding.

We reach, therefore, the same conclusion as to the plaintiff's right to an injunction reached by the court below; but, guided by the decision of the Supreme Court in the Rectanus Case, on different grounds.

[5] So far as damages and profits are concerned, we agree, also, with the District Court that the burden is upon the plaintiff to prove that the defendant has made profits attributable, in whole or in part, to its trade-mark. Westinghouse Mfg. Co. v. Wagner Mfg. Co., 225 U. S. 604, 622, 32 Sup. Ct. 691, 56 L. Ed. 1222, 41 L. R. A. (N. S.) 653; Ludington Novelty Co. v. Leonard, 127 Fed. 155, 62 C. C. A. 269; Keystone Type Foundry v. Portland Pub. Co. (C. C.) 180 Fed. 301. This burden was not sustained.

It is true that the plaintiff promptly notified the defendant in September, 1915, that its use of the word "Queen" was an infringement upon the plaintiff's rights, and that the defendant thereafter wrong-

fully persisted in this infringing use. But, as the court below found, there was no evidence that any mistake was ever made by purchasers, and there was affirmative evidence that no mistake was made to the knowledge of the defendant's officials. Moreover, the goods of the two concerns were to some degree distinguished by cartons, labels, and other markings, notwithstanding the common use of the word "Queen" as a trade-mark. The findings of the court below, that "the evidence fails to show that the defendant has adopted the word 'Queen' with any intention of deceiving the public, or of appropriating the plaintiff's good will or trade reputation," and "that the word 'Queen' was used by the defendant apparently in good faith and in reliance upon its former use by the earlier company which had used it since 1909," were plainly warranted by the evidence and dispose of any doubt otherwise possibly arising as to the plaintiff's right to an accounting for damages and profits.

The decree of the District Court is affirmed, and neither party recovers costs of appeal.

SEEBACH v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. November 15, 1919.)

No. 5360.

1. CONSTITUTIONAL LAW ⟸90—RIGHT OF FREE SPEECH NOT A RIGHT TO HAMPER WAR.
   The constitutional guaranty of right of freedom of speech does not warrant one in exercising such right in time of war in such a manner as to destroy the nation or hamper military operations.
2. ARMY AND NAVY ⟸40—VIOLATION OF ESPIONAGE ACT.
   Statements made by accused during the World War attacking the draft, and suggesting to registrants that others were going to refuse to go to war, together with the application of insulting epithets to one who had enlisted for military service, amount to violations of Espionage Act, § 3 (Comp. St. 1918, § 10212c), being attempts to cause insubordination, disloyalty, and refusal of duty in the military forces.
3. CRIMINAL LAW ⟸1159(2, 3, 4)—CONSIDERATION OF EVIDENCE ON APPEAL.
   On writ of error to review a conviction, the appellate court will not weigh conflicting evidence or determine credibility of witnesses, and will uphold the verdict, if supported by substantial evidence.
4. CRIMINAL LAW ⟸1159(2)—IMPEACHMENT OF VERDICT BY RECOMMENDATION TO LENIENCY.
   That the jury, which convicted accused of violating Espionage Act, § 3 (Comp. St. 1918, § 10212c), recommended leniency, will not establish on appeal that there was no substantial evidence to support the conviction.
5. WITNESSES ⟸337(6)—IMPEACHMENT AS TO OTHER OFFENSES.
   In a prosecution for violating Espionage Act, § 3 (Comp. St. 1918, § 10212c), where defendant denied having made statements similar to those set forth in the indictment, evidence of such statements was admissible as impeaching evidence.
6. CRIMINAL LAW ⟸371(1)—EVIDENCE OF OTHER OFFENSES AS SHOWING INTENT.
   In a prosecution under Espionage Act, § 3 (Comp. St. 1918, § 10212c), where it was contended that accused made statements with intent to cause insubordination and refusal of duty in the military forces, evidence of similar statements was admissible in chief on the question of intent.

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7. CRIMINAL LAW ⟸684—ADMISSION ON REBUTTAL OF EVIDENCE ALSO ADMISSIBLE IN CHIEF.
Where evdence was admissible in chief as well as in rebuttal, the fact that it was admitted in rebuttal is not reversible error.

8. ARMY AND NAVY ⟸40—CAUSING INSUBORDINATION AMONG DRAFT REGISTRANTS; "MILITARY FORCES."
Those who had registered under the Draft Act of May 18, 1917, are part of the "military forces" of the United States, within Espionage Act, § 3 (Comp. St. 1918, § 10212c), denouncing the offense of attempt to cause insubordination and refusal of duty in the military forces.
[Ed. Note.—For other definitions, see Words and Phrases, Military Forces.]

9. ARMY AND NAVY ⟸40—ATTEMPT TO CAUSE INSUBORDINATION.
A charge in a prosecution for attempting to cause insubordination, etc., of the military forces in violation of Espionage Act, § 3 (Comp. St. 1918, § 10212c), which used the term "intent to cause insubordination," etc., as the equivalent of willfulness, is not objectionable.

10. CRIMINAL LAW ⟸304(2), 814(2)—JUDICIAL NOTICE.
In a prosecution for violation of Espionage Act, § 3 (Comp. St. 1918, § 10212c), the court may take judicial notice that the United States was at war during the times covered by the indictment, and may so charge the jury.

11. CRIMINAL LAW ⟸767—INSTRUCTIONS AS TO APPLICATION OF LAW TO FACTS.
Where the evidence upon any issue is clear and uncontradicted, presenting a question of law, the court may, without usurping the functions of the jury, instruct them as to the principles applicable to the case made by such evidence, and this rule applies especially to facts judicially noticed.

In Error to the District Court of the United States for the District of Minnesota; Wilbur F. Booth, Judge.

John C. Seebach was convicted of violating the Espionage Act of June 15, 1917, and he brings error. Affirmed.

H. V. Mercer, of Minneapolis, Minn. (W. N. Carroll, of Minneapolis, Minn., and Arthur E. Arntson, of Red Wing, Minn., on the brief), for plaintiff in error.

Alfred Jaques, U. S. Atty., of Duluth, Minn.

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

HOOK, Circuit Judge. Seebach was convicted of willful attempts to cause insubordination, disloyalty, and refusal of duty in the military forces of the United States when the United States was at war, contrary to section 3, tit. 1, of the Espionage Act of June 15, 1917 (40 Stat. 217, c. 30 [Comp. St. 1918, § 10212c]). The three counts of the indictment, under each of which there was a conviction, severally charged that the attempts were made by statements, counsel, and advice to three young men who had theretofore registered under the Draft Act of May 18, 1917 (40 Stat. 76, c. 15), as follows:

To Harry Olson—"I do not think that the draft is right, to take the young men from this country and send them to another country, to protect the land of England and France. Just think of sending the young men of this country to protect another country. They will go down to the bottom of the sea 20,000 at a time. I would rather see my son Carl shot than go to war against

Germany. How did you come out in the draft? Are you going, if you are called?"

To Alf G. Nelson—"Do you know that a lot of the boys (meaning soldier boys) are going to refuse to go to France? The government cannot compel them to go."

To Henry D. Reitman, summarized from a conversation—"Are you the Reitman boy that enlisted? What did you do that for? Don't you know you are a damn fool to do that? Don't you know Germany is going to win this war? Germany has enough resources and men to win the war. (Reitman: "Why, if you are so strong for Germany, why don't you move over there?") No; no; that is not it. I am for America. I hope every American citizen who has bought Russian bonds will lose every cent he invested."

[1, 2] The right of free speech in time of war and the tendency of words spoken or written to affect injuriously the military preparations and operations of the government have been so often considered by the courts that an extended discussion of the sufficiency of the present indictment is unnecessary. Time, place, and circumstance have everywhere much to do with the quality of human conduct, and this is true of the exercise of rights under the Constitution. The Constitution contains no invitation to destroy the fundamental structure of the government, to frustrate its duly ordered operations, or to lend aid to the public enemies. When the nation is at war, its very existence is in the scales, and the freedom of action and speech of the individual is qualified accordingly. If this were not so, each one might determine for himself the validity or force of public statutes for the general safety; there could even be no such crime as treason. The tendency of the language above quoted, when addressed to men in the military service during the time mentioned, to cause insubordination, disloyalty, and refusal of duty, is obvious. An indictment which states that the language was uttered in willful attempt to cause that result charges an offense against the statute.

[3, 4] Much of the argument of counsel is addressed to the evidence. The question at the trial of a criminal case is whether the guilt of the accused has been shown beyond a reasonable doubt. Upon conviction and appeal it is whether the verdict below was supported by substantial evidence. Humes v. United States, 170 U. S. 210, 18 Sup. Ct. 602, 42 L. Ed. 1011. The appellate court does not weigh conflicting testimony or the credibility of witnesses. The verdict here clearly stands this test. The recommendation of leniency by the jury is argued as impairing the effect of the evidence against the accused. But, if we could consider it, such a recommendation would seem to proceed upon the assumption of guilt, not of innocence. We cannot know what other considerations induced it, nor say that the discretion of the trial court invoked by the recommendation was not duly exercised.

[5-7] Evidence that the accused made statements to other persons similar to those set forth in the indictment was received in rebuttal, after he had denied them. It was proper for impeachment. Furthermore the evidence would have been admissible in chief to show intent. Exchange Bank v. Moss, 79 C. C. A. 278, 149 Fed. 340. Being relevant for that purpose, admission in rebuttal instead of in chief was not

reversible error. Goldsby v. United States, 160 U. S. 70, 16 Sup. Ct. 216, 40 L. Ed. 343.

[8-11] It appeared without dispute or contradiction at the trial that the three young men named in the indictment had registered in accordance with the Draft Act of May 18, 1917. The trial proceeded upon that assumption, and the court in charging the jury said that they were therefore in the military forces of the United States, within the meaning of section 3 of the Espionage Act. An exception was taken to this conclusion, but it was correct. See Debs v. United States (March 10, 1919) 249 U. S. 211, 39 Sup. Ct. 252, 63 L. Ed. 566. Though the above was the only exception taken, counsel extends the argument to other parts of the charge. Passing the failure to direct the attention of the trial court to them, we see no merit in the criticisms. The court correctly defined the term "willfully" as used in the Espionage Act. Elsewhere in the charge it used intent to cause insubordination, etc., as equivalent to willfulness. This was right. Chicago, B. & Q. R. Co. v. United States, 114 C. C. A. 334, 194 Fed. 349. It is difficult to see how the attempt was not willful, if the result was intended and the means employed reasonably calculated to attain it.

Complaint is made that the court took judicial notice that the United States was at war during the times covered by the indictment. So far as judicial notice is concerned, see United States v. Hamburg-American Co., 239 U. S. 467, 36 Sup. Ct. 212, 60 L. Ed. 387; Louisville Bridge Co. v. United States, 242 U. S. 409, 37 Sup. Ct. 158, 61 L. Ed. 395; Oetjen v. Central Leather Co., 246 U. S. 297, 38 Sup. Ct. 309, 62 L. Ed. 726. Judicial notice having been properly taken of a fact not embracing the entire issue made by the plea of not guilty, it was not necessary to submit it to the decision of the jury. In effect it became a matter of law for the court to instruct them.

"It has long been the settled doctrine of this court that the evidence before the jury, if clear and uncontradicted upon any issue made by the parties, presented a question of law, in respect of which the court could, without usurping the functions of the jury, instruct them as to the principles applicable to the case made by such evidence." Rosen v. United States, 161 U. S. 29, 16 Sup. Ct. 434, 480, 40 L. Ed. 606.

This especially applies to facts judicially noticed. Nothing more in the case requires attention.

The sentence is affirmed.

UNITED STEEL CO. v. CASEY et al.

(Circuit Court of Appeals, Sixth Circuit. February 13, 1920.)

No. 3302.

1. CONTRACTS ⊂=232(4)—PROVISION AS TO EXTRAS DID NOT PROHIBIT ORAL MODIFICATION.

A provision, in a contract for excavating, grading, back-filling, and concreting, that no extras would be allowed without an understanding and written order, did not prohibit the making of an oral contract changing the compensation to be paid for the work and material covered by the written contract, but was a fact to be considered by the jury, with evidence tending to establish the oral contract.

2. EVIDENCE ⊂=596(3)—ORAL MODIFICATION OF CONTRACT MAY BE ESTABLISHED BY SIMPLE PREPONDERANCE.

An oral modification of a written contract may be established by a preponderance of the evidence, and need not be established by clear and convincing proofs.

3. CONTRACTS ⊂=237(2)—MODIFICATION OF CONTRACT SUPPORTED BY CONSIDERATION, WHERE DEFENDANT HAD DELAYED AND EMBARRASSED PLAINTIFF IN ITS PERFORMANCE.

Where defendant made changes in the location of the work, and failed to furnish plans for part of the work of excavating, etc., and underestimated the amount of excavation, thus delaying plaintiff in the performance of the contract, and necessitating the doing of a large part of the work in the winter season, there was sufficient consideration for an oral contract to pay plaintiff the reasonable value of the work, instead of the unit prices fixed by the written contract for the work, even though plaintiff did not specifically waive claims for damages from such delays.

4. CONTRACTS ⊂=237(2)—MODIFICATION AS TO PRICE FOR WORK SUPPORTED BY CONSIDERATION, WHERE CHARACTER OF WORK WAS MISREPRESENTED THOUGH IN GOOD FAITH.

Where, in the negotiations for a contract for excavation, etc., defendant misrepresented the character of the soil to be excavated, though the representations were made in good faith, there was a sufficient consideration for an oral contract fixing a different price for that part of the work than that prescribed in the written contract covering the work.

In Error to the District Court of the United States for the Eastern Division of the Northern District of Ohio; D. C. Westenhaver, Judge.

Action by John F. Casey and another, doing business as the John F. Casey Company against the United Steel Company. Judgment for plaintiffs, and defendant brings error. Affirmed.

H. H. McKeehan, of Cleveland, Ohio, and John H. Fimple, of Canton, Ohio, for plaintiff in error.

Paul J. Bickel and W. C. Boyle, both of Cleveland, Ohio, for defendants in error.

Before KNAPPEN, DENISON, and DONAHUE, Circuit Judges.

DONAHUE, Circuit Judge. On the 4th day of September, 1915, the United Steel Company entered into a contract in writing with the John F. Casey Company, by the terms of which the latter company agreed to do certain excavating, grading, back-filling, and concreting at fixed and definite prices per cubic yard. This contract was signed

on the part of the United Steel Company by S. R. Smythe, engineer, and on the part of the Casey Company by John F. Casey.

The Casey Company completed this contract September 23, 1916, and later commenced an action against the Steel Company to recover $112,295.99 for and on account of work and labor performed and material furnished. It is admitted that, based upon the unit prices named in the written contract, there was then a balance due the Casey Company from the Steel Company of approximately $12,000. The Steel Company denied that the Casey Company was entitled to recover this balance, by reason of the fact that it had failed to complete the work at the time specified in the contract; but there is now no longer a serious dispute in reference to this amount.

The real question in dispute is the claim of the Casey Company that on or about the 22d day of November, 1915, the Steel Company agreed with it that the unit prices named in the written contract should not be the measure of compensation for the work then or thereafter to be done, but, on the contrary, that the Steel Company would pay the Casey Company, for the work performed and material furnished, the fair and reasonable value thereof.

The Casey Company claims that the fair and reasonable value of the material furnished and the work done by it exceeds by about $100,000 the amount that would be due it, if calculated upon the unit price fixed in the contract. The Steel Company in its answer denied that any oral agreement had been made changing the prices per unit fixed in the written contract, and in its cross-petition asks damages for $500,000 for failure to complete the work without delay and in the quickest possible time, as provided in the contract. The jury returned a verdict against the Steel Company for the sum of $68,831.56, including the amount of $12,261.73, upon which verdict a judgment was rendered accordingly. This proceeding in error is prosecuted to reverse that judgment.

It is contended on the part of the plaintiff in error that there was no consideration for the alleged oral promise of the Steel Company to pay the Casey Company a fair and reasonable amount for material to be furnished, that the court erred in charging the jury that a preponderance of the evidence would be sufficient to warrant the finding that the written contract was orally modified, and that the verdict of the jury finding in favor of the plaintiff upon that issue is not sustained by clear and convincing proofs.

[1] Whether the oral contract was made as pleaded in the petition, by the terms of which the Steel Company agreed to pay the Casey Company the fair and reasonable value of the work done and material furnished by it, instead of the unit price named in the written contract, is purely a question of fact for the jury. The correctness of this verdict in this particular involves the weight of the evidence, which this court will not consider, except in connection with the degree of proof required to establish such oral contract, the terms of which differ materially in a very important particular from the terms of the written one. The provision in the contract that "no extras will be considered or allowed in connection with this contract, without first hav-

ing an understanding and written order between John F. Casey Company and the United Steel Company," does not in terms prohibit the making of an oral contract changing the compensation to be paid for the work and material actually covered by the written contract, but it does emphasize the fact that at the time this contract was executed it was the purpose and intention of the parties that the rights and liabilities of each should be measured and determined by its terms, at least as to the extent of the work to be done and the quantity of material to be furnished. While this provision applied only to extra material and labor not specified or included in the contract, nevertheless it was a fact to be considered by the jury in connection with the evidence tending to establish an oral contract, but in no wise controlling the determination of that issue.

[2] The plaintiff avers a new and distinct contract as to price, not in writing, made some months after the original written contract was made; nevertheless we know of no rule of law or evidence that requires an oral contract, or an oral modification of a written contract, to be established by clear and convincing proofs. On the contrary, the authorities seem to be unanimous that such contracts may be established by a preponderance of the evidence. Jones, Stranathan & Co. v. Greaves, 26 Ohio St. 2, 20 Am. Rep. 752; Lyon v. Fleahmann, 34 Ohio St. 151–155; Shaul v. Norman, 34 Ohio St. 157; Bell v. McGinness, 40 Ohio St. 204, 48 Am. Rep. 673; Achenbach v. Stoddard, 253 Pa. 338, 98 Atl. 604; Piatt's Administrator v. U. S., 89 U. S. (22 Wall.) 496, 506, 22 L. Ed. 858.

The case of Ashley v. Henahan, 56 Ohio St. 559, 47 N. E. 573, involved a claim by the contractor for extra work done and material furnished in defiance of the express provision of the written contract that he would make no such claim except upon a written order from the architect. The other cases cited by counsel for plaintiff in error involve like questions, except the case of Hasler v. West India Steamship Co., 212 Fed. 862, 129 C. C. A. 382, in which case there was no claim made that a new oral contract, changing or modifying the terms of a written contract, had been made; but, on the contrary, the plaintiff claimed that the terms of the contract as written had been orally waived by agents of the other contracting party, and this without any consideration whatever paid or agreed to be paid by the party in default.

We are, therefore, of the opinion that the trial court did not err in its charge to the jury touching the degree of proof required to establish an oral modification of the terms of a written contract.

[3] The more important question, perhaps, is the claim that there is no consideration for the oral agreement. There is evidence in this record that prior to the time it is claimed this oral contract was made, and after the Casey Company had started to put its machinery in place, it was notified by telegram from Mr. Smythe, representing the Steel Company, that it had changed the location of the steel plant three hundred feet further east than as first located, and commanding him to stop all work at once in connection with erection of equipment and cable work; that this change of location necessitated the making of

a new fill, during all of which time the Casey Company was compelled to suspend operations; that after the Casey Company had relaid its tracks it was informed by the Steel Company that the change in location was 316⁶/₁₀ feet, instead of 300 feet, and again the track had to be removed and placed still further east. The actual cost of these changes were paid by the Steel Company, but the Casey Company was delayed at least three weeks thereby.

There is also evidence in this record that the Steel Company failed and neglected to furnish plans for a material part of the work to be done; that the failure to do this, not only hindered and embarrassed the contractor in doing his work, but also increased the cost of operation; that these delays caused by the Steel Company prevented the Casey Company from completing their contract in the fall of the year, when the weather was more favorable for that character of work. There is also evidence to the effect that Mr. Smythe, representing the Steel Company, had represented to Mr. Casey that the concrete would be about 15,000 cubic yards, and the excavation from 120,000 to 130,000 cubic yards, while the actual amount of excavation was 217,921 cubic yards and of concrete 24,366 cubic yards, an increase of nearly double the quantity estimated by the Steel Company's engineer; that under ordinary circumstances this, perhaps, would have been to the advantage of the Casey Company, but, because of the fact that it was compelled to do a large part of this work in the winter season, it naturally and necessarily resulted to its disadvantage; that, in fixing the price per unit for this character of work and material, the time of the year in which the work is to be performed is an important consideration; that a lower price would be charged for excavation and concrete work in the summer and fall than would be charged for like work in the winter months.

If the jury believed this evidence to be true, then the consent of the contractor to go on with the work in the winter months, although but for the fault of the owner he might have completed his contract in good weather, and his waiver of damages for the delays occasioned by the owner were sufficient consideration to sustain the oral contract. King v. Railway Co., 61 Minn. 482, 63 N. W. 1105; Tobey v. Price, 75 Ill. 645; Allamon v. Mayor of Albany, 43 Barb. (N. Y.) 33; Stubbings Co. v. World's Columbian Exposition Co., 110 Ill. App. 211.

This case must be distinguished from the case of Lingenfelder v. Wainwright Brewing Co., 103 Mo. 578, 15 S. W. 844, and other cases in line with that decision. In that case Lingenfelder, at the time the oral contract was made to pay him 5 per cent. on the refrigerator plant as the condition of his complying with his contract relating to other matters, had no claim for damages whatever against the owner, nor was there any reasonable excuse for his refusal to perform the work covered by that contract according to its terms. The court, in the consideration of that case, said:

"He took advantage of Wainwright's necessities, and extorted the promise" without "even the flimsy pretext that Wainwright had violated any of the conditions of the contract on his part."

In this case there is substantial evidence that the Steel Company had so delayed, hindered, and embarrassed the Casey Company in the performance of its contract that it would at least have had a bona fide claim for damages, regardless of the amount that it might have recovered in a suit based upon such claim.

It is not important, except as a fact for the consideration of the jury, that Mr. Casey, representing the Casey Company, did not, at the time it is claimed this oral contract was made, specifically waive all claims for damages as a consideration for this oral contract. Parties to a contract are presumed to understand and appreciate all the facts and circumstances within their knowledge in relation to the subject-matter then under consideration. If the Casey Company, after making this contract, had brought action for damages occasioned by the delays incident to change of location and failure of the Steel Company to furnish plans, it would have been met with the answer that any claims for damages it may have had were waived and compensated by the provisions of the new contract, regardless of whether it had, in terms, waived such damages.

[4] It also appears from the evidence that the character of the soil was in a large part wholly different from what the parties understood it to be at the time the contract was made. There is evidence in this record that Mr. Smythe, representing the Steel Company, pointed out to Mr. Casey the character of the soil to be excavated; that he called attention to an excavation, about 16 feet deep, 30 feet wide, and 50 feet long, near the location of the work covered by the contract, which excavation had been made by the Steel Company for an additional open-hearth furnace at plant A. This excavation was in sand and gravel. Mr. Smythe also called Mr. Casey's attention to the bed and banks of the creek as representing the condition of the soil to be encountered, and this was also of gravelly sand.

The fact that these representations were made in good faith and in the honest belief that the character of the soil to be excavated under the terms of this contract was similar to the soil shown to the contractor is not important, if these representations were made to Mr. Casey for the purpose of inducing him to believe them to be true, and the Casey Company had a right to rely, and did rely, upon the truth of these representations. If the jury found these facts in favor of the plaintiff, it would constitute a sufficient consideration for the oral contract fixing a different price per unit for that particular part of the work. On the other hand, in the absence of such representations, a contract is not invalid, nor is the obligor therein discharged from its terms, because it turns out to be difficult or burdensome to perform. Cottrell v. Smokeless Fuel Co., 148 Fed. 594, 78 C. C. A. 366, 9 L. R. A. (N. S.) 1187; U. S. v. Gleason, 175 U. S. 588, 20 Sup. Ct. 228, 44 L. Ed. 284; Simpson v. U. S., 172 U. S. 372, 19 Sup. Ct. 222, 43 L. Ed. 482; Ry. Power & Light Co. v. City of Columbus, Ohio, 249 U. S. 399, 39 Sup. Ct. 349, 63 L. Ed. 669.

However, where a contract must be performed under burdensome conditions not anticipated, and not within the contemplation of the parties at the time the contract was made, and the promisee measures

up to the right standard of honesty and fair dealing, and agrees, in view of the changed conditions, to pay what is then reasonable, just, and fair, such new contract is not without consideration within the meaning of that term, either in law or in equity. Cooke v. Murphy, 70 Ill. 96; Galveston v. Railroad Co., 46 Tex. 435, 440; King v. L. & N. Ry. Co., 131 Ky. 46, 114 S. W. 308; Hart v. Lauman, 29 Barb. (N. Y.) 410; Meech v. Buffalo, 29 N. Y. 198.

The judgment of the District Court is affirmed.

GOOCH v. BUFORD et al.

(Circuit Court of Appeals, Sixth Circuit. February 13, 1920.)

No. 3326.

1. APPEAL AND ERROR ⟸1099(11)—QUESTION DECIDED ON FORMER WRIT OF ERROR NO LONGER OPEN.

Where it was decided on a former writ of error that a verdict and judgment for defendant on the first count, in an action for personal injuries, did not dispose of the second count based on breach of contract, that question was no longer open.

2. JUDGMENT ⟸194—RECOVERY ON COUNT FOR BREACH OF CONTRACT NOT BARRED BY VERDICT AND JUDGMENT ON COUNT FOR NEGLIGENCE.

Where plaintiff, suing a hospital for personal injuries, alleged negligence in one count and in another count breach of a contract to furnish her special and extraordinary care, nursing, and watching, because of her mental condition and suicidal tendencies, a verdict and judgment for defendant on the first count did not dispose of the second count, as the right to recover would not depend on the same facts.

3. HOSPITALS ⟸8—QUESTION FOR JURY IN ACTION FOR INJURIES TO PATIENT.

In an action against a hospital for personal injuries alleged to have resulted from breach of a contract made with plaintiff's husband to furnish her a special nurse and special care, because of her mental condition and suicidal tendencies, evidence as to the making of the contract and its breach *held* to make a question for the jury.

4. HOSPITALS ⟸8—WHETHER PLAINTIFF WOULD HAVE BEEN INJURED IF SPECIAL NURSE HAD REMAINED IN CHARGE WAS QUESTION FOR JURY.

In an action for personal injuries alleged to have resulted from a hospital's breach of contract to furnish a patient a special nurse and special care, whether the injury would have happened if the special nurse had remained in charge was a conclusion to be drawn from the other facts in the case, and was a question for the jury.

5. PRINCIPAL AND AGENT ⟸157—PHYSICIAN COULD NOT ON BEHALF OF BOTH PARTIES REVOKE CONTRACT MADE FOR PATIENT WITH FIRM OF WHICH HE WAS A MEMBER.

Where one member of a partnership conducting a hospital was also the attending physician of a patient, in whose behalf her husband contracted for a special nurse and special care, such physician could not, as a representative of both parties, revoke the contract without the knowledge or consent of any one other than himself, so as to relieve proprietors of liability for injuries to patient from breach of contract.

6. CONTRACTS ⟸187(1)—PLAINTIFF ENTITLED TO DAMAGES FOR BREACH OF CONTRACT MADE BY HER HUSBAND WITH HOSPITAL FOR HER BENEFIT.

Where plaintiff's husband contracted with a hospital to furnish plaintiff a special nurse and special care, plaintiff was the direct beneficiary of the contract and entitled to recover damages for any personal injuries sustained by reason of its breach.

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

Action by Mary Dockery Gooch, by next friend, W. D. Gooch, against G. G. Buford and another, doing business as the Presbyterian Home Hospital. Judgment on a directed verdict for defendants, and plaintiff brings error. Reversed and remanded.

John E. Bell, of Memphis, Tenn., for plaintiff in error.

John W. Farley, of Memphis, Tenn., for defendants in error.

Before KNAPPEN, DENISON, and DONAHUE, Circuit Judges.

DONAHUE, Circuit Judge. The amended declaration contained two counts—one to recover damages for personal injuries to plaintiff caused by the negligence of the defendants; the other to recover damages for the same injuries caused by defendants' breach of contract. The defendants' answer denied negligence on their part, averred contributory negligence on the part of the plaintiff, and for a third defense pleaded the statute of limitation. For answer to the second count, the defendants denied the making of a contract as in the declaration alleged.

Upon the trial of the issues so joined the court instructed the jury to return a verdict for the defendants on the first count of plaintiff's amended declaration, which was done accordingly. Upon the second count of the declaration the jury disagreed and were discharged. Final disposition of the second count was reserved for further orders of the court. Later, upon motion of the defendants, the court entered final judgment, dismissing plaintiff's petition with costs. This judgment was reversed by this court on the 6th day of March, 1917, for the reason that the issues upon the second count had not been adjudicated when the motion to dismiss was considered and sustained. Gooch v. Presbyterian Home Hospital, 239 Fed. 828, 152 C. C. A. 614. The cause was then remanded to the District Court, with directions to award the plaintiff a new trial upon the second count in the amended declaration in accordance with this judgment of reversal.

The cause then came on for trial in the District Court on the second count, and at the close of all the evidence the court peremptorily instructed the jury to return a verdict in favor of the defendants, and final judgment was entered upon this verdict. This proceeding in error is prosecuted to reverse that judgment.

[1, 2] The larger portion of the brief for defendants in error is devoted to a discussion of the effect of the verdict and judgment on the first count in the declaration. It is insisted that there is but one injury, and but one cause of action, and that a verdict and judgment upon either count disposes of the whole case. That is the same question that was presented to this court and decided adversely to defendants' contention in the first error proceedings, and therefore is no longer an open question in this case. However, it might be well in passing to say that, while each count in the declaration sought to recover damages for the same injuries, aside from the fact that one is based on tort, the other on breach of contract, the right to recover would not depend upon the same facts. Upon the first count it would

be necessary for the plaintiff to establish by a preponderance of the evidence that defendants had failed, neglected, or refused to give to this patient the usual, ordinary, and reasonable care and attention given by hospitals of this character to patients in like mental and physical condition.

Upon the second count the question of usual, ordinary, and reasonable care and attention would not be involved, but it would be necessary for the plaintiff to establish by a preponderance of the evidence that a contract was made with the defendants, as averred in the second count, by the terms of which this patient was to receive special and extraordinary care, nursing, and watching, which her husband, in view of his knowledge of her mental condition and suicidal tendencies, deemed to be necessary, and which extraordinary service the defendants agreed to furnish, and for which the husband agreed to pay, in addition to the hospital fee for usual and ordinary care and attention.

The fact that upon the trial of the first count in the declaration the plaintiff failed to establish by evidence that defendants were guilty of neglect in failing to provide this patient with ordinary and usual care and attention could not in any way affect or determine the issue as to whether they had given her such special care and attention as required by the terms of this contract, if such contract were in fact made.

The issues presented by the second count and the answer thereto, as distinguished from the first count, are: First. Was there a contract made, the terms of which were substantially as averred in the second count of the declaration? Second. Was there a breach of this contract on the part of the defendants? Third. Did this breach of contract result in injury to the plaintiff? If there was evidence offered by the plaintiff tending to establish these material averments, then the cause should have been submitted to the jury upon proper instructions by the court, and it was error to direct a verdict for the defendants.

[3] W. D. Gooch and Alfred Dockery testified on behalf of the plaintiff that her husband, Prof. Gooch, had made a contract with Dr. Buford, one of the partners and representing the partnership operating the Presbyterian Home Hospital, by the terms of which the defendants were to furnish plaintiff a special nurse, for which Prof. Gooch agreed to pay the sum of $15 per week in addition to the ordinary hospital fee of $20 per week for room, board, and ordinary care and attention, furnished to patients in like mental and physical condition; that at the time this contract was made he paid to Dr. Buford $50 on account; that by the terms of this contract this special nurse was to give her entire time and attention to the care of plaintiff; that, whenever this special nurse was required to leave the patient, one of the floor nurses would be called to take her place; that no extra charge would be made for the service of the floor nurse while relieving the special nurse, this service being included in the room rental.

They also testified that Prof. Gooch told Dr. Buford at that time that he had authorized Alfred Dockery, brother of the plaintiff, to act as his agent; that Mr. Dockery lived in the city, and that whenever Dr. Buford wanted to confer with him in reference to her case he could be reached by telephone. Mr. Dockery also testified that three days

prior to the injury he had called to see his sister, Mrs. Gooch; that when leaving the hospital Dr. Buford called him into his office and told him that the plaintiff was worrying over the expense of the special nurse, and wanted to know if he did not think it best to discharge her; that Mr. Dockery then said to Dr. Buford that he thought the nurse was very necessary to be with the plaintiff at all times, and he would not agree to her discharge; that, if the nurse was to be dismissed, Dr. Buford would have to take the matter up with Prof. Gooch; that he (Mr. Dockery) would not agree to her discharge.

Mrs. Earl Smith, formerly Miss Jennie Roberts, testified that she was assigned by the hospital as special nurse for the plaintiff; that in obedience to the orders given her Mrs. Gooch was never allowed to be out of her sight during the time she was so employed, except when she was relieved by another nurse. She further testified that she was dismissed from this case by Dr. Buford between 8 and 9 o'clock on the morning of the day the plaintiff was injured; that the plaintiff was injured shortly after the lunch hour; that after she was dismissed from this case she went on general duty as a floor nurse; that on the day plaintiff was injured she carried the lunch tray into her room, then went for her own lunch, but that she did not ask any one to watch her that day, because she was not her patient any longer, but "just walked into her room and set the lunch down and walked out, the same as she would in any other patient's room."

Dr. Buford does not deny that as representative of the partnership operating this hospital he entered into a contract with Prof. Gooch, by the terms of which the hospital was to furnish a special nurse to the plaintiff; but he does deny that anything was said about having a nurse constantly in attendance. He further testified that it is the duty of a special nurse to stay with the patient in her charge; "that no other nurse is permitted to go there unless it is for a special accommodation or something, and this special nurse gives her entire time and attention to this patient." He admits that he discharged this special nurse on the same day the injury occurred to the plaintiff. It further appears, from the evidence of Prof. Gooch, Mr. Dockery, and Dr. Buford, that at the time this contract for a special nurse was made Dr. Buford was employed as physician to treat the plaintiff professionally; that there was a discussion between Prof. Gooch and Dr. Buford as to whether more than one special nurse would be required to care for the plaintiff in her mental condition; that Dr. Buford had advised that one special nurse would be sufficient; that Prof. Gooch insisted upon seeing the special nurse to be assigned to the case before deciding whether more than one would be necessary. In this connection Dr. Buford was asked by his counsel:

"Was that your professional opinion as the physician in charge, after you had seen and examined and conversed with this lady—as the physician—not as manager of the hospital at all, but as the physician in charge of the patient, acting as the physician, and contrary to your interests as part owner of the hospital, that she should have only one special nurse?"

Answer: "Only one special nurse; yes. There was no necessity for more."

It is clear, however, from the testimony of these three witnesses, that up to this time Dr. Buford had not seen, examined, or conversed with Mrs. Gooch, as assumed by counsel when this question was asked, and therefore he could not have been exercising his professional knowledge as to her need. Nor does he make any such claim in his testimony relative to the making of this contract. On the contrary, he testified that Prof. Gooch had asked in the beginning of the conversation to let the expenses be as small as possible, and that "he was looking to Prof. Gooch's interest, as separate from the hospital, as much as he would any other man's interest." It would therefore appear that in giving this advice to Prof. Gooch he was not acting in any professional capacity, but was acting for the hospital, and endeavoring upon its part to treat Prof. Gooch fairly, the same as he would treat any other man, regardless of professional employment.

Dr. Buford denied that he had any conversation with Mr. Dockery with reference to the discharge of this nurse. There is also a conflict in the evidence as to the terms of the contract, touching the extent and character of the services to be rendered by a special nurse, and also as to the exact time when she ended her connection with this case. This conflict in the evidence cannot affect the constitutional right of plaintiff to have these issues submitted to a jury for its determination.

It is also contended, even if the special nurse did end her connection with this case in the forenoon of that day, that nevertheless the plaintiff was receiving the same care and attention at the time the injury occurred that she would have received, had the special nurse continued in charge, and that, in any event, the same result would have followed.

[4] There is not, and in the very nature of the case there could not be, any evidence offered as to what would or would not have happened, had the special nurse remained in charge. That is a conclusion that must be drawn from the other facts proven in the case, and it is also a question for the jury to determine.

[5] It is further contended that Dr. Buford, as physician to Mrs. Gooch, was authorized to rescind this contract for a special nurse that he, as one of the partners and managing agent of the partnership, had made with her husband for her safety. In answer to this it is sufficient to say that Dr. Buford could not occupy a dual relation to this contract, nor could he represent both parties thereto, either in the making or revocation of the same. Prof. Gooch knew the mental condition of his wife and her suicidal tendency far better than any other person present at the time the contract was made. Having made this contract, he had the right to rely upon the faithful performance of its terms by the other contracting party.

Whether Dr. Buford, as the physician of Mrs. Gooch, might have rescinded or revoked this contract without the knowledge or consent of Prof. Gooch, were he in no wise connected with the hospital and acting solely and on behalf of his patient, is a question that does not arise in this case; neither is it a question of the good faith of Dr. Buford, but rather a question of his legal right and authority to act as the representative of both contracting parties. His employment as her physician could not and did not change his legal relation to the principal he represented in making this contract, to wit, the partner-

ship, of which he was not only a member, but also in active charge and management of its affairs. Nor did it authorize him, as her physician, to agree with himself, as managing agent of that partnership, that the contract entered into between Prof. Gooch and the hospital should be revoked or canceled without the knowledge or consent of either party thereto, except in so far as he assumed the authority to represent both.

[6] These propositions are too elementary to require further discussion. Dr. Buford not only purported to represent the hospital, but actually did represent it in making this contract. He cannot now be heard to say that in revoking and rescinding the same contract he not only represented the hospital, but also represented Prof. Gooch, or his patient, Mrs. Gooch, who was and is the direct beneficiary of this contract, and entitled to recover any damages she may have sustained by reason of its breach.

The judgment of the District Court is reversed, and the cause remanded for new trial and further proceedings according to law.

PATTERSON v. DIAZ et al.

(Circuit Court of Appeals, Fifth Circuit. February 9, 1920.)

No. 3382.

ADVERSE POSSESSION ⊂=48—ACTUAL POSSESSION NOT INTERRUPTED BY RECORDING DEED BY ADVERSE CLAIMANT.

Civ. Code Canal Zone, art. 2526, providing that "the acquisitive prescription of real property * * * does not obtain against a recorded title, except by virtue of another recorded title," does not give the mere recording of a deed by one claimant the effect of interrupting or rendering ineffective the actual possession of an adverse claimant, who holds under a previously recorded title.

Appeal from the District Court of the United States for the Canal Zone; William H. Jackson, Judge.

Suit in equity by Domingo Diaz and others against Guillermo Patterson. Decree for complainants, and defendant appeals. Reversed.

Edwin T. Merrick and Ralph Schwarz, both of New Orleans, La. (Merrick, Gensler & Schwarz, of New Orleans, La., on the brief), for appellant.

Harmodio Arias, of Panama, R. O. P., and Irvin R. Saal, of New Orleans, La. (Milling, Godchaux, Saal & Milling, of New Orleans, La., on the brief), for appellees.

Before WALKER, Circuit Judge, and GRUBB and CLAYTON, District Judges.

WALKER, Circuit Judge. The appellees (hereinafter referred to as the plaintiffs), claiming to be the owners of an estate known as Lo de Caceres, brought this suit in November, 1917, against the appellant (hereinafter referred to as the defendant), who, it was averred, claim-

ed to be the owner of the estate of Mata Redonda, which adjoins the first-mentioned estate on the west, and that he had an interest in and to a portion of described land in the Canal Zone which the plaintiffs' petition alleged was part of the Lo de Caceres estate. The petition prayed that the adverse claim asserted by the defendant be determined by the decree of the court, and that it be declared and adjudged that the plaintiffs are the owners of said described lands and are entitled to the possession thereof, and that the defendant has no estate or interest therein. There was a decree in favor of the plaintiffs, granting the relief prayed. The appeal is from that decree.

The claim asserted by the petition of the plaintiffs was based upon a chain of conveyances beginning with a grant by the Spanish crown in 1736 of the estate of Lo de Caceres. The petition did not assert the claim that the plaintiffs had acquired title by possession under claim of ownership. The defendant claimed under a chain of conveyances ending with one made to himself in 1891, and recorded in that year, and he also claimed the land in dispute by prescription or adverse possession. Several conveyances successively made to the defendant's predecessors in title, commencing with one made in 1859, described land included in that which was decreed to belong to the plaintiffs, and there was evidence tending to prove that for more than 30 years prior to the bringing of the suit land which was adjudged to the plaintiffs was continuously and adversely in the possession of the defendant and those under whom he claimed. There was no evidence to support a finding as to who was in possession of the land in dispute prior to 1869.

The opinion rendered by the trial judge shows that the decree in favor of the plaintiffs resulted from the conclusion that, under the following provision of the Civil Code of the Canal Zone, the recording in 1895 of the conveyances under which the plaintiffs' predecessor in title claimed had the effect, though neither such claimant nor any one claiming through him got possession of the land in dispute, of preventing the acquisition by the defendant of the ownership of such land by the continuance thereafter of the possession commenced by a predecessor of the defendant, to which the latter succeeded when the deed to him was made and recorded in 1891, and from which he was not ousted:

"Art. 2526. The acquisitive prescription of real property or of real rights constituted therein does not obtain against a recorded title, except by virtue of another recorded title, nor shall it begin to run but from the date of the record of the second."

That opinion, after making a statement of the contentions of the parties and expressing the conclusion from evidence adduced that the description contained in conveyances under which the plaintiffs claimed embraced the land in dispute, and after referring to the above-quoted provision of the Civil Code, concluded as follows:

"There does not seem to be any doubt whatever that the defendant had acquired by 1869 by prescription a portion of the lands purchased in 1832 by the plaintiffs' predecessors in interest. But the question to decide is whether the title so acquired continues to the present time. We find that the last record effected by or on behalf of the defendant with reference to the

lands in dispute took place in 1891. After that date neither the said defendant nor any one on his behalf has made any inscription on the public land registry that would affect the recorded possession of the lands claimed. On the other hand, we find that the plaintiffs by their predecessors in title reasserted their recorded possession of 1832, which they had lost by prescription, by means of the registration of the public sale of the estate of Lo de Caceres that took place in 1895. In this public sale the old line of Mocambo to the Mata Redonda is again restated. Hence the conflict between the two estates reappears from the said year of 1895. Furthermore, after that year, several sales of undivided interests in the estate of Lo de Caceres took place, and hence the corresponding inscriptions were affected, all of which show that public and open assertions of ownership, in the manner provided by law, were made by said plaintiffs or their predecessors in interest, in opposition to any and all claims of ownership of the defendant.

"The court, therefore, finds that, applying section 2526 above quoted, prescription began to run in 1895 as against the recorded possession of the defendant; that the defendant has not interrupted that prescription, inasmuch as he has no recorded title subsequent to 1891; and that, as more than ten years have elapsed since 1895, the plaintiffs have reacquired the lands in dispute. The plaintiffs are therefore entitled to a decree in accordance with the above findings."

In view of the above-mentioned condition of the evidence adduced, the quoted part of the court's opinion plainly indicates that the case was disposed of on the theory that, assuming, without determining from the evidence adduced, that the defendant and those through whom he claimed had continuous and uninterrupted possession under claim of ownership for the length of time required to confer title by prescription, that possession was ineffective in his behalf from the date of the recording of a deed describing the land, made by an adverse claimant to a third person, though neither the grantee in such deed nor any one through whom he claimed, or who claimed under him, acquired possession of any of the land described therein, and though the conveyances under which the defendant claimed were first recorded.

In behalf of the defendant it is contended that the court was in error in failing to apply the provision of section 40 of the Code of Civil Procedure of the Canal Zone, under which title to land is acquired by ten years' uninterrupted adverse possession under claim of ownership. The Code of which that provision is a part went into force on May 1, 1907. Section 37 of that Code, that being the first section of the chapter containing section 40, provides that:

"This chapter shall not apply * * * to cases wherein the right of action has already accrued."

As the right of action asserted in the instant case accrued before that Code went into force, section 40 of that Code is not applicable to this case. It is the previously existing law which is applicable.

The above-quoted provision of the Civil Code, which the court's opinion shows was relied on to support the conclusion reached, is to be interpreted in the light of other provisions of that Code, among them the following:

"Art. 2512. Prescription is a manner of acquiring the things of another, or of extinguishing another's actions or rights, by reason of having possessed the things and said actions and rights not having been exercised during a certain lapse of time, and with the attendance of the other legal requisites.

"An action or right prescribes when it is extinguished by prescription."

"Art. 2521. If a thing shall have been possessed successively and without interruption, by two or more persons, the time of the previous possessor may or may not be added to the time of the successor, according to the provisions of article 778.

"The possession begun by a deceased person continues in the vacant inheritance, which shall be understood to possess in the name of the heir."

"Art. 778. Whether one succeeds under a universal or singular title, the possession of the successor begins at the time thereof, unless he shall desire to add that of his predecessor to his own; but in such case he appropriates it together with its qualities and vices.

"One's own possession may be added in the same terms to that of an uninterrupted series of predecessors."

"Art. 2527. Acquisitive prescription is ordinary and extraordinary.

"Art. 2528. To acquire the ordinary prescription, a regular uninterrupted possession, during such time as the laws require, shall be necessary.

"Art. 2529. The time necessary for ordinary prescription is three years for movables, and ten years for real property. * * *"

"Art. 2531. The ownership of things in commerce, which shall not have been acquired by ordinary prescription, may be acquired by extraordinary prescription, under the following rules:

"1. For the extraordinary prescription no title whatsoever is necessary.

"2. Good faith is presumed therein of right notwithstanding the absence of a title acquisitive of ownership.

"3. But the existence of a title of mere possession, shall cause bad faith to be presumed and shall not produce the prescription, unless the following two circumstances be present:

"1. That he who claims to be the owner cannot prove that during the past thirty years his ownership shall have been acknowledged expressly or impliedly by the person pleading the prescription.

"2. That he who pleads the prescription shall prove that he has had possession without violence, concealment, or interruption for the same period of time.

"Art. 2532. The lapse of time necessary to acquire by this kind of prescription is thirty years against any person, and is not suspended in favor of those enumerated in article 2530."

"Art. 789. In order that registered possession may cease, it is necessary that the record be canceled, either by the will of the parties or by a new record in which the registered possessor transfers his right to another, or by judicial decree.

"As long as the record subsists, he who obtains the thing which is the subject-matter of the record, does not acquire the possession thereof nor does he put an end to the existing possession."

The language used in article 2526 does not indicate a purpose to give to the recording of a conveyance by and to parties who are strangers to the possession of the thing conveyed or purported to be conveyed the effect of preventing the acquisition of ownership by prescription by one remaining in possession under a previously recorded title. It does not purport to give to the mere recording of a deed to such an adverse claimant the effect of interrupting or rendering ineffective the actual possession of a stranger to such deed who holds under a previously recorded title. It does not make the effectiveness of an actually uninterrupted adverse possession dependent upon a re-recording of the title of the possessor which had already been recorded when an adverse claimant had recorded the instrument or instruments under which the latter claims. It does no more than require one record of the title under which the possessor claims to make his possession effective against a recorded title in favor of another. The provision

cannot be given the effect of requiring a possessor to have a title recorded to enable him to acquire ownership by extraordinary prescription. To do so would be in the teeth of the following provision of the above set out article 2531:

"For the extraordinary prescription no title whatsoever is necessary."

In view of the just-quoted explicit provision, it is to be inferred that the provision of article 2526 was intended to have reference only to the acquisition of ownership by ordinary prescription, and not to such acquisition by extraordinary prescription, by means of which a possessor having no title whatsoever may acquire ownership of the thing possessed for the required time. Furthermore, the deeds under which the defendant possessed and claimed land in dispute having already been recorded when the instruments under which the plaintiffs claimed were recorded, to give to the recording of the last-mentioned instruments, in the absence of a claimant thereunder acquiring possession, the effect of terminating the defendant's previously registered possession, is inconsistent with the provision of article 789, above set out. That provision stands in the way of a registered possession being terminated by the mere recording of a deed, not made by the possessor, to one who does not acquire possession. Possession being essential to the acquisition of ownership by prescription (article 2512, supra), there is no basis in law for the conclusion that the mere lapse of time from the date of the record of a deed by and to parties out of possession can have the effect of conferring ownership by prescription on the grantee in such deed.

It appears from the record that the decree appealed from was based upon the conclusion that the plaintiffs had acquired by prescription the ownership of the land sued for, without that land having been possessed by them or by any one through whom they claimed, and though their petition did not assert the claim that they were by prescription entitled to that land. The court erred in so concluding.

What has been said indicates the grounds which are deemed to support the conclusion reached that the case was disposed of on a theory inconsistent with the law applicable to the facts disclosed by the pleadings and the evidence adduced. There was conflicting oral testimony as to the possession of the land in dispute. There was such evidence tending to prove that the defendant and those to whose rights he succeeded were, for more than 30 years immediately preceding the bringing of the suit, continuously and uninterruptedly in possession under claims of ownership of land which the decree appealed from adjudged to the plaintiffs. If that evidence was such as to require a finding in accordance with it, a result would be that the defendant was entitled by prescription to disputed land so possessed. There was no finding for or against what that evidence tended to prove. Such evidence, and that in conflict with it, can be weighed by the trial court better than by this court. A good deal of the oral testimony, as it is disclosed by the record before us, is unintelligible, because nothing in the record, including the maps which have been made a part of it, enables us to determine the location of places and objects mentioned by witnesses. The proper determination of issues of facts presented calls

for the weighing of oral testimony by the tribunal before which that testimony was given. The record discloses that, in consequence of a misconception of what is the law applicable to the case, this was not done in the trial now under review.

For the reasons indicated, the conclusion is that this court, without undertaking to pass on the conflicting evidence, should reverse the decree and remand the cause for further proceedings not inconsistent with this opinion; and it is so ordered.

Reversed.

GINACA et al. v. PETERSON (two cases.) (Nos. 3391, 3392.)

(Circuit Court of Appeals, Ninth Circuit. February 2, 1920. Rehearing Denied April 5, 1920.)

1. QUIETING TITLE ⟸44(4)—QUITCLAIM DEED SUFFICIENT PRIMA FACIE TO SUPPORT SUIT.

A quitclaim deed from one in possession, accompanied by delivery of actual possession, is prima facie evidence of title, and will support a suit to quiet title.

2. QUIETING TITLE ⟸10(2)—IT IS UNNECESSARY TO GO BACK OF COMMON SOURCE OF TITLE.

Where defendant in a suit to quiet title claims through a tax deed based on a sale for taxes levied while complainant's grantor was owner, such grantor is the common source of title, and it is unnecessary for either party to go back of such source in the proof.

3. TAXATION ⟸788(7)—TAX DEED NOT EVIDENCE OF REGULARITY OF NOTICE TO REDEEM.

A tax deed is not evidence of giving of the notice required by Pol. Code Cal. § 3785, to be given to the owner or occupant of the land 30 days before expiration of time for redemption, or before application for the deed, and without such notice the deed is invalid.

4. CORPORATIONS ⟸616—CONVEYANCE OF PROPERTY BY SOLE STOCKHOLDER AFTER FORFEITURE OF CHARTER VALID.

On a forfeiture of the charter of a corporation under the laws of California, the president, who was also sole stockholder and trustee, *held* authorized to convey its property, and in the asbence of creditors his conveyance cannot be collaterally attacked.

5. MINES AND MINERALS ⟸12—ALIEN MAY PROTECT RIGHTS IN UNPATENTED CLAIMS.

An alien may own unpatented mining claims and protect his rights therein in adverse proceedings in the Land Department or in the courts, although not qualified to obtain a patent by suit under Rev. St. § 2326 (Comp. St. § 4623).

Appeals from the District Court of the United States for the Northern Division of the Southern District of California; Benjamin F. Bledsoe, Judge.

Suits in equity by Ellen Justina Peterson against Gladys Ginaca and Louis A. Ginaca, executrix and executor of the will of Henry G. Ginaca, deceased, and No. 9 Gold Mining Company. Decrees for complainant, and defendants appeal. Affirmed.

A. H. Ricketts and Peter F. Dunne, both of San Francisco, Cal., Louis W. Bennett, of Oakland, Cal., and R. L. McWilliams, of San Francisco, Cal., for appellants.

T. John Butler, Sullivan & Sullivan, and Theodore J. Roche, all of San Francisco, Cal., and J. C. Thomas, of Oakland, Cal., for appellee.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

HUNT, Circuit Judge. These are appeals from decrees quieting title of appellee, Ellen Peterson, to certain mining lands in California, and enjoining appellants from trespassing or interfering with appellee's possession. Defendants denied all material allegations of the bill, and alleged ownership and actual, open, peaceable, and exclusive possession. The defendants No. 9 Gold Mining Company and Henry G. Ginaca, who died pending these suits, also set up proceedings in the United States Land Office in the matter of their respective applications for patent from the United States for certain tracts, Nos. 6 and 10. Tract No. 6 is called the Eureka mine; tract No. 10, the No. 9 mine, or the Baltimore mine.

It appears that in 1896 Moses L. Rodgers sold many mining claims, including the property involved, to S. W. Parker, for a consideration partly paid in cash and partly by mortgage back upon the property in the sum of $48,000. At the time of the transfer by Rodgers he was in possession, and delivered possession to Parker, who remained in possession until October 4, 1896, when he conveyed the lands to the Hornitos Gold Mining Company, a California corporation. By conveyance dated January 8, 1913, between the tax collector of the county of Mariposa, state of California, and the state, the record title of the property, which was sold for nonpayment of taxes for the year 1897, was described as the value of the interest created by mortgage by Parker to the Hornitos Gold Mining Company, and the record title is described also in another conveyance between the tax collector and the state of California dated January 6, 1915. The mortgage of $48,000 is also referred to in the indenture. In March, 1905, the Hornitos Gold Mining Company, by proclamation of the Governor of California, forfeited its charter, and on March 10, 1915, Parker, who was the sole stockholder and trustee of the corporation, conveyed the property involved to C. H. Perry, who took possession, and on March 10, 1915, by deed conveyed to Ellen Peterson, appellee herein.

The two tracts, Nos. 6 and 10, called the Eureka mine and the No. 9 mine, or Baltimore mine, were in the possession of and conveyed by the predecessors in interest of Ellen Peterson, as already set forth, and Parker, on September 19, 1896, located the Eureka mine by marking mounds of rock and posting notices and running a shaft or tunnel 200 feet deep. There was a shaft, rock in place, and a large out-cropping. Parker also erected stamps, engines, and put improvements upon the mine. The No. 9 or Baltimore mine (called tract 10), in the possession of and conveyed by Rodgers to Parker, as already indicated, was used as a center from which the other mines, except the Eureka, were worked. The Eureka was away from the other properties. Improvements were made upon the No. 9 as far back as 1896. After acquiring the

properties, Ellen Peterson was frequently upon them, directed assessment work thereon, and in February, 1915, under her direction, work of the value of $300 was performed on the Eureka. In 1914 the assessment work was done on the No. 9, but in 1915 the performance of such work thereon was prevented by the appellants. In the latter part of 1916, the appellee, by reason of disturbances, was prevented from working on the Eureka. In April, 1915, two of Ellen Peterson's employés were arrested at the instance of the alleged grantors of the appellants, and were charged with being unlawfully upon the properties.

It also appears that in April, 1917, while these suits were pending, Henry G. Ginaca, since deceased, applied for patent for the Eureka mine under the name of the Josephine mine, and that an adverse claim was filed by Ellen Peterson in the Land Office in June, 1917. Application for patent for the No. 9 Gold Mining Company was also made, and an adverse claim was filed in the Land Office by Ellen Peterson.

The appellants lay claim to all property involved, except the No. 9 mine and the Eureka mine, upon the basis of tax deeds from the tax collector of Mariposa county, Cal. One deed is from D. E. Bertken, dated September 11, 1913, to G. D. Turner, purporting to convey a certain piece of property containing 108 acres; another deed from the same tax collector, dated November 6, 1915, to Rosendo Busano, purporting to convey 25 acres; another deed, dated March 15, 1915, to Clarence W. Lake. The deed dated September 11, 1913, to Turner, purports to convey the property described therein for nonpayment of taxes for 1905, while the deed to Busano purports to convey certain property for nonpayment of taxes for the fiscal year 1896. In neither of these deeds is it recited that any notice of the sale was given to the owner of the land, and there is no evidence in the record that any such notice was given. In the deed to Lake the tax collector purports to convey certain of the lands described in the complaint filed in this action, but not all of such lands.

With respect to the mining locations, the title which appellants assert is wholly dependent upon the claim that the locations are superior to the title established by Ellen Peterson. The argument of the appellants is that a quitclaim deed is not of itself sufficient to constitute prima facie evidence of title; that a suit to quiet title cannot be maintained unless the complainant's title by occupancy has ripened into a title by prescription, or, if based upon color of title, by the payment of taxes; that a tax deed, whether valid or not, does not create a common source of title; that where the defendants make application for patent to the mining claim the complainant in a suit pending prior to such application should, by supplemental pleading, base the existing suit upon rights granted by section 2326, Revised Statutes of the United States (Comp. St. § 4623), and have the controversy determined accordingly; that the title to the Josephine location being in fieri, and no supplemental pleading having been filed by the complainant, the court was without authority to determine that the title to that claim vested in the complainant.

The appellee contends that the tax deed of March 15, 1915, is void, and that the Eureka and No. 9 mines are properly claimed by appel-

lee by virtue of prior location and the doing of annual assessment work and by virtue of the color of title in Ellen Peterson under the deeds to her from her grantors and more than five years' undisturbed possession of the mines immediately prior to the filing of these suits.

[1] First considering the tracts, other than the unpatented mining claims, tracts Nos. 6 and 10, we find that appellee Peterson and her grantors were in continuous and exclusive possession for more than 20 years. It therefore devolved upon the appellants to overthrow her title by showing that the tax title deed of March 15, 1915, to Lake was superior. A quitclaim deed from one in possession, accompanied by a delivery of actual possession, is prima facie evidence of title, and is proof thereof until such title is shown to be invalid or inferior by the one who assails it. See cases hereinafter cited.

But, if we assume that the tax deeds under which appellants claim were valid, they establish a common source of title. Appellants rely upon the tax deed of March 15, 1915; that is, the tax deed to Lake. But from September, 1896, when Rodgers, who was then in possession, conveyed to Parker, Parker held title until October, 1896, when title was conveyed to the Hornitos Gold Mining Company. Title remained in the Hornitos Gold Mining Company until after the forfeiture of the charter of that corporation, when title became vested in the trustees for the stockholders.

Examination of the assessment roll, the advertisement of the delinquent list, the certificate of sale to the state, the published notice of sale of the tax collector, and other papers which had to do with the proceedings which culminated in the execution of the tax deed of March 15, 1915, discloses that the assessment was of a mortgage given by S. Webber Parker during the time that the title to the land was in Parker, and that the record title to the land at the time of the assessmen thereof was in the Hornitos Gold Mining Company.

[2] Taxes are a lien upon the lands, and in the enforcement of statutory proceedings to enforce such a lien there must be an ownership of the property against which the lien is established. Toler v. Edwards, 249 Mo. 152, 155 S. W. 26. It would follow that, inasmuch as the title asserted by the appellants and that asserted by the appellee are from a common source, it is not necessary for either party to go back of that common source in their proof. McGorray v. Robinson, 135 Cal. 312, 67 Pac. 279. In Phillips v. Menotti, 167 Cal. 328, 139 Pac. 796, the court said that, where both parties claim title from a common source, it is sufficient to show conveyance of title from that source, without further establishing that the grantor himself had title. In Bond v. Aickly, 168 Cal. 161, 141 Pac. 1188, in an action to quiet title, the court said:

"As between parties, neither of whom can connect himself with the legal title, the one who proves prior possession in himself or those through whom he claims, makes out a sufficient showing of ownership. 15 Cyc. 30. 'Occupancy for any period confers title sufficient against all except the state and those who have title by prescription, accession, transfer, will, or succession.' Civil Code, § 1006. It has always been the law in this state, as well as elsewhere, that possession is prima facie evidence of ownership."

The court cited many earlier California decisions and continued:

"Accordingly, in the absence of anything to show a better or prior title, Aickly's possession, taken in 1892, established his ownership of the premises at that time. His quitclaim deed to Annie Bond transferred to her whatever title he then had, * * * and Annie's subsequent deed vested the title in plaintiff. When this point was reached, the plaintiff had established a perfect prima facie case, which could be overcome only by establishing a superior title in the defendant."

The same doctrine is announced in Redmond v. McLean, 32 Cal. App. 729, 164 Pac. 15.

[3] The Lake deed of March 15, 1915, from the tax collector, recites that levy was made for taxes for 1897 due to the state, but fails to show that the Hornitos Company had any notice of the tax sale or of any proceedings leading up thereto, and the testimony heard upon the trial was to the effect that no notice of the tax sale, or any of the proceedings upon which the sale was based, was ever given to the Hornitos Gold Mining Company. There is a recital that notice was mailed "to the party to whom the land was last assessed," etc., to wit, "M. L. Rodgers," etc. The assessment roll which was introduced in evidence shows upon its face that the Hornitos Gold Mining Company was the owner of the land when the assessment was made, and there is nothing in the deed from the tax collector to Lake, dated March 15, 1915, showing that any notice of any kind was ever given to the Hornitos Gold Mining Company.

Section 3785 of the Political Code of California, in force when the sale to the state was made, provided that the purchaser of property sold for delinquent taxes, or his assignee, must 30 days previous to the expiration of the time for redemption, or 30 days before he applies for a deed, serve upon the owner of the property purchased, or upon the person occupying the property, if the property is occupied, a written notice stating that said property, or a portion thereof, has been sold for delinquent taxes, giving the date of the sale, the amount of property sold, the amount for which it was sold, the amount then due, and the time when the right of redemption will expire, or when the purchaser will apply for a deed. The tax sale under which appellants herein claim was had March 15, 1915, or 5 days after the Hornitos Gold Mining Company conveyed the land to one C. H. Perry; but the statute was not complied with by notice to the Hornitos Gold Mining Company at least 30 days before that sale.

In Chapman v. Jocelyn, 187 Pac. 962, decided May 31, 1919, the Supreme Court of California reviews the earlier decisions, and, after holding that the production of a tax deed in evidence establishes a prima facie title, said:

" 'But several years subsequent to the foregoing legislation, a statute was enacted providing that the purchaser of property sold for delinquent taxes, or his assignee, must, 30 days previous to the expiration of the time for redemption, or 30 days before he applies for a deed, serve a notice upon the owner. * * * The service of this notice is not one of those matters established prima facie by the deed under section 3786, supra; but it is insisted under section 3787, supra, the deed ipso facto is made conclusive evidence of such service. * * * As already suggested, this enactment of the Legislature requiring notice to be served, etc., is of much more recent date

than section 3787 of the Political Code, and it is very apparent, upon an inspection of this provision, that the Legislature never intended that it should come within the purview of that section. It certainly should not be held by this court to be embraced within the rules of evidence there provided, in the absence of an express declaration to that effect, for the section is severe and rigid in its operation.' * * * It is evident that the Legislature intended each notice to contain the same statement of the amount due * * * at the date of the sale. * * * The point that the notice fails to conform to the law, in that it contains a statement, in effect, that the whole tract will be sold to the purchaser who is willing to pay the amount due, etc., is well taken, for the reason that no competition is invited. As said in section 80 of Black on Tax Titles, page 103: 'The notice must also follow the statute in stating whether the whole tract will be sold, or an undivided interest in it, or a designated portion of it, or as much of it as may be found necessary. If the collector gives notice of a sale which in this respect will exceed his authority, it is void.' The statement in the notice that sale would be to the bidder who will pay the amount due on the bond, together with the cost of the publication of this notice, is also an incorrect statement of the terms of the sale as required by law."

Here appellants failed to submit any evidence that any notice of sale was given, or that the notice of sale which may have been given was such as complied with the requirements of the statute. They therefore failed to show any title under the tax deeds upon which they rely, or under the deeds from the tax collector to Turner and Busano, to which reference has hereinbefore been made. See, also, Davis v. Peck, 165 Cal. 353, 132 Pac. 438; Strauss v. Canty, 169 Cal. 101, 145 Pac. 1012; Johnson v. Taylor, 150 Cal. 201, 88 Pac. 903, 10 L. R. A. (N. S.) 818, 119 Am. St. Rep. 181; Krotzer v. Douglas, 163 Cal. 49, 124 Pac. 722. Another grave defect apparent is that the assessment for a large part of the property involved was made against M. L. Rogers, notwithstanding the fact that the assessment roll showed that the lands described had been conveyed by deed from S. Webber Parker who gave the mortgage for $48,000, to the Hornitos Gold Mining Company. The assessor does not appear to have had authority to assess the lands against M. L. Rogers.

Again, on the face of the tax roll Rodgers' name appears as M. L. Rogers, and in subsequent documents it was spelled Rodgers and Rogers. There is no evidence to show that notice of the proceedings required to be given by the statute was given to Rogers or Rodgers. Henderson v. De Turk, 164 Cal. 296, 128 Pac. 747.

It is urged that an action to quiet title cannot be maintained, unless the title of the plaintiff by occupancy has ripened into a title by prescription, or, if based upon color of title, by the payment of taxes. Appellants cite section 1006, California Civil Code, which contained the general provision that occupancy for any period confers a title sufficient against all except the state, and those who have title by prescription, with the proviso added in 1915 to the effect that title conferred by such occupancy shall not be a sufficient interest in real property to enable the occupant or his privies to maintain an action to quiet title under the provisions of section 738 of the Code of Civil Procedure of California, unless such occupancy shall have ripened into title by prescription. Discussion of this statute is irrelevant, because appellee makes no claim of title by adverse possession, but predicates her right

upon the statutes of California (sections 318, 319, 320 and 321, of the Code of Civil Procedure), which refer to actions for the recovery of real property or the possession thereof.

[4] It is said that a stockholder of a corporation which has forfeited its charter cannot as a corporation convey real property of the corporation, and that one not shown to be a director in office at the time of the forfeiture of the charter of the corporation cannot properly execute a deed as president and trustee. The evidence, however, shows that at the time of the execution of the deed of March 10, 1915, S. W. Parker was the president of the Hornitos Gold Mining Company and owner of all of the capital stock of the corporation. We believe that he had ample power to do with the property of the corporation and to make conveyance of property, and that it is not in the power of any one to complain of any disposition made by Parker of the property, except, of course, creditors existing at the time of the disposition. Havemeyer v. Superior Court, 84 Cal. 327, 24 Pac. 121, 10 L. R. A. 627, 18 Am. St. Rep. 192; Civil Code Cal. § 400; Reed & Co. v. Harshall, 12 Cal. App. 697, 108 Pac. 719; Relley v. Campbell, 134 Cal. 175, 66 Pac. 220; Deming v. Maas, 18 Cal. App. 330, 123 Pac. 204.

[5] Passing next to the unpatented mining claims: It is urged that an adverse claimant must be a citizen of the United States, or must have declared her intention to become a citizen of the United States. That is the rule, doubtless, where the adverse claimant endeavors to prosecute an adverse suit against one who applies for a patent under the mining laws of the United States, and wherein such adverse claimant seeks to obtain title to the mining claim for himself or herself. On the other hand, an alien is not prevented from owning unpatented mining claims, and an alien so owning may protect his property rights in the mining claims in adverse proceedings before the Land Department of the United States or in the courts, although he may not acquire title from the United States through such proceedings. Altoona Q. M. Co. v. Integral Q. M. Co., 114 Cal. 100, 45 Pac. 1047.

It is urged that, where the defendants apply for patent, the plaintiff in a suit pending prior to such application should, by supplemental proceedings, base the existing suit upon the rights granted by section 2326 of the Revised Statutes, and have the controversy determined accordingly. This may be accepted as correct where the adverse claimant is lawfully qualified to receive a patent from the United States, and, as already indicated, where she seeks such patent in the adverse suit. But the proposition is not pertinent to the case before us, for here the adverse claimant is not qualified to receive patent from the United States, and has not sought such patent in these suits, but only endeavors to protect her property from being unlawfully taken from her, and from having a cloud put upon the title by the unlawful acts of the appellants.

It is said that, the Josephine location being in fieri and the plaintiff having filed no supplemental pleading, there was no authority in the District Court to determine that the title to the mining claims vested in the plaintiffs. But the title involved in this controversy is not in fieri. There never has been a determination that the title to the fee in the

mining claims involved was in the appellee, but merely that as against these appellants appellee has the valid and legal title to the mining claims involved. It is therefore of no concern to the United States, other than to be advised to whom the mines are awarded by the court, to the end that the general government may not issue patent to a party not entitled to the same. Had the United States issued patent to appellants, then Ellen Peterson, by supplemental pleading, could obtain a decree that the appellants were holding such title in trust for her.

It is apparent that the mining claims were located as required by law, and that appellee or her grantors were in possession for over five years, and did the necessary assessment work upon the claims until 1916, when appellants interfered with her and in effect ousted her from possession.

We find no error in the decree of the District Court.

Affirmed.

TJOSEVIG et al. v. DONOHOE et al.*

(Circuit Court of Appeals, Ninth Circuit. February 2, 1920.)

No. 3360.

1. TRUSTS ⟸17, 18(3), 101—TRUST ARISES FROM CONTRACT TO CONVEY PROPERTY IN CONSIDERATION OF SERVICES, NOT WITHIN STATUTE OF FRAUDS.
   Where, on performance by complainants of services under a written contract with defendants, complainants became entitled to conveyance of an interest in mining claims, legal title to which was in defendants, from that time defendants held complainants' interest in trust, and such trust relation cannot be attributed to a subsequent oral agreement to defer the conveyance, so as to bring it within the statute of frauds.

2. DEEDS ⟸6—AGREEMENT TO CONVEY PROPERTY NOT CONVERTED INTO CONVEYANCE.
   A contract providing that, on performance by complainants, defendants should convey to them an interest in certain property, *held* not converted from an agreement to convey into a conveyance by a further provision that, if defendants should be unable or refuse to convey, it should be treated as conveyance.

3. MINES AND MINERALS ⟸54(2)—CONSTRUCTION OF QUITCLAIM AS TO PROPERTY CONVEYED.
   Where the grantors in a quitclaim deed to mining property represented that they were sole owners, and they in fact held the legal title of record, which they purported to convey, they cannot claim, as against the owner of an equitable interest who affirms the sale, that their deed did not convey such interest.

4. APPEAL AND ERROR ⟸878(1)—APPELLEE NOT ENTITLED TO MODIFICATION OF DECREE.
   A complainant, who does not appeal from a decree awarding him affirmative relief, cannot review it as to the denial of a portion of the relief sought.

Appeal from the District Court of the United States for the First Division of the District of Alaska; Robert W. Jennings, Judge.

Suit in equity by T. J. Donohoe and Edmund Smith against Christian Tjosevig and others. Decree for complainants, and defendants appeal. Affirmed.

See, also, 255 Fed. 5, 166 C. C. A. 333.

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

*Certiorari denied 251 U. S. —, 40 Sup. Ct. 396, 64 L. Ed. —.

The appellees, in a suit which they brought against the appellants, the Tjosevig Copper Company and other parties defendant, alleged that the appellees and appellants entered into a contract by which the appellees, as attorneys at law, were to represent the appellants in litigation concerning their interests in certain designated mining claims, in consideration of which the appellants were to deed to the appellees an undivided 7½ one-hundredths interest of the total interests remaining to the appellants after the conclusion of such litigation; that it was agreed in the contract that said specified undivided interest in and to each of the claims should be conveyed immediately after the settlement of the litigation by good and sufficient quitclaim or mining deed, and that in case the appellants were unable or refused to execute said deed the contract should be understood to be "a conveyance, and the said parties of the first part hereby give and grant unto the said parties of the second part, their heirs, executors, administrators, and assigns, the said undivided 7½ one-hundredths in and to said above-described lode mining claims, to have and to hold the same unto the said parties of the second part, their heirs, executors, administrators, and assigns, forever." The complaint alleged that the appellees performed said contract on their part, resulting in a decree on April 6, 1911, the effect of which was set forth, but that the appellants ignored their rights and sold the claims for a large amount of money and stock, under some kind of an arrangement with the defendant corporations under which some of the money has been paid, and the remainder of money and stock has been placed in escrow, and they prayed that they be adjudged to be owners of their percentage in the money and stock for which the said claims had been sold, and prayed for an accounting.

The appellants filed their joint answer, admitted the contract, and alleged the sale to have been for $117,000 in cash and 125,000 shares of stock, but alleged that the sale was a quitclaim of their interests only, and no more, in some of the claims mentioned in the decree of 1911, and of certain other claims not so mentioned. The answer admitted that at the time when the same was filed, March 3, 1917, the $117,000 had been paid to the First Bank of Cordova as trustee, and alleged that whatever interest the appellees ever had had become forfeited to the appellants for nonperformance of their proportion of the assessment work under and by virtue of regular proceedings which were set forth.

The appellees replied, denying that the appellant's deed was only a quitclaim of their right, title, and interest, and alleged that the other claims embraced in the conveyance were of no value. Concerning the alleged forfeiture, they alleged that there was a parol contract by which the appellants were to do the assessment work for the appellees in consideration of the latter looking after the legal end and endeavoring to effect a sale, which contract appellants performed, and they denied that the forfeiture proceedings were legal.

The appellees thereafter filed their amended and supplemental complaint, in which, in addition to the principal allegations of the original complaint, they alleged that the price to be received by the appellants for the claims was $121,000 in cash and 125,000 shares of stock, and that the cash had been paid to the First Bank of Cordova as agent and trustee of the appellants.

To the amended and supplemental complaint Christian and Eli Tjosevig filed their joint answer, setting up, as before, the defense of forfeiture of the appellees' rights and of the quitclaim only of the appellants' rights, and alleging that the sale was made in consideration of the conveyance of claims and interest in addition to those mentioned in the contract, to which additional claims and interests the appellees had no right or title, and that these additional claims and interests were of great value, and that there was no way of determining or ascertaining, in case the court should find that the appellees were entitled to any part of the money received by the appellants, what their proportion or share should be, and alleging further that $^{3}/_{48}$ of the sum received was the sole property of the appellant Halvorsen, and that for that interest, so belonging to him exclusively, he was to receive $20,000. And the answer pleaded estoppel against the appellees on the ground, as alleged, that they had failed to assert any claim to the mining claims, and refused to accept a deed

or conveyance thereof, and refused to assist in developing the claims, and that they knew in April, 1916, that negotiations were pending for the sale of the claims, but failed and neglected to assert any right or interest in the same, until after the claims had been sold.

The appellees replied, setting up the parol contract as to the performance of assessment work, denied that the deed given by the appellants was a quitclaim of only their right, title, and interest, denied that $^{3}/_{48}$ interest of the purchase money belonged to Halvorsen.

The appellant Halvorsen filed his separate answer, alleging that subsequent to the decree of April 6, 1911, he purchased from Holman, Ekemo, and Hazlet certain interests which were in no way involved in that litigation, and that he, joining in the conveyance to the Copper Company, sold to the company those interests for $20,000, $3,000 of which had been paid to him; the remaining $17,000 being the balance of the purchase price then held by the First Bank of Cordova under the injunction of the court.

The appellees replied alleging that Christian Tjosevig was, at the time of the execution of the contract, the owner of the said interests which later were so transferred to Halvorsen, and that Halvorsen paid no consideration therefor, but held the same as trustee for Christian Tjosevig.

The court below, upon the evidence, made findings of fact, the substance of which is as follows: That the contract between the appellees and the appellants was as alleged in the complaint; that the appellees performed the services which they had agreed to perform, and thereby became owners of and entitled to a deed from the appellants to an undivided 7½ per cent. of the interest of the appellants in said claims; that on the request of the appellants Christian Tjosevig and Eli Tjosevig the appellees agreed not to demand a deed, but that those appellants should hold the legal title to the appellees' interest in trust for them; that said appellants agreed that they would annually, until the sale of the mining claims was made, do and perform all the assessment work required by law for the proportionate share and interest of the appellees, in consideration of which the appellees agreed that they would use their best efforts in endeavoring to secure a purchaser for the said property, and when called upon would draw the necessary papers, contracts, and agreements in connection therewith, and would counsel and advise the said Tjosevigs in all matters connected with their interest, and that pending the sale of the said property the said Tjosevigs should continue to hold the legal title to the appellees' interest in trust for them; that the said appellants, although they agreed to do the assessment work, neglected to do the annual assessment work, or make the improvements annually required by law, on or for the benefit of said mining claims during the years 1911 to 1915, inclusive, and no money was due from the appellees for assessment work, as said appellants well knew when they published the forfeiture notice and attempted to forfeit the appellees' interest.

The court found that the sale was made in June, 1916, of all the interest of the appellants, as well as the interests of the appellees, for $117,000 in cash and 125,000 shares of capital stock of the Copper Company; that the appellant Halvorsen joined in said deed for the purpose of conveying the legal title to $^{3}/_{48}$ interest in certain claims owned by Christian Tjosevig, the record title of which had been placed in Halvorsen, and which he held as trustee for Christian; that possession was delivered to the Copper Company of all said mining claims, and the Copper Company went into the possession of each and every part thereof, and that said appellants wholly ignored the rights of the appellees, and refused to account or pay them any part or portion of the purchase price; that in all said transactions and during all the time thereof Christian Tjosevig acted as attorney in fact and as agent for Eli Tjosevig and Andrew Halvorsen; that the appellees have at all times acquiesced in the sale of said property, by claiming their full and proper interest in the consideration; that the said appellants were the holders of the legal title in the mining claims as trustees for the appellees, and did not act in good faith when they attempted to forfeit the interests of the appellees; and the court made findings to the effect that all of said forfeiture proceedings were void, and found that the appellant Christian Tjosevig, with the knowledge and consent

of the other appellants, willfully and intentionally mingled the trust property with the nontrust property in such a way as to make it impossible to ascertain the relative value of each, or to ascertain whether the trust property, by being combined with the nontrust property, has not conferred a greater benefit on the nontrust property than the combination has conferred upon the trust property.

As conclusions of law the court found that the appellants sold and conveyed the appellees' interest under and by virtue of the deed to the Copper Company, and that the appellees are entitled to a decree against the appellants for 7½ per cent, of the $117,000, with interest on the same from December 1, 1916, at 8 per cent. per annum, and to 7½ per cent. of the 125,000 shares of the stock of the Copper Company. From that decree the appeal is taken.

John Rustgard, of Juneau, Alaska, for appellants.

Hellenthal & Hellenthal, of Juneau, Alaska, Lyons & Orton, of Seattle, Wash., Donohoe & Dimond, of Valdez, Alaska, and Smith, Chester & Brown, of Seattle, Wash., for appellees.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

GILBERT, Circuit Judge (after stating the facts as above). [1] It is contended that a trust relationship between the appellees and the appellants was neither pleaded nor proved, and the statute of frauds is invoked. The statute of frauds is complied with in the fact that the appellants held the appellees' interest in trust under a contract which was in writing and was signed by the appellants, and which created the trust. It provided that the appellees, after the conclusion of the litigation, should receive from the appellants a deed of a specified undivided interest in the mining claims. It was competent, either by a parol agreement or by inaction, to postpone the conveyance. There is no denial that it was in fact postponed, and there is no contention that an interest in the property was ever conveyed to the appellees after the date of the contract. The complaint plainly shows that a trust was pleaded. The appellees, after setting forth in their amended complaint the terms of the contract and their performance thereof, alleged that from the date of the original decree, which was obtained by them under that contract, until the sale to the Copper Company, the appellants held the interests of the appellees in trust for them.

The appellants urge as against the existence of a trust that the parties to the contract of 1911 treated that instrument as conveying title to the appellees, and they point to the fact that in the interval between the final decree of April 6, 1911, and the sale to the Copper Company the appellees signed, together with the appellants, certain options that were given on the mining properties. There is nothing in that fact to show that the appellants did not hold the property in trust. It indicates only that the owners of the equitable interest and the owners of the legal title were working in harmony and had agreed upon terms of sale. It has no further probative value. Nor does the fact that after the forfeiture proceedings the appellants claimed the properties adversely to the appellees negative the existence of a trust. Nor does the fact that the appellees finally became convinced that the appellants were intending to "beat them out of their interest" in the property tend to prove that there was no trust. And the same may be said of any

alleged admissions of the appellees that it was incumbent upon them to contribute to the assessment work.

The appellants are in error in asserting that the court below found that the appellants were trustees of an express trust created orally. What the court found was that on the request of the appellants the appellees agreed not to demand a deed and agreed that the appellants should hold the legal title to their interest in trust for them. That is not a finding that an express trust was created by parol. It is a finding that the date of the conveyance was by agreement of the parties deferred, and that in the meantime the trust which had been created by the contract continued in force.

[2] The appellants contend that, notwithstanding the deed to the Copper Company, the appellees still hold whatever interest they had in the mining claims, that the contract itself operated as a transfer of title to the appellees, and that they have not been injured by the deed to the Copper Company. We are unable to assent to this view. While the contract contains words of present grant, it also clearly shows that it was the intention of the parties that at the close of the contemplated litigation a deed should be executed to the appellees. Says the contract:

"The said 7½ one-hundredths undivided interest in and to each said claim shall be conveyed immediately after the settlement of the said litigation as aforesaid by a good and sufficient quitclaim or mining deed, and in case the said parties of the first part are unable to or refuse to execute said deed as above, then and in that case this instrument shall be understood to be and it is hereby agreed to be a conveyance."

It is not shown that the appellants were unable to convey, or that they refused to convey, and the contingency, therefore, on which the contract was to stand for a deed, never arose. Instead of executing the deed at the close of the litigation, as the contract required, the appellants agreed, as the court below found, to retain the title to the interest of the appellees in order the better to negotiate a sale of the mining claims.

The appellants point to the allegation of the original complaint which charges that they failed and neglected to convey to the appellees their interest in the claims. That, however, is far from saying that the appellants refused to convey. The case was tried on the amended complaint. If the original complaint had contained an allegation that the appellants refused to convey, the appellees were not precluded from otherwise alleging the facts in an amended complaint. In Williams v. Paine, 169 U. S. 55, 76, 18 Sup. Ct. 279, 287 (42 L. Ed. 658) the court said:

"We agree generally that, although there are words of conveyance in præsenti in a contract for the purchase and sale of lands, still, if from the whole instrument it is manifest that further conveyances were contemplated by the parties, it will be considered an agreement to convey and not a conveyance. The whole question is one of intention, to be gathered from the instrument itself."

To the same effect is Chavez v. Bergere, 231 U. S. 482, 34 Sup. Ct. 144, 58 L. Ed. 325.

[3] The appellants contend, further, that it is immaterial whether the appellees' interest was legal or equitable; that whatever interest in the premises they ever had they still have, for the reason that the deed to the Copper Company was a quitclaim deed and transferred only the interest of the grantors. The record leaves no room to doubt that in conveying the mining claims to the Copper Company the grantors intended to grant, and the Copper Company and its agent understood that they were to receive, an absolute transfer of all interests in the claims. The evidence is that Christian Tjosevig, for himself and the other appellants, represented that the appellees' interest had been advertised out, and there was no fear of any question regarding the title; that the grantee had expected to receive a warranty deed, but that a quitclaim deed was accepted only for the reason that patents had not yet issued to the mining claims; that Christian Tjosevig repeatedly stated that it was the intention to convey a clear title to the whole property, and that after the appellees brought their suit he stated to the officers of the purchaser that the appellees' claims were fictitious; that it was never his intention to convey anything but a clear title.

In an option for a deed given on April 6, 1916, by the appellants to Rowe for the sale of the mining claims, the grantors gave the right to purchase "all their right, title, and interest in [which said interest includes the whole] those certain mining claims or lodes," etc. That option was forfeited, and on June 6, 1916, when the claims were sold to the Copper Company, a contract was entered into between the grantors in the deed and the Copper Company, one purpose of which was to make provision for the terms of payment of the purchase price. It was agreed in that contract that the Copper Company should have the right to enter upon said mining claims "for the purpose of mining, developing, and equipping the same, and operating the same as a going mine or mines, and to sell or dispose of any of the ores so mined or milled." The contract and the deed are parts of one transaction and are to be construed together. The contract shows that the Copper Company was given the unrestricted right to enter upon said mining claims and to mine and dispose of all the ores thereof, on the assumption that the appellants and Nils Tjosevig were the owners of said claims and were possessed of the right to mine and sell all the ores therein.

It is the general rule that the grantee in a quitclaim deed takes only the interest of his grantor in the premises. Lindblom v. Rocks, 146 Fed. 660, 77 C. C. A. 86. In 18 C. J. 314, it is said:

"But the fact that a deed purports to convey the grantor's interest is not conclusive of an intention to convey only that interest. The intention, to be gathered from the whole instrument, must prevail."

In Wise v. Watts, 239 Fed. 207, 152 C. C. A. 195, in giving effect to a conveyance which was in the form of a quitclaim deed, this court held that the paramount object in the construction of a deed is to give effect to the intention of the parties, which is to be gathered from a consideration of the entire instrument, read in the light of the facts and circumstances under which it was executed. The deed made to the Copper Company had greater efficacy than a mere quitclaim. By

its terms it conveyed "all the estate, right, title, interest, property, possession, claim, and demand whatever, as well in law as in equity, of the grantors." The grantors held at that time the legal title to all interests in the claims as they appeared of record; the appellees' contract not having been recorded. Taking the language of the deed, together with the coincident contract between the parties, and the facts and circumstances surrounding the transaction, we entertain no doubt that the deed was, and was intended to be, a conveyance of all interests in the claims. Trudeau v. Fischer, 96 Neb. 275, 147 N. W. 698; Garrett v. Christopher, 74 Tex. 453, 12 S. W. 67, 15 Am. St. Rep. 850; Holland, Adm'r v. Rogers, 33 Ark. 251; Plummer v. Gould, 92 Mich. 1, 52 N. W. 146, 31 Am. St. Rep. 567; Dennison v. Ely, 1 Barb. (N. Y.) 610.

It is contended that the Copper Company had, through Rowe, its agent, actual notice of the interest of the appellees before making the purchase; that Rowe had seen the record at Chitina showing that the interests of the appellees had been forfeited for nonperformance of assessment work, and must have also seen that the notice showed on its face that it was absolutely defective. It does not follow from this that Rowe discovered any defect in the forfeiture proceedings. The appellants' counsel in the court below had discovered no such defect. They set forth in the answer that the appellants had acquired the appellees' interest by forfeiture, and, although they have abandoned that contention in this court, they stoutly maintained it in the court below. Rowe testified that Christian Tjosevig told him that he had "advertised everybody out." Said the witness:

"He asked me at that time if I had not found the statement to be true that they had been advertised out. I admitted I had checked up his statements at the office of the mining recorder at Chitina on my first trip to Alaska, and had found them correct according to the records of that office. There never was any question in my mind but that Christian Tjosevig was transferring all the right, title, and interest in the property to the corporation. He said many times that everything was cleaned up."

The appellants advert to the fact that at the time when the appellees began the present suit a considerable proportion of the purchase money had not been paid, and they argue that the Copper Company was not a purchaser in good faith. It would make no difference in this case, if the Copper Company had notice of all the antecedent facts in relation to the appellees' claim of interest and had not paid the purchase price at the time when this suit was begun. The controlling fact is that the appellants, together with Nils Tjosevig, made a conveyance of all interests in the property to the Copper Company. The appellees had the right to regard the conveyance as a thing accomplished, and to acquiesce in it, and to require the appellants to account to them for their proportion of the purchase money then paid or agreed to be paid. It is not important to inquire what remedy, if any, the appellees might have had as against the Copper Company.

Of the assignment of error directed to the finding that the legal title to $^{8}/_{48}$ interest in several claims, which stood at the time of the conveyance to the Copper Company in the name of Halvorsen, was held

by him as trustee for Christian Tjosevig, it is sufficient to say that Halvorsen joined in the conveyance with the other grantors, and thereby transferred whatever interest he had in the claims. The record is convincing that he had no right to that $^{3}/_{48}$ interest. But, if there is due him any proportion of the proceeds which his coappellants received, his demand is against them and not against the appellees. Halvorsen joined with the other appellants in petitioning the court to release to them all of the purchase money held in trust, excepting $17,000, which was deemed more than sufficient to meet the appellees' demand. The court below went as far as equity permitted in expressing its purpose to direct that any portion of the fund in excess of the amount awarded to the appellees, with interest and costs, should be turned over to Halvorsen.

[4] The appellees ask us to modify the judgment, and they point to the fact that in the opinion of the court below it was said that they were entitled to 7½ per cent. of the $3,000, which the appellants received on the forfeiture of the contract to Rowe; the court having omitted in the decree to add that amount to the judgment. The appellees, not having appealed from the decree awarding them affirmative relief, cannot review the denial of a portion of the relief which they sought. Sanborn-Cutting Co. v. Paine, 244 Fed. 672, 682, 157 C. C. A. 120; Lasswell Land & Lumber Co. v. Lee Wilson & Co., 236 Fed. 322, 149 C. C. A. 454.

The decree is affirmed.

LANE v. EQUITABLE TRUST CO. OF NEW YORK. *

(Circuit Court of Appeals, Eighth Circuit. November 24, 1919.)

No. 5381.

1. RAILROADS ⟸191—MORTGAGE TRUSTEE ENTITLED TO DEFICIENCY DECREE.
The trustee in a railroad trust deed *held* entitled to a deficiency decree under equity rule 10 (198 Fed. xxi, 115 C. C. A. xxi), where the proceeds of the mortgaged property sold under foreclosure decree were insufficient to pay the mortgage debt, and the trust deed expressly authorized the trustee to collect any deficiency in its own name.

2. MORTGAGES ⟸559(5)—SUPPLEMENTARY DECREE FOR DEFICIENCY, WHERE DEFICIENCY LIABILITY ADJUDGED IN PRINCIPAL DECREE NOT APPEALED FROM.
Where a foreclosure decree, ordering sale of mortgaged property, provided that in case of deficiency the amount should be reported by the master, and complainant, trustee in the mortgage, should be entitled to judgment therefor, from which decree no appeal was taken, a deficiency decree subsequently entered pursuant thereto *held* not subject to attack by an unsecured creditor of mortgagor.

3. MORTGAGES ⟸559(5)—SUFFICIENCY OF PLEADING TO SUPPORT DEFICIENCY DECREE.
A prayer for general relief in a bill for foreclosure of a mortgage *held* broad enough to authorize a deficiency judgment.

4. CORPORATIONS ⟸642(7)—SUIT BY FOREIGN CORPORATION NOT "DOING BUSINESS IN STATE."
Bringing suit by a foreign corporation as trustee to foreclose a mortgage on real estate situated in the state of suit does not constitute "doing business" in that state.

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

*Certiorari denied 251 U. S. —, 40 Sup. Ct. 344, 64 L. Ed. —.

5. COURTS ⊂=343—PARTIES ON FORECLOSURE IN FEDERAL COURT NOT CONTROLLED BY STATE STATUTE.

Rev. St. Mo. 1909, § 2859, requiring foreign trustees bringing suit to foreclose a trust deed on property in that state to join a resident trustee as plaintiff, cannot control suits brought in a federal court.

6. RAILROADS ⊂=196—REORGANIZATION BY CONTRIBUTING STOCKHOLDERS AND BONDHOLDERS PURCHASING AT FORECLOSURE SALE DOES NOT CONSTITUTE PAYMENT OF BONDS.

That under a plan of reorganization stockholders and bondholders of the old railroad corporation, who contributed cash for the purchase of its property at foreclosure sale, were to receive stock and bonds of the new company, does not raise any presumption that the property was worth more than the price it sold for, or that the bonds secured were to be considered paid in full.

Stone, Circuit Judge, dissenting.

Appeal from the District Court of the United States for the Eastern District of Missouri; Walter H. Sanborn, Judge.

Suit by the Equitable Trust Company of New York against the Wabash Railroad Company and James B. Forgan. From a deficiency decree, Rome Lane appeals. Affirmed.

Wells H. Blodgett and Clifford B. Allen, both of St. Louis, Mo., for appellant.

Theodore Rassieur, of St. Louis, Mo. (George Welwood Murray and Lawrence Greer, both of New York City, of counsel, and Murray, Prentice & Howland and Pierce & Greer, all of New York City, and Jourdan, Rassieur & Pierce, of St. Louis, Mo., on the brief), for appellee.

Daniel N. Kirby, of St. Louis, Mo. (Nagel & Kirby, of St. Louis, Mo., on the brief), for Wabash Ry. Co., by leave of Court.

Before STONE, Circuit Judge, and MUNGER and YOUMANS, District Judges.

YOUMANS, District Judge. On January 30, 1914, a decree of foreclosure upon a deed of trust was entered in the case of Equitable Trust Company of New York v. Wabash R. R. Co. and James B. Forgan. The property of the railroad company covered by the deed of trust was ordered sold, and sale of the property was accordingly made. The amount realized from the sale was not sufficient to pay the indebtedness secured by the deed of trust. On March 8, 1918, the Equitable Trust Company filed a motion under equity rule 10 (198 Fed. xxi, 115 C. C. A. xxi) for a deficiency judgment against the railroad company. The appellant, an unsecured creditor of the railroad company, on behalf of himself and other unsecured creditors, resisted the motion.

The pleading filed by appellant is summarized in the brief filed by his counsel, as follows:

"(a) That it was true, as alleged in said petition, that the amount realized from the sale of said mortgaged property was not sufficient to pay the amount due as principal and interest of said bonds.

"(b) That the matters set forth and alleged in the foreclosure bill of the

Equitable Trust Company were not sufficient to entitle said trust company to a personal judgment against said Wabash Railroad Company for any deficiency.

"(c) That said foreclosure decree was entered January 30, 1914, and that a sale thereunder was had July 22, 1915; that at the instance of said trust company the receivers under said foreclosure bill were discharged on the 18th day of September, 1916, and that by the consent and procurement of said trust company all the unmortgaged property and assets of the Wabash Railroad Company were taken over and transferred by said receivers to the new Wabash Railway Company, and that no steps were taken by said Equitable Trust Company to procure a deficiency judgment until after proceedings had been instituted by general creditors for an accounting and recovery of the trust funds wrongfully diverted as aforesaid at the instance of said trust company, and that said trust company was in equity now estopped from having and recovering a deficiency judgment for any sum whatever.

"(d) That under the plan of the bondholders and stockholders of said Wabash Railroad Company for the foreclosure of said mortgage and a sale of the mortgaged property under a foreclosure decree, and the purchase thereof by a committee representing said stockholders and bondholders (as shown by the record, folio 289), all claims and demands of the holders of said bonds and of said Equitable Trust Company as trustee against said Wabash Company on account of said bonds were fully satisfied and discharged."

The issue presented by the motion and answer was submitted upon the following stipulation:

"It is hereby stipulated and agreed between the parties hereto as follows:

"(1) That the paper hereto attached, marked 'Exhibit A,' and entitled 'Wabash Railroad Company, Plan and Agreement of Reorganization,' dated April 28, 1915, is a true and correct copy of said plan and agreement of reorganization, and is made a part of the record in this proceeding with the same force and effect as the original copy of said plan and agreement of reorganization.

"(2) That the paper hereto attached, marked 'Exhibit B,' and entitled 'The Wabash Railroad Company Joint Reorganization Committee,' dated January 26, 1916, is a true and correct copy of the final report of said joint reorganization committee, made to the board of directors of the Wabash Railway Company, and is made a part of the record in this cause with the same force and effect as the original copy of said final report.

"(3) That the paper hereto attached and marked 'Exhibit C' and entitled 'Method 5' is a correct computation, made by Thomas J. Tobin, of interest on the principal of the first refunding and extensions mortgage bonds, and on the accumulated interest as provided in paragraph 10 of the foreclosure decree by the method as stated upon said exhibit. Said exhibit is hereby made a part of the record in this cause.

"(4) It is agreed that the court may refer to and use in this proceeding bound volumes I and II of the printed record of the various proceedings in the Wabash receivership cases, entitled 'Record of Wabash R. R. Co. Receivership.'

"It is further agreed that all or any part of the orders, petitions, decrees, or other documents set forth in said printed volumes, and referred to in this proceeding by either party hereto by appropriate references, may be considered and used by either party making reference to the same as a part of the record in this cause."

[1] I. The first ground urged by counsel for appellant is that equity rule 10 does not authorize the entry of a deficiency judgment in favor of a trustee to whom the defendant is not indebted. In support of this contention reliance is placed upon the case of Mackay v. Randolph-Macon Coal Co., 178 Fed. 881, 102 C. C. A. 115, decided by this court. In that case a deficiency judgment had been taken by a trustee for bondholders under a deed of trust. The defendant corporation had been adjudged a bankrupt, and the remainder of its estate was being

administered in the bankruptcy court in the Eastern district of Missouri. With the intention of having the trustee in bankruptcy bring suit in the state of New York against the stockholders of the bankrupt for unpaid subscriptions to stock, the trustee for the bondholders presented his deficiency judgment for allowance in bankruptcy. In the statement of facts Judge Amidon, speaking for the court, said:

"The only claim proven in bankruptcy is the deficiency decree, and the trustee in bankruptcy would, of course, have no higher right than the holder of that claim. Being apprehensive that the trustee under the mortgage might not be a 'creditor' of the corporation who would be entitled to maintain the suit against stockholders for their unpaid subscriptions, holders of the bonds secured by the mortgage made due proof of the same before the referee, and asked that they be allowed as claims against the estate. The referee, being of the opinion that the bonds had been merged in the deficiency judgment, disallowed the claims, and his ruling was affirmed on appeal to the District Court. The bondholders seek a review of that action by the present appeal."

The only question before the court was whether each separate bond was merged in the deficiency judgment, so as to prevent a separate allowance in bankruptcy on the bond. On that point the court said (178 Fed. 884, 102 C. C. A. 118):

"It is manifest that the appeal turns mainly upon the question whether the cause of action arising out of the bonds was merged in the deficiency decree. Both merger and res adjudicata lie in the same field. They are not, however, identical. A point may become res adjudicata as to one cause of action in a suit upon an entirely independent cause of action between the same parties, if it has been there directly litigated. Merger, on the contrary, cannot result unless the causes of action in the two suits are identical."

The court said also:

"As between the parties to the foreclosure suit, the deficiency decree is, of course, conclusive of every fact necessary to support the decree. It forecloses inquiry as to whether the court had authority to enter a deficiency judgment. Hatcher v. Hendrie, etc., Supply Co., 133 Fed. 267, 272, 68 C. C. A. 19. But the suit against the stockholders is not between the parties to the foreclosure action. It is pending in the state of New York. By the decisions of the highest court of that state it is doubtful whether a judgment against a corporation is more than prima facie evidence of the creditor's debt in a suit against stockholders. Cook on Corporations, §§ 209 and 224. If that should be the holding of the court in the action of the trustee in bankruptcy against the stockholders of this corporation, the defense would be open to them that the trustee under the mortgage had no right whatever except to enforce the security, and was in no sense a creditor of the corporation. The peculiar language of the covenant in the mortgage, to say the least, gives color to such a defense.

"The principle of merger has its foundation mainly in the maxim: 'Nemo debet bis vexari pro una et eadem causa.' That maxim has no application to the facts of this case. No one could possibly be vexed by costs or litigation through the allowance of the bondholders' claims. No costs could accrue, and it was not necessary to summon any person to the hearing of the claims. Another reason that has guided courts in barring a second action for the same cause is that the judgment already entered affords to the plaintiff all the judicial aid that could be obtained from a second judgment. In the present case there is good reason for saying that the allowance of the bondholders' claims would furnish the trustee in bankruptcy a much better basis than the deficiency decree for his suit against the stockholders. The claims could have been allowed without the possibility of injury to others. The referee had full power, both by his order and his subsequent control over the administration of the estate, to safeguard all interests from any prejudice from the allowance of both claims.

"The whole case is therefore reduced simply to this: Should the court of bankruptcy have aided these creditors by removing one of the apprehended dangers from their pathway, when it could have done so without the slightest cost or prejudice to any one? The reason of the rule which it thought deprived it of the power to grant the aid was wanting in this case, and we think the rule itself, even if otherwise applicable, should not have been enforced."

It was not held in that case that the deficiency judgment was invalid. It was held that the doctrine of merger did not apply. It is true that language was used in that opinion which went beyond the point involved in the case, as stated in the opinion, but "the language of the opinion cannot be separated from the facts of the case." Coca-Cola Co. v. Moore, 256 Fed. 640, 643, — C. C. A. —.

The case of In re A. J. Ellis, Inc. (D. C.) 242 Fed. 156, is also cited by counsel for appellant as sustaining their contention. That case arose in the state of New Jersey. The question involved was the right of the trustee for bondholders in a deed of trust to prove a deficiency judgment against a bankrupt corporation. The referee in bankruptcy refused to allow the claim. Upon petition for review the District Court said:

"In New Jersey, a separate suit at law upon the bond is necessary to secure judgment for deficiency in the foreclosure of mortgages."

The court then quoted the sections of the statute of New Jersey making that requirement. The court then in its opinion proceeds to say:

"The cause of action arising out of the bonds in this case was not merged in the deficiency decree. The trustee could not prosecute a separate action at law upon the bonds in order to secure a deficiency judgment; neither can it prove this deficiency claim, which, however, need not be reduced to judgment in order to be proved. In re McAusland (D. C.) 235 Fed. 173. There is some authority in apparent conflict with the conclusion herein reached (Grant v. Winona, etc., S. W. R. R. Co., 85 Minn. 422, 89 N. W. 60; Laing v. Queen City Ry. Co. [Tex. Civ. App.] 49 S. W. 136), yet the decisions in those cases are explained in part, at least, by the provisions contained in the mortgage and the provisions of the statute in those jurisdictions. A deficiency decree in those jurisdictions may be entered in the foreclosure proceedings."

The court distinguished the practice in New Jersey from the practice in other states.

Counsel for appellant in their brief say that the above case was affirmed by the Court of Appeals of the Third Circuit in 252 Fed. 483, 164 C. C. A. 399. While that is true, a careful reading of the opinion of the court discloses that the question of the allowance of the deficiency judgment was not considered. With reference to the facts in that case the court said:

"The undisputed facts are as follows: In June, 1910, the bankrupt, A. J. Ellis, Incorporated, executed 200 bonds, each for $500, to the New Jersey Title Guarantee & Trust Company as trustee for the future holders. The bonds were 10-year 6 per cent. obligations, interest and principal payable at the trustee's office in Jersey City, and were secured by a mortgage on real and personal property. If certain specified defaults should occur, the trustee was bound to foreclose if two-thirds of the bonds should so request. Default did occur, the request was made, and in May, 1915, the company filed a foreclosure bill in the state chancery. At this time the bankruptcy proceeding was in progress—the adjudication had been entered in March—and Mc-

Burney, the trustee in bankruptcy, was made one of the defendants in the bill by permission of the District Court. There was no defense, and in October all the mortgaged property was sold for $50,000. As the decree had been for more than $86,000, with interest, and, as certain costs and fees had also accrued, the result was that the sale left nearly $38,000 of the mortgage debt unpaid. A deed for the property was made in December, 1915, and a month later the trust company on behalf of the bondholders filed a claim in bankruptcy for the deficiency. McBurney objected, and in October the referee disallowed the claim; his disallowance being affirmed by the District Court on April 27, 1917. 242 Fed. 156. From this order the first appeal now before us was taken by the trust company.

"The claim was rejected on the ground that it should have been made by the bondholders themselves and in their own names, and accordingly on April 30 a petition to amend the claim was filed by William J. Sloane and Babette Mohler, who held all the outstanding bonds, except eight; these being unrepresented in the proceedings, both below and in this court. The petitioners averred inter alia that after the foreclosure sale a deficiency of $230.04 existed on each bond, and that they had requested and instructed the trust company to act as their agent to prove their claim against the bankrupt estate for such deficiency, that the company had proved on behalf of all the bondholders, and that the petitioners had ratified and did ratify whatever the company had done as their agent, praying leave to amend the proof so as to make it a direct claim by William J. Sloane and Mrs. Mohler upon the bonds held by them respectively. The District Court allowed the amendment, and the second appeal is from this order."

It is thus seen that two appeals were taken, one on the refusal to allow the deficiency judgment, and the other on the question of allowing two bondholders, who held all outstanding bonds except eight, to amend the proof theretofore made by the trustee in the deed of trust, so as to make it a direct claim by the two bondholders on the bonds held by them respectively. On these two points the Court of Appeals said:

"We need not consider the question raised by the first appeal. The only bondholders on this record are the two just named, and if they were properly allowed to adopt the trust company's claim already on file the company's appeal becomes academic. We think Judge Davis was right in allowing the amendment. The claim set forth all the facts with particularity, and expressly stated that the company was acting for the bondholders. Every one knew the facts and was aware that the company did not own the bonds and could not benefit by the balance still due on the mortgage debt. Whether it had a formal legal right to use its own name while collecting the money for the bondholders was a matter of dispute; if it had, the bondholders did not need to file individual claims, and we see no reason why they might not safely wait until that question should be finally decided. In re Standard Co. (D. C.) 186 Fed. 586. Instead of waiting, however, the bondholders assumed that the company might be wrong, and (pending the final decision) took steps to amend the claim, thus acquiring the second string for their bow. Save in the disputed point, the company's proof was complete; the objection made to it was wholly based on a rule of procedure, and had no support in the merits, for the balance was undoubtedly due to the bondholders, and the company had authority to make the claim as agent. The only mistake (if mistake it were) consisted in failing to set forth positively that the real creditors were themselves asserting their conceded right, and that the company was merely an agent."

The significant sentence in the foregoing quotation is the following:

"Save in the disputed point, the company's proof was complete; the objection made to it was wholly based on a rule of procedure, and had no sup-

port in the merits, for the balance was undoubtedly due to the bondholders, and the company had authority to make the claim as agent."

In the case at bar the taking of a deficiency judgment was expressly authorized and provided for in section 13, article 5, of the deed of trust, which section reads as follows:

"In case default shall be made in the payment of any interest on any bond hereby secured, or in case default shall be made in the payment of the principal of any such bond when the same shall become payable, whether at the maturity of said bonds, or by declaration as authorized by this indenture, or by a sale of the mortgaged premises as hereinbefore provided, then, upon demand of the trust company, the railroad company agrees and covenants that it will pay to the trust company, for the benefit of the holders of the bonds and coupons hereby secured then outstanding, the whole amount which shall then be due and payable on all such bonds and coupons for principal or interest, or both, as the case may be, with interest upon the overdue principal and installments of interest; and, in case the railroad company shall fail to pay the same forthwith upon such demand, the trust company, in its own name and as trustee of an express trust, shall be entitled to recover judgment for the whole amount so due and unpaid. The trust company shall be entitled to recover judgment as aforesaid before or after or during the pendency of any proceeding for the enforcement of the lien of this indenture upon the mortgaged premises, and the right of the trust company to recover such judgment shall not be affected by any entry or sale hereunder, or by the exercise of any other right, power, or remedy for the enforcement of the provisions of this indenture, or by the foreclosure of the lien thereof; and in case of a sale of the mortgaged premises and of the application of the proceeds of sale to the payment of the mortgage debt, the trust company, in its own name and as trustee of an express trust, shall be entitled to receive and to enforce payment of any and all deficiencies or amounts then remaining due and unpaid upon any and all of the bonds issued hereunder and then outstanding, for the benefit of the holders thereof, and shall be entitled to recover judgment for any portion of the mortgaged debt remaining unpaid, with interest. No recovery of any judgment by the trust company and no levy of any execution under any such judgment upon property subject to the lien of this indenture, or upon any other property, shall in any manner, or to any extent, affect or impair the lien of the trust company upon the mortgaged property, or any part thereof, or any rights, powers, or remedies of the trust company hereunder, or any rights, powers, or remedies of the holders of the bonds hereby secured, but such lien, rights, powers, and remedies shall continue unaffected and unimpaired as before. Any moneys thus recovered or collected by the trust company under this article, less the cost and expenses of collection and the reasonable compensation of the trust company, shall be applied by it towards payment to the holders of such bonds and coupons of the amounts due and unpaid upon such bonds and coupons respectively, such payment in every instance to be made ratably and without any preference or priority upon presentation of the respective bonds and coupons and indorsement of such payment thereon, if partly paid, or upon cancellation thereof, if paid in full."

[2] Appellant is not a bondholder. His interest is adverse to the interest of the bondholders. In the Randolph-Macon and Ellis Cases bondholders were asserting their right to maintain in their own names suits upon the bonds, instead of maintaining these suits in the names of their agents, the trustees in the deeds of trust. The attitude of appellant is not comparable with the attitude of the bondholders in those cases. Here appellant seeks to defeat the claims of the bondholders. He is not endeavoring to aid them in maintaining those claims.

Article 21 of the decree of foreclosure is as follows:

"Deficiency Judgment.

"It is further ordered, adjudged, and decreed that, in case the proceeds of such sale shall not be sufficient after the making of the other payments in article XVIII of this decree directed to be made, to pay in full the whole amount of the principal of said first refunding and extensions mortgage bonds, together with overdue interest thereon, and all other sums found by this decree to be due and owing, including receivers' certificates, then the said special master shall report to the court the amount of such deficiency, and, upon confirmation of said report, the complainant, as trustee under said first refunding and extensions mortgage, shall be entitled to have judgment against the defendant the Wabash Railroad Company for the amount of the deficiency, and shall have execution therefor, pursuant to the rules and practice of this court."

It thus appears that a deficiency judgment was expressly provided for in the deed of trust, that in the decree the special master was expressly directed to report the amount of the deficiency, if there should be one, and that the trustee should be entitled to have judgment for the amount of such deficiency. We think that rule 10 authorized a deficiency judgment in this case.

Moreover, the final decree of foreclosure was entered on January 30, 1914, and no appeal was taken therefrom. That decree declared the trustee was entitled to a judgment for the amount of the deficiency, if the proceeds of the sale should not be sufficient to pay the amount found due upon the bonds. The court had jurisdiction to enter this decree of foreclosure, whether this issue was decided wrong or right. It was not open to attack by the appellant, an unsecured creditor, at the time he made his objection. The amount of the deficiency was left for future determination, but the right of the trustee to recover it had been finally adjudicated.

[3] II. The next point urged by appellant is that the prayer of the original bill was not broad enough to warrant the rendering of the deficiency judgment. Assuming, without deciding or conceding, that appellant can raise that question, we are of opinion that there is no merit in this contention. The prayer of the bill was for general relief, and we think that such a prayer is sufficient to authorize the rendition of a deficiency judgment. Seattle, L. S. & E. Ry. Co. v. Union Trust Co., 79 Fed. 179, 188, 24 C. C. A. 512; Shepherd v. Pepper, 133 U. S. 626, 10 Sup. Ct. 438, 33 L. Ed. 706; Northwestern Mutual Life Insurance Co. v. Keith, 77 Fed. 374, 23 C. C. A. 196; Ramsden v. Keene, 198 Fed. 807, 117 C. C. A. 449; Kansas City Southern Ry. Co. v. Guardian Trust Co., 240 U. S. 166, 178, 36 Sup. Ct. 334, 60 L. Ed. 579.

[4] III. The next point urged by counsel for appellant is that appellee, being a trust company organized under the laws of New York, could not bring and maintain a suit to foreclose a deed of trust on real estate in the state of Missouri. The suit for foreclosure did not constitute doing business in the state of Missouri. Frick Co. v. Marshall, 86 Mo. App. 463; Missouri Coal & Mining Co. v. Ladd, 160 Mo. 435, 61 S. W. 191; Meddis v. Kenney, 176 Mo. 200, 75 S. W. 633, 98 Am. St. Rep. 496; Broadway Bond Street Co. v. Fidelity Printing Co., 182 Mo. App. 309, 170 S. W. 394.

[5] IV. The next point urged by appellant is that section 2859 of the Revised Statutes of Missouri of 1909 provides that a foreign corporation or individual trustee cannot foreclose a deed of trust covering property in that state without joining a resident trustee as a party plaintiff. That requirement of the statute of Missouri cannot control the bringing of a suit in a United States court in that state by a foreign corporation. Barron v. Burnside, 121 U. S. 186, 7 Sup. Ct. 931, 30 L. Ed. 915; Butler Bros. Shoe Co. v. United States Rubber Co., 156 Fed. 1, 84 C. C. A. 167; Dunlop v. Mercer, 156 Fed. 545, 86 C. C. A. 435.

"It may not be doubted that the judicial power of the United States, as created by the Constitution and provided for by Congress, pursuant to its constitutional authority, is a power wholly independent of state action, and which therefore the several states may not by any exertion of authority in any form, directly or indirectly, destroy, abridge, limit, or render inefficacious. The doctrine is so elementary as to require no citation of authority to sustain it. Indeed, it stands out so plainly as one of the essential and fundamental conceptions upon which our constitutional system rests, and the lines which define it are so broad and so obvious, that, unlike some of the other powers delegated by the Constitution, where the lines of distinction are less clearly defined, the attempts to transgress or forget them have been so infrequent as to call for few cases for their statement and application." Harrison v. St. Louis & San Francisco R. R., 232 U. S. 318, 328, 34 Sup. Ct. 333, 335 (58 L. Ed. 621, L. R. A. 1915F, 1187).

[6] V. The next contention of counsel for appellant is that, under the plan of reorganization which preceded the sale under the foreclosure decree and by the adoption of such plan, the bonds were paid in full. The only evidence in the record on that point is the plan itself. It does not provide that the acceptance of the plan by the stockholders and bondholders of the railroad company shall constitute full payment of the bonds.

The plan provided for the raising of $27,720,000 in cash for the purpose of paying certain liabilities enumerated in the plan, amounting to that sum. The provision in the plan is as follows:

"The foregoing cash requirements are to be met, as hereinafter provided, by payments of $30 per share by the preferred and common stockholders of the present company (amount outstanding $92,400,000), which payments, so far as not made by the stockholders, are to be made by the holders of first refunding and extensions mortgage bonds, and are further to be underwritten by a syndicate .....$27,720,000."

Provision for unsecured creditors was made in the plan as follows:

"Unsecured creditors of the Wabash Railroad Company will be entitled under the plan to receive, in settlement and discharge of their claims duly presented and established, 25 per cent. thereof in convertible preferred stock B, at par, and 75 per cent. in common stock, at par, of the new company."

Terms and conditions were set out in the plan by which holders of general unsecured indebtedness against the railroad company might participate in the plan, if they desired to do so.

It cannot be said, because the stockholder in the old corporation thus acquired stock in the new, that a conclusive presumption, or any presumption at all, arises that the property was worth more than the price

it sold for at foreclosure sale and more than the mortgage debt. In the opinion in Kansas City Southern Ry. Co. v. Guardian Trust Co., 240 U. S. 178, 36 Sup. Ct. 337 (60 L. Ed. 579), reference is made to the fact "that reorganization plans often would fail if the old stockholders could not be induced to come in and contribute some fresh money," and the court further says, in that opinion, "that the necessity of such arrangements should lead courts to avoid artificial scruples."

The record in this case contains no testimony that would sustain the charge of fraud to hinder and delay the unsecured creditors. There is no testimony in the record to show that the property which passed under the foreclosure decree was worth more than the price it sold for. Appellant relies upon the plan of reorganization alone to sustain his contention. In our opinion that is not sufficient.

The decision of the lower court should be affirmed; and it is so ordered.

STONE, Circuit Judge (dissenting). I am unable to agree with the result reached by the majority of the court, because I think the trustee in this deed of trust had no authority or right to procure a deficiency decree. As to this contention, the position of appellee is that the terms of the mortgage created an express trust, investing the trustee with the specific power and duty of recovering such a deficiency decree for the benefit of all of the bondholders. To this appellant opposes the suggestions that the contract cannot enlarge the equity powers and jurisdiction of the District Court; that such powers, respecting mortgage deficiency decrees, exist only by virtue of equity rule 10; that equity rule 10 expressly limits such decrees to amounts "found due to the plaintiff," and that such language means amounts owing to plaintiff as a creditor of defendant.

The language of the mortgage intended is found in section 13, article 5, quoted in the majority opinion. The provision shows a clear intention and attempt to invest the trust company with full power to obtain a deficiency decree for all the bondholders; but it is evident that the jurisdiction of courts cannot be affected by contracts between private parties. It is true, however, that contracts may create legal relations between parties which place them within a jurisdiction which would not otherwise apply, and if the quoted portion of the deed of trust makes the trust company the trustee of the bonds for the bondholders, then it is a creditor of the mortgagor, and fully capable of enforcing payment, either through a deficiency decree or a separate suit. Therefore the questions here are: What is the jurisdiction of United States courts relating to deficiency decrees? and has the above provision of the deed of trust placed the trust company within that jurisdiction?

Prior to the adoption of old equity rule 92, now rule 10, there was no jurisdiction to enter a deficiency decree in a foreclosure suit. Noonnan v. Lee, 67 U. S. (2 Black) 499, 509, 17 L. Ed. 278; Orchard v. Hughes, 68 U. S. (1 Wall.) 73, 77, 17 L. Ed. 560. The existence and extent of such jurisdiction, therefore, depends upon the construction to be given that rule, which is as follows:

"In suits for the foreclosure of mortgages, or the enforcement of other liens, a decree may be rendered for any balance that may be found due to the plaintiff over and above the proceeds of the sale or sales, and execution may issue for the collection of the same, as is provided in rule 8 when the decree is solely for the payment of money."

This rule was adopted as a result of the two above decisions, and closely followed the latter, appearing in the same volume of the reports (page vii). Both of those cases were instances where the foreclosing mortgagee owned the entire debt secured by the mortgage. The language of that rule requires that the plaintiff, here the trustee, must be the one to whom the liability represented by the deficiency decree is "due." This court has decided that such a trustee, not owning the bonds, is not the one to whom such amount is due. Mackay v. Coal Co., 178 Fed. 881, 102 C. C. A. 115; also see In re Ellis (D. C.) 242 Fed. 156. I think that decision controlling and correct, for the reasons given therein. But in addition to what is there said there are the following considerations, which seem to me worthy of attention:

It must be assumed that in the carefully prepared rules of the Supreme Court every word was intended to have an effective meaning. The purpose of this rule was to permit recovery of deficiencies in foreclosure suits, and thus obviate the necessity of a separate action for that purpose. The court had in mind that the ordinary parties to such a foreclosure action would be the mortgagee or trustee and the mortgagor, and it had no intention of permitting persons, not parties to that suit, to obtain relief or to be bound by what was done therein. It therefore distinctly specified that deficiency decrees should go only for "any balance" found "due to the plaintiff." If this is not the proper construction of the rule, then the court meant nothing by the words "to the plaintiff," because those words can be eliminated and still leave a right to recover "for any balance that may be found due." The rule cannot be thus emasculated. Appellee recognizes that the balance must be due to "the plaintiff," and seeks to interpret the deed of trust as creating the trust company a trustee of this balance.

The mere statement in the deed of trust that the trustee is made "trustee of an express trust" does not create a trust, unless the relation so established contains elements essential to a trust. Was such a relation created by the language above quoted in the majority opinion from the deed of trust?

"A trust is where there are rights, titles, and interests in property distinct from the legal ownership." Seymour v. Freer, 8 Wall. 202, 213 (19 L. Ed. 306); also see 39 Cyc. 18, and citations.

"A trustee is not an agent. An agent represents and acts for his principal, who may be either a natural or artificial person. A trustee may be defined generally as a person in whom some estate, interest, or power in or affecting property is vested for the benefit of another." Taylor v. Davis, 110 U. S. 330, 334, 4 Sup. Ct. 147, 150 (28 L. Ed. 163).

A trustee is "the person who takes and holds the legal title to the trust property for the benefit of another." 39 Cyc. 19, also page 76, and numerous citations. It is thus evident that a trust cannot exist unless there are present three elements: A res, or subject to which

the trust attaches; a trustee, who holds the legal title for the benefit of another; and a cestui que trust, for whose benefit the legal title is held. Does this claimed trust possess these elements? I think not. What was the res, and what title was transferred to the alleged trustee? Clearly the property covered by the deed of trust was not the res, because this section of the mortgage applies only after that property has been exhausted and an unpaid residue left. No title to the bonds or to the unpaid residue is transferred to the trustee; that title in the bondholders is left complete and undisturbed. The attempted grant was solely and only that of a power to receive payment or to enforce payment. That this is true is emphasized by the provision that no such recovery by the trustee "shall in any manner, or to any extent, affect or impair * * * any rights, powers, or remedies of the holders of the bonds hereby secured, but such lien, rights, powers, and remedies shall continue unaffected and unimpaired as before." Again, there is no imperative obligation upon the trust company to seek enforcement beyond the realization upon the mortgaged property.

"The distinction between a power and a trust is marked and obvious. Powers, as Chief Justice Wilmot observed, are never imperative; they leave the act to be done at the will of the party to whom they are given. Trusts are always imperative, and are obligatory upon the conscience of the party intrusted." Stanley v. Colt, 5 Wall. 119, 168 (18 L. Ed. 502). Also see 39 Cyc. 22, and citations.

All that was here granted was a power or permission to bring a suit for the benefit of the bondholders. This makes nothing "due" the trustee in any proper legal sense of the word as used in rule 10.

BULGER, Supervising Steamboat Inspector, et al. v. BENSON.

(Circuit Court of Appeals, Ninth Circuit. February 2, 1920.)

No. 3304.

1. PILOTS ⊂=17—INSPECTORS MAY IMPOSE PENALTY, BUT CANNOT SUSPEND LICENSE.

Where the only charge made in the complaint of a local board of inspectors against a licensed pilot, on which a hearing was held, under Rev. St. § 4450 (Comp. St. § 8212), was a disregard of article 16 of the Pilot Rules (Act June 7, 1897 [Comp. St. § 7889]), the only penalty which may be imposed, on an adverse finding, is the fine of $50, expressly prescribed by section 3 of the act (Comp. St. § 7907), and the board is without power to suspend his license in addition.

2. INJUNCTION ⊂=74—ENFORCEMENT OF ILLEGAL ORDER SUSPENDING PILOT'S LICENSE MAY BE ENJOINED.

A federal court *held* to have jurisdiction to enjoin enforcement of an order of a local board of steamboat inspectors and of a supervising inspector, suspending the license of a pilot, where in making such order they exceeded their powers.

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

Suit by George E. Benson against John K. Bulger, Supervising Inspector, Steamboat Inspection Service, Department of Commerce of the United States, and others, as Local Inspectors. Decree for complainant, and defendants appeal. Affirmed.

For opinion below, see 251 Fed. 757.

The appellee, Benson, a master and pilot of steam vessels, appeared with counsel before the appellants, Deering and Craft, local inspectors of the United States Steamboat Inspection Service at Seattle, to answer the following letter:

"Sir: You, as a licensed officer of steam vessels, are hereby charged with inattention to your duties and violation of section No. 4442, R. S. U. S., in connection with the navigation of the steamer Tolo, of which you were master and pilot, and in charge of the navigation of said vessel when she collided with the steamer Magic on October 5, 1917, disregarding the provisions of article 16 of the Pilot Rules for Certain Inland Waters of the Atlantic and Pacific Coasts and of the Coast of the Gulf of Mexico, as follows: 'Every vessel shall, in a fog, mist, falling snow, or heavy rainstorm, go at a moderate speed, having careful regard to the existing circumstances and conditions. * * * A steam vessel hearing, apparently forward of her beam, the fog signal of a vessel, the position of which is not ascertained, shall, so far as the circumstances of the case admit, stop her engines, and then navigate with caution until danger of collision is over.'"

Benson pleaded "not guilty," and after a hearing the local inspectors found that the charges preferred were sustained and ordered:

"Pursuant to the authority of this board, by section 4450, R. S. U. S., the license of George E. Benson, master and pilot, * * * is hereby suspended for a period of six months from date of surrender of his license to this office, which surrender Mr. Benson has been directed to make at once."

Thereafter the Treasury Department, through the Collector of Customs, notified the appellee that a fine of $50 was imposed upon him pursuant to article 31 of the Pilot Rules. Benson appealed from the order of the local inspectors to the supervising inspector, but the latter refused to entertain the appeal unless Benson surrendered his license pending the appeal. Benson then prayed for injunction against the enforcement of the order of the local inspectors, and against the imposition of any penalty other than a fine of $50 for violation of article 16 of the Pilot Rules, and commanding appellants to recognize the appellee as a duly licensed master and pilot and to reinstate him in the full enjoyment of his license. After a hearing on the merits the District Court denied a motion to dismiss the bill, and made a decree nullifying the order of the local inspectors suspending the license issued to Benson, and enjoined the supervising inspector and the local inspectors from imposing any fine or penalty upon Benson, other than a $50 fine for violation of article 16 of the Pilot Rules. The inspectors appealed.

Section 4442 of the Revised Statutes (Comp. St. § 8204), Regulation of Steam Vessels, authorizes the inspectors to grant a license to pilot a vessel and provides: "But such license shall be suspended or revoked upon satisfactory evidence of the negligence, unskillfulness, inattention to the duties of his station, or intemperance, or the willful violation of any provision of this title." Section 4450 (section 8212) after providing for the investigation of the conduct of an officer acting under the authority of a license, authorizes examination of an alleged delinquent and provides that, if the board "shall be satisfied that such licensed officer is incompetent, or has been guilty of misbehavior, negligence, or unskillfulness, or has endangered life, or willfully violated any provision of this title, they shall immediately suspend or revoke his license."

Robert C. Saunders, U. S. Atty., of Seattle, Wash., and Frederick R. Conway, Asst. U. S. Atty., of Tacoma, Wash., for appellants.

Fred H. Peterson and Philip D. MacBride, both of Seattle, Wash., for appellee.

Before GILBERT, MORROW, and HUNT, Circuit Judges.

HUNT, Circuit Judge (after stating the facts as above). [1] The questions presented are whether the court had jurisdiction to grant relief and whether the complaint charged more than the offense of disregarding the provisions of Article 16 of the Pilot Rules.

Article 16, already quoted, of the Pilot Rules, is part of section 1, chapter 4, of the Act of June 7, 1897, 30 Stat. 99 (U. S. Comp. Stat. § 7889). Section 3 of the same chapter and same act (30 Stat. 102 [§ 7907]) provides that every pilot who neglects or refuses to observe the the provisions of the act referred to shall be liable to a penalty of $50. Under section 4405 of the Revised Statutes, as amended by Act Feb. 8, 1907, 34 Stat. 881 (U. S. Comp. Stat. § 8159), the supervising inspector and the supervising inspector general, as a board, shall establish, with the approval of the Secretary of Commerce and Labor, all necessary regulations with respect to the steamboat inspection service and such regulations shall have the force of law. Under a prescribed form (801a) of the General Rules and Regulations of the Board of Supervising Inspectors, Edition of November 21, 1916, page 144, it is provided that—

"Upon the revocation or suspension of the license of any such officer, master, or pilot, said license shall be surrendered to the local inspectors ordering such suspension or revocation."

Under the rules of practice for the government of supervising and local inspectors of steam vessels, in trials of such officers, the inspector shall furnish the "accused" with a copy of the charges, "setting forth specifically their character and the section of the statutes or the rules of the board that have been violated," and an appeal is provided for to the supervising inspector, who, in turn, is required to proceed to investigate the case under the same rules prescribed for the trial of the accused by the local board.

The contention of the appellants is that the local inspectors had jurisdiction to make the order of suspension, unless the provisions of the statutes already referred to with respect to such suspension are to be construed as penal rather than remedial. An opinion by the Attorney General (24 Op. Atty. Gen. 136) is cited as holding that, for the crimes and misdemeanors which are defined in the steamboat inspection law, a regular course of procedure through the criminal courts is provided, but that, where a question arises with respect to the revocation of the licenses of pilots and engineers, section 4450, heretofore quoted, is remedial, and not penal, and that the revocation of a license, as provided for in that statute, may be viewed—

"not in the light of a punishment for an offense committed, but rather as a remedy placed in the hands of the board of inspectors to insure greater efficiency in the steamboat inspection service, and to guard against obstruction or injury to commerce. * * *"

We agree with the District Court that the charge of inattention to duties and violation of section 4442 in connection with the navigation of the steamer Tolo does not "specifically" set forth the character of the charges against the pilot. The statute evidently contemplated some statement of facts upon which the alleged inattention to the duties

of his station was predicated, and we think that more than the general language should have been set forth.

There was a specific charge however, that the pilot had disregarded the provisions of article 16 of the Pilot Rules as quoted, and the learned judge was correct in ruling that the specific allegation should control, and that the general reference to section 4442 was surplusage. To the specific charge the accused made answer, and after investigation was found guilty. The question whether or not the statute or rule is strictly penal is not of controlling importance, further than to say that it is penal in its nature, and should receive a strict construction.

The only charge being that the accused violated article 16 of the Pilot Rules, the inspectors were only authorized to impose the penalty provided for by article 31, section 7180, Barnes' Federal Code (Comp. St. §§ 7905–7909). Under this rule every pilot who neglects or refuses to observe the provisions of the act shall be liable to a penalty of $50, and for all damages sustained by any passenger to his person or to his baggage by such neglect, provided that nothing in the rule shall relieve any vessel, owner, or corporation from any liability incurred by reason of such neglect or refusal. As no suspension of license is provided for in case of a violation of article 16, the inspectors exceeded their authority in ordering a suspension of the license of the appellee and in directing a surrender of his license.

[2] Our opinion is that the District Court had jurisdiction to enjoin against the doing of illegal acts by the inspectors and supervising inspector, and that the decree of the court whereby the order suspending the license issued to appellee was held null and void, and restraining the inspectors from imposing any penalty other than a $50 fine for having violated article 16 of the Pilot Rules, is correct.

Affirmed.

BENEDICTO, Treasurer of Porto Rico, v. COMPANIA DE LOS FERROCARRILES DE PUERTO RICO.

(Circuit Court of Appeals, First Circuit. February 4, 1920.)

No. 1420.

TAXATION ⊜611(4)—SUIT TO ENJOIN COLLECTION OF TAXES NOT MAINTAINABLE FOR WANT OF PROPER PARTIES.

A railroad company, whose franchise and property were exempted from taxation, which contracted with another company to operate its road and pay for new extensions and equipment, *held* not entitled to maintain a suit to enjoin collection of taxes levied against property so acquired, on the ground that it is the owner and the property within its tax exemption, to which suit the operating company is not a party.

Appeal from the District Court of the United States for the District of Porto Rico; Peter J. Hamilton, Judge.

Suit by the Compania de los Ferrocarriles de Puerto Rico against Jose E. Benedicto, Treasurer of Porto Rico. Decree for complainant, and defendant appeals. Reversed and remanded, with directions to dismiss bill.

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

Charles Marvin, of Washington, D. C. (Dana T. Gallup, of Washington, D. C., on the brief), for appellant.

Francis H. Dexter, of San Juan, P. R., for appellee.

Before BINGHAM, JOHNSON, and ANDERSON, Circuit Judges.

ANDERSON, Circuit Judge. The plaintiff (appellee) is the owner of a franchise for the construction and operation of a railroad system in Porto Rico, one of the provisions of which is an exemption from taxation on its railroad property for 25 years, ending in 1927. When, in 1902, this exemption was granted, the railroad system was but partially built and equipped. Under a contract in 1902 the operation of the system was turned over to the American Railroad Company of Porto Rico—the plaintiff, however, to furnish the capital requisite for completing, equipping, and extending the system. This operating contract was so modified in 1906 as thereafter to place the burden of furnishing new capital upon the American Company; it being secured therefor upon the equipment and rolling stock purchased and other facilities created out of the funds so advanced, in some fashion not very clearly defined, either in the contracts or in the evidence. The American Company is not entitled to exemption from taxation on any railroad property owned by it. The exemption right has not been assigned, and it is not now claimed to be assignable. Nor is it claimed that the operating contracts amount to a lease. See opinion of Attorney General Wickersham dated December 1, 1910, 28 Op. Attys. Gen., 491, where the relations of the two companies and the exemption from taxation are discussed in detail. So far as applicable to this case, we accord with the conclusions there reached by the learned Attorney General. Morgan v. Louisiana, 93 U. S. 217, 23 L. Ed. 860; Railroad Co. v. Commissioner, 103 U. S. 1, 26 L. Ed. 359; Chesapeake & Ohio Railway Co. v. Miller, 114 U. S. 176, 5 Sup. Ct. 813, 29 L. Ed. 121; Pickard v. Railroad Co., 130 U. S. 637, 9 Sup. Ct. 640, 32 L. Ed. 1051.

Since 1906 the American Company has actually furnished and used for equipment and new construction much more than $1,000,000 of new capital. Cars used upon the system bear the name of the American Company. Part of the rolling stock is testified to be "security," in exactly what legal form does not appear. Part of its advances seem to be secured by mortgage upon certain property.

For the tax year 1917–18 the defendant, as treasurer of Porto Rico, assessed the American Company (not the plaintiff) for taxes on the basis of $1,000,000 property owned by it and used in this railroad system. On this basis of $1,000,000 there was levied for the first half of the fiscal year a tax amounting to $6,636.50. This was paid by the American Company under protest. Suit to recover said amount was then brought by the American Company in the insular court, dismissed on demurrer, and the American Company failed to perfect and prosecute its right of appeal. There is nothing to indicate that the American Company has not a plain, adequate, and complete remedy at law for any illegal taxes assessed upon it; but its rights and duties as a taxpayer are not now before the court. For the second half of the same tax year a tax of $7,019.12 was levied by the defendant on the

same basis of $1,000,000 taxable property. Then this suit was brought by the plaintiff, the owner of the franchise, seeking an injunction against the collection of this tax. The gist of the plaintiff's claim is that the defendant has assessed the plaintiff's property as being the property of the American Company, thus clouding its title to certain realty (a pier assessed for $40,000), and subjecting it, as alleged to a multiplicity of suits to defend its personalty, besides impairing the obligation of the exemption contract.

The contentions of the plaintiff were in part sustained by the court below, which found that the pier, assessed at $40,000, and the rolling stock, assessed at $500,000, belong to the plaintiff, and as such were entitled to exemption from taxation. Thereupon a final decree was entered, enjoining the defendant, as treasurer of Porto Rico, his successors in office, and all employés and agents of the Treasury Department—

"from levying and collecting taxes of any kind or character for insular or municipal purposes under the authority of the Legislature of Porto Rico upon any or all real property, rolling stock, and all other property used by the American Railroad Company of Porto Rico and necessary for the operation of the railroad lines of the Compania de los Ferrocarriles de Puerto Rico under a certain operating agreement made and entered between the said companies on the 22d day of March, 1902, as modified by the agreement of November 15, 1906.

"This injunction shall be in force until the 24th day of January, 1927, when the exemption to plaintiff company hereinbefore referred to expires by operation of law."

From this decree an appeal was taken to this court. There are 38 assignments of error, with which we are not called upon to deal in detail. It is enough now to say that they raise, broadly, objections fatal, in our view, to the maintenance of the action.

In effect, the plaintiff, by this suit, seeks to induce the court to determine important and difficult questions of title and property rights as between it and the American Company, and also as to the rights and duties of the American Company as a taxpayer on its investment of more than $1,000,000 in the railroad system of Porto Rico. It is too plain for argument that the court has no jurisdiction to deal with either class of questions, unless and until the American Company is before the court. Property derived from the capital furnished by the American Company for this railroad enterprise cannot be adjudicated to be the plaintiff's property, and thus covered by its tax exemption, without at the same time determining it to be the plaintiff's as against rights which may be asserted by the American Company. On this record we cannot legally determine the facts upon which the plaintiff grounds its claim for relief in equity.

It may be well to add that this opinion is not to be taken as an intimation that, apart from the fatal defect as to proper parties, we accord with the court below in its deductions from the evidence or in its rulings of law. But on this record we should be dealing with purely moot questions if we discussed and determined the questions of fact and law with which the court below undertook to deal. It is enough now to hold that the plaintiff has not made out a case within the doctrine of Greene v. Louis & Interurban Co., 244 U. S. 499, 507,

37 Sup. Ct. 673, 61 L. Ed. 1280, Ann. Cas. 1917E, 88; Truax v. Raich, 239 U. S. 33, 37, 36 Sup. Ct. 7, 60 L. Ed. 131, L. R. A. 1916D, 545, Ann. Cas. 1917B, 283; Phila. Co. v. Stimson, 223 U. S. 605, 621, 32 Sup. Ct. 340, 56 L. Ed. 570; Ex parte Young, 209 U. S. 123, 150, 155, 28 Sup. Ct. 441, 52 L. Ed. 714, 13 L. R. A. (N. S.) 932, 14 Ann. Cas. 764; Benedicto v. Porto Rican Tobacco Co., 256 Fed. 422, 167 C. C. A. 550; Looney v. Crane Co., 245 U. S. 178, 38 Sup. Ct. 85, 62 L. Ed. 230. Nor does the case fall within the principal approved by the Supreme Court in Pollock v. Farmers' Trust Co., 157 U. S. 429, 553, 15 Sup. Ct. 673, 39 L. Ed. 759.

The decree of the District Court is reversed, and the case is remanded to that court, with directions to dismiss the bill, and the appellant recovers his costs of appeal.

BRILL v. JEWETT et al.

(Circuit Court of Appeals, Fifth Circuit. February 10, 1920.)

No. 3473.

1. CONTRACTS ⟸182(1)—OBLIGATION IS PRESUMED JOINT UNLESS DIFFERENT INTENTION IS DISCLOSED.
   The presumption of law is that, when two or more in writing incur an obligation, the undertaking is joint, and not several, unless the language used discloses a different intention.

2. BILLS AND NOTES ⟸120—JOINT NOTE NOT RENDERED SEVERAL BY AGREEMENT SEVERALLY TO PAY ATTORNEY'S FEES.
   The presumption that a note signed by two persons and joint in form was joint, and not several, was not rebutted by the recitals that the makers and indorsers severally agreed to pay reasonable attorney's fees, if the note was placed in the hands of an attorney for collection.

3. ABATEMENT AND REVIVAL ⟸50—STATUTE HELD TO ABROGATE COMMON-LAW RULE AS TO EFFECT OF DEATH OF JOINT OBLIGOR.
   Gen. St. Fla. 1906, § 1375, providing that all actions for personal injuries, therein specified, die with the person, and that all other actions may be maintained in the name of the representative of the deceased, provides for the survival of all actions, other than those enumerated, on the death of either obligor or obligee, and abrogates the common-law rule that the death of one joint obligor discharges his representative and leaves the surviving obligor alone liable.

4. ABATEMENT AND REVIVAL ⟸50—STATUTE AS TO SURVIVAL SHOULD BE LIBERALLY CONSTRUED.
   Gen. St. Fla. 1906, § 1375, as to the survival of actions, should be liberally construed to effectuate its remedial purpose.

In Error to the District Court of the United States for the Southern District of Florida; Rhydon M. Call, Judge.

Action by Louis Brill against Mary B. Jewett and another as executrices of Florence E. Inman, deceased. Judgment for defendants on demurrer, and plaintiff brings error. Reversed.

K. I. McKay and R. W. Withers, both of Tampa, Fla., for plaintiff in error.

William Hunter, of Tampa, Fla., for defendants in error.

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

Before WALKER, Circuit Judge, and GRUBB and JACK, District Judges.

WALKER, Circuit Judge. This was an action by the plaintiff in error, suing as indorsee, against the defendants in error, the personal representatives of Florence E. Inman, deceased, on an instrument of which the following is a copy:

"$15,000.00. Tampa, Fla., April 3, 1911.

"On demand after date we promise to pay to the order of the Swann & Holtsinger Company, fifteen thousand dollars with interest after maturity at the rate of eight per cent. per annum until paid, for value received, negotiable and payable at any bank in Tampa, Florida, and if not paid at maturity, this note may be placed in the hands of an attorney at law for collection, and, in that event, it is agreed and promised by the makers and indorsers, severally, to pay an additional sum of reasonable attorney's fees, having deposited with the said payee as collateral security for the payment of this note, and any note given in extension or renewal thereof.

"Eugene Holtsinger. [Seal.]
"Florence E. Inman. [Seal.]"

It was disclosed by the declaration as it was amended that Eugene Holtsinger died intestate after the decease of the other maker of the note, Florence E. Inman. The defendants by demurrer suggested that the right of action on the joint note sued on survived only against Eugene Holtsinger or his estate. The demurrer to that effect was sustained.

The demurrer was based upon the proposition that under the common law, which, except as it has been modified, is in force in Florida, if one of two joint obligors dies the debt is extinguished against his representative, and the surviving obligor is alone chargeable. Pickersgill v. Lahens, 15 Wall. 140, 21 L. Ed. 119.

[1, 2] In behalf of the plaintiff in error it is contended that the note sued on imposed a several obligation on each of the makers of it. The presumption of law is that when two or more in writing incur an obligation the undertaking is joint, and not several, unless the language used discloses a different intention. Atlanta & St. A. B. Ry. Co. v. Thomas, 60 Fla. 412, 53 South. 510; 13 Corpus Juris, 577. The language of the instrument in question is not such as to rebut that presumption, so far as the obligations imposed on the makers are concerned. The only words of severance found in the instrument are those in the part of it imposing an obligation to pay an attorney's fee in the event of the note not being paid at maturity and being placed in the hands of an attorney at law for collection. The severance so effected seems to have been intended to be between the makers on the one hand and the indorsers on the other hand. The language used in that part of the instrument does not indicate a purpose to make the obligation it imposes on the makers a several one of each of them. The conclusion is that if the above-stated common-law rule still is in force in Florida the note is not enforceable against the personal representatives of that one of the two joint obligors who died first.

[3] The following statute of Florida is invoked in behalf of the plaintiff in error to support the conclusion that the right of action

against the maker who died first was enforceable against her personal representatives:

"All actions for personal injuries shall die with the person, to wit: Assault and battery, slander, false imprisonment, and malicious prosecution; all other actions shall and may be maintained in the name of the representatives of the deceased." General Statutes of Florida, § 1375.

Under the familiar rule of construction which is expressed in the maxim, "Expressio unius est exclusio alterius," we think that the first clause of the quoted statute is to be regarded as an enumeration of the actions which die with the person, and as impliedly including a statement to the effect that actions other than those enumerated do not die with the person. The last clause of the section is not inconsistent with the just-stated conclusion. It makes all actions other than those enumerated maintainable in the name of the representatives of the deceased. The language used puts it beyond question that, in the event of the death of one who had a right of action other than those enumerated, the party liable surviving, such right of action is made enforceable against the latter by the personal representative of the former. This is admitted by the counsel for the defendants in error.

To sustain the contention made in their behalf would result in giving to the statute the effect of creating the anomaly of a class of actions which survive in favor of the personal representatives of deceased beneficiaries, but die with the persons of those who incurred liabilities. Valentine v. Norton, 30 Me. 194. The statute plainly provides for the survival of all actions other than those enumerated. There is no indication of an intention to make any action survive after the decease of one party and not survive after the decease of the other. The use of the words "shall and may be maintained" is what is relied on to give the provision the effect of making "all other actions" survive only in favor of the personal representatives of the beneficiaries thereof. In attributing such a meaning to the language used it is assumed, and we think improperly, that an action may not as well be said to be maintained against one as in his favor.

[4] But the language of such a statute is to be liberally construed, to effectuate the remedial purpose it evidences. The intention in providing for the survival of all actions except the enumerated ones was to prevent their enforceability being destroyed by the death of a party. As to such actions there was an abrogation of the common-law rules as to the effect of the death of a party. We think that the language of the statute, giving it the meaning and effect which it must be supposed was intended, requires the conclusion that it prevents the death of one of the joint makers of the note sued on from having the effect of making the obligation imposed by it enforceable only against the other then surviving maker.

The averments of the declaration do not show that there has been any appointment of a personal representative of Eugene Holtsinger, one of the deceased makers of the note sued on. They do not show that there is in existence any one subject to be sued on it, except the defendants in error, the personal representatives of one of the deceased makers. As the asserted right of action survived against the parties

sued, and it not appearing that there is any one else subject to be sued, the declaration was not subject to the demurrer interposed. The court erred in sustaining that demurrer.

Because of that error the judgment is reversed.

CITY OF HAMMOND, IND., et al. v. CALUMET COAL & SUPPLY CO.

(Circuit Court of Appeals, Seventh Circuit. January 6, 1920.)

No. 2718.

1. COURTS ⟸489(2)—FEDERAL COURT MAY ENTERTAIN INJUNCTION SUIT WHERE VALIDITY OF STATE STATUTE IS INVOLVED.
   Where enforcement of an alleged unconstitutional municipal ordinance would subject complainant to successive fines aggregating a large amount, it is not required to resort first to the state courts, but may maintain a suit for injunction in a federal court.
2. MUNICIPAL CORPORATIONS ⟸121—APPLICANT FOR PERMIT UNDER ORDINANCE NOT ESTOPPED TO DENY VALIDITY.
   That complainant applied for a building permit under a city ordinance *held* not to estop it to attack the validity of the ordinance on refusal of its application.
3. MUNICIPAL CORPORATIONS ⟸625—UNREASONABLE ORDINANCE INVALID.
   An ordinance prescribing conditions for granting a permit for the use of property for a wood, coal, or lumber yard *held* invalid as unreasonable.

Appeal from the District Court of the United States for the District of Indiana.

Suit in equity by the Calumet Coal & Supply Company against the City of Hammond, Ind., and members of its Board of Public Works. From an order granting preliminary injunction, defendants appeal. Affirmed.

W. J. Whinery, of Hammond, Ind., for appellants.

Charles W. Moores, of Indianapolis, Ind., for appellee.

Before BAKER, EVANS, and PAGE, Circuit Judges.

PAGE, Circuit Judge. This suit was started by appellee, hereinafter known as Company, against appellants, the city of Hammond, hereinafter known as City, and its board of public works, to enjoin the City from enforcing against the Company the following ordinance, passed by the City:

"Section 3. Any person, firm or corporation hereafter desiring to locate, build, erect and maintain, or establish and maintain a coal, lumber or wood yard upon any block or square in said city, shall file with the board of public works his or its petition for a permit, which shall properly describe the parcel of ground upon which it is proposed to locate such coal, lumber or wood yard, and the same shall be signed by a majority of the property owners owning property upon both sides of the street between the two nearest intersecting streets of said proposed location, of such coal, lumber or wood yard. Thereupon said board of public works shall cause forthwith written notice to be given by letter addressed and mailed to each of the property owners owning property as aforesaid, stating in such notice that at a time and place therein named, the said board will consider the petition for a permit to erect or es-

tablish such coal, lumber or wood yard; and if the board of public works, after hearing, be satisfied that the petition is properly signed by a majority of the property owners as aforesaid, then in that event a permit shall be granted by said board of public works to such applicant to erect or establish such coal, lumber or wood yard; and thereupon the city controller shall be authorized to issue a permit to erect and maintain or establish and maintain such coal, lumber or wood yard.

"Section 4. Any person, firm or corporation who shall violate any of the provisions of this ordinance shall be fined in any sum not less than twenty-five dollars ($25.00), nor more than three hundred dollars ($300.00), and every day that such ordinance is violated shall constitute a separate offense.

"Section 5. And be it further ordained and provided that any coal, lumber or wood yard erected or established in violation of this ordinance shall be deemed a nuisance and may be abated as such; and it is hereby made the duty of the building inspector of the city of Hammond to abate the same as a nuisance by proper steps taken."

The Company, desiring to establish a coal yard upon lot B of Eder's addition to Hammond, on January 8, 1919, filed a petition signed by the Company and Giles T. Warner, trustee, as owner of said lot, with the board of public works, asking for a permit. Property owners residing on Detroit street filed objections. A public hearing was had and other objections were filed. On February 5, 1919, the petition was denied. The petition was amended, and again denied. On February 18th the Company commenced a suit in the Lake county circuit court of Indiana to enjoin the City. The City there filed an answer similar to its answer here. That suit was dismissed and this suit was commenced on February 25, 1919, in the District Court of the United States for the District of Indiana.

The bill is based upon the claim that the ordinance is in contravention of the Fourteenth Amendment of the Constitution of the United States. The prayer is that the ordinance shall be adjudged invalid and that the City and its agents shall be restrained from in any way enforcing said ordinance.

On February 28th the City filed its answer, insisting upon the validity and the enforcement of the ordinance. On March 7th Judge Anderson granted a temporary restraining order, and the City appealed for the purpose of having the restraining order dissolved.

[1] It is argued that the federal court should not entertain jurisdiction but that the Company should be left to work out its rights in the state courts of Indiana, with the ultimate right to come into the federal courts if it shall be found that a federal question is involved.

Not counting the time spent by the Company in its endeavors to get a permit prior to the commencement of this suit, 255 days have elapsed to this date. If the Company had established its yard, it would, if the ordinance is valid, be liable to a minimum penalty of not less than $6,000 and a maximum penalty of $36,000 up to this date, exclusive of losses in improvements and to business, if interrupted.

Even under the rule in Cavanaugh v. Looney, 248 U. S. 453, 39 Sup. Ct. 142, 63 L. Ed. 354, decided by the United States Supreme Court on January 13, 1919, cited by the City, the Company has a right to have its case heard here, and it would be inequitable and unjust and serve no good purpose to send it to the state courts.

[2] It is argued that, because the Company asked for a permit

under the ordinance, it thereby waived any right to challenge the validity of the ordinance.

If the ordinance is invalid, it is clear that the board of public works had no power to act. The principal authority cited in support of City's contention that the Company is estopped is Phillips v. Kankakee Reclamation Co., 178 Ind. 31, 98 N. E. 804, Ann. Cas. 1915C, 56. It will not be necessary to do more than quote the rule stated in that case to show that it has no application whatever to the facts here.

"One who receives a benefit under an unconstitutional law is estopped from denying its constitutionality."

"One who stands by and without objection sees his property benefited by a public improvement is estopped to deny the legality of the proceedings under which the improvement was made."

No stretch of the imagination can picture any benefit received or that could be received by the Company. The whole act was in derogation of its rights.

[3] The City insists that the ordinance is valid. We are of opinion that the city of Hammond had authority to enact legislation of the general character attempted in the ordinance in question, but that the ordinance is invalid because it does not represent a reasonable exercise of power.

It is doubtful if the Company's property comes within any fair definition of a "block or square." It is certain that, except as the end of Hink street, or the end of Detroit street, whichever it may be, touches 30 feet of the north side of the west end of the property, and except that there is a thirty foot street, or alley, which would be an extension of Hink street, between the property in question and the property east of it, there is no street touching the property, between two intersecting streets. There is no one disclosed by the record who had the right, under the terms of the ordinance, to either consent to or oppose a permit. The property owners on Detroit street did not come within the terms of the ordinance.

The only authority the board of public works had was to give notice to the property owners coming within the terms of the ordinance, and "if it, after hearing, be satisfied that the petition is properly signed by a majority of the property owners" described, then to grant a permit. The ordinance gives to the majority property owners (might be one or more) who happen to own property on a street situated as specified in the ordinance, the power for any reason, or no reason, arbitrarily, to prevent any property owner from using his property for a coal, lumber or wood yard, no matter where or how it is situated. It also, in effect, gives the same men the power to brand any such property as a nuisance, which may be abated if its owner dares to use it as a coal, lumber or wood yard. Such an ordinance is unreasonable and invalid. Eubank v. Richmond, 226 U. S. 137, 33 Sup. Ct. 76, 57 L. Ed. 156, 42 L. R. A. (N. S.) 1123, Ann. Cas. 1914B, 192; Cusack Co. v. City of Chicago, 242 U. S. 531, 37 Sup. Ct. 190, 61 L. Ed. 472, L. R. A. 1918A, 136, Ann. Cas. 1917C, 594.

The action of the District Court in granting the temporary restraining order is affirmed.

WEICHEN v. UNITED STATES.

(Circuit Court of Appeals, Seventh Circuit. January 6, 1920.)

No. 2724.

1. CRIMINAL LAW ⊜1038(2), 1056(1)—INSTRUCTION IN PROSECUTION FOR DOING BUSINESS AS RETAIL LIQUOR DEALER WITHOUT PAYMENT OF TAX NOT REVERSIBLE ERROR.
Instruction, in a prosecution for carrying on business as retail liquor dealer without payment of special tax, that proof of a single sale might warrant conviction, *held* not reversible error under the evidence, where no exceptions were taken, nor further instructions requested.

2. COURTS ⊜66(2)—TERM OF FEDERAL COURT PROPERLY ADJOURNED, THOUGH ORDER FOR ADJOURNMENT WAS NOT DIRECTED TO MARSHAL OR CLERK.
Under Judicial Code, § 12 (Comp. St. § 979), providing that, if a judge is unable to attend at any time during a term, court may be adjourned by the marshal or clerk by virtue of a written order "directed" to him by the judge, court will be held to have been properly adjourned, where recorded entry by judge recites adjournment, but is not directed to any officer, since the officers must take notice of the order, and it will be presumed that they performed their duty.

3. CRIMINAL LAW ⊜322—OFFICERS PRESUMED TO HAVE PERFORMED THEIR DUTIES.
Public officers are presumed to have performed their duties.

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

Criminal prosecution by the United States against August Weichen. Judgment of conviction, and defendant brings error. Affirmed.

Charles A. Karch, of East St. Louis, Ill., for plaintiff in error.

J. G. Burnside, of Vandalia, Ill., and McCawley Baird, of Olney, Ill., for the United States.

Before BAKER, EVANS, and PAGE, Circuit Judges.

BAKER, Circuit Judge. Plaintiff in error was convicted under an indictment in two counts; the first charging him with carrying on the business of a retail dealer in spirituous liquors without having paid the special tax, and the second count setting forth a similar illegal business in malt liquors.

[1] 1. Complaint is made of the following portions of the charge to the jury:

"The law expressly prohibits or states that any one who makes a sale of either one or both of malt or distilled spirits is a retail liquor dealer; one sale, or a dozen sales, the number is not important, so there is a sale of either one or both."

"You are trying him for having retailed liquor in the manner and form as charged in the indictment, and if in the conduct of his business of running a gambling house he charged his patrons money for the privilege of participating in the game, and if as part of the furnishings they received for the money they paid they also received whisky, then the defendant is guilty under the first count; and if for the same consideration or any portion of it they received beer from the defendant, then the defendant is guilty under the second count. If his patrons received both beer and whisky as a portion of the consideration for an extra charge of the money, or as gen-

eral furnishings of the game or entertainment in which they participated, then he is guilty under both counts."

No exception was taken to any portion of the court's instructions to the jury; nor was any request made for additional and more particular instructions. Weichen's insistence is that the court was under the duty of explaining to the jury that the offense charged consisted, not in making a particular sale to a particular person at a particular time, but in carrying on the business of retailing spirituous or malt liquors. In Ledbetter v. United States, 170 U. S. 606, 610, 18 Sup. Ct. 774, 775 (42 L. Ed. 1162), the court said:

"While it has been sometimes held that proof of selling to one person was, at least, prima facie evidence of criminality, the real offense consists in carrying on such business, and if only a single sale were proven it might be a good defense to show that such sale was exceptional, accidental, or made under such circumstances as to indicate that it was not the business of the vendor."

Under this ruling the single sale may make out a prima facie case; and if the defendant should make the defense that the sale was exceptional, accidental, or made under such circumstances as to indicate that it was not the business of the vendor the defendant should request the court to charge the jury on the lines of such defense. Under the circumstances of this case, in which the evidence on behalf of the prosecution showed many sales of both spirituous and malt liquors, and in which the defendant failed to challenge the attention of the trial judge either by exceptions or requests for additional instructions, we cannot hold that any reversible error appears.

2. At the conclusion of all of the evidence Weichen moved for a directed verdict in his favor. Upon an examination of the evidence, which it would be profitless to detail, we find that there was no error in denying this motion.

[2] 3. In his brief, without having laid any basis in the trial court by objection or in this court by assignment of error, Weichen contends that the trial court was without jurisdiction to proceed with the trial at the time when it was had. In the record before us the first entry is as follows:

"Be it remembered that heretofore, to wit: On the 24th day of October, A. D. 1918, the following proceedings were had in said court and entered of record, to wit:

"Thursday, October 24, A. D. 1918.

"Court met pursuant to adjournment.

"Present: Honorable George W. English, Judge.

"It is ordered by the court that the regular November term, of the District Court of the United States for the Eastern District of Illinois, as designated by law to be held at East St. Louis, Illinois, on the first Monday of November, 1918, be, and the same is hereby adjourned from the first Monday of November, 1918, to Monday, December 2, 1918, at 9:00 a. m."

And then follows, under date of December 2, 1918, the record of the trial.

[3] Weichen's point is that the adjournment of the regular November term until the second day of December was not in accordance with section 12 of the Judicial Code (Comp. St. § 979), which provides:

"If the judge of any District Court is unable to attend at the commencement of any regular, adjourned, or special term, or any time during such term, the court may be adjourned by the marshal, or clerk, 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."

While the order of October 24th is not in terms directed to either the marshal or the clerk, those officials were required to take cognizance of it and will be presumed to have performed their duty until the contrary appears. Presumably on the first Monday of November the marshal or the clerk advised all persons who assembled to attend court at the November term that the beginning of the term was adjourned to December 2d. See Stockslager v. United States, 116 Fed. 590, 54 C. C. A. 46.

The judgment is affirmed.

THE HATTIE THOMAS.

THE ETTA McELROY.

(Circuit Court of Appeals, Second Circuit. January 14, 1920.)

Nos. 116, 117.

1. MARITIME LIENS ⊂=40—NOT LOST BY RENDERING BILLS AND RELYING ON ACCOUNT STATED.
   Where repairs were made on vessels at the request of the owner, so as to create a maritime lien under Act June 23, 1910 (Comp. St. §§ 7783–7787), the maritime liens were not lost by rendering bills to the owner, nor by relying on the retention of such bills without objection as accounts stated.

2. MARITIME LIENS ⊂=64—EXISTENCE OF LIEN ADMITTED BY FAILURE TO DENY.
   In a suit in admiralty to enforce maritime liens, the answer admitted, by failure to deny, that the libelant had a maritime lien.

3. MARITIME LIENS ⊂=65—AMOUNT OF LIEN MAY BE ESTABLISHED BY ACCOUNT STATED.
   A contract for repairs to vessels being of a maritime nature, the amount of the lien could be established in a court of admiralty by an account stated.

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

Separate libels in admiralty by Verdon & Co. against the steam lighter Hattie Thomas, her engines, etc., and against the steam lighter Etta McElroy, her engines, etc.; the Rogers Russell Marine Transportation Company being the claimant in each case. Decree for libelant in each case, and claimant appeals. Affirmed.

Thomas P. McKenna, of New York City (Bernard C. McKenna, of New York City, of counsel), for appellant.

Alexander & Ash, of New York City (Mark Ash, of New York City, of counsel), for appellee.

Before ROGERS, HOUGH, and MANTON, Circuit Judges.

MANTON, Circuit Judge. These appeals were argued together and will be treated in one opinion. The appellee in the court below ob-

tained a decree against the Hattie Thomas for $1,780.84, and against the Etta McElroy for $3,322.90. The libel, as to its material allegations, excepting as to the amount claimed for the work done, is substantially the same in each case. The allegations are as follows:

"Second. Upon information and belief, that at various times between July, * * * at West Bow Brighton, New York, the libelant herein, which at said times was and now is a New York corporation, at the instance and request of the owner of said vessel, or its agent, performed work, labor, and services, and furnished materials, in and about the necessary repair of said vessel, at the price and of the value in the aggregate of * * *, no part of which sum, although demanded, has been paid.

"Third. Upon information and belief, that on or about * * * libelant forwarded and transmitted to the owner of said vessel an account current, or bill of items, of the said work done and materials furnished, amounting in the aggregate to said sum of * * *, which account current, or bill of items, was retained without objection and thereupon became an account stated.

"Fourth. Pursuant to the provisions of an act of Congress relating to liens on vessels for repairs, supplies, and other necessaries, passed June 23, 1910, libelant's claim aforesaid became and still is a maritime lien upon said vessel.

"Fifth. All and singular the premises are true and within the admiralty and maritime jurisdiction of this court."

The issues raised were referred to a master, and he made the above awards, which were confirmed by the District Judge. That repairs were made upon each of the vessels at the request of the owner of the vessels is not disputed. After the repairs were completed, the appellee forwarded to the shipowner a bill of items for the repairs. As thus rendered, no objection was made at the time.

[1] The contention of the appellant is that liability has been fixed in the court below against the vessels in these actions upon the theory that the appellee's cause of action was upon an account stated. It is claimed that invoking this form of relief, through the legal theory of an account stated, created a novation of the liability, and that admiralty has not jurisdiction. It is further contended that allegation third of the libel, being an attempt by the appellee to allege an account stated, is not a sufficient allegation to sustain a libel for an account stated. The suit is in rem and a maritime lien for the repairs is claimed.

We think the appellant is in error in these contentions. We think that the appellee did not lose its maritime lien, which arose upon the completion of the repairs, because it thereafter rendered bills to the owner; nor did it by alleging in the libel that the bills were retained without objection and therefore became an account stated. When the repairs were made upon the vessels, under the act of Congress of June 23, 1910 (Ann. Comp. Stat. 1916, §§ 7783–7787), the claim became and was a maritime lien upon the vessels, and was such at the time of the filing of the libel.

It will be observed that paragraph second of the libel sets forth a sufficient allegation to establish the maritime lien and the right to maintain the action in rem. The appellee in each action rested its case upon proof that the order for repairs was not disputed, and that the amount of the repairs and the price or value thereof was sent to the owners in the form of an itemized statement, and that such bills were kept, and not returned or objected to. The appellant's witness ad-

mitted the receipt of the bills as proven by the appellee. The appellant's superintendent testified to a conversation he had with one Rogers, president of the corporation which owned the vessels, in which he made no objection, but stated he had considerable money outstanding and expected to pay the bill, and that he would make a substantial payment and arrange for the payment of the remainder. The itemized statement of the materials furnished and the work performed was very lengthy, and would involve very considerable proof, if it was necessary to prove each item separately.

[2] In Morse Dry Dock & Repair Co. v. Munson S. S. Line (D. C.) 155 Fed. 150, affirmed by this court in 158 Fed. 1021, 85 C. C. A. 666, there was an action for repairs in similar form. The suit was in personam. The libel alleged that the respondent engaged the libelant to repair four steamers, that the work was finished, and that there was a balance due. The itemized bills for the work and materials against each vessel were delivered by the libelant to the respondent; the respondent admitted the correctness of the bills and promised to pay the account. The libel was drafted in very much the same language as is this. The court assumed jurisdiction in admiralty, and sustained the libel, and rendered a verdict, which was affirmed in this court, where it was said:

"We think the District Judge was correct in holding that the action was upon an account stated"

—and affirmed upon the District Judge's opinion. Indeed, the answer admits, by failure to deny, that the appellee has a maritime lien. Dunham v. Cudlipp, 94 N. Y. 129.

The acceptance of a note of a third person for a pre-existing debt does not constitute payment, in the absence of an express agreement to that effect. Atlas S. S. Co. v. Colombian Land Co., 102 Fed. 358, 42 C. C. A. 398. And the acceptance of the note of a third person, and taken for debt of a vessel, does not discharge the maritime lien. The James T. Easton (D. C.) 49 Fed. 656. Where a debt was for material and supplies furnished to a vessel, and therefore cognizable in admiralty, it does not deprive a creditor of the right to sue in admiralty by taking a bond and mortgage, unless it appears that such was the express intention of the parties. Robins Dry Dock & Repair Co. v. Chesbrough, 216 Fed. 121, 132 C. C. A. 365. And so a maritime contract is not changed into a nonmaritime contract because of an account stated. Morse Dry Dock & Repair Co. v. Munson Steamship Line, 158 Fed. 1021, 85 C. C. A. 666.

[3] We conclude that the principle of these cases is applicable to the case at bar, where the admiralty jurisdiction is invoked in an action in rem. The nature of the contract being maritime, it was permissible to establish the amount of the lien in a court of admiralty by the method of an account stated. To do so is a mere matter of evidence.

The decrees are affirmed, with interest and costs.

In re 9,889 BAGS OF MALT.

RENKE v. HOWARD.

(Circuit Court of Appeals, First Circuit. November 19, 1919.)

No. 1422.

SHIPPING ⊂=154—LIEN FOR FREIGHT WAIVED BY UNLOADING AND STORING IN NAME OF CONSIGNEE.

Owner of a barge *held* to have lost his right to a lien for freight on a cargo which was unloaded at a wharf, and received and stored in the name of the consignee, without any agreement or understanding or knowledge on the part of the wharf owner that a lien was claimed.

Appeal from the District Court of the United States for the District of Massachusetts; Clarence Hale, Judge.

Suit in admiralty by Thomas J. Howard against 9,889 Bags of Malt; George T. Renke, claimant. Decree for libelant, and claimant appeals. Reversed.

Pitt F. Drew, of Boston, Mass., for appellant.

Richard H. Wiswall, of Boston, Mass. (Hill, Barlow & Homans, of Boston, Mass., on the brief), for appellee.

Before BINGHAM, JOHNSON, and ANDERSON, Circuit Judges.

ANDERSON, Circuit Judge. This case grew out of a libel against a cargo of malt to enforce an alleged lien in favor of the owner of the barge George S. Repplier for freight and demurrage accruing in connection with the transportation of the malt from Hoboken, N. J., to Boston.

The court below found that the libelant had performed his contract of carriage; that his maritime lien therefor had not been lost; and entered a decree for the libelant.

While several questions are raised on the record, the only one we find it necessary to consider and determine is whether the libelant retained his lien against the cargo. We think he did not, and that the libel must consequently be dismissed.

On July 12, 1917, Renke, the claimant and owner, had about 500 tons of malt on cars in Hoboken, which he had contracted to sell to one Logi in France. This he desired to have speedily transported to Mystic Wharf, Boston, in order to connect with the Moorish Prince, due to sail about 10 days later. Because of war conditions, he could obtain no assurance from the railroad company of transportation in season to connect with this steamer. Accordingly, he engaged one Elder, who was engaged in the lighterage business, to procure water transportation. Elder went to the firm of Gilmartin & Trundy, ship brokers, and through them contracted with the libelant, the owner of the barge, for the transportation of the malt. Howard was to furnish both barge and power; that it, towage for the trip. The malt was shipped in the name of W. H. Story & Co., commission merchants, who were financing Renke in the transaction.

There is some conflict of evidence as to the degree of speed, or diligence in transportation, for which Howard contracted, and also as to whether he performed his contract. But our conclusion that the libelant lost his lien makes it unnecessary for us to consider and determine any questions arising concerning the contract or its performance. The action is in rem to enforce a lien; if there was no lien, the action fails.

The barge George S. Repplier was loaded on July 15. It, with three other barges, was taken in tow, and started on July 17. Delayed by fog, and because of the other barges, the cargo of malt finally reached Mystic Wharf on July 28, 8 days after the Moorish Prince had sailed, and 16 days after the claimant had made his contract with Elder. The barge was in charge of Capt. Gaffney. Renke seems to have been unknown to all the parties, except Elder, until he appeared in the case as claimant in October. The France & Canada Steamship Company was in control of this wharf, and one Akerley in charge thereof. The barge stayed at the wharf, loaded, for 6 days. Exactly what occurred during these 6 days the record does not show. After 6 days some one gave instructions that the malt should be unloaded on the wharf. Gaffney testified that he did not know why the cargo was not unloaded before; that he had nothing to do with unloading, and said nothing to the representatives of the France & Canada Steamship Company about this freight. In fact, the malt was taken out of the barge, apparently by Akerley's directions, and put in storage in a warehouse belonging to the Boston & Maine Railroad. Subsequently the railroad company and the steamship company both sought to maintain liens for their respective claims, originating in unloading and in storing the malt. These claims appear to have been paid by Renke's financial agent; the intervening petitions of the steamship company and the railroad company were accordingly dismissed. We find no evidence that, when this malt was discharged from the barge, Howard or any one in his behalf in any way, by word or act, indicated any purpose of claiming any lien thereon for freight and demurrage. Akerley testified to the effect that neither the captain nor the owner of the barge, or any one representing either of them, made any claim of a lien; that he had the malt put on the pier, so that it could go on some later ship; and then caused it to be stored in the name of Logi. After the cargo was discharged, controversies arose between the parties, both as to the time taken for the voyage and as to an alleged shortage in the malt delivery. Howard, who had been 25 years in this line of business, and must be presumed to be familiar with maritime liens, on August 8 threatened to "attach" the malt if his claim was not promptly paid. This threat to attach is, in our view, inconsistent with his even supposing that he had retained such constructive possession of the malt as to permit his maritime lien to survive. On August 15 he repeated his demand for payment of the freight and demurrage, but without asserting any claim to a maritime lien.

We do not think the evidence sustains the finding of the court below that "the malt was received by the France & Canada Steamship Company as a deposit for the benefit of both parties." The steamship

company seems to us to have taken possession of the malt because there was no one else to take possession of it, and without any notice, express or implied, from Howard or from any one in his behalf, of any claim of a continuing lien. The case does not, we think, fall within the principle laid down in Bags of Linseed, 66 U. S. (1 Black) 108, 114 (17 L. Ed. 35), cited by the court below. In that case, the court, by Chief Justice Taney, said:

"It is true that such a delivery, without any condition or qualification annexed, would be a waiver of the lien, because, as we have already said, the lien is but an incident to the possession, with the right to retain. But in cases of the kind above mentioned it is frequently, perhaps more usually, understood between the parties that transferring the goods from the ship to the warehouse shall not be regarded as a waiver of the lien, and that the shipowner reserves the right to proceed in rem to enforce it, if the freight is not paid. And if it appears by the evidence that such an understanding did exist between the parties, before or at the time the cargo was placed in the hands of the consignee, or if such an understanding is plainly to be inferred from the established local usage of the port, a court of admiralty will regard the transaction as a deposit of the goods, for the time, in the warehouse, and not as an absolute delivery, and, on that ground, will consider the shipowner as still constructively in possession, so far as to preserve his lien and his remedy in rem."

The evidence in this case utterly fails to show that "such an understanding did exist between the parties." This case has been frequently cited, and the doctrine enunciated in the above quotation consistently followed. None of the libelant's cases cited justify his claim, on the facts of this case.

The decree of the District Court is reversed, and the case is remanded to that court, with directions to dismiss the libel, with costs; and the appellant recovers his costs of appeal.

ROBERTSON v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. December 17, 1919.)

No. 5382.

1. INTOXICATING LIQUORS ⟸210—INDICTMENT CHARGING TRANSPORTATION WITHIN CAMP ZONE STATES AN OFFENSE.
An information charging the transportation of intoxicating liquor within five miles of a military camp *held* to state an offense under the regulations made by the President expressly authorized by Selective Draft Act, § 12 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 2019a).

2. INTOXICATING LIQUORS ⟸210—INFORMATION FOR TRANSPORTING LIQUOR WITHIN CAMP ZONE NOT DEFECTIVE.
An information for transporting liquor within a military camp zone, in violation of regulations made by the President, is not defective for failing to allege that defendant is not punishable under the Articles of War.

3. INDICTMENT AND INFORMATION ⟸3—VIOLATION OF PROHIBITION REGULATIONS MAY BE PROSECUTED BY INFORMATION.
The offense of selling or transporting liquor within a military camp zone, in violation of regulations made by the President, may be prosecuted by information.

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4. CRIMINAL LAW ⟸1206(3)—STATUTE ALLOWING SENTENCE AT HARD LABOR NOT APPLICABLE TO STATUTE SUBSEQUENTLY ENACTED.
The provision of Criminal Code, § 338 (Comp. St. § 10512), that the omission of the words "hard labor" from provisions of "this act" prescribing punishment shall not deprive the court of power to impose hard labor in any case where such power then existed, *held* not to apply to a penal statute subsequently enacted.

5. INTOXICATING LIQUORS ⟸3—PRESIDENT MAY PROHIBIT TRANSPORTATION OF LIQUOR WITHIN CAMP ZONES.
The provision of the presidential regulations prohibiting "transportation" of liquor within the military camp zones prescribed therein *held* within the authority given by Selective Draft Act, § 12 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 2019a).

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

Criminal prosecution by the United States against Clara Robertson. Judgment of conviction, and defendant brings error. Affirmed.

J. E. Grigsby, of Albuquerque, N. M. (W. C. Heacock, of Albuquerque, N. M., on the brief), for plaintiff in error.

J. O. Seth, Asst. U. S. Atty., of Santa Fé, N. M. (Summers Burkhart, U. S. Atty., of Albuquerque, N. M., on the brief), for the United States.

Before CARLAND and STONE, Circuit Judges, and ELLIOTT, District Judge.

STONE, Circuit Judge. [1] Error from conviction for violation of presidential regulations of June 27, 1918, promulgated under section 12 of the Draft Act (40 Stat. 82 [Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 2019a]), prohibiting the transportation of intoxicants within a five-mile zone surrounding a military encampment. There are no properly preserved exceptions presenting any of the questions here argued. However, as the sentence involves imprisonment we have examined the points presented. The first contention is that no offense is stated in the information in violation of section 12. That section is:

"Sec. 12. That the President of the United States, as Commander-in-Chief of the Army, is authorized to make such regulations governing the prohibition of alcoholic liquors in or near military camps and to the officers and enlisted men of the Army as he may from time to time deem necessary or advisable: Provided, that no person, corporation, partnership, or association shall sell, supply, or have in his or its possession any intoxicating or spirituous liquors at any military station, cantonment, camp, fort, post, officers' or enlisted men's club, which is being used at the time for military purposes under this act, but the Secretary of War may make regulations permitting the sale and use of intoxicating liquors for medicinal purposes. It shall be unlawful to sell any intoxicating liquor including beer, ale, or wine, to any officer or member of the military forces while in uniform, except as herein provided. Any person, corporation, partnership, or association violating the provisions of this section or the regulations made thereunder shall, unless otherwise punishable under the Articles of War, be deemed guilty of a misdemeanor and be punished by a fine of not more than $1,000 or imprisonment for not more than twelve months, or both."

It is true that this section does not designate the "transportation" of liquor as an offense, but it does provide for regulations to be promulgated by the President, and section 1 of the regulations promulgated June 27, 1918, specifically prohibits that any liquor be "transported to any place within any such zone."

[2] It is next claimed that the information was vitally defective in not alleging that the offense here charged was not punishable under the Articles of War. Such exception in the statute was no part of the definition of the offense, and was a matter of defense, rather than one necessary to be alleged in the information. United States v. Cook, 17 Wall. 168, 21 L. Ed. 538; United States v. Scott (D. C.) 248 Fed. 361.

[3, 4] The next proposition is that the accused could be proceeded against only by indictment. The argument advanced is that, although the statute did not provide for imprisonment beyond one year, and made no provision for jail sentence to be at "hard labor," and although the sentence was for less than a year, and no requirement therein of hard labor, yet that the sentence might have required such hard labor, and therefore might have been an "infamous punishment." No hard labor requirement could have been attached to this sentence, because the maximum imprisonment permitted was one year, and hard labor was not expressly permitted by the statute. Ex parte Karstendick, 93 U. S. 396, 23 L. Ed. 889; In re Mills, 135 U. S. 263, 10 Sup. Ct. 762, 34 L. Ed. 107. The reliance placed by the counsel of accused upon the provision in section 338 of the Criminal Code (Act March 4, 1909, 35 Stat. p. 1088 [Comp. St. § 10512]), that the omission of the words "hard labor" from the provisions of the Criminal Code should not deprive the court of the power to impose such, is not well founded. That provision referred to that statute alone, and has no application to this one, subsequently enacted.

[5] The final contention is that the President had no authority to prohibit the "transportation" of liquor within the camp zone, but, if he had such authority, the information was fatally defective, in failing to state that such regulations had been made. The statute gave the President power to make regulations "governing the prohibition of alcoholic liquors in or near military camps," and prescribed the punishment for violation of such regulations. Congress, having declared the purpose of the regulations and the punishment for violation of them, could and did leave the definition of those regulations to the Executive. The regulation prohibiting the transportation of liquor within certain reasonable limits "near" the camps was well within the authority granted. Such a regulation has the effect of law, and it was not necessary to plead its existence in the information. The information properly covered this phase of the accusation, by alleging facts which would bring the acts charged within the regulations.

The judgment is affirmed.

HANRAHAN v. PACIFIC TRANSPORT CO., Limited.

(Circuit Court of Appeals, Second Circuit. November 12, 1919.)

No. 44.

1. ADMIRALTY ⟸2—MARITIME RIGHTS NOT CHANGED BY CHOICE OF COMMON-LAW REMEDY.
That a seaman injured on board sues at law for the injury does not change the fact that his rights are governed by the maritime law.

2. SEAMEN ⟸9—SHIP NOT UNSEAWORTHY, SO AS TO GIVE RIGHT TO DAMAGES FOR INJURY.
A ship *held* not unseaworthy, because of the temporary absence of a handrail while she was lying alongside a wharf discharging cargo, so as to entitle a seaman injured thereby to recover damages.

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

Action at law by William F. Hanrahan against the Pacific Transport Company, Limited. Judgment for defendant, and plaintiff brings error. Affirmed.

Certiorari denied 251 U. S. —, 40 Sup. Ct. 345, 64 L. Ed. —.

The Pacific Company is the owner of a steamship, and Hanrahan was a member of her crew. The vessel being in port, and fast to a pier, Hanrahan returned at night from shore leave, and while walking on the upper deck, and toward his quarters, fell overboard, suffering personal injuries, for which he brought this common-law action. We assume for the purposes of this case that the reason why he was injured was that by the negligence of the ship's officers a certain handrail was not in place. This rail consisted of wire rope passing through stanchions, which were insertable in sockets built into the deck. It was erected to take the place of a bulwark.

From all the evidence the jury might have found that Hanrahan's injuries were caused or contributed to by the absence of the handrail. He asked to go to the jury on the theory that the vessel was unseaworthy by reason of the failure of those in charge of her to maintain the handrail in place. This motion having been denied, and verdict directed as above, he took this writ.

Silas B. Axtell, of New York City (Arthur Lavenburg, of New York City, of counsel), for plaintiff in error.

Kirlin, Woolsey & Hickox, of New York City (Robert S. Erskine, of New York City, and L. De Grove Potter, of White Plains, N. Y., of counsel), for defendant in error.

Before WARD, HOUGH, and MANTON, Circuit Judges.

HOUGH, Circuit Judge (after stating the facts as above). If defendant, as master, had been constructing a house, instead of operating a ship, and plaintiff (the servant) had fallen from a defective scaffold, instead of from an unguarded deck, the resulting injury would have conferred both a common-law right and a common-law remedy, and such right would (or might) have resulted from breach of a contract recognized, if not created, by the common law.

At the time of this accident, however, plaintiff's relation to defendant resulted from a maritime contract, viz. his hiring as a seaman.

The scope and effect of such contract is defined and regulated solely by the general maritime law, which is a different system of jurisprudence from the common law, and neither subordinated to nor controlled thereby. Cf. Southern Pacific Co. v. Jensen, 244 U. S. 205, 37 Sup. Ct. 524, 61 L. Ed. 1086, L. R. A. 1918C, 451, Ann. Cas. 1917E, 900.

[1] Assuming that the master of this ship negligently omitted to place the handrail, and that there is a causal connection between such negligence and plaintiff's injuries, he is entitled, not to "indemnity" for the consequences of that negligence, but to "maintenance and cure"—i. e., "care." The Osceola, 189 U. S. 158, 23 Sup. Ct. 483, 47 L. Ed. 760; The Bouker No. 2, 241 Fed. 831, 154 C. C. A. 533. This is the result of the maritime law, and that this action was brought on the common-law side of the court below makes no difference. Plaintiff chose a common-law remedy, but the choice neither changed the maritime rights of the parties, nor created a new right. Chelentis v. Luckenbach, etc., Co., 247 U. S. 372, 38 Sup. Ct. 501, 62 L. Ed. 1171.

[2] But since by the law maritime a seaman is entitled to "indemnity" (which may be taken as equivalent to "damages") for injuries received through the "unseaworthiness of the ship" (The Osceola, supra, 189 U. S. at page 175, 23 Sup. Ct. 483, 47 L. Ed. 760), it is now urged that section 20, Seaman's Act March 4, 1915, c. 153, 38 Stat. 1185 (Comp. St. § 8337a), requires a holding that it was at least for the jury to say whether this ship was not unseaworthy, as a result of the negligent absence of handrails; for such negligence being that of an officer, who cannot (under section 20) be regarded as plaintiff's fellow servant, the case is the same as if defendant owner had personally made the deck unsafe for plaintiff's lawful purposes.

The argument fails both on authority and reason, for (1) it is opposed to the ground of decision in Chelentis v. Luckenbach, etc., Co., supra; and (2) it involves a misuse of the word "seaworthiness."

(1) Chelentis claimed to have been injured by obeying a negligent order; this plaintiff alleges injury because an order was negligently omitted. If (as held) section 20 had no application to Chelentis, it has none here, because it is still immaterial "whether the master and seaman are fellow servants or not"; maintenance and care remain the full limit of the controlling maritime law.

(2) Every allegation of fact made by plaintiff has been assumed, yet we hold that no jury could on such facts declare the ship unseaworthy.

Seaworthiness is a relative term; a vessel may have that quality in port, and yet be wholly unfit for rough water (McLanahan v. Universal, etc., Co., 1 Pet. 170, 7 L. Ed. 98); and to say that this ship was unseaworthy because she had no handrail up, while lying alongside a wharf discharging cargo, is merely untrue.

The contention confounds seaworthiness and safety, if not seaworthiness and comfort; and the facts presented require only reference to Hedley v. Pinkney, [1894] App. Cas. 222, and Olson v. Navigation Co., 104 Fed. 574, 44 C. C. A. 51.

Presenting this point before a jury somewhat beclouds the final

issue, which is whether section 20 has changed or sought to change the general maritime law. That it does not was decided in the Chelentis Case.

Judgment affirmed, with costs.

THE ESROM.

(Circuit Court of Appeals, Second Circuit. January 14, 1920.)

No. 76.

SHIPPING ⊂=132(3)—BURDEN ON SHIPPER TO PROVE ALLEGED UNREASONABLE DELAY IN SAILING.

In a suit by a shipper for damages for delay in sailing of the vessel after execution of the bill of lading, the burden of proving that the delay was unreasonable under the circumstances, and for how long, *held* to rest on libelant.

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

Suit in admiralty by Charles E. Michael and another, copartners as Charles E. Michael & Sons, against the steamship Esrom; Actieselskabet Dampkibet Island, claimant. Decree for libelants and claimant appeals. Reversed.

Burlington, Veeder, Masten & Fearey, of New York City (R. H. Hupper and Goulding K. Wight, both of New York City, of counsel), for appellant.

Bullowa & Bullowa, of New York City (H. L. Cheyney, of New York City, of counsel), for appellees.

Before WARD, HOUGH, and MANTON, Circuit Judges.

WARD, Circuit Judge. July 6, 1915, the libelants made a freight contract with the Interocean Transportation Company for the shipment of 1,957 bales of tobacco from New York to Copenhagen in July; no vessel being named. July 30 the Transportation Company chartered the steamer Esrom to be loaded by it for Copenhagen. Article 1 of the charter provided that the Esrom was to load at New York:

"A full and complete cargo of wheat and/or maize and/or other lawful merchandise, and being so loaded shall forthwith proceed as ordered upon signing bills of lading to Gothenburg and Copenhagen."

Article 13 of the charter provided:

"The captain shall sign bills of lading or master's receipts as and when presented, without prejudice or reference to this charter party, and any difference between the amount of freight by the bills of lading and this charter party, to be settled at port of loading before sailing, as customary."

The foregoing provisions regulate the rights of the charterers and owners inter se.

July 31 the libelants delivered the tobacco to the steamer and paid the Transportation Company the freight in advance against the company's printed form of bill of lading which concludes as follows:

"In witness whereof the master or agent of the steamship hath affirmed to three bills of lading all of this tenor and date, one of which being accomplished, the others to stand void. Interocean Transportation Co.,

"By .....

"W. Habel, Master."

All of the above was the printed form, except the words "three" and "W. Habel, Master."

The Interocean Transportation Company did not sign the bill of lading, but the master did. He testified that he signed it as master by virtue of article 13 of the charter party, and that the owners subsequently forbade him to sign any more bills of lading without first getting authority from them.

The bill of lading, making no reference whatever to the charter party, constituted the contract between the libelants and the charterers, for performance of which, after execution by the master and shipment of the tobacco, the steamship also became bound.

September 17 the Transportation Company became bankrupt, without having paid the freight due under the charter party, and thereupon the owners were obliged to discharge some of the cargo at the demand of shippers, to negotiate some freight settlement with other shippers, who wished their shipments to go forward, and who had paid freight to the Transportation Company without getting bills of lading signed by the master, and to complete the loading. These things necessitated delay, and the result was that she did not sail until October 9.

The trial judge held that the steamship was bound for the performance of the bill of lading, and as he directed a decree for the libelants we must infer that he thought she was also bound to sail within a reasonable time and had not done so. But neither he nor the commissioner determined what was a reasonable time under all the circumstances or discussed it in any way. Indeed, the commissioner allowed interest on the value of the tobacco for three months, although the steamship sailed nine weeks after the goods went aboard, at which date the relation between the libelants and the steamship began. The burden of proving that the sailing was unreasonable under the circumstances of the case, and for how long, lay upon the libelants, and they have not sustained it.

The decree is reversed.

In re POTTIER & STYMUS CO.

Petition of WHITTLESEY.

(Circuit Court of Appeals, Second Circuit. November 12, 1919.)

No. 10.

BANKRUPTCY ⊂=140(½), 154—CREDITOR'S RIGHT OF SET-OFF AGAINST LIEN ON HIS GOODS FOR REPAIRS BY BANKRUPT.

Where furniture owned by a creditor was at the time of bankruptcy in possession of bankrupt for repairs, which had been partially completed, such creditor *held* entitled to reclaim the furniture on payment of the amount then due for work done thereon, and to set off against such amount the amount of his admitted claim.

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

In the matter of Pottier & Stymus Company, bankrupt. On petition of Charles W. Whittlesey to revise order of District Court. Order reversed.

At the date of filing petition one Whittlesey was a creditor of the bankrupt in $718.48, and the bankrupt had possession of divers articles of furniture intrusted to it by Whittlesey for repair and improvement. This work was incomplete when bankruptcy supervened; it was, however, shown below by competent evidence that the value of the work done and materials furnished before petition filed was $991.78. A receiver took charge of the bankrupt's affairs, who refused to surrender the property in question to Whittlesey, and also refused to complete the work thereupon unless Whittlesey paid him in full for all labor and material, whether furnished before or after bankruptcy. Thereupon a written agreement was made between the receiver and Whittlesey whereby the latter agreed so to pay; but it was provided that by so doing Whittlesey did "not in any way waive any of his rights to claim from the receiver or bankrupt [estate] the return of the moneys so paid" to the extent of Whittlesey's admitted claim and alleged set-off, viz. $718.48. The District Court refused to allow the set-off, and Whittlesey filed this petition.

Walsh & Young, of New York City (John Patrick Walsh, of New York City, of counsel), for petitioner.

Zalkin & Cohen, of New York City, for receiver.

Before WARD, ROGERS, and HOUGH, Circuit Judges.

HOUGH, Circuit Judge (after stating the facts as above). It may be admitted (though the facts shown are meager) that the bankrupt had the possessory lien of an artisan for the work and materials expended on Whittlesey's furniture. But such lien grew in amount from day to day and could at any time be adjusted or measured in money, and as well on the day of filing petition as any other. It is also true that the receiver or other officer representing the bankrupt estate was not bound to complete the Whittlesey job; it was like any other contract made by a bankrupt. Howard v. Magazine, etc., Co., 147 App. Div. 335, 131 N. Y. Supp. 916. If Whittlesey's work had been completed by the receiver, without any reservation of right or claim by Whittlesey, a different situation might have arisen; as the case stands, we need not consider that question.

Admittedly Whittlesey has no right to set off the bankrupt's debt against a demand by the receiver for work done by himself; the debts or credits are not mutual within the meaning of section 68 of the Bankruptcy Act (Act July 1, 1898, c. 541, 30 Stat. 565 [Comp. St. § 9652]). But what Whittlesey insisted on below, and now urges, is that what he owed Pottier & Stymus for their work and material should be ascertained as of the date of petition filed, and he be allowed to set off his admitted debt against that amount. That this position is right, we do not doubt. The possessory lien of an artisan stands upon no higher ground than the statutory mechanic's lien, and that set-off is allowable in foreclosure of such liens is settled. Valett v. Baker, 129 App. Div. 514, 114 N. Y. Supp. 214, and cases cited. Nor is it necessary to the exercise of set-off that the demand should be matured or presently due at date of bankruptcy. We so held in respect of the creditors' claim, and there is no difference between that and a claim by the bankrupt. In re Semmer Glass Co., 135 Fed. 77, 67 C. C. A. 551, appeal dismissed as Conboy v. First National Bank, 203 U. S. 141, 27 Sup. Ct. 50, 51 L. Ed. 128.

It is further urged, in support of the result below, that petitioner is estopped from now claiming to exercise the right of set-off because he made a new contract with the receiver. This is a mere matter of construing the agreement; in our opinion the reservation of Whittlesey's rights was complete. The position originally taken by the receiver was that to grant the set-off created a preference. It is quite true that set-off does work a sort of preference; but, while the Bankrupt Act itself creates preferences, it does not create, but recognizes, set-offs (Studley v. Boylston Bank, 229 U. S. at 528, 33 Sup. Ct. 806, 57 L. Ed. 1313); indeed, a set-off may be described as a sort of lawful preference.

At the most the bankrupts were bailees of Whittlesey's furniture, and the receiver or trustee acquired no title whatever to the same. In re Wright-Dana, etc., Co., 211 Fed. 908, 128 C. C. A. 286. His only right thereto arose from a lien capable of ascertainment or valuation. The receiver, therefore, erred in not surrendering the property on demand, and payment of any balance due after allowing the set-off demanded.

The order appealed from is reversed, and the matter remanded for further proceedings not inconsistent with this opinion. If the receiver or trustee desires to combat the evidence offered by the petitioner as to the value of the work done by Pottier & Stymus before bankruptcy, he may at his own costs and charges take a reference for that purpose; but against whatever may turn out to be the value of such work, labor, and material Whittlesey is entitled to set off his admitted demand, $718.48. He is also granted the costs of this court.

STEPHENS v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. February 9, 1920.)

No. 3349.

INDICTMENT AND INFORMATION ⊂=88—SUFFICIENT AVERMENT OF INTENT.

An indictment charging that an act was done knowingly, willfully, unlawfully, and feloniously sufficiently charges criminal intent.

Criminal prosecution by the United States against E. A. Stephens. On motion for rehearing. Denied.

For former opinion, see 261 Fed. 590, — C. C. A. —.

PER CURIAM. Plaintiff in error urges that the indictment "does not allege any intent whatsoever." It is true that it does not use the word "intent," but the allegation that defendant knowingly, willfully, unlawfully, and feloniously did attempt to cause and create insubordination and disloyalty in the military and naval forces, by doing the things charged, sufficiently charged that the attempt was done with willful and unlawful purpose. Bise v. United States, 144 Fed. 374, 74 C. C. A. 1, 7 Ann. Cas. 165; People v. Butler, 1 Idaho, 231; State v. Rechnitz, 20 Mont. 488, 52 Pac. 264; State v. Clark, 32 Nev. 145, 104 Pac. 593, Ann. Cas. 1912C, 754; Atkinson v. State, 34 Tex. Cr. R. 424, 30 S. W. 1064; State v. Hagar, 50 W. Va. 370, 40 S. E. 393; Bunch v. State, 58 Fla. 9, 50 South. 534, 138 Am. St. Rep. 91; State v. Daly, 41 Or. 515, 70 Pac. 706; State v. Hughes, 31 Nev. 270, 102 Pac. 562; People v. Willett, 102 N. Y. 251, 6 N. E. 301.

Motion denied.

HENKIN v. FOUSEK.

(Circuit Court of Appeals, Eighth Circuit. January 9, 1920.)

No. 5164.

BANKRUPTCY ⊂=461—ALLOWANCE OF APPEAL BY BANKRUPT IN FORMA PAUPERIS.

Leave granted to a bankrupt to prosecute an appeal in forma pauperis from an order adjudging him in contempt for failure to comply with an order requiring him to pay over money to his trustee.

Appeal from the District Court of the United States for the District of South Dakota.

In the matter of Louis Henkin, bankrupt; Charles B. Fousek, trustee. On motion by bankrupt to prosecute appeal in forma pauperis. Granted.

Before SANBORN and STONE, Circuit Judges, and MUNGER, District Judge.

STONE, Circuit Judge. This is a motion to prosecute an appeal in forma pauperis. Because of the unusual situation in this case, it is advisable to state the views of the court upon this motion, in order that

the disposition now made may have no bearing upon the merits of the appeal when later presented to this court. This appeal is from an order adjudging appellant guilty of contempt in not obeying an order to pay over to the trustee in bankruptcy of his estate $6,000, which the court found belonged to that estate, and which appellant had secreted and refused to so pay over. The finding of the trial court is that appellant—

"now does have in his possession, or under his control, the said sum of money so concealed by him as aforesaid, and that he willfully and intentionally secretes, holds, and detains the same from the said trustee in bankruptcy, and his said creditors, in contempt of this court. * * *"

Among other assignments of error are several which challenge the sufficiency of the evidence in the contempt proceedings. As showing that appellant had, at the time he was ordered to pay over the above sum, that money, or that he has since that time been physically able to comply with such order. These contentions will apparently be strongly urged upon the hearing of the merits in this appeal. We think that we should not upon this motion prejudge or affect these important features of the appeal. However, it is necessary to carefully guard against an injustice to appellant in the direction of a denial of a hearing in this court on his appeal. Confronted by this situation, and guided by a solicitude to preserve appellant's right to a hearing in this court on the merits of his appeal, we have concluded to grant his motion to prosecute that appeal in forma pauperis, with the clear statement that such is done out of abundant caution for his rights, and with no intention of affecting in any wise the merits of that appeal.

It is so ordered.

CONCRETE APPLIANCES CO. et al. v. MEINKEN et al.

(Circuit Court of Appeals, Sixth Circuit. January 6, 1920. On Petition for Rehearing, March 2, 1920.)

No. 3241.

1. PATENTS ⟸61—VALIDITY AFFECTED BY PRIOR APPLICATION FOR ANOTHER PATENT.

   A patent, applied for after filing of application for, but before issue of, another patent in the same art, should, as to anticipation and the presence of invention, be judged upon the basis of which the earlier application is a part, though it was not a part of the prior art, in the sense in which that phrase is used with reference only to publication.

2. PATENTS ⟸328—FOR DISTRIBUTING WET CONCRETE INVALID FOR WANT OF INVENTION.

   The Smith patent, No. 948,746, for an apparatus for distributing wet concrete, as limited by the prior Callahan patent, No. 948,719, *held* not to show invention.

3. PATENTS ⟸328—COMBINATION DEVICE FOR DISTRIBUTING WET CONCRETE VALID AND NOT ANTICIPATED.

   The Callahan patent, No. 948,719, for an apparatus for distributing wet concrete, consisting of an elevating tower and devices for spreading same over structure, though a combination, *held* to show invention, and not to have been anticipated.

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

4. PATENTS ⊂=27(2)—DOUBLE USE.
Apparatus for elevating and distributing wet concrete *held* not a mere double use of earlier apparatus for loading coal.

5. PATENTS ⊂=26(2)—NEW RESULT.
The elevation and gravity distribution of wet concrete to and around the successive floors of a building being constructed, and all in a semi-automatic way, is a new result in a patentable sense.

6. PATENTS ⊂=25—AGGREGATION.
Apparatus designed for what is in a fair sense a unitary work does not become an aggregation merely because it involves successive steps under manual control.

On Petition for Rehearing.

7. PATENTS ⊂=328—PATENT FOR DEVICE FOR ELEVATING AND DISTRIBUTING CONCRETE CONSTRUED.
The Callahan patent, No. 948,719, for an apparatus for elevating and distributing wet concrete to the floors of buildings under construction, one of the features of which is a horizontally movable boom adjustably connected with the tower and adapted to be arranged at various positions in the height thereof, *held* not limited to horizontal adjustability of the boom, nor to a tower built section by section as the building progresses.

Appeal from the District Court of the United States for the Western Division of the Southern District of Ohio; Howard C. Hollister, Judge.

Suit by the Concrete Appliances Company and another against Dietrich Meinken and others. From a decree for defendants, plaintiffs appeal. Reversed and remanded, with directions.

Suit upon patents numbered 948,719, issued February 8, 1910, to L. Callahan, and 948,746, issued February 8, 1910, to A. L. Smith. This case involves the tower apparatus now in common use for elevating and distributing wet ("mush") concrete upon the successive floors of high buildings, constructed in whole or in part from that material. The apparatus, as now used, involves two steps: First, elevating the material to a reservoir or hopper bin temporarily fixed at the desired elevation in the tower; and, second, distributing it from that elevation, by gravity, through a conduit revolving at the point of connection with the hopper bin and having at least one swiveled elbow joint, whereby any desired point upon the selected horizontal plane can be reached for the gravity discharge of the material.

Callahan and Smith each showed, in his drawing, the complete apparatus; but Callahan made no claim to the feature of the double swiveled discharge pipe. Callahan's application was filed January 21, 1909; Smith's on February 23d of the same year. The Patent Office notified Callahan that his application seemed to conflict with another, and suggested to him some of the claims which Smith had made. Callahan adopted these claims, whereby an interference was declared. The substance of the issue is shown by count 1, which is given in the margin.[1] Upon this issue, Callahan conceded priority; judgment was rendered upon the concession; Callahan canceled these additional claims; and both patents issued. Both patents, by assignments, licenses, etc., became the property of the Concrete Appliances Company and Insley, and this suit was brought by them in the court below based upon alleged infringement of both patents. The above-quoted count 1 of the interference became claim 1 of the Smith patent, and is typical of those sued upon.

[1] "In a device for distributing concrete, means for elevating the concrete to a point above the work to be performed; a hopper adapted to receive the concrete so elevated; a primary distributing pipe revolubly mounted beneath the hopper; and a secondary distributing pipe revolubly mounted beneath the mouth of the first named pipe, substantially as described."

Claim 5 of the Callahan patent is here quoted,[2] and may be accepted as a statement of his invention said to be infringed. Claims 1, 2, and 13 are also declared upon.

Arthur M. Hood, of Indianapolis, Ind., for appellants.

F. E. Dennett, of Milwaukee, Wis., for appellees.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

DENISON, Circuit Judge (after stating the facts as above). [1, 2] It goes without saying that the Smith patent can get no advantage merely because it has been owned and commercially exploited along with the Callahan patent. Upon this record, Smith cannot claim to be the inventor of anything shown by Callahan's application, except as the latter is modified by the later concession of priority. The Callahan patent is not a part of the prior art, in the sense in which that phrase is used with reference only to publications, but the Smith patent, both as to anticipation and as to the presence of invention, must be judged upon the basis of which the earlier Callahan application is a part. Lemley v. Dobson-Evans Co., 243 Fed. 391, 156 C. C. A. 171. It must therefore be assumed, as against Smith, that the advance of his claim 1 consisted merely in taking the concrete elevating and distributing apparatus of Callahan and substituting for Callahan's simple discharging conduit, revolving only at the point of attachment to the receiving hopper, the compound discharging conduit consisting of two or more sections revolubly connected with each other.[3] We are not convinced that this advance involved any invention. Such a double swiveled conduit was a well-known expedient for the gravity conveying of any material which it was desired to discharge at selected points in a lower horizontal plane. It is obvious—at least when it is pointed out to us—that, with an inclined conduit revolving at its upper end, the lower end could be made to reach any desired point on the lower plane, either by changing the angle of inclination and modifying the length of the conduit, as by telescoping a section, or by adding a supplementary conduit revolubly connected with the lower end of the primary one. Neither form had been in use for concrete (before Callahan), but both forms were old for other purposes. The double swiveled form had been most highly developed in grain elevators, for distributing the grain from the elevated receiving bin to the several openings on the floor below, which indicated spouts leading to still lower storage bins.

If the matter were to be considered in the broadest sense, there

[2] "Claim 5. An apparatus for the purpose described, comprising a tower, a conduit extending laterally therefrom, a suitably supported horizontally movable boom carrying the conduit, said boom being adjustably connected with the tower and adapted to be arranged at various points in the height thereof, means for raising plastic material to the point desired in the height of the conduit [tower], and means for receiving plastic material from the raising means and conducting the same to the conduit; the said receiving and conducting means being adjustable in the direction of the height of the tower."

[3] We speak thus of Callahan's form, because of the necessary effect of the filing dates, the concession, and the form of the issued claims.

might be such distinctions between elevating and distributing grain and elevating and distributing concrete that transferring a device from one art to the other and making the necessary adaptation would involve invention. That need not be decided; but here Smith begins at the point where the elevation of the concrete is finished. He has then merely the question of gravity distribution. He finds that concrete has been distributed and grain has been distributed by a single unitary chute, swinging and turning at its upper end, and that grain has also been distributed by the double swiveled chute, thereby increasing the ability to select exactly the desired point for discharge. In the words which were used in Crown Co. v. Sterling Co., 217 Fed. 381, 133 C. C. A. 297, Callahan had already "bridged over whatever gap there was" between the art of concrete building and the art of gravity distribution, and the "door of opportunity was open" to all who wished to use in the former art an expedient well known in the latter. It seems to us quite clear that there is no invention in adding to the device of Callahan the well-known additional swiveled joint in the discharge conduit. It follows that those claims of the Smith patent sued upon are invalid, and the decree of the court below, which dismissed the bill as to this patent, must so far be affirmed.

[3] At the time these patentees appeared on the field concrete had already come into extensive use as a building material in connection with metallic reinforcements, and it had been found that it was suitable for buildings of all shapes and of many stories in height. When mixed of the proper consistency, it was called "mush" concrete, and to handle this material and deliver it efficiently at the place of use in a large building operation was a considerable problem. Various methods had been employed, but the one most approved consisted in raising it by elevator to the floor or level where it was to be used and there dumping it into wheelbarrows, by which it was conveyed to the various desired points of use upon that level. It occurred to Callahan that he could construct a tower, or skeleton elevator shaft, which should originally extend, or which, by successive additions, should be made to extend, well above the highest story of the proposed building; that he could attach to this tower, and make vertically adjustable thereon, a receiving bin or hopper carrying a downwardly inclined and revolubly connected discharge chute, which could be swung about to reach various points on the next lower level to that where the receiving bin was fixed; that this receiving bin and its discharging apparatus could be temporarily fixed, as the building advanced, at positions on the tower suitably elevated above each successive story; that the mush concrete could be elevated inside the tower to these various fixed positions and there dumped into the receiving bin; and that, in this way the mush concrete could be delivered in an approximately automatic way throughout the successive floors or levels of a building, no matter how high. Upon this record, this general thought was wholly novel. It has proved to be of great commercial value. It is common knowledge that, mostly within the period since the patent issued, reinforced concrete has largely superseded all other materials in the erection of large structures, and the

record shows that 80 or 90 per cent. of all the important construction work of this class in the country employs this Callahan method, and that all of the larger manufacturers of machinery and apparatus for this general purpose have taken licenses under the patent. It is not too much to say that the invention has played a large part in revolutionizing the building industry, and that it is not common for a patent in litigation to find itself supported by such a large measure of commercial merit and public acquiescence.

It is not contended that the patent is anticipated, in the strict sense of that term, but the defendant's position, approved by the court below, is that Callahan only put together old and familiar elements, and that his advance did not involve invention over what had gone before. To determine this question, we must know, first, the character of the relations between what was old and this new arrangement; and, second, whether his claims are properly characterized by reference to his real advance. To elevate material to a fixed and invariable height, and to distribute it therefrom by gravity, through a swinging, revolving chute, to different discharge spots upon a lower level, was common. As we have said, in considering the Smith patent, this was familiar in the class of grain elevators. The typical so-called grain elevator, or storage house, was a permanent structure, and grain was carried by various types of elevating apparatus to the permanent top floor or level. From the bottom of the bin there situated depended a swinging chute, which could be moved about so as to discharge, upon the floor below, into any storage bin opening from that level. These grain elevators, like others of similar type shown by the record, entirely lack the only substantial novelty claimed for Callahan. They did not have a temporary receiving bin or hopper with a connected discharge chute vertically adjustable in an elevator tower, adapted to distribute the material upon successive levels. If invention lies in this thought and its practical application, the grain elevators are not important.

Next we are cited to several examples of unloading apparatus for vessels, of which the English patent to Baillie, No. 10,380 of 1888, is as relevant as any. In this device, which was for transferring coal from a barge to the ship alongside, there was a receiving bin or hopper located in an elevated framework or staging on the barge, and from which a depending chute carried the material away by gravity to the proper bunker in the ship. The coal contents of the barge were raised to this point by an endless chain of buckets over an inclined mast or support pivoted to the vertical frame at its upper end. Evidently, as the contents of the hold of the vessel became lowered, this mast must be extended further down, or further to one side, and this could be done either by an extension of the lower end or by lowering the upper pivoted point. The patent shows both methods of adjustment. The bin and pivot could be lowered upon this supporting stage a short distance—not more than the height of the bin. The point of final delivery was not changed. Such vertical adjustability as there was in the bin was incidental to raising and lowering the whole "tower" to accommodate it to the point where elevation be-

gan. We do not find here any substantial disclosure of the real novelty of Callahan's invention, as above stated.

This leaves for consideration only the patent to Theiss et al., No. 866,166, of September 17, 1907. It is not to be doubted that this is suggestive of the idea and the apparatus of Callahan; whether it is more than a mere suggestion is the question. Theiss' apparatus, like Baillie's, was intended for unloading coal from a barge and loading it into the hold of a ship. It consisted essentially of a tower-shaped structure permanently erected upon the deck of a barge or scow. It was intended to reach a distance substantially higher than the coal-receiving hatchways of the particular ship which might be selected to be served; there was never occasion to make it any higher. This tower carried an elevator car or skip which was loaded with coal when it was at the bottom of the tower, and then was elevated as far as necessary to be dumped into a receiving bin, which bin was capable of vertical adjustment on the tower. This receiving bin in turn dumped into a chute, which, at its lower end, discharged through the hatchway of the vessel to be loaded. This chute was not revolubly connected with the bin or tower. It could not be moved laterally. It was carried, by the tower, in ways or guides which gave the chute its inclination and permitted it to slide therein longitudinally. There was a permitted adjustment of the guide by which the angle of inclination could be changed, but this was done by releasing and readjusting and refastening the guideways, and could not be done as a part of the operation of the device while in use.

The adjustment and fixing of the chute, in order to discharge into a desired hatchway, was a complicated matter. First, the carrying scow must be so positioned and fastened with reference to the ship that the tower was exactly opposite the hatchway. Second, the receiving bin and the chute must be adjusted vertically in the tower at such a position that the chute, in its carrying guides, would be pointed at the hatchway. Third, the chute must be slid downward and outward, in the direction at which it was pointed, until its lower end entered the hatchway. If, then, it was next desired to reach another hatchway on the same transverse line, the vertical adjustment of the bin and the chute carrier, and the aiming of the chute at the new hatchway and its longitudinal extension into contact therewith, must be repeated. If it were desired to reach hatchways further forward or aft, the scow and its entire apparatus must be released and floated alongside the ship to its new position. In the broadest sense, this patent shows a plan of elevating material to an adjustable vertical height, and from there distributing it by gravity to selected positions upon a lower level; but it shows this idea in a very rudimentary form. It would be practically useless, for the purposes now involved.

In details of construction and of claim reading, there is ample differentiation. Claim 5 of Callahan, above quoted, will not read on Theiss. A comparison of the Theiss apparatus with this claim shows: (a) That the Theiss apparatus is not "for the purpose described," in any restricted sense of that phrase. (b) That Theiss has a relatively short supporting framework, rather than a relatively high and

distinctive tower. (c) That, while Theiss has "a conduit," it does not "extend laterally therefrom," excepting in the most general sense. (d) That Theiss has no "suitably supported horizontally movable boom carrying the conduit," nor anything which approximates such a boom. (e) That, since he has no boom at all, of course he has no boom "adjustably connected with the tower and adapted to be arranged at the various points of the height thereof"; but it must be said that Theiss' conduit itself has this vertically adjustable connection with the tower. (f) The remaining elements of the claim are literally met well enough by Theiss, save for the distinction as to their use with plastic material.

[4] The question presented by Theiss seems not to be one merely of double use, because the structural differences are too great; but, if the physical resemblance were much closer, the defense of double use would be far from satisfactory. See Ansonia Co. v. Electrical Co., 144 U. S. 11, 18, 12 Sup. Ct. 601, 36 L. Ed. 327; Potts v. Creager, 155 U. S. 597, 606–608, 15 Sup. Ct. 194, 39 L. Ed. 275; Hobbs v. Beach, 180 U. S. 383, 390, 21 Sup. Ct. 409, 45 L. Ed. 586; Gold v. Newton (C. C. A. 2) 254 Fed. 824, 827, 166 C. C. A. 270. Certainly, the art of loading coal into a ship for fuel is not the same art as that of distributing wet concrete to a building structure; nor is the analogy very close. It is not at all certain, even if probable, that an experienced building engineer, considering methods of handling wet concrete for a skyscraper, would call to mind a coal-handling apparatus on a harbor scow. On the other hand, it impresses us as a bold and original thought that this material could be handled in this way. Distributing mush concrete through gravity chutes by one apparatus throughout the whole course of building obviously involved difficulties; it had never been handled by gravity chutes at all, excepting under simple conditions where these difficulties did not exist, and then, perhaps, had been done only on paper. On one side was the danger that it would adhere to the chutes and set and choke up the pipes, at least at the valves and gates; on the other side, the risk that the elements would disintegrate, and the water and the cement and the broken stone fall in separate strata.

Callahan's conception, that this material could be thus treated so as to deliver it from the ground all about the successive several floors of a high building and with practically no manual labor, except that involved in the story by story adjustment of the apparatus, involved, we think, inventive thought of a high order, when accompanied as it was by the devising of suitable apparatus to carry out the thought, which apparatus substantially differed from anything which had ever been constructed for any purpose, although every element was old. It is true, in a sense, that the Callahan device is produced upon the basis of Theiss' structure by substituting for the longitudinally sliding and extensible delivery chute of Theiss, the revolubly mounted chute of the grain elevators; but this is not the whole truth. Callahan built up his tower to a height never thought of by Theiss, and which Theiss could not have accomplished without capsizing his barge; and Callahan supplied a chute-supporting boom

attached to the receiving hopper and vertically adjustable with it, a feature which the grain elevators did not have and could not have used. He thereby laid the basis for adapting the structure to use fairly distinct from that of either a coal elevator or a grain elevator.

As upon every such question, there is no authoritative decision which compels one or the other conclusion. The doubtful inference is rather one of fact; but we select and refer to a few instances where invention has been found—by the Supreme Court or by this court—and the facts of which may well be thought to present no stronger inferences in its favor than do those of the instant case: Loom Co. v. Higgins, 105 U. S. 581, 590, 26 L. Ed. 1177; Hobbs v. Beach, 180 U. S. 383, 393, 21 Sup. Ct. 409, 45 L. Ed. 586; Expanded Metal Co. v. Bradford, 214 U. S. 366, 381, 29 Sup. Ct. 652, 53 L. Ed. 1034; National Co. v. Aiken, 163 Fed. 254, 259, 91 C. C. A. 114; Warren v. Owosso, 166 Fed. 309, 92 C. C. A. 227; Morgan Co. v. Alliance Co., 176 Fed. 100, 109, 100 C. C. A. 30; Ferro-Concrete Co. v. Concrete Co., 206 Fed. 666, 124 C. C. A. 466; International Co. v. Sievert, 213 Fed. 225, 129 C. C. A. 569.

[5] The test of the presence of invention in a new assembly of old elements is sometimes said to be whether a new result is accomplished. This is often not a helpful rule, because its application involves definition of the phrase "new result," and this opens the original difficulty. Within a narrow definition, every new combination of old elements gets a new result; but this is not the sense in which the phrase is rightly used as indicative of invention. The recent opinion of this court in Huebner Co. v. Matthews Co., 253 Fed. 435, 165 C. C. A. 177, illustrates this situation. The ultimate practical result at which the patentee and his predecessors aimed was to carry packages by gravity upon a runway from one place to another. The patentee was the first to accomplish this with such a degree of efficiency as to make the device commercially popular; but the same result, except in efficiency degree, had several times been reached before, and by apparatus so similar as to be superficially indistinguishable. The patentee had simply added the well-known and common mechanical refinements and expedients already used by others, even in the same art—e. g., he used roller bearings, instead of ordinary journal boxes—and we declined to regard this as a new result. We have no intention to depart from that line of our recent decisions [4] of which this one is typical; such refinements are not inventions. On the other hand, we recall no instance of combinations of old elements which has been held to produce "a new result" in a patentable sense and which better deserves that commendation than does Callahan's. The quasi automatic elevation and distribution of wet concrete under the varying conditions of progressive building and by a single apparatus was an entire novelty. No one had tried to do it; apparently, no one had thought of it; it was useful in a very high degree; and when we

[4] Berger Co. v. Trussed Co., 257 Fed. 741, — C. C. A. —; Edwards v. Dayton Co., 257 Fed. 980, — C. C. A. —; Van Dorn Co. v. Mathis Co., 260 Fed. 400, — C. C. A. —.

find a new result in this complete and extreme sense accomplished by a confessedly new combination—though of known means—we think both the purpose of the patent law and the rightful application of the decisions thereunder require that it should be awarded the merit of invention.

[6] We have stated our conclusion that the device of the patent is not an aggregation in the sense that it represents such a mere assembling of old elements as might have been made by the exercise of only ordinary skill. It is at least equally clear that the device is not an aggregation in the more technical sense of the word, but is rather a true combination. It is true that the use of the apparatus involves successive steps, and is at each of its stages under direct or indirect manual control; but in a fair sense the entire operation of elevating and distributing the concrete is a unitary thing. From the time it starts on its journey from the ground to the time it is deposited in the forms, its progress might well be automatic. There is clear distinction between this performance and that of the associated washing and wringing machines, discussed by the Supreme Court in Grinnell Co. v. Johnson Co., 247 U. S. 426, 38 Sup. Ct. 547, 62 L. Ed. 1196. In the latter case, both the judgment and the hand of the operator were involved, in submitting to the second operation the material which had finished the first; the juxtaposition of the two machines was a mere matter of convenience. In the present case, the operator can, at the most, only interfere to prevent the otherwise normal completion or second part of what is intended to be the unitary work; and even then his interference will only temporarily stay the normal action. We collected and commented on the decisions of the Supreme Court and other courts on this subject in Gas Co. v. United Co., 228 Fed. 684, 143 C. C. A. 206. Callahan's patent should not be condemned as an aggregation.

We do not overlook the fact that some, and perhaps a considerable portion, of the practical and commercial success has been due to the use of the feature covered by the Smith patent; but this does not detract from the patentable and inventive merit of Callahan's idea. An oscillating or swinging chute, even without Smith's secondary swivel, would make the primary distribution of the concrete throughout the floor or level, leaving the secondary and more accurate distribution to be accomplished by further means. We have held that the particular means adopted by Smith did not involve invention, and we can hardly say that much of the credit due to public use should be taken away from Callahan, because he had not himself adopted an improvement and refinement which, however important to commercial success, was within the grasp of the men ordinarily skilled in the art.

We have considered claim 5. Claims 1, 2, and 13, also in suit, use more general terms and are superficially somewhat broader; but we think, in connection with the specification, they necessarily intend that the means for receiving the concrete from the raising means and taking it to the conduit are vertically adjustable in the tower. This may fairly be implied from the requirement that the material is to be

raised to a "suitable point" in the tower. It is then seen that all these claims involve what we have thought Callahan's meritorious invention, resting upon the successive story by story operation of the device. With this interpretation, they are not very different from claim 5, but should be treated as other expressions of the same thought in terms nominally of somewhat broader equivalency. These claims, also, should be considered valid.

Infringement is not denied.

The decree below, as entered, must be set aside, and the record remanded for a new decree, modified in accordance with this opinion.

On Petition for Rehearing.

[7] The application for rehearing brings to our attention a matter not mentioned in the opinion. We selected claim 5 as the one most suitable for study, because it expressly incorporated those features in which we thought patentable novelty was to be found. One of these features was the horizontally movable boom carrying the conduit, and "being adjustably connected with the tower and adapted to be arranged at various positions in the height thereof." We assumed that this referred to a vertical adjustment of the boom in the tower. The assumption is now challenged, because it is said that the adjustable connection between the boom and the tower was that mechanism which provided for a horizontal adjustment of the upper end of the boom on a horizontal track (which defendant has not used), and that the provision for vertical change of the boom in the tower is not adjustability, but rather refers to a disassembling of the parts in one location and reassembling them in another. It is true that the specification refers to a horizontal adjustability, but we do not think that it is this capacity to which claim 5 refers—at any rate, this inference is not clear enough to justify limiting the claim to a comparatively unimportant detail. Such an inference is contradicted, both by the fact that this horizontal adjustability of the boom on the tower is made the special characteristic of a group of claims not in suit, and by the fact that the thought is stated in the claim in immediate connection with the reference to "various points in the height" of the tower, and after one reference has been made to the horizontal motion of the boom and the reference to that function apparently finished, while the draftsman turned to the thought of vertical change. It is true, also, that in the form of the invention shown in the drawings, and specifically described, the vertical change was to be made by taking out bolts, removing the horizontal platform, raising it, and bolting it again to a new position, and that this is not adjustability in the most precise definition. However, it is well within the sense in which the word is very often used, and we must define it as the patentee intended. For these reasons we adhere to the interpretation of the claim in this respect which the opinion assumed.

It is also true enough that Callahan specifically contemplated building his tower up section by section, as the building progressed; but this was a matter of preference. His drawing shows the completed tower,

permitting operation anywhere along its height, and observation of his plan of erection does not change our conception of the real disclosure.

In other respects, further review of the case leaves our stated conclusions unchanged, and the application for rehearing will be disallowed.

SCOTT & WILLIAMS v. HEMPHILL MFG. CO.

(Circuit Court of Appeals, First Circuit. February 18, 1920.)

No. 1379.

PATENTS ⊜328—FOR IMPROVEMENT IN KNITTING MACHINE HELD INVALID, AND NOT INFRINGED, IF VALID.

Claims 20–32, inclusive, of the Wardwell patent, No. 649,021, for improvements in knitting machines, *held* invalid for want of invention, and not infringed, if valid, and claim 36 invalid for anticipation.

Appeal from the District Court of the United States for the District of Rhode Island; Arthur L. Brown, Judge.

Suit by Scott & Williams, Incorporated, against the Hemphill Manufacturing Company. From a decree dismissing the bill (247 Fed. 540), plaintiff appeals. Affirmed.

Hubert Howson, of New York City, and Frederick P. Fish, of Boston, Mass. (Howson & Howson, of New York City, on the brief), for appellant.

Frederick L. Emery, of Boston, Mass. (James H. Thurston, of Providence, R. I., on the brief), for appellee.

Before BINGHAM, JOHNSON, and ANDERSON, Circuit Judges.

BINGHAM, Circuit Judge. This is an appeal from a decree of the District Court for Rhode Island in an equity suit charging infringement of letters patent No. 649,021, issued to C. J. A. Wardwell May 8, 1900, for improvements in knitting machines, and now owned by the plaintiff. The defenses are anticipation, noninvention, noninfringement, and laches.

There are five claims in issue. They all relate to certain mechanism in knitting machines, whereby the variations in the knitting of a stocking are automatically produced, and more particularly to alleged improvements in old mechanism for producing these variations automatically; they do not provide automatic action for effecting these changes for the first time.

Claim 29, which is typical of claims 29 to 32, inclusive, is as follows:

"29. A knitting machine organized so as to knit in circular and reciprocating courses and to produce stockings having seamless heels and toes, said machine having, in combination, a time shaft which moves from time to time and by intervening mechanism controls the variations in the knitting, said time shaft being given from time to time an intermittent step by step motion and a movement through a greater extent than that of its usual steps, and automatic means controlled by a pattern mechanism for moving said time shaft, substantially as set forth."

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

In the court below the bill was dismissed. It was there pointed out that claims 29 to 32 embodied an old mechanical motion as their special feature, and it was held (1) that if Wardwell was the first to use this old mechanical motion in machines for the automatic knitting of stockings, its introduction did not involve invention, but related to a mechanical detail of construction; and (2) if its introduction involved invention and rendered the claims valid, they must be limited to the structure disclosed; that, thus limited, the comparison upon the question of infringement would be, not of movements produced, but of means whereby the plaintiff and defendant in their respective machines produced the movements; and that, when so compared, the defendant did not infringe these claims.

Claim 36 reads as follows:

"36. A knitting machine having, in combination, a time shaft; a ratchet loose on said shaft; a chain wheel movable with said ratchet; a pattern chain engaging said chain wheel; a ratchet wheel fast to the time shaft; a pawl engaging said loose ratchet wheel to impart a step by step movement to said pattern chain; a pawl engaging said fast ratchet to give a step by step movement to the time shaft; a lifter engaging said fast ratchet pawl to normally hold it out of co-operation with said fast ratchet, and adapted to drop when a variation in the pattern chain co-operates therewith, thereby permitting said pawl to engage its fast ratchet wheel, substantially as set forth."

This claim omits the long movement of claims 29 to 32. In the opinion of the court below it is pointed out that the special feature of the combination of this claim is "a lifter engaging said fast ratchet pawl to normally hold it out of co-operation with said fast ratchet, and adapted to drop when a variation in the pattern chain co-operates therewith, thereby permitting said pawl to engage its fast ratchet wheel," and, after showing that the prior art discloses machines embodying means to perform the same function and in substantially the same way, it was held that this claim also related rather to a detail in machine building than to any novel and inventive idea peculiar to knitting machines, and that, if the claim could be sustained as valid, it was only by limiting it to the particular construction shown, and, so limited, was not infringed.

After giving careful consideration to the arguments and briefs of counsel and having made an extended examination of the state of the art as presented by the record, we are of the opinion that the court below was right in dismissing the bill, so far as concerns claims 29 to 32, and for the reasons stated in its opinion.

As to claim 36, we think it is anticipated by letters patent No. 508,965, granted to McMichael & Wildman, November 21, 1893. Every element embodied in this claim is disclosed in the McMichael & Wildman patent. It is true that the lifter in the latter machine is made integral with the fast ratchet pawl, while Wardwell's lifter is constructed as a separate part; but the claim is such that a lifter of either construction answers its requirements. If a lifter integral with the pawl would not answer the requirements of claim 29, that is unimportant, for claim 36 does not contain the long movement embodied in claim 29.

Regarding claim 36 as invalid, because of anticipation, we think the bill was properly dismissed as to this claim also.

The decree of the District Court is affirmed, with costs to the appellee.

DE VRY CORPORATION v. ACME MOTION PICTURE PROJECTOR CO.

(Circuit Court of Appeals, Seventh Circuit. January 6, 1920.)

No. 2715.

PATENTS ⊜328—FOR MOVING PICTURE MACHINE VOID FOR LACK OF INVENTION.

The Lockwood patent, No. 929,678, for an improvement in apparatus for exhibiting moving pictures, consisting of a rotary fan for ventilating the moving picture cabinet when in use, to prevent the film from being subjected to excessive heat, *held* void for lack of novelty and invention.

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

Suit by the De Vry Corporation against the Acme Motion Picture Projector Company. Decree for defendant, and complainant appeals. Affirmed.

Fred Gerlach, of Chicago, Ill., for appellant.

Luther Johns, of Chicago, Ill., for appellee.

Before BAKER, EVANS, and PAGE, Circuit Judges.

BAKER, Circuit Judge. This is an appeal from a decree dismissing for want of equity the appellant's bill for alleged infringement of patent No. 929,678, issued on August 3, 1909, to Lockwood for improvements in apparatus for exhibiting moving pictures. The decree followed a ruling sustaining appellee's motion to dismiss, which was in the nature of a general demurrer.

Claims 14, 15, and 16 were the only ones counted on in the bill. As these claims are all of the same effect so far as determining the correctness of the ruling on demurrer is concerned, only one of them is subjoined.

"16. In an apparatus for exhibiting moving pictures, the combination with a cabinet having a picture film therein, of a light and a light condenser therein, an inclosing casing for said lamp and condenser, and a rotary fan for withdrawing the heated air from said casing and discharging it without said cabinet."

In his specification the applicant acknowledged that the motion picture cabinet, with its necessary projecting means, was old in the art. He noted that the pictures are printed on a highly inflammable film of celluloid. "To guard against the possibility of igniting the inflammable film," he said, "I have provided a ventilating apparatus by means of which the air heated by the lamp and in the projector is withdrawn and discharged from the cabinet. As shown, this comprises a rotary fan driven by the motor and which is connected to the casing surrounding the lamp and containing the light condenser; and the fan is

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

connected with a conduit for discharging the hot air out of the cabinet. Thus the temperature within the chamber is prevented from rising to the danger point."

In Lange v. McGuin, 177 Fed. 219, 101 C. C. A. 389, we spoke of the demurrer in equity pleading in this way:

"It is not the province of a demurrer to speak of matters beyond the bill. Of course, every bill is written against the background of common knowledge; and in that view a demurrer may be said to invite the chancellor to take judicial notice of the background. But if a bill, in and by its own averments, states a prima facie case, that case cannot properly be overthrown by the chancellor merely on the ground that he judicially knows of facts that would support an answer. His judicial knowledge must go farther, and be so broad and all-embracing that he can properly hold that no facts exist that would tend to controvert the supposed answer and support a replication and the bill. This is so because, if such facts exist, the complainant is entitled to a hearing where he can present and argue the facts, and such a hearing cannot be had on demurrer to the bill."

Under that rule we upheld bills against demurrers in Westrumite Co. v. Commissioners, 174 Fed. 144, 98 C. C. A. 178, and Krell Piano Co. v. Storey & Clark Co., 207 Fed. 946, 125 C. C. A. 394, Wright v. Wisconsin Lime & Cement Co., 239 Fed. 534, 152 C. C. A. 412, and sustained demurrers to bills in Chas. Boldt Co. v. Turner Bros. Co., 199 Fed. 139, 117 C. C. A. 621, and Bronk v. Chas. H. Scott Co., 211 Fed. 338, 128 C. C. A. 17.

In the present case the claims in suit and the specification explanatory thereof make it clear that Lockwood contributed nothing to the strict art of projecting moving pictures, and that his improvement consisted in ventilating by means of a rotary fan the moving picture cabinet in order to prevent the inflammable film from being subjected to excessive heat. If invention may be predicated upon that act, then any one could obtain a monopoly of the use of a ventilating fan in every cabinet or box or room into which he put a different apparatus, or in which existed a different condition on account of which he desired ventilation for a different purpose. Jones v. Cyphers, 126 Fed. 753, 62 C. C. A. 21; Baker v. Duncombe Mfg. Co., 146 Fed. 744, 77 C. C. A. 234; Voightmann v. Perkinson, 138 Fed. 56, 70 C. C. A. 482; National Regulator Co. v. Powers Regulator Co., 160 Fed. 460, 87 C. C. A. 444; Alexander v. De Moulin Bros. & Co., 199 Fed. 145, 117 C. C. A. 627.

The decree is affirmed.

BURGESS BATTERY CO. v. NOVO MFG. CO., Inc.

(Circuit Court of Appeals, Second Circuit. November 20, 1919.)

No. 31.

PATENTS ⊂=328—FOR ELECTRIC HAND LAMP VOID FOR LACK OF INVENTION.

The Burgess patent, No. 1,084,926, for an electric hand lamp, claim 4, *held* void for lack of invention, in view of the prior art.

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

Suit in equity by the Burgess Battery Company against the Novo Manufacturing Company, Incorporated. Decree for complainant, and defendant appeals. Reversed.

Action is upon a single claim (No. 4) of the Burgess patent, No. 1,084,926, for an electric hand lamp or flashlight. The claim in suit is as follows:

"In a tubular hand lamp, the combination of an insulating casing, batteries therein, a lamp at one end of said casing, a closure for the other end of said casing, said closure carrying a spring for establishing connection with said batteries, a reflector for said lamp, a contact device near the center of said casing, conductors leading from said contact device to said reflector and to said spring, respectively, a lens for said lamp and *a lens support enveloping said reflector and its conductor and insulated therefrom* to prevent accidental lighting of the lamp through accidental connection of those parts with other parts of the device."

The trial court sustained the patent. Defendants appealed.

Drury W. Cooper and William F. Nickel, both of New York City, for appellant.

Pennie, Davis, Marvin & Edmonds, of New York City (Arba B. Marvin and W. B. Morton, both of New York City, of counsel), for appellee.

Before WARD, ROGERS, and HOUGH, Circuit Judges.

HOUGH, Circuit Judge (after stating the facts as above). Invention is asserted in respect of the above claim because the patentee overcame accidental short-circuiting in lamps having a tubular fiber casing, but with metal ends. The specification dwells on the point thus:

"There is no exposed part [of the lamp] which can be accidentally connected to any other part to cause inadvertent lighting of the lamp. This is an important feature, for it has often happened with other lamps of this general type that when placed in a box or bag with tools, or thrown into a wire mail basket, the lamp would light up with its thumb contactor open, and thus might completely wear out its batteries to no useful purpose."

The disclosed means for accomplishing this desirable result consist (in the language of the above claim) of "a lens support enveloping said reflector and its conductor and insulated therefrom," so that if by accident a continuous strip of conducting metal touches both the metallic ends of the fibrous and non-conducting lamp case, the circuit would still be incomplete.

But lamps with casings wholly of conducting metal were old, and such lamps (as was said below in another case on the same patent) were "in a wire basket all the time," yet by this same device of insulating

the reflector and its conductor wastage was prevented. Lobel, British, 9,050 of 1911. The embodiment of the claim in suit is substantially the lamp of Patterson, 807,860, plus the insulation of Lobel, supra.

Appellee urges that a new combination of the oldest elements productive of a new result is patentable invention. It may be invention, but that question of fact cannot be resolved in favor of such a patentee, without considering other matters equally pertinent to solution.

The question here important is whether it required anything more than the skill of a mechanic electrician to use for the prevention of accidental short-circuiting in a fiber-cased lamp, the well-known insulation of a metal-cased lamp. We hold that it did not as matter of fact. Approved methods of reasoning on such a matter are well illustrated in Herzog v. Chas. Keller & Co., 234 Fed. 85, 148 C. C. A. 101, and Æolian Co. v. Wanamaker, 234 Fed. 90, 148 C. C. A. 106. This patent contains claims not in suit, covering the feature of a focusing reflector, as to which we, of course, can express no opinion.

We therefore confine decision to finding no invention in the claim in suit, and direct that the decree appealed from be reversed, with costs, and the case remitted, with directions to dismiss the bill, with costs in the court below.

JAY et al. v. WEINBERG et al.*

(Circuit Court of Appeals, Seventh Circuit. April 29, 1919. Rehearing Denied December 5, 1919.)

No. 2646.

1. PATENTS ⊂=328—INFRINGEMENT; VACUUM SUCTION DEVICE.
The Higginson & Arundel patent, No. 1,067,814, and the Jay patents, No. 1,132,273 and No. 1,134,457, for vacuum suction devices for raising gasoline in an automobile from a main tank below the level of the carburetor to a secondary tank, *held* limited to the specific means shown, and, as so construed, not infringed.

2. PATENTS ⊂=174—LIMITATION OF IMPROVEMENT PATENTS.
Where the general art has been developed by pioneers, there is room for an adapter to have only a specific patent for his particular form of adaptation, and he is not privileged to exclude others from gleaning in the same open field.

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

Suit in equity by Webb Jay and the Stewart-Warner Speedometer Corporation against Frederick Weinberg and the Auto Parts Company. Decree for defendants, and complainants appeal. Affirmed.

For opinion below, see 250 Fed. 469.

Charles Burton, of Edwardsville, Ill., and George L. Wilkinson, of Chicago, Ill., for appellants.

R. A. Parker, for appellees.

Before BAKER, Circuit Judge, and LANDIS and ENGLISH, District Judges.

⊂=For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes
*Certiorari denied 251 U. S. —, 40 Sup. Ct. 396, 64 L. Ed. —.

BAKER, Circuit Judge. This is an appeal from a final decree dismissing appellants' bill for infringement of the Higginson and Arundel patent, No. 1,067,814, and the Jay patents, Nos. 1,132,273 and 1,134,457, for vacuum suction means of raising gasoline in an automobile from a main tank below the level of the carburetor into a secondary tank from which gasoline flows to the carburetor by gravity.

[1] The trial court found that in the water-elevating art the principle of operation whereby a fluid is lifted by vacuum suction and discharged by gravity, and the general combinations of mechanical means for attaining the result, were old and well known long before appellants' patentees began their labors; that appellants' patentees, starting from this common ground, had made certain specific improvements which they were entitled to have protected; that the appellees, operating under Weinberg's patent No. 1,229,360, had started from the same common ground and had made certain specific improvements; and that appellees' improvements do not overlap any of appellants'.

Consideration of the record, briefs, and oral argument, has led us to approve the findings of the trial court and the reasons therefor as expressed at length in Jay v. Weinberg (D. C.) 250 Fed. 469.

The exigencies of the case have caused appellants to contend that—

"The water-elevating art is too remote from the internal combustion engine art to warrant imputing knowledge of expedients in the former to persons engaged in the latter art."

No problem of the internal combustion engine is present. To the gravity-fed carburetor it is immaterial where the feed tank gets its supply. So appellants' insistence is that the art of elevating water from a lower to a higher reservoir is not analogous to the art of elevating gasoline from a lower to a higher reservoir. We agree that the arts are not analogous; they are identical.

[2] Where the general art has been developed by the pioneers, there is room for an adapter to have only a specific patent for his particular form of adaptation, and he is not privileged to exclude others from gleaning in the same open field. Loew Supply Co. v. Fred Miller Brewing Co., 138 Fed. 886, 71 C. C. A. 266.

The decree is affirmed.

DUPRE v. DENISON et al.

(District Court, N. D. New York. February 23, 1920.)

INJUNCTION ⊂=174—CONTINUANCE OF TEMPORARY INJUNCTION IN SUIT OVER OWNERSHIP OF PATENT DENIED.

A temporary injunction restraining an assignee of a patent from disposing of rights thereunder or issuing licenses will not be continued on the unsupported affidavit of plaintiff that he was induced to sign the assignment by misrepresentations that it was a power of attorney, where he concedes that he read the instrument and the misrepresentations are denied by counter affidavits.

In Equity. Suit by William H. Dupre against Howard P. Denison and another. On motion to continue a temporary injunction. Motion denied.

Motion to continue an injunction restraining the defendants from disposing of rights under or granting licenses to use a certain patent originally granted to William H. Dupre, letters patent No. 927,337, dated July 6, 1909, for "lubricating means."

James F. Hubbell, of Utica, N. Y. (Charles B. Mason, of Utica, N. Y., of counsel), for complainant.

Eugene A. Thompson, of Syracuse, N. Y. (Le Roy B. Williams, of Syracuse, N. Y., of counsel), for defendants.

RAY, District Judge. On the complaint and the affidavit of the plaintiff an order was made by me on or about December 22, 1919, temporarily enjoining the defendants from incumbering by licenses or otherwise the title to the patent mentioned in the moving papers, and which was originally issued to the plaintiff in this action, who resides at Vicksburg, state of Mississippi. Such order required the defendants to show cause December 31, 1919, why such injunction order should not be continued during the pendency of this action and until it is finally determined. The defendants have filed certain affidavits, which deny substantially all the material allegations of the moving papers.

The plaintiff contends that the defendant Denison came to his place of business in the city of Vicksburg, state of Mississippi, on the 7th of November, 1919, and in substance represented that he desired and would be willing to become the agent of the plaintiff for the purpose of selling rights to use the patent above referred to, and that said Denison finally induced him to sign a paper which the plaintiff supposed was a power of attorney giving Denison the right to sell rights under said patent as agent for the plaintiff, and that, believing he was signing such a power of attorney, he executed and acknowledged the instrument which turned out to be an assignment to the Bowen Products Corporation, of the City of Syracuse, N. Y., of the said letters patent and of all rights thereunder. The paper executed by Dupre on the 7th of November, 1919, was acknowledged before John Howard, a notary public of the county of Warren, city of Vicksburg, state of Mississippi, and the acknowledgment bears the seal of said Howard. This assign-

ment was recorded in the United States Patent Office November 15, 1919.

The defendants contend that Mr. Denison went to Mr. Dupre at the time the assignment was executed for the purpose of purchasing the patent; that there was no misrepresentation, and no statement by Mr. Denison to the effect that he desired to become or would become the agent of Dupre in disposing of rights under such patent; that Dupre showed a perfect willingness to dispose of his rights in the said patent; and that Mr. Denison, in behalf of the Bowen Products Corporation, which he represented, purchased the said patent for the sum of $500 and paid the consideration at the time. Dupre concedes that he read the instrument which he signed on the day in question. There is no pretense he was in any way prevented from reading it, or ascertaining fully the contents of such instrument. Mr. Howard, who took the acknowledgment of Mr. Dupre to the assignment of the patent November 7, 1919, does not make any affidavit on the subject. No one makes affidavit to the effect that Mr. Denison represented to Dupre that the instrument signed by Dupre was other than it purported to be; that is, an assignment of the patent and of all rights thereunder. I do not think the complaint and sustaining affidavits, the allegations of which are supported by the affidavits of Dupre alone, an interested party, are sufficient to overcome the denials of Mr. Denison, or to justify an injunction as prayed for.

There will be an order denying the motion.

LOCKPORT GLASS CO. v. H. L. DIXON CO.

(District Court, W. D. Pennsylvania. February 27, 1919.)

No. 2104.

REMOVAL OF CAUSES ⊂=14—CAUSE CANNOT BE REMOVED INTO DISTRICT IN ANOTHER STATE.

Judicial Code, § 29 (Comp. St. § 1011), which alone prescribes procedure for removal of causes, made removable by section 28 (Comp. St. § 1010) "into the district court for the proper district," by providing that the petition shall be "for the removal of such suit into the District Court to be held in the district where such suit is pending," expresses the legislative meaning of the term "proper district," as used in section 28, and there is no authority for removal of a cause from a state court into a federal court of a district in a different state.

At Law. Action by the Lockport Glass Company against the H. L. Dixon Company. On motion to remand to state court. Granted.

George C. Lewis, of Lockport, N. Y. (Patterson, Crawford, Miller & Arensberg, of Pittsburgh, Pa., of counsel), for plaintiff.

Reed, Smith, Shaw & Beal, of Pittsburgh, Pa., and Locke, Babcock, Spratt & Hallister, of Buffalo, N. Y., for defendant.

ORR, District Judge. This case comes before the court upon a motion to remand. The plaintiff is a corporation of the state of New

Jersey. The defendant is a corporation of the state of Pennsylvania. The suit was brought in the Supreme Court of the state of New York, and upon the application of the defendant to that court the cause was removed to this court.

Plaintiff's motion to remand must prevail. While this court would have had jurisdiction, had the action been brought originally in this court, yet, inasmuch as the action was brought in the Supreme Court of the state of New York, this court has no jurisdiction by virtue of the proceedings whereby the case was removed here. The Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1087) provides in chapter 3 for the removal of causes from the state courts to federal tribunals. The Code provides, not only for classes of cases wherein removal may be effected, but also provides the process for effecting removals. In section 28 (Comp. St. § 1010) the classes of cases (with some exceptions found in other provisions of the statutes) are set forth. In section 29 (Comp. St. § 1011) the process which must be followed is declared. In defining the classes, the statute provides that suits within such classes "may be removed by the defendant or defendants therein to the District Court of the United States for the proper district."

The words "proper district" have given rise to a diversity of opinion. Some cases have held that they mean any district of the United States in which the action could have been brought originally, and that therefore a removal from a state court to a District Court situate in another state can be had, because the suit could have been brought in the latter. The unreasonableness of such a construction must appear in the light of the application of such construction to extreme cases. Suppose a citizen of New Jersey has been aggrieved by a citizen of California, and immediately thereafter brings his action of tort in the state court of New York, where the offense was committed, and parties and witnesses are there to be conveniently found. The defendant, under such a construction of the words "proper district," would be entitled to have the cause removed to the District Court of the United States for the Southern District of California, if he were a citizen of Los Angeles. Again, if proceedings were instituted by a citizen of New Jersey in a state court of Pennsylvania, and immediately there was an attachment of personal property, the defendant and owner of the property, if he were a citizen of the Southern district of California, might remove the action to that district. Such cases, however, cannot arise if there is kept in mind the fact that the words "proper district" are only in the provisions of the statute which determine the classes of cases which may be removed.

When an examination of section 29 of the Judicial Code is made, we find the procedure for the removal of causes set forth in detail, and such procedure must be followed in every case of every class for the removal of which section 28 has provided, and those requirements show what is meant in the statute by the words "proper district." The petition must be presented by the defendant to the state court in the suit therein pending, within a time limited by the law governing such court for filing an answer or plea, and such petition must be, in the language of the act, "for the removal of such suit into the District Court to

be held in the district where such suit is pending." In that language is found the expression of the legislative mind that the "proper district" of section 28 is the district in which such suit is pending. A suit pending in the state court of New York, or a suit pending in the state court of Pennsylvania, cannot be held to be pending in the Southern district of California. The present action was pending in the state of New York at the time the petition for removal was filed. In no way can it be deemed to have been pending in the Western district of Pennsylvania.

The distinction has not always been maintained, in the decisions upon the sections of the Judicial Code just referred to, between what may be the "proper district" in which the plaintiff might have brought his action and the "proper district" for the removal of the action already brought. This is apparent when we consider that Congress has never repealed the Conformity Statute (section 914 of the Revised Statutes [Comp. St. § 1537]), requiring practice, pleadings, forms, and modes of proceeding in civil causes, other than equity and admiralty causes, to conform, as near as may be, to the practice, pleadings, forms, and mode of proceeding existing at the time in like causes in courts of record of the state within which such Circuit or District Courts are held.

It is not difficult to conceive of the existence in different states of a different practice, of different forms of pleading, and different modes of proceeding. If a suit should be removed from one state to a District court of a district in another state, the practice, pleadings, forms, and modes of procedure adopted by the plaintiff before removal might not be in conformity with those of the state in which the District Court to which the removal is had performed its judicial functions. Again, referring to the procedure for removal as found only in section 29 aforesaid, we find that the certified copy of the record shall be entered in the District Court within 30 days, and "the parties so removing the said cause shall, within thirty days thereafter, plead, answer, or demur to the declaration or complaint in said cause, and the cause shall then proceed in the same manner as if it had been originally commenced in the said District Court."

It would not be of special value to review all the authorities bearing upon the question now before the court. A very valuable opinion upon the subject of removal of causes is that of Judge Rellstab, of the District Court of New Jersey, in Ostrom v. Edison, 244 Fed. 228. In that opinion the majority of the cases are considered, and proper consideration given to the meaning of the words "proper district." As is well emphasized in that opinion, the real question is the determination of legislative intent.

Section 53 of the Judicial Code, (Comp. St. § 1035), contained in chapter 4, under the heading "District Courts—Miscellaneous Provisions," is helpful in ascertaining the legislative intent with respect to removals. The last part of that section is as follows:

"In all cases of the removal of suits from the courts of a state to the District Court of the United States such removal shall be to the United States District Court in the division in which the county is situated from which the

removal is made; and the time within which the removal shall be perfected, in so far as it refers to or is regulated by the terms of United States courts, shall be deemed to refer to the terms of the United States District Court in such division."

Section 53, in which that language is found, relates to districts containing more than one division, but may be helpful in arriving at the solution of the question in this case, although there is but one division in this district. In the report of the special joint committee on revision and codification of the laws of the United States upon the Senate bill to codify, revise, and amend the laws relating to the judiciary, which resulted in the passage of the Judicial Code, it is pointed out by the committee that section 53 is intended to embrace a great many acts creating or changing judicial districts or divisions thereof, and those acts are severally set forth in connection with the respective states.

Examining those acts we find that there was an act passed August 8, 1888 (25 Stat. 388, c. 789), entitled "An act to subdivide the Western judicial district of Louisiana." Section 7 of that act provides:

"That causes removed from any court of the state of Louisiana into the Circuit Court of the United States within said Western district shall be removed to the Circuit Court in the division in which such state court is held."

The same language is found in "An act to subdivide the Eastern judicial district of Louisiana," etc., passed August 13, 1888. 25 Stat. 438, c. 869. Again, in an act passed April 26, 1890 (26 Stat. 72, c. 167), entitled "An act providing the terms and places of holding the courts of the United States in the district of Minnesota, and for other purposes," there is found this provision:

"That causes removed from any court in the state of Minnesota into the Circuit Court shall be removed to the Circuit Court in the division in which said state court is held."

It is significant that Congress, while enacting many statutes containing provisions relating to removal of causes from one court to another in the same state, neglected to provide expressly for such removal to the courts in other states. Such legislation was about the time and after Act Aug. 13, 1888, c. 866, 25 Stat. 433, entitled:

"An act to correct the enrollment of an act approved March third, eighteen hundred and eighty-seven, entitled 'An act to amend sections one, two, three and ten of an act to determine the jurisdiction of the Circuit Courts of the United States, and to regulate the removal of causes from the state courts, and for other purposes, approved March third, eighteen hundred and seventy-five.'"

The act last mentioned was the act before the Supreme Court in Ex parte Wisner, 203 U. S. 449, 27 Sup. Ct. 150, 51 L. Ed. 264, from which case appears to have sprung the diversity of opinion with respect to the construction of sections 28 and 29 of the Judicial Code.

There does not seem to be sufficient grounds for assuming that Congress impliedly extended the judicial power of the United States to permit of a removal of an action in a state court, by the defendant, into a federal court of a district in a different state. Until there is some express enactment by Congress, a case so removed should be remanded.

Therefore the motion to remand in this case must be granted.

CLEVELAND CLIFFS IRON CO. v. VILLAGE OF KINNEY et al.

(District Court, D. Minnesota, Fifth Division. August 20, 1919.)

1. COURTS ⟸280—DISTRICT COURT MUST SEARCH RECORD FOR JURISDICTIONAL FACTS.

United States District Court, being a court of limited jurisdiction, must search the record in each case to ascertain whether the jurisdictional facts exist.

2. COURTS ⟸322(5)—AMENDMENT TO ALLEGE DIVERSITY OF CITIZENSHIP IS ALLOWED AS OF COURSE AT ANY STAGE.

Under the express provisions of Judicial Code, § 274c (Comp. St. § 1251c), an amendment to allege the diversity of citizenship necessary to give the court jurisdiction may be allowed as of course at any stage of the proceedings, if such diversity in fact exists.

3. COURTS ⟸329—BILL TO ENJOIN ELECTION FOR ANNEXATION TO VILLAGE HELD NOT TO SHOW JURISDICTIONAL AMOUNT IN CONTROVERSY BY INCREASE OF TAXATION.

A bill to enjoin an election to annex territory to a village, which alleged the ownership by complainant of land within the territory affected, but did not allege that the amount of taxation would be thereby increased, does not establish the jurisdictional amount in controversy, though it does allege that the assessed valuation of plaintiff's land exceeded that amount.

4. COURTS ⟸329—BILL TO ENJOIN ELECTION FOR ANNEXATION TO VILLAGE AS HELD NOT TO SHOW JURISDICTIONAL AMOUNT IN CONTROVERSY.

A bill to enjoin an election to annex territory containing land of complainant to a village, because such annexation would infringe plaintiff's right to have his taxes assessed and levied by the township, instead of the village, authorities, but not showing the value of such right, does not establish the jurisdictional amount in controversy.

5. COURTS ⟸262(2)—EXISTENCE OF REMEDY AT LAW ENFORCEABLE ONLY IN STATE COURT DOES NOT DENY EQUITABLE POWER OF FEDERAL COURT.

The fact that plaintiff, who by reason of diversity of citizenship is entitled to sue in the federal court, has a plain, speedy, and adequate remedy at law enforceable only in the state courts, does not deprive it of the right to sue in equity in the federal court.

6. COURTS ⟸262(2)—DOUBTFUL REMEDY AT LAW DOES NOT NEGATIVE JURISDICTION.

The fact that plaintiff has a remedy at law by quo warranto does not deprive him of right to sue in equity, where it is doubtful whether the state quo warranto proceedings can be enforced in the federal court.

7. EQUITY ⟸17—PROTECTION OF PROPERTY RIGHT EXTENDS TO EVERY RIGHT OF A PECUNIARY NATURE.

The jurisdiction of equity, unless enlarged by express statute, is limited to protection of rights of property, but such rights of property include any civil right of a pecuniary nature.

8. EQUITY ⟸15—RIGHT TO BE GOVERNED AND TAXED BY TOWNSHIP RATHER THAN VILLAGE IS "POLITICAL RIGHT" NOT ENFORCEABLE IN EQUITY.

The right of an owner of property to continue to have his land assessed and taxes levied thereon, and the money spent by township authorities, instead of by village authorities, is a political, not a property, right, which cannot be enforced by equity; political rights consisting in the power to participate directly or indirectly in the management of the government.

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

9. INJUNCTION ⟸80—WILL NOT ISSUE AGAINST HOLDING OF AN ELECTION.

Though, under Laws Minn. 1909, c. 113, as construed by the state Supreme Court, the question whether property in territory sought to be

annexed to a village is such as may properly be subjected to village government is open to inquiry in quo warranto proceedings, equity cannot pass on that question, which is the question to be determined by the electors, in a suit to restrain the holding of the election, and will not enjoin an election on that question.

10. MUNICIPAL CORPORATIONS ⇐33(9)—STATE COURT'S RIGHT TO REVIEW ELECTION ANNEXING TERRITORY BY QUO WARRANTO DOES NOT MAKE RIGHT OF PARTIES A PROPERTY RIGHT.

Laws Minn. 1909, c. 113, giving the state courts power to review by quo warranto the validity of an election for the annexation of territory to a village, does not change the political right of property owners in that territory to remain under township government into a property right, which may be enforced in equity.

In Equity. Suit by the Cleveland Cliffs Iron Company against the Village of Kinney and others to enjoin the holding of an election. On final hearing. Preliminary injunction set aside, and bill dismissed.

Washburn, Bailey & Mitchell, of Duluth, Minn., for plaintiff.

Whipple & Randall, of Duluth, Minn., and Luke F. Burns, of Virginia, Minn., for defendants Village of Kinney, John Schultz, and John Setala.

Charles E. Adams and Whipple & Randall, all of Duluth, Minn., for defendant county auditor.

BOOTH, District Judge. This is a suit in equity by the Cleveland Cliffs Iron Company against the village of Kinney and others, to enjoin the defendants from holding an election for the purpose of annexing to the village of Kinney the lands described in the complaint, and from calling an election at any time during the pendency of the action to vote upon said question of annexation, or from taking any action in reference to such election. The bill was filed June 12, 1918. A preliminary injunction was issued on the 15th day of June, 1918. Subsequently the county auditor was made a party defendant. The case has been brought on for final hearing upon the bill, amended and supplemental bill, answers to said original and supplemental bills, and testimony taken. The following facts appear:

The village of Kinney is a village in St. Louis county, Minn., including within its limits, at the commencement of this suit, approximately 1,200 acres of land, and with a population of approximately 1,000 persons. The assessed value of the land within the limits of the village of Kinney for the year 1917 was approximately $846,985. The taxes levied and assessed for said year by said village were approximately $15,500. The village is located within the town of Great Scott. The total valuation in said town at the commencement of the suit was approximately $2,105,000.

Plaintiff is the owner through leases of the following lands lying within the town of Great Scott, but outside the limits of the village of Kinney as existing at the commencement of this suit, to wit: The north one-half of the southwest quarter and the southeast quarter of the southwest quarter of section 12, and the north one-half of the northwest quarter and the southeast quarter of the northwest quarter of section 13, all in township 58 north, range 19 west. The assessed

valuation of said property at the commencement of the suit was approximately $300,000; at the time of the trial approximately $400,000. At the commencement of the suit there was but one resident upon the lands owned by the plaintiff, but the plaintiff was at that time planning to open mines upon its property, and about to bring a considerable number of men upon said lands for the purpose of opening and operating the mine. At the time of the trial, the mine had been opened, and the population on the plaintiff's land was approximately 257.

On the 4th day of June, 1918, there was presented to the village council of the village of Kinney a petition, signed by 6 persons, praying that the village council call an annexation election for the purpose of determining whether certain territory described in the petition should be annexed to the village of Kinney, including plaintiff's lands, and comprising in all some 1,560 acres, having approximately 108 residents. Upon the presentation of said petition, the village council passed a resolution calling an election for the 17th of June, 1918, and appointed the defendants John Schultz and John Setala inspectors and judges of election, and as a third inspector and judge Alvin Goodspeed, Sr.

The statutory steps preliminary to the holding of the election were duly taken. On the 15th of June, 1918, a preliminary injunction was issued after hearing, and was served upon the village of Kinney and two of the personal defendants, to wit, John Schultz and Alvin Goodspeed, Jr. By inadvertence, one of the personal defendants was alleged in the complaint to be an inspector of the election, when in fact he was not, so that service of the writ of injunction was in fact made on one only of the three inspectors of the election. On the 17th of June, 1918, the election was held. Two of the appointed inspectors being absent, the third one who was present swore in two other inspectors in accordance with the provisions of the statute. On the 18th of June, the village recorder of the village made his certificate and attached thereto certain papers, required by the statute to be filed with the county auditor in case of such election, and forwarded same to the county auditor. Each and all of the inspectors of the election and the village recorder had full knowledge and notice of the preliminary injunction.

Thereafter, and on or about the 3d of September, 1918, the village council of Kinney passed a resolution making its annual levy of taxes in the sum of $40,000 for general purposes and returned the same to the county auditor. The taxes as finally spread upon the tax books by the county auditor for said village of Kinney for said year amounted to $31,614.22.

The supplemental bill sets out facts as to matters occurring subsequent to the issuance of the preliminary injunction, and prays for additional relief, viz. that the attempted annexation be declared invalid, that the election proceedings be set aside, and the land attempted to be included by said annexation be declared not a part of the village of Kinney, and that the county auditor be enjoined from spreading any taxes levied by the village of Kinney against the lands attempted to be annexed.

By timely motions, and also in their answers, the defendants have contested the jurisdiction of the court: First, that this court as a fed-

eral court has no jurisdiction of the case; second, that the subject-matter in suit is not one of which an equity court in general has jurisdiction.

[1] The United States District Court, being a court of limited jurisdiction, it is the duty of the court to search the record in each case to ascertain whether the jurisdictional facts exist. N. Y. Life Ins. Co. v. Johnson, 255 Fed. 958, 167 C. C. A. 250. Although upon the face of the plaintiff's pleadings the claim is made that the statute under which the election was proposed to be held is unconstitutional and void, as being in contravention both as to the Constitution of the United States and of the state of Minnesota, such contention was expressly disclaimed upon the final hearing.

[2] The jurisdiction of this court as a federal court is sought to be sustained on the ground of diversity of citizenship. This was not alleged in the original bill; but an amendment was allowed, and, although the sufficiency of this amendment is attacked, yet, as it appears from the record that the diversity of citizenship does in fact exist, an amendment which would be sufficient in form would be allowed as of course at any stage of the proceedings. Judicial Code, § 274c (Comp. St. § 1251c).

[3] But the amount involved necessary to give the court jurisdiction is not alleged either in the original bill or in the supplemental bill. The assessed valuation of plaintiff's land is alleged and proven, but this amount, of course, is not the amount involved in the suit. The loss of the land is not involved nor is any damage to the land alleged or claimed. However, questions relating to the taxation of the land are involved, and the original bill contains this allegation:

"That the annexation of said lands of this plaintiff would be of absolutely no benefit to this plaintiff, or to said lands; on the contrary, it would simply divert funds raised by taxation upon certain property to the village treasurer, to be largely squandered in useless expenditures, the annual taxes at the present village rate on said property being upwards of $5,000 yearly."

It is not alleged, however, what the current taxes paid by the plaintiff on its said lands in the town of Great Scott were under the conditions existing at the time of filing the bill, nor is it alleged what the taxes levied by the town of Great Scott on said lands would be if the proposed annexation was not carried out. It may be noted in this connection that, if the village of Kinney and the town of Great Scott each should levy taxes upon plaintiff's land up to the legal limit under the existing statutes of Minnesota, the difference between the two amounts thus levied would not be sufficient to meet the jurisdictional requirement of this court. Further than this, upon the trial, one of the plaintiff's witnesses, manager of said plaintiff company, testified that the company made no claim that the taxes would be higher on plaintiff's lands after annexation than before, and did not base opposition to the annexation on the ground of increased taxation, but did claim that the taxes levied should be expended by the township authorities of the town of Great Scott, rather than be expended by the village authorities of Kinney, for the benefit of that village.

[4] Such being the state of the record, the jurisdictional amount, so far as increased taxes are concerned, is neither alleged, claimed,

nor shown to exist. Two rights are, however, claimed by the plaintiff to be threatened or injured by the annexation:

1. The right to have the taxes paid by plaintiff company levied and administered by the authorities of the town of Great Scott rather than by the authorities of the village of Kinney.

2. The right to have plaintiff's lands remain subject to township government, instead of being subjected to village government.

But no value is alleged or proven as to either of these rights nor is the amount of threatened damage either alleged or proven. Perhaps, in the nature of the case, this was not possible; but, if so, it simply shows the impossibility of establishing one of the necessary jurisdictional facts. My conclusion is, therefore, that the prerequisite jurisdictional amount is not shown to exist and that the bill must be for that reason dismissed. See Vance v. Vandercook Co., 170 U. S. 468, 18 Sup. Ct. 645, 42 L. Ed. 1111; U. S. Express Co. v. Poe, Auditor, et al. (C. C.) 61 Fed. 475; Risley v. City of Utica et al. (C. C.) 168 Fed. 737; Maryland Casualty Co. v. Price et al., 231 Fed. 397, 145 C. C. A. 391, Ann. Cas. 1917B, 50; Fuerst Bros. & Co. v. Polasky et al., 249 Fed. 447, 162 C. C. A. 13; N. Y. Life Ins. Co. v. Johnson, 255 Fed. 958, 167 C. C. A. 250.

It is also urged by defendants that this court, as a court of equity, has no jurisdiction on account of the nature of the suit.

[5] 1. It is contended that plaintiff has a plain, adequate, and complete remedy at law, namely, by quo warranto. In my judgment this contention cannot be sustained. Where by reason of diverse citizenship plaintiffs are entitled to sue in the federal court, the remedy at law to negative equitable jurisdiction must be a remedy at law in the federal court. Arrowsmith v. Gleason, 129 U. S. 86, 9 Sup. Ct. 237, 32 L. Ed. 630; Smyth v. Ames, 169 U. S. 466, 516, 18 Sup. Ct. 418, 42 L. Ed. 819; Smith v. Reeves, 178 U. S. 436, 20 Sup. Ct. 919, 44 L. Ed. 1140; Singer Sewing Mch. Co. v. Benedict, Treas., etc., 229 U. S. 481, 33 Sup. Ct. 942, 57 L. Ed. 1288; Johnson, Treas., v. Wells Fargo & Co., 239 U. S. 234, 243, 36 Sup. Ct. 62, 60 L. Ed. 243; Union Pac. R. R. Co. v. Board of County Com'rs, 247 U. S. 282, 38 Sup. Ct. 510, 62 L. Ed. 1110.

[6] It is probable that the remedy of quo warranto in the federal court is limited to cases specifically authorized by statute. See Foster's Federal Practice, § 468; In re Yancey (C. C.) 28 Fed. 445, 451. If the remedy at law is doubtful merely, equitable jurisdiction is properly exercised. Davis v. Wakelee, 156 U. S. 680, 16 Sup. Ct. 1200, 41 L. Ed. 310; Union Pac. R. R. Co. v. Board of County Com'rs, 247 U. S. 282, 38 Sup. Ct. 510, 62 L. Ed. 1110.

[7] 2. It is further contended by defendants that the court has no jurisdiction, because the subject-matter of the suit is not of equitable cognizance. It is claimed that the acts sought to be enjoined are political acts, and that the rights sought to be asserted by plaintiff are political rights. In the case of In re Sawyer, 124 U. S. 200, 8 Sup. Ct. 482, 31 L. Ed. 402, the court, in speaking of the jurisdiction of a court of equity, said:

"The office and jurisdiction of a court of equity, unless enlarged by express statute, are limited to the protection of rights of property."

This jurisdiction, however, to protect rights of property, includes any civil right of a pecuniary nature. International News Service v. Associated Press, 248 U. S. 215, 236, 39 Sup. Ct. 68, 63 L. Ed. 211, 2 A. L. R. 293. And equity may even restrain prosecution under unconstitutional enactments if necessary to protect property rights. Davis & Farnum Co. v. Los Angeles, 189 U. S. 207, 23 Sup. Ct. 498, 47 L. Ed. 778; Dobbins v. Los Angeles, 195 U. S. 223, 241, 25 Sup. Ct. 18, 49 L. Ed. 169; Ex parte Young, 209 U. S. 123, 155, 161, 28 Sup. Ct. 441, 52 L. Ed. 714, 13 L. R. A. (N. S.) 932, 14 Ann. Cas. 764; Philadelphia Co. v. Stimson, 223 U. S. 605, 607, 620, 32 Sup. Ct. 340, 56 L. Ed. 570.

[8] As has been shown above, the right to prevent a threatened illegal increase of taxes is not in this case, but the two rights claimed by the plaintiff are: (1) The right to have the taxes paid by plaintiff company levied and administered by the authorities of the town of Great Scott, rather than by the authorities of the village of Kinney; (2) the right to have plaintiff's lands remain subject to township government, instead of being subjected to village government. Whether such rights actually exist, and are possessed by plaintiff, and, if so, whether they are property rights, may both well be doubted.

That the Legislature may change the boundaries of the political subdivisions of the state is elementary. In Kelly v. Pittsburg, 104 U. S. 78, 26 L. Ed. 658, the court said:

"What portion of a state shall be within the limits of a city, and be governed by its authorities and its laws, has always been considered to be a proper subject of legislation. How thickly or how sparsely the territory within a city must be settled is one of the matters within legislative discretion. Whether territory should be governed for local purposes by a county, a city, or a township organization is one of the most usual and ordinary subjects of state legislation."

In the case of Hunter v. Pittsburg, 207 U. S. 161, 28 Sup. Ct. 40, 52 L. Ed. 151, the court said:

"Municipal corporations are political subdivisions of the state, created as convenient agencies for exercising such of the governmental powers of the state as may be intrusted to them. * * * The number and nature and duration of the powers conferred upon these corporations and the territory over which they shall be exercised rests in the absolute discretion of the state. * * * The state, therefore, at its pleasure, may modify or withdraw all such powers, may take without compensation such property, hold it itself, or vest it in other agencies, expand or contract the territorial area, unite the whole or a part of it with another municipality, repeal the charter, and destroy the corporation. All this may be done, conditionally or unconditionally, with or without the consent of the citizens, or even against their protest. In all these respects the state is supreme, and its legislative body, conforming its acts to the state Constitution, may do as it will, unrestrained by any provision of the Constitution of the United States. Although the inhabitants and property owners may by such changes suffer inconvenience, and their property may be lessened in value by the burden of increased taxation, or for any other reason, they have no right by contract or otherwise in the unaltered or continued existence of the corporation or its powers, and there is nothing in the federal Constitution which protects them from these injurious consequences. The power is in the state, and those who legislate for the state are alone responsible for any unjust or oppressive exercise of it."

See, also, Mt. Pleasant v. Beckwith, 100 U. S. 514, 529, 25 L. Ed. 699; McQuillin on Mun. Corporations, § 265; State v. Village of Gilbert, 127 Minn. 452, 459, 149 N. W. 951, and cases cited; Dillon, Mun. Corporations, § 1394.

But it is claimed by plaintiff that these cases have reference to acts done and changes made by the Legislature directly; whereas, in the case at bar, the action is taken by the local authorities under general law, and that there is a distinction between the two classes of cases, and that in the latter class of cases courts of equity will interfere, even to the extent of enjoining an election whenever necessary to protect property rights. The cases of Wilton v. Pierce County, 61 Wash. 386, 112 Pac. 386, Macon v. Hughes, 110 Ga. 795, 36 S. E. 247, Layton v. Mayor, 50 La. Ann. 121, 23 South. 99, and other cases are cited by plaintiff as tending to support such contention. I do not think these cases proceed upon the distinction claimed by plaintiff, but they do hold that a court of equity has jurisdiction under certain circumstances to enjoin the holding of an election. In my judgment, however, these cases are opposed to the greater weight of authority, and this is recognized in the Georgia case.

[9] It is the general rule that courts of equity have no jurisdiction in political matters, and that, in the absence of special statutory authority, courts of equity have no power to enjoin the holding of an election; and this is true, whether the election relates to the filling of public office or to other matters, such as changes in boundaries or political subdivisions and other kindred matters. State of Ga. v. Stanton, 6 Wall. 50, 18 L. Ed. 721; Holmes v. Oldham, 12 Fed. Cas. 421, No. 6,643; Green v. Mills, 69 Fed. 852, 16 C. C. A. 516, 30 L. R. A. 90; Anthony v. Burrow (C. C.) 129 Fed. 783; Taylor v. Kercheval (C. C.) 82 Fed. 497, 500; Angelus v. Sullivan, 246 Fed. 54, 64, 158 C. C. A. 280; Bonifaci v. Thompson (D. C.) 252 Fed. 878, 879; People v. City of Galesburg, 48 Ill. 486; Dickey v. Reed, 78 Ill. 261; Walton v. Develing, 61 Ill. 201; Fletcher v. Tuttle, 151 Ill. 41, 37 N. E. 683, 25 L. R. A. 143, 42 Am. St. Rep. 220; Harris v. Schryock, 82 Ill. 119; People v. Barrett, 203 Ill. 99, 67 N. E. 742, 96 Am. St. Rep. 296; People v. McWeeney, 259 Ill. 161, 102 N. E. 233, Ann. Cas. 1916B, 34; Morgan v. County Court, 53 W. Va. 372, 44 S. E. 182; Smith v. McCarthy, 56 Pa. 359; Spelling on Inj. § 630; Joyce on Inj. §§ 1386–1390; Duggan v. Emporia, 84 Kan. 429, 114 Pac. 235, Ann. Cas. 1912A, 719; City Council of McAlester v. Milwee, 31 Okl. 620, 122 Pac. 173, 40 L. R. A. (N. S.) 576; McCrary on Elections, § 386; Pomeroy's Eq. Rem. vol. 1, § 331.

[10] It is true that the Supreme Court of the state of Minnesota, in State v. Gilbert, has held that the lands sought to be annexed under chapter 113, Laws of 1909 (the statute here involved), must be so conditioned as properly to be subjected to village government, and that this question is open to inquiry by the courts in quo warranto proceedings. This holding does not, in my judgment, establish that the right inquired into in the quo warranto proceedings is a property right, nor does it give countenance to the idea that a court of equity has jurisdic-

tion to enjoin the holding of such an election. It rather indicates that, when the Legislature acts through its subordinate agency the village council, the acts of such council, though quasi political in their nature and affecting political rights, are nevertheless subject to inquiry by the courts in quo warranto proceedings, for the purpose of ascertaining whether the acts of the council have been in conformity with the statutory requirements. That property rights may be affected by the result of the quo warranto proceedings is doubtless true; but the fundamental basis of the proceeding is to ascertain the legality of the quasi political acts of the local authorities, including the constitutionality of the statute under which they act.

The definition of "political rights," given by Bouvier and quoted with approval by the court in People v. Barrett, supra, is as follows:

"Political rights consist in the power to participate, directly or indirectly, in the establishment or management of government."

It is suggested that the plaintiff, being a corporation, cannot, strictly speaking, be possessed of political rights as such. This is probably true, but the conclusion sought to be drawn that the rights claimed by plaintiff in the case at bar must therefore be property rights is not a necessary conclusion. With perhaps equal justification the conclusion might be drawn that no such rights as plaintiff claims in the case at bar exist at all in behalf of a corporation.

But whether the alleged rights of plaintiff, which are sought to be protected, are property rights or quasi political rights, it is certain that the relief demanded is a drastic interference with political rights. This is not all. It is demanded that the court, in advance of the election, determine the very question which the voters are entitled to decide, namely, whether the territory in question sought to be annexed is so conditioned as to be properly subject to village government. That this question, under the Minnesota statutes and decisions, is a question of fact for the voters to decide, see State v. Village of Dover, 113 Minn. 452, 130 N. W. 74, 539; State v. Village of Gilbert, supra.

It is true that this decision of the voters on that question may be inquired into by the courts by way of review in quo warranto proceedings; but this review after the election is quite a different matter from restraining the holding of the election until the court has itself first passed its judgment upon the very question which the election is to decide.

All of the cases cited by plaintiff in which injunctions were granted against the holding of elections were based on the fact that there was some matter outside the election itself into which the court might properly inquire and the determination of which might necessitate the forbidding of the election. In the case at bar, the court is asked to determine, first, the very question involved in the election, and then, if the decision is adverse, to forbid the voters to pass upon that question, although the Legislature has said they may pass upon it. No case has been pointed out holding that a court of equity has such power, and I am constrained to hold that it has no such jurisdiction.

Inasmuch as what has been said disposes of the case, it is unnecessary to consider the question whether the lands of plaintiff sought to be annexed to the village of Kinney were so conditioned as to be properly subject to village government, nor the further question as to the effect of the violation of the preliminary injunction by the defendants. Since this court has at no time had jurisdiction, the preliminary injunction must be set aside, and the original bill and amended and supplemental bill dismissed, with costs to the defendants; and it is so ordered. A decree may be prepared accordingly.

It is with great diffidence that I have reached these conclusions, because the question of jurisdiction has already been passed upon favorably by my associate in issuing the preliminary injunction; and it is only at his express request, and after I had once refused to reopen the question of jurisdiction, that I have consented to consider and pass upon the matter. While the conclusions are not free from doubt, they are the only ones that I have been able conscientiously to adopt, after a careful consideration of the record, aided by the well-prepared briefs of able counsel. Much fuller discussion has doubtless been given to the question of jurisdiction upon the final hearing than was practicable at the hearing for a preliminary injunction.

It is also with great reluctance that I have reached the result stated, because it precludes doing more than expressing the deepest disapproval of the course of action taken by the defendants and others, who either by active or tacit participation have supported them in disobeying the preliminary injunction. Such conduct was in my judgment gravely unbecoming and unwarranted.

BORDER LINE TRANSP. CO. v. CANADIAN PAC. RY. CO.

THE WAKENA. THE NITINAT.

(District Court, W. D. Washington, N. D. April 8, 1919.)

No. 4071.

1. COLLISION ⟸79—CAUSED BY MUTUAL FAULTS OF VESSELS MEETING.
Evidence *held* to show that the motor vessel Wakena and the tug Nitinat, meeting at sea were both in fault for a collision; the Nitinat for answering the signal of the Wakena and then failing to navigate accordingly, and the Wakena for not reversing when her first signal was unanswered.

2. COLLISION ⟸11—VESSELS IN SAME WATERS BOUND BY SAME RULES.
All vessels navigating in the same waters are bound by the same rules.

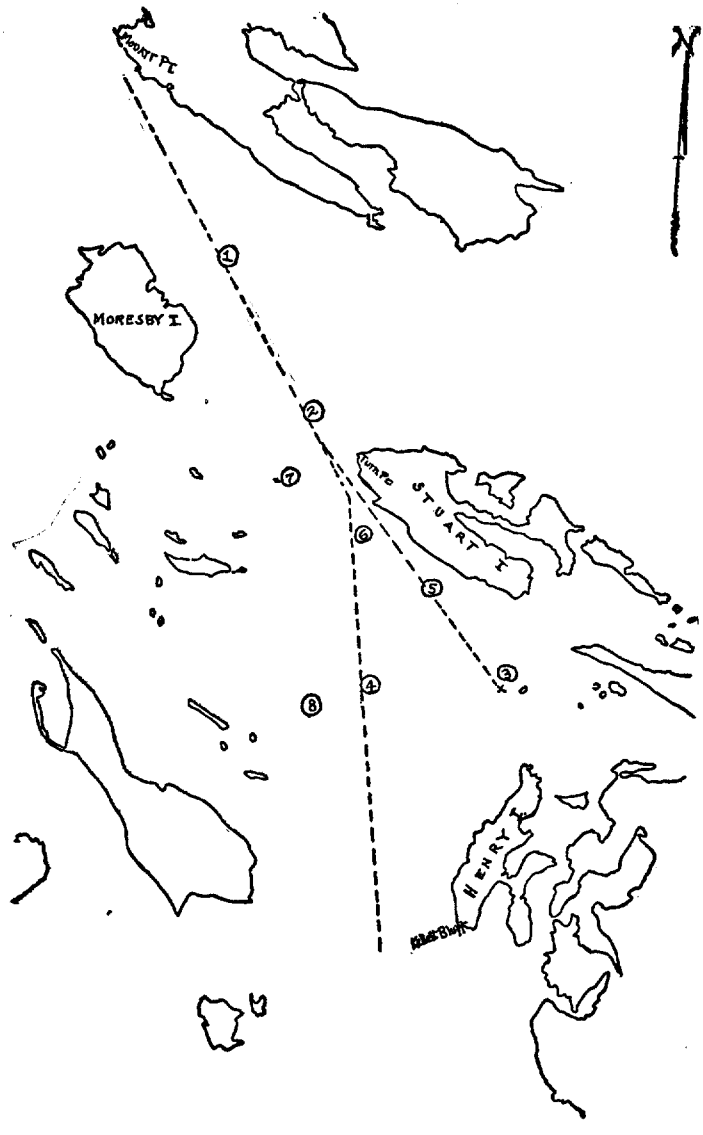
In Admiralty. Suit for collision by the Border Line Transportation Company, owner of the motor vessel Wakena, against the Canadian Pacific Railway Company, owner of the tug Nitinat. Decree dividing damages.

Huffer & Hayden, of Seattle, for libelant.
Bogle, Merritt & Bogle, of Seattle, for respondent.

NETERER, District Judge. On March 1, 1918, at a point approximately 2,000 yards southerly on a straight line drawn from Turn Point, Stuart Island, to Kellett Bluff, Henry Island, and approximately 100 yards west, the motor vessel Wakena and steam tug Nitinat came into collision. The dividing line between inland waters and the open sea is a straight line from Kellett Bluff to Turn Point. Coast Pilot, U. S. page 239.

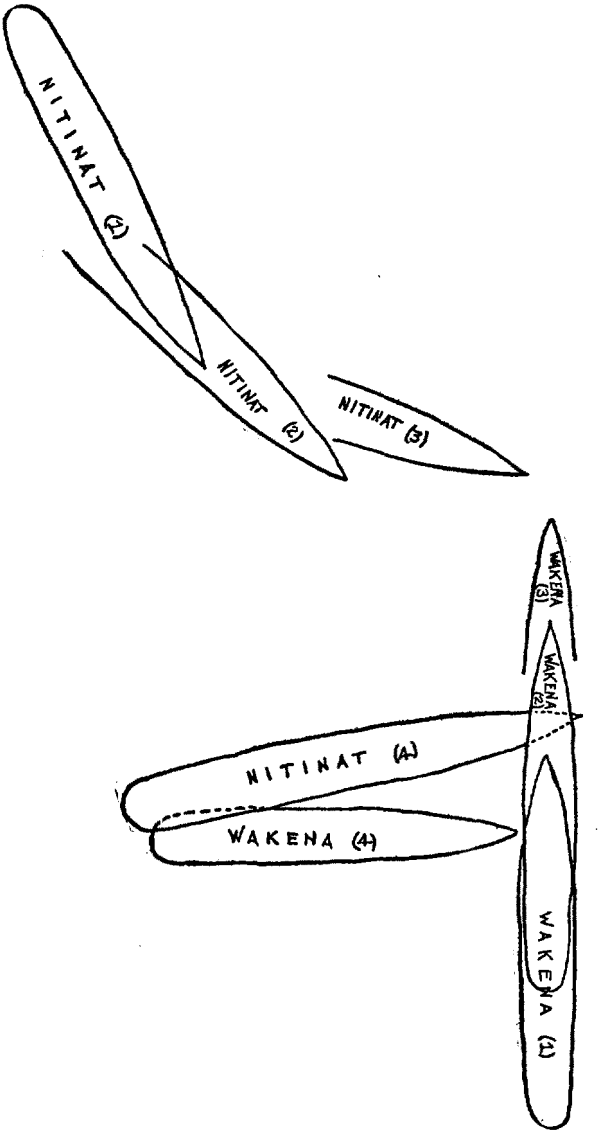
The Wakena is a twin screw motor ship of 316 net registered tons, flat bottom, 7½ feet draft, and was proceeding light in ballast at a speed of 6½ knots per hour from Vancouver to Victoria, B. C. The Nitinat is an iron steam tug of 14 feet 6 inches draft, with a speed of 7 knots an hour, having in tow a barge between 290 and 300 feet long, loaded with 15 full cars; the towline from the Nitinat was approximately 900 feet long; the tide was at flood, which increased the tug's speed to 8 knots an hour. The Nitinat was on a voyage from Esquimalt to Vancouver, B. C. The Wakena was proceeding in a direction south by east, and the Nitinat N. W. by N.

[1] The evidence is conclusive that both vessels acted upon the assumption that they were navigating upon inland waters. The navigating officers of both vessels are in error as to the relative location of the vessels when first observed. The following diagram portrays the waters in which the vessels were navigating, and the courses and location of the vessels as indicated by the first officer of the Wakena:



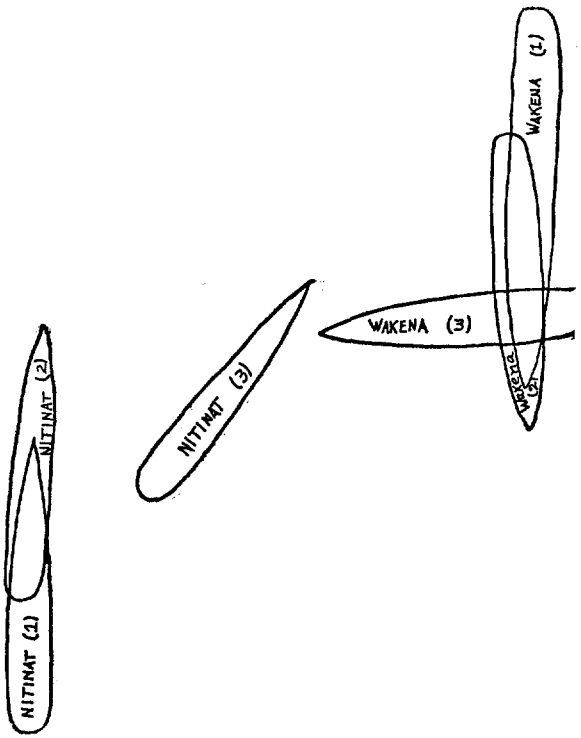
1. Indicates Wakena's course, Mouatt Point to Turn Point.
2. Location of Wakena when the Nitinat and the Adelaide were first observed.
3. Nitinat, when first observed by Wakena's first officer.
4. Wakena's course after reaching a point 300 yards off Turn Point.
5. Course Nitinat appeared to be taking.
6. Point of collision.
7. Where Adelaide was at time of passing Wakena.
8. Adelaide when first sighted by Wakena.

The following diagram portrays the relative situation of the vessels as given by the first officer of the Wakena immediately prior to the collision:



1. Bearing of boats at time of Wakena's first whistle, being about one-fourth of a mile or more apart.
2. Second whistle, about 200 yards closer.
3. Four whistles of the Nitinat.
4. Collision of boats.

The following diagram portrays the relative position of the vessels as given by A. B. Robson, the officer on watch of the Nitinat:



Nitinat 1. Course of Nitinat, northerly.
Wakena 1. Position of Wakena on hearing Wakena's one blast of whistle.
Nitinat 2. When answering Wakena's first blast.
Nitinat 3—Wakena 3. Position of boats just before collision.

The distance between the vessels at the time of answering the Wakena's one blast of the whistle is one-fourth of a mile, as given by Mr. Robson.

The testimony of the first officer of the Nitinat that he was one-fourth of a mile to the starboard of the Wakena places the vessels in a relation to each other where a collision would be impossible, and the maneuvering of the vessels as indicated by the diagram made by this witness (Robson) emphasizes such fact. The statement of the first officer of the Wakena that the Nitinat was far to his port side, as indicated by the diagram, is greatly exaggerated.

The testimony establishes that these vessels, when first approaching, were green to green. This relation of the vessels appears to be sustained by the testimony of the first officer of the Adelaide, who, after having passed the Nitinat and its tow, and the Wakena nearly half a mile to starboard, looking back, saw the vessels in such relation that a

collision was inevitable, which would indicate, considering the location of the Adelaide, that the Nitinat was on the Wakena's port.

[2] Much emphasis is placed by respondent upon the fact that the collision occurred in the open sea and without the jurisdiction of the Inland Rules of the Road. All vessels running upon the same waters should be bound by the same rules. The Delaware, 161 U. S. 459, 16 Sup. Ct. 516, 40 L. Ed. 771. However, in this case, both parties were proceeding upon the theory that they were navigating inland waters. The first officer of the Nitinat in answer to the question, "When you answered her one blast with one blast, what did you do?" replied, "I ported the helm; that is, I directed my course to starboard."

The circumstances considered, and the facts upon which there is no dispute, or are established, indicate that, when one blast was given by the Wakena and answered by the Nitinat, if the Nitinat had properly maneuvered as indicated by the signal, the collision would not have occurred; or, if that was impossible of execution, then the Nitinat is at fault in acquiescing in a maneuver which it was dangerous or impossible to execute. I think the Wakena was at fault in not reversing its engine when it received no response to its first blast and saw that a collision was inevitable.

I think both vessels are at fault, and the damages should be divided.

PEARCE v. LEDERER, Internal Revenue Collector.

(District Court, E. D. Pennsylvania. November 28, 1919.)

No. 5848.

1. POWERS ⊜36(2)—LAW GOVERNING EXERCISE OF POWER OF APPOINTMENT.
Under the law of Pennsylvania the question of the effective exercise of a power of appointment is determined by the domicile of the donor of the power, not of the donee.

2. WILLS ⊜682(2) — INTEREST OF BENEFICIARY UNDER SPENDTHRIFT TRUST.
Where property has been bequeathed or devised to a trustee on a spendthrift trust, the beneficiary has nothing until and except as he receives, and all of the property until actually received by him remains the estate of the first testator, although the beneficiary may be the donee of a power of appointment, and may exercise it.

3. WILLS ⊜692, 693(1)—EXERCISE OF POWER OF APPOINTMENT UNDER SPENDTHRIFT TRUST.
Where the beneficiary of a spendthrift trust by his will exercises a power of appointment of which he is donee, under the law of Pennsylvania his appointee takes, not under his will but under the will of the donor.

4. INTERNAL REVENUE ⊜8—TRUST ESTATE NOT SUBJECT TO INHERITANCE TAX.
The principal of a spendthrift trust fund, bequeathed by will by the beneficiary of the trust under a power of appointment given him, although included with his other estate, and thereby made subject to general administration by his executor and to his debts, *held* under the law of Pennsylvania not subject to inheritance tax as part of his estate, under Act Sept. 8, 1916, § 202 (Comp. St. § 6336½c).

At Law. Action by John W. Pearce, executor of Alfred Pearce, deceased, against Ephraim Lederer, Collector of Internal Revenue for the First District of Pennsylvania. Judgment for plaintiff.

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

Arthur U. Bannard, of Philadelphia, Pa., for plaintiff.

Robert J. Sterrett, Asst. U. S. Atty., and Francis Fisher Kane, U. S. Atty., both of Philadelphia, Pa., for defendant.

DICKINSON, District Judge. Plaintiff sues in assumpsit to recover the sum of $1,590.61, with interest from November 16, 1918 (less $10.32), claimed as an unlawfully exacted inheritance tax on the estate of which the plaintiff is the executor. On August 30, 1918, the plaintiff was notified of the assessment of an additional tax of $1,557.33, aggregating, with the 10 per cent. per annum penalty imposed to November 16, 1918, the above sum of $1,590.61.

The theory of liability upon which the assessment was made, and upon which the lawfulness of the tax is now asserted, is that Elizabeth Pearce, the mother of the plaintiff, by her will created a spendthrift trust for the benefit of her children, of whom the plaintiff's decedent was one, under which the children were given the income from this trust fund for life, with power of testamentary disposition. Plaintiff's decedent died seized and possessed of an estate of his own, besides being donee of the foregoing power. The plaintiff was acting in a dual capacity. He is trustee under the mother's estate, and as such has in his hands the trust fund to which reference has been made, and he is also the executor of his brother, who was one of the life beneficiaries of this trust estate and donee of the testamentary power above mentioned. The will of the plaintiff's decedent recited the power, and declared it to be his intention by will to exercise that power, and to include the fund to which that power applied in the disposition which he made of his estate.

Inasmuch as it is the settled law of Pennsylvania that property thus held in trust passes, when title does pass, through and by the will of the donor of the power, and as part of the estate of such donor, and not as part of the estate of the donee, it follows, as a consequence, that in strictness the plaintiff was called upon to account for the property in his hands as trustee of his mother's estate so far as affects this trust fund, and as the executor of his brother's estate so far as affects the remaining estate and property in his hands. In the accounting and distribution which he made as such executor, however, there was brought in and included that portion of the principal or capital sum which was in his hands as trustee of his mother's will, which was disposed of through and by the exercise of the power of appointment which had been given to his brother by the mother's will.

The plaintiff, claiming that only the property in his hands as executor was liable to payment of a tax, made his return and paid the tax on this basis. The United States, claiming that the share of the trust fund disposed of as above stated should be also included in arriving at the sum subject to the payment of the tax, brought this part of the trust fund into the sum upon which the tax should be levied. The theory upon which the payment of the tax now sought to be recovered was levied is that this trust fund was subject to the tax. The theory of the case of the plaintiff is that this trust fund should not be included in the tax assessment.

This presents the question to be decided. It is brought up on motion for a judgment notwithstanding the affidavit of defense. The rule is taken on the assumption that technically the United States is not a party to the present cause, but that the action is one against the collector as an individual. Counsel for defendant acquiesces in this view. There is no dispute between the parties, other than the controversy over the broad question above suggested, and all other findings are concededly to be made in favor of the plaintiff. We mention this, because counsel for the plaintiff has brought into his brief a discussion of his right to judgment now in his favor, if his position on this main question is upheld. In the brief submitted on behalf of the defendant, which we now have before us, every other question than this main question is admittedly out of the case, and because of this has not been considered.

In order to meet the question above outlined, it may be premised that the death of the donor of the power was before the act of Congress imposing the tax (Act Cong. Sept. 8, 1916, c. 463, 39 Stat. 756), and the death of the donee was after that date. The text of the act of Congress is, so far as it bears upon the controversy before us, that the tax is imposed "upon the transfer of the net estate of every decedent dying after the passage of this act." Section 201 (Comp. St. § 6336½b). The sum which in any given case represents the tax thus imposed is to be found by estimating the value of the estate of the decedent "to the extent of the interest therein of the decedent at the time of his death, which after his death, is subject to the payment of the charges against his estate and the expenses of its administration, and is subject to distribution as part of his estate." Section 202 (section 6336½c). In providing for the deductions to be made from this gross valuation, in order to determine the net estate subject to the tax, there is included, after an enumeration of specific deductions, "such other charges against the estate as are allowed by the laws of the jurisdiction, * * * under which the estate is being administered." Section 203 (section 6336½d).

We have also been referred by counsel for defendant to the act of assembly of Pennsylvania of June 4, 1879 (P. L. 88), and to the Act of Congress of February 24, 1919 (40 Stat. 1057, c. 18). We do not quite see the bearing of either of these statutes upon the decision of the question before us. It is not asserted by the plaintiff that Congress could not have subjected property (for it is property in a very substantial sense) in the form of a right or power of appointment to the payment of the tax. The proposition set up is that Congress did not subject this property to the tax, inasmuch as the act of 1919 was not passed until after the death of this decedent. It is, of course, not claimed that this act subjects this estate to the payment of the tax. As a declaration, and in this sense an indication of legislative intent, the implication is rather in plaintiff's favor than against it, because the declaration of Congress is that we did not tax property of this kind by the act of 1916, but we do now tax it by the act of 1919.

The sole bearing which the act of assembly of Pennsylvania of 1879 has upon the subject of the exercise of a power is to declare what in

Pennsylvania shall be deemed an effective exercise of that power. The law, as it was before it was changed by the legislative enactment, was that the power could be exercised only through and by a clear-cut reference to the power and a clear declaration of the donee to exercise it, and it could be exercised only in strict accordance with the mode and manner of its exercise laid down by the donor. The real change made by legislation was that a general devise, which before the statute would not have been a good exercise of the power, should thereafter be deemed to be a lawful and effective exercise, unless a contrary intention appeared by the will. In other words, there is a complete bouleversement of the principles of law involved. Before the enactment of the legislation of this kind, the instrument asserted to be an exercise of the power must, among other things, disclose a clear intention to exercise. After that legislation, it was assumed to have been exercised unless the contrary intention was disclosed.

The general proposition involved is admitted to be one which supports the claim of the plaintiff. The thought is advanced, however, that a testator, who subsequently dies seized and possessed of an estate of his own, and who was also the donee of a power of appointment, might by his will so blend the estate which was his individual property with the other estate over which he had the power of appointment as to subject both of them to liability for the payment of the inheritance tax. Before taking up the consideration or discussing the cases cited in support of this proposition, it is well to have a firm grasp of the principles of law which should be in mind in order to enable us to apprehend the rulings made and the reasoning which controls these rulings.

[1] We start off with the principle, well established in Pennsylvania and in a number, if not all, of the other states, that the question of the proper, the lawful, and in this sense the effective, exercise of a power of appointment, is determined by the law of the domicile, not of the donee, but of the donor, of the power. It follows that if, to instance a concrete case, a power of appointment was given under and by the will of a testator, who was domiciled at the time of his death in Delaware, to a donee, who exercises that power of appointment by a will made in Pennsylvania and who there died, the question of the effective exercise of the power would be determined, not by the law of Pennsylvania, but by the law of Delaware, and if the will which was made was not a good exercise of the power under the laws of Delaware, the appointee would not take, notwithstanding the fact that the exercise would have been good under the laws of Pennsylvania. Bingham's Appeal, 64 Pa. 345; Aubert's Appeal, 109 Pa. 447, 1 Atl. 336.

[2] Another proposition is that, where property, as here, has been bequeathed or devised to a trustee who holds under a spendthrift trust, the beneficiary has nothing until and except as he receives, and all of the property until actually received by the beneficiary remains the estate of the first testator, notwithstanding the fact that the beneficiary may be the donee of a power of appointment by will and may exercise it.

[3] Still another proposition is that the appointee, who takes, takes, when he takes, not under the will of the donee of the power, but under the will of the donor. When the power of appointment is general, the donee may exercise that power in favor of his creditors, or in favor of those who have a claim growing out of the administration of his estate, as he may exercise it in favor of any one or in any way he pleases; but the proposition holds good that the appointee, whoever he is, takes under the will of the donor, and if he is the creditor of the donee, and has been made the appointee because he was such creditor, he nevertheless takes qua appointee, and not qua creditor. In other words, the appointee takes as a beneficiary, and not as a creditor, precisely as the creditors of a son would take to whom a father had bequeathed legacies measured by the claim of debt which they had against the son. Burt v. Herron's Ex'rs, 66 Pa. 400.

[4] The argument is made which, on its face, has at least plausibility, if not force, that as section 202 of the taxing act (Comp. St. § 6336½c) directs that all property which, after the death of the decedent whose estate is subject to the tax, "is subject to the payment of the charges against his estate and the expenses of its administration and is subject to distribution as part of his estate," shall be subjected to the inheritance tax, and as this testator has subjected this property to the payment of his debts and to the administrative expenses of his estate, he has thereby brought it within the taxing act.

It is to be observed, however, that there are three conditions in this clause, which are put, not in the disjunctive, but in the conjunctive. It is not estates which are subjected to the payment of debts or estates which are subjected to administrative expenses or estates which are distributable as part of the estate of the decedent whose estate is taxed, but it is an interest or property which responds to all of these conditions which is to be valued and included within the taxable property. It is doubtless well not to lay much stress upon this mere verbiage of the act of Congress, because it is well recognized that conjunctive and disjunctive prepositions are very laxly and loosely used by legislators, as well as other people, and because of this the courts have exercised a wide latitude in the construction of legislative enactments, and the word "and" is often construed to mean "or." It is to be further observed that the words of the taxing act which describe the property to be taxed describe it as property which is "subject to" the payment of his debts, not property which by his will he charges with the payment of his debts, and it is only by seizing upon the expression "after his death" that the property now in question could be said to be subject to the payment of debts.

We are not inclined, however, to lay stress upon the distinction here suggested, because this act of Congress may be construed to mean any property upon which creditors, qua creditors, have a claim, no matter how their claims arise. The proposition upon which we do lay stress, however, and upon which we place reliance as a proper ground upon which the question before us should be ruled, is the distinction before noted, that creditors who take through and by the exercise of a power of appointment take, not because they are creditors, but because they are appointees, and take, not under the will of the donee, but under

the will of the donor. It is true that they have been made appointees because they were creditors, but they emphatically are not creditors because they are appointees.

It is admitted that the question before us is to be determined in accordance with the law of Pennsylvania. In consequence, counsel for the defendant have cited the Pennsylvania cases upon which they rely. We pass without comment cases ruled in other jurisdictions, because it is conceded that the doctrines there laid down have been rejected in Pennsylvania.

The first case cited is that of Commonwealth v. Duffield, 12 Pa. 277. The opinion in that case was delivered by Chief Justice Gibson, who by general accord has been given a premier position among the lawyers of Pennsylvania. The ground of the ruling in that case is made perfectly clear, and it is that the property which passes by virtue of a power of appointment not merely is not, but cannot possibly be or become, the property of the donee or form part of his estate.

Commonwealth v. Williams' Executors, 13 Pa. 29, admittedly lays down the same proposition, which is involved in the other proposition that the appointee takes, not under the will of the donee, but under the will of the donor. The critical stage in the argument made on behalf of the defendant in its progress to its conclusion is reached just here. The propositions above stated are admitted to be sound, but it is averred "that the donee may, in the absence of contrary instructions by the donor, do voluntarily what the English courts of equity compel him to do." Let us see if this is true, or possibly can be true. The English courts subjected the property to the payment of debts because it was the law of England that the donee of a general power of appointment was ipso facto given such an estate in the gift of the donor as to subject it to all the liabilities to which his own estate was subject. The courts reasoned themselves to this conclusion by following the line of thought that, inasmuch as the donee had the power to give the property to his creditors if he chose, and as they were of the opinion that he should do so, it followed that these courts looked upon it as if that thing had been done. This, it is to be noted, is the very line of thought which Judge Gibson combats, and the doctrine deduced is the very doctrine which is repudiated in Pennsylvania.

Huddy's Estate, 236 Pa. 276, 84 Atl. 909, is relied upon, not for what it decides, but for what the opinion expresses was not being decided. The will of the donee in that case did not direct the payment of debts, and we are asked to draw the inference that, because the court made the distinction which it did make between wills which contained a direction for the payment of debts and those which did not, ergo if there had been in the Huddy estate the direction to pay debts the conclusion reached would have been the opposite of the conclusion which was reached. We think this inference would be justified. We are asked, however, to draw the further inference that, because creditors would have been awarded their just claims in the Huddy estate if the will had so directed, it is the law of Pennsylvania that the estate of the donor is liable for the debts of the donee. Let us see if this second inference is justified.

The proceeding there, it is to be noted, was one of distribution. Emma Huddy was the donor. The gift was of a sum of money to her executors in trust to pay the income to her granddaughter for life, with a general power of appointment in the granddaughter. The granddaughter married, and by her will gave a number of pecuniary legacies, and the residue of her estate she directed to be divided into two equal portions, one of which she gave to her brothers and sisters, and the other of which she gave to her husband as long as he should remain single; this share being subject to a trust in favor of her sisters upon the death or marriage of her husband. The husband elected to take against the will. It is to be observed that the husband would take whatever he took under the intestate laws, and therefore would share in nothing except the estate of his deceased wife. It is further observed that the adjudication made was in the estate of Emma Huddy, not of Helen Moore. The auditing judge gave the whole fund to the sisters and brother and to the sisters, one-half to each of these two classes. There was no claim upon the part of any one that the fund should be awarded to the executors of the donee, but the court in banc of its own motion so awarded it. An appeal was taken from this decree.

The argument on behalf of the appellant laid down the general proposition that under the law of Pennsylvania appointees took under the will of the donor, not the will of the donee, and distinguished the cases which had been ruled by the orphans' courts of Philadelphia upon the ground that in every one of these cases the payment of debts had been directed. It was further pointed out that the courts of the other counties in the state, or at least some of them, had refused to follow the Philadelphia rule. The decree from which the appeal was taken was made upon the proposition that the creditors of the donee had claims against her estate, and as she had blended her own property with that over which she had the power of appointment, the latter fund should go to her executors. The decree was reversed upon the two propositions—one that there was no occasion to apply the act of 1879, inasmuch as the donee had a sufficient estate to pay all the legacies she had bequeathed without calling upon the trust fund, and therefore there was no justification to assume that she intended to exercise the power given to her; and the other that the trust fund was not part of the estate of the donee, but wholly that of the donor. The effect of a blending was expressly not ruled, for the reason that in the opinion of the court that question was not before them.

Browne's Appeal, 244 Pa. 248, 90 Atl. 566, which was cited in the adjudication in the estate of the donor here, has no bearing upon the question before us, as the question there was whether or not the one exercising the power of appointment possessed that power.

This leaves only the Philadelphia orphans' court cases to be considered. Some expressions have crept into the reports of the Philadelphia cases which, if casually read, seem to give some measure of support to the defendant's argument. It is these expressions which provoked the dissenting comments from the courts of some of the other counties in the state. The appearance of support given to the argument on be-

half of the defendant in the instant case is really due to the conclusion reached in some of these cases, which was that the estate of the donor over which the donee had the power of appointment was distributable to the creditors of the donee. This, however, has absolutely no significance, because it will be found that there is nothing in any of these cases inconsistent with the recognition and application of the principle above formulated.

The doctrine or principle is (as before stated) that the whole subject-matter of the power belongs to the estate of the donor, and is no part (nor can the donee, by any act of his own, make it part) of the estate of the donee. If the donee is given a general power of appointment, he may of course exercise that power in favor of his creditors, as he may exercise it in favor of any one else. If he exercises it in the form of a direction to his executors to pay his debts, the creditors take, but (as already several times stated) they take, not qua creditors, but qua appointees. It is perfectly true, as Judge Lamorelle remarks, that in the process of getting to the creditors of the donee what has been given to them it is practically convenient to give the fund to the executors of the donee, and that the distribution should be made to the creditor appointees as if they took as creditors. In consequence of this, what is done takes on the appearance of a finding that the power of appointment fund is subject to the payment of the debts of the donee.

It will be observed, however, that the proposition is wholly an "as if" proposition, and that the direction of the donee to his executor to pay his debts out of the appointment fund is really the making of the executor the appointee of the donee to the amount of such debts and trustee for the creditors, and thus receiving the fund as such appointee, he distributes it to those who are the creditors just as if they were getting their money as creditors. It still remains wholly true that they get what they get, not because they are creditors, but because they are appointees, although it is also true that they have been made appointees because they were creditors.

If the Philadelphia orphans' court cases and the cases ruled by the orphans' courts of other counties are read with this distinction in mind, it will be seen that in every case what was ruled was entirely consistent with the principles laid down by Chief Justice Gibson and the other justices of the Supreme Court. The real purpose of invoking the "blending" of the estates is to enable the courts to determine whether the donee by his will intended to make his creditors appointees of the appointment fund, or whether he intended them to be paid out of his individual estate. Stokes' Estate, 3 Pa. Co. Ct. R. 193; Horner's Estate, 4 Pa. Co. Ct. R. 189; Fell's Estate, 14 Pa. Dist. R. 327; Huey's Estate, 17 Pa. Dist. R. 1030; Pearce's Estate (not reported); Kensel's Estate, 21 Montg. Co. Law Rep'r (Pa.) 37; Brewer's Estate, 33 Pittsb. L. J. (Pa.) 161.

Much may be said in favor of the proposition, as one founded upon sound legal principles, that one who is given the usufruct of property, together with the power of disposition, is the owner of that property, and should not be permitted to hold it as against his creditors. We do not see that anything is gained by dragging in the supposed equity of

creditors, nor resorting to any principle of equity, as distinguished from the law. Indeed, the equity of creditors is by no means clear. They have their legal rights, and these spring from the policy of law that the property of every man is subject to the payment of his debts, and that, whenever a man has every interest in property which full ownership could give him, he is the owner, with all the consequences of ownership. Such is the law in some jurisdictions, but it is not the law of Pennsylvania. The Pennsylvania doctrine is that the donor held his property clear of all claims of the creditors of any one else, and if he chose to create what is in effect a spendthrift trust in favor of his donee, the property so given is not subject to the claims of creditors of the donee. The only way of overthrowing this doctrine is by establishing a policy of the law which may be expressed in the paradox that property cannot be given to any one without property being given to him.

In order that the judgment entered in this case may have a definite date, no judgment is now entered, but plaintiff is given leave to enter judgment; the court being of opinion that the rule for judgment should be made absolute.

UNITED STATES v. SISCHO.

(District Court, W. D. Washington, N. D. November 22, 1919.)

No. 4038.

1. STATUTES ⟸194—RULE OF CONSTRUCTION OF EJUSDEM GENERIS.
The rule of construction known as "ejusdem generis" is that general and specific words, which are capable of analogous meaning, being associated together, take color from each other, so that the general words are restricted to a sense analogous to the less general (citing Words and Phrases, Ejusdem Generis.)

2. WORDS AND PHRASES—"EXPORTS AND IMPORTS."
The words "exports and imports," used in the federal Constitution, apply only to property.

3. WORDS AND PHRASES—"EXPORTS AND IMPORTS."
The words "exports and imports" cannot apply to a dead human body.

4. CUSTOMS DUTIES ⟸130—FORFEITURE ON IMPORTATION OF PROHIBITED GOODS.
Prohibited goods are ipso facto forfeited by the fact of importation.

5. CUSTOMS DUTIES ⟸129—COLLECTION OF PENALTY FOR UNLAWFUL INTRODUCTION OF SMOKING OPIUM; "MERCHANDISE."
In an action under Act June 22, 1874, § 15 (Comp. St. § 5803), to collect a penalty imposed by the Customs Department under Rev. St. § 2809 (Comp. St. § 5506), against one who unlawfully brought into the United States smoking opium, *held*, in view of Comp. St. §§ 8800, 8801, forbidding the importation of smoking opium, as well as sections 6287a and 6287b, and Act June 22, 1874, § 4 (Comp. St. § 5798), defining smuggling, smoking opium is not "merchandise," within Rev. St. § 2766 (Comp. St. § 5462), defining merchandise as including goods, wares, and chattels of every description capable of being imported, for it is an outlaw drug, hence the penalty described by section 2809 is inapplicable.

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

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

6. CUSTOMS DUTIES ⊂=129—COLLECTION OF PENALTY FOR UNLAWFUL IMPORTATION OF SMOKING OPIUM.
As smoking opium is a prohibited thing, and could have no market value in the United States, defendant, who smuggled into the United States smoking opium from British Columbia, where its sale was also forbidden, cannot be required to pay the penalty prescribed by Rev. St. § 2809 (Comp. St. § 5506), against the master of vessels who bring in merchandise without manifesting the same, etc., for the penalty is under the section based on the value of the merchandise so brought in.

7. STATUTES ⊂=163—IMPLIED REPEAL OF GENERAL STATUTE BY SPECIAL STATUTE.
The enactment of a special statute repeals and takes the subject out of a general statute, which otherwise might include the particular subject-matter dealt with in the special statute.

8. STATUTES ⊂=183—INTERPRETATION ACCORDING TO INTENT.
Interpretation of a statute should be not according to the letter of the statute, but according to the intent as gathered from all parts of the law.

9. STATUTES ⊂=183—CONSTRUCTION ACCORDING TO INTENT.
The letter of a statute should not be followed, if it will produce an absurd result, or if a more reasonable meaning presents itself.

10. STATUTES ⊂=228—OFFICE OF PROVISO.
The usual office of a proviso in a statute is to except something which otherwise would fall within its scope.

11. STATUTES ⊂=239—CONSTRUCTION WITH REFERENCE TO COMMON LAW.
Statutes are construed with reference to the common law; so, in construing statutes in derogation of common law, there should be no greater departure than the statute expressly declares.

12. CUSTOMS DUTIES ⊂=129—PENALTIES FOR IMPORTATION OF SMOKING OPIUM.
Comp. St. § 8801f, declaring that whenever opium, cocaine, or any preparations or derivatives thereof, shall be found on any vessel at any port of the United States, which is not shown on the vessel's manifest as required, such vessel shall be liable for the penalty and forfeiture prescribed by Rev. St. & 2809 (Comp. St. § 5506), does not include smoking opium, for it cannot be considered a preparation or derivative of opium, as the importation of smoking opium is forbidden, and in view of the penalties prescribed for the smuggling of smoking opium into the United States.

At Law. Action by the United States against Wesley L. Sischo. Judgment for defendant.

Robert C. Saunders, U. S. Atty., and Miss Charlotte Kolmitz, Asst. U. S. Atty., both of Seattle, Wash.

Daniel Landon, of Seattle, Wash., for defendant.

CUSHMAN, District Judge. The defendant, Wesley L. Sischo, was tried for a violation of Act Feb. 9, 1909, as amended January 17, 1914 (section 8801, Comp. St.), convicted, sentenced, and is now serving a term of years in the penitentiary for smuggling opium prepared for smoking from British Columbia into the United States. The opium and the boat in which it was smuggled have been forfeited. The Customs Department under section 2809, R. S. (section 5506, Comp. St.), imposed a penalty of $6,400 upon the defendant, and this suit was begun under section 15 of Act June 22, 1874 (section 5803, Comp. St.), upon the report of the collector, and a writ of attachment issued against a Marmon automobile, the property of this defendant, to satisfy the said penalty.

The complaint or libel of the government describes the importation as "certain merchandise denied importation into the United States, to wit, one hundred (100) five-tael tins of opium, prepared for smoking purposes, the same not being on any manifest or included or described in the manifest," and alleges that the value of such merchandise was $6,400. The answer of the defendant denies the allegations of the libel, and specifically denies that the so-called merchandise was worth the sum of $6,400, or any sum whatever.

A trial has been had, upon which the government produced testimony regarding the value, in this country, of morphine, and showed that the opium brought in by Sischo could be converted into morphine. There was no evidence as to the cost of such conversion. Other testimony was introduced as to what price was paid in British Columbia for such opium. The laws of British Columbia, as our own, prohibit any importation or traffic in such opium. Further testimony was given regarding the price paid for opium in China, Mexico, and Macao, a Portuguese colony near China.

Section 2809, R. S. (2 Fed. St. Ann. 647; section 5506, Comp. St.), provides:

"If any merchandise is brought into the United States in any vessel whatever from any foreign port without having such a manifest on board, or which shall not be included or described in the manifest, or shall not agree therewith, the master shall be liable to a penalty equal to the value of such merchandise not included in such manifest; and all such merchandise not included in the manifest belonging or consigned to the master, mate, officers, or crew of such vessel, shall be forfeited."

This section is contained in the Customs Revenue Act of March 2, 1799 (1 Stat. 646, c. 22, § 24).

"The word 'merchandise,' as used in this title, may include goods, wares, and chattels of every description capable of being imported." Section 2766, R. S. section 5462, Comp. St.)

Section 15 of the act of June 22, 1874 (an act entitled "An act to amend the customs revenue laws and to repeal moieties"), provides:

"That it shall be the duty of any officer or person employed in the customs revenue service of the United States, upon detection of any violation of the customs laws, forthwith to make complaint thereof to the collector of the district, whose duty it shall be promptly to report the same to the district attorney of the district in which such frauds shall be committed. Immediately upon the receipt of such complaint, if, in his judgment, it can be sustained, it shall be the duty of such district attorney to cause investigation into the facts to be made before a United States commissioner having jurisdiction thereof, and to initiate proper proceedings to recover the fines and penalties in the premises, and to prosecute the same with the utmost diligence to final judgment." 18 Stat. 189 (section 5803, Comp. St.).

The statutes further provide:

"After the first day of April, nineteen hundred and nine, it shall be unlawful to import into the United States opium in any form or any preparation or derivative thereof: Provided, that opium and preparations and derivatives thereof, other than smoking opium or opium prepared for smoking, may be imported for medicinal purposes only, under regulations which the Secretary of the Treasury is hereby authorized to prescribe, and when so imported shall be subject to the duties which are now or may hereafter be imposed by law." Section 8800, Comp. St.

"If any person shall fraudulently or knowingly import or bring into the United States, or assist in so doing, any opium or any preparation or derivative thereof contrary to law, or shall receive, conceal, buy, sell, or in any manner facilitate the transportation, concealment, or sale of such opium or preparation or derivative thereof after importation, knowing the same to have been imported contrary to law, such opium or preparation or derivative thereof shall be forfeited and shall be destroyed, and the offender shall be fined in any sum not exceeding $5,000 nor less than $50 or by imprisonment for any time not exceeding two years, or both. Whenever, on trial for a violation of this section, the defendant is shown to have, or to have had, possession of such opium or preparation or derivative thereof, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant shall explain the possession to the satisfaction of the jury." Section 8801, Comp. St.

"Whenever opium or cocaine or any preparations or derivatives thereof shall be found upon any vessel arriving at any port of the United States which is not shown upon the vessel's manifest, as is provided by sections twenty-eight hundred and six and twenty-eight hundred and seven of the Revised Statutes, such vessel shall be liable for the penalty and forfeiture prescribed in section twenty-eight hundred and nine of the Revised Statutes." Section 8801f, Comp. St.

A tax of $300 per pound is levied upon opium manufactured in the United States for smoking purposes, and a minimum bond of $100,000 is required of the manufacturer (sections 6287a and 6287b, Comp. St.); but all opium prepared for smoking is denied importation (sections 8800 and 8801, Comp. St.).

Section 4 of the act of June 22, 1874 (section 5798, Comp. St.), defines smuggling as—

"* * * The act, with intent to defraud, of bringing into the United States, or, with like intent, attempting to bring into the United States, dutiable articles without passing the same, or the package containing the same, through the custom house, or submitting them to the officers of the revenue for examination."

[1-5] To justify a judgment for the penalty for which suit is brought, three things are necessary:

(1) That section 2809, R. S., was intended to cover prohibited articles—things denied admission to the United States—as well as legitimate articles of commerce brought into the United States in an unauthorized manner; that is, not manifested as required by law.

(2) That imported opium prepared for smoking purposes falls within the description of "goods, wares or merchandise," as the same are used in customs duty laws and section 2809, R. S.

(3) That such opium is an article of merchandise of value and that the value has been shown.

The decisions as to the rule of construction of provisions for forfeiture and penalties are not in accord. Certain courts have held that they are highly penal; others hold them remedial in character; but, even by the latter class, as well as the former, the case must be brought, not only within the letter, but the spirit, of the statute. 12 Cyc. 1166, B, and 1167.

If the present case is not fairly within the provisions of section 2809, R. S., no cause arises for stretching that statute to cover it as an overlooked need. It is not casus omissus, for section 3082, R. S. (section 5785, Comp. St.), the general smuggling statute, and section 8801

(Comp. St.), the opium smuggling statute, being the statute under which the defendant was convicted, make provision, not only for imprisonment and fine, but forfeiture as well.

Customs laws pertain to that part of commerce that has to do with property, its exchanges and movements. "Customs duties" is the name given to taxes on the importation and exportation of commodities (Webster's Dictionary); the tariff or tax assessed upon merchandise imported from, or exported to, a foreign country (Standard Dictionary).

What is condemned by section 2809, R. S., is nonmanifested merchandise. Webster defines "merchandise" as "whatever is usually bought or sold in trade or market or by a merchant." "Commodity" is defined as an article of trade; a movable article of value; something that is bought and sold. Standard Dictionary. "Merchandise" is anything customarily bought and sold for profit. Standard Dictionary. For "capable" Webster gives as synonyms: "Susceptible; competent; qualified; fitting; possessing legal power or capacity." The word "chattels" is derived from the Norman French; its meaning being goods of every kind, every species of property movable, which is less than freehold. Bouvier (3d Ed.) vol. 1, p. 471.

If "capable of being imported" referred to, and was limited to, physically capable, Congress would have contented itself with saying personal chattels, for it would be ridiculous to think that Congress would have thought it necessary to exclude the impossible—the importation of chattels real. Opium lawfully brought into the United States is merchandise; but it does not, necessarily, follow that smoking opium, denied admission to the United States, is merchandise, considered either generally or as the word is used in section 2809, R. S.

The rule of construction, "noscitur a sociis," is particularly applicable and frequently resorted to in interpreting custom statutes. "Merchandise, goods, wares and chattels" are not used in an all-comprehensive sense, so as to include all movable things. These words as used in this statute, do not include ships themselves. 12 Cyc. 1132 (11); The Conqueror, 166 U. S. 110, 17 Sup. Ct. 510, 41 L. Ed. 937.

The words "chattels capable of being imported," being used with the words "goods and wares," under the rule "noscitur a sociis," would limit their meaning to articles the subject of commercial transactions —lawfully the subject of such transactions. All laws regulating the payment of duties are, for practical application to commercial operations, to be considered in a commercial sense.

Merchandise may include every article of traffic, foreign and domestic, which is properly embraced in a commercial transaction; but it would not include imported slaves, although they were merchandise in a foreign state. Groves v. Slaughter, 40 U. S. (15 Pet.) 449, at pages 506 and 507, 10 L. Ed. 800.

The rule of construction of ejusdem generis is that general and specific words, which are capable of analogous meaning, being associated together, take color from each other, so that the general words are restricted to a sense analogous to the less general. 3 Words and

Phrases, 2328; U. S. v. Baumgartner (D. C.) 259 Fed. 722, at page 725. So the words "merchandise and chattels," in these two statutes, take color from the words "goods and wares," and show that the things contemplated are such as are capable of entering into the commerce of the United States—things that can legally be bought and sold.

Section 5299, Comp. St., providing for the seizure and forfeiture of obscene books and articles, does not describe nor recognize them as "merchandise, goods or wares," but refers to such objects throughout as "articles," painstakingly designating them as such not less than seven times in this section. In Criminal Code, § 245 (Act March 4, 1909, c. 321, 35 Stat. 1138 [Comp. St. § 10415]), providing a punishment for the importation and transportation of obscene books and indecent things, they are not described as "merchandise," nor recognized as such, nor as "chattels," but are properly and accurately described as that which they legally are, "articles, matters, and things."

The words "exports and imports," as used in the Constitution, refer only to property. 12 Cyc. p. 1108, B, 5.

"The words 'inspection laws,' 'imports,' and 'exports,' as used in clause 2, § 10, art. 1, of the Constitution, have exclusive reference to property.

"This is apparent from the language of clause 1, § 9, of the same article, where, in regard to the admission of persons of the African race, the word 'migration' is applied to free persons, and 'importation' to slaves."

People v. Compagnie Gen. Transatlantique, 107 U. S. 59, 2 Sup. Ct. 87, 27 L. Ed. 383.

The words 'exports' and 'imports' cannot apply to a dead human body. In re Wong Yung Quy, 2 Fed. 624, 6 Sawy. 442. In the importation of smoking opium, under the laws as at present existing, there cannot properly be said to exist an intent to defraud the United States. There is no question of revenue, or loss of anything of value, involved. If the illegal importation of such opium—being absolutely prohibited—can be called the working of fraud upon the United States, then the commission of any crime can properly be so designated.

Section 15 of the act of June 22, 1874, the section under which this suit is brought, provides:

"That it shall be the duty of any officer or person employed in the customs revenue service of the United States, upon detection of any violation of the customs laws, forthwith to make complaint thereof to the collector of the district, whose duty it shall be promptly to report the same to the district attorney of the district in which such *frauds* shall be committed. Immediately upon the receipt of such complaint, if, in his judgment, it can be sustained, it shall be the duty of such district attorney to cause investigation into the facts to be made before a United States commissioner having jurisdiction thereof, and to initiate proper proceedings to recover the fines and penalties in the premises, and to prosecute the same with the utmost diligence to final judgment." Section 5803, Comp. St. (The italics are those of the court.)

Section 16 of the same act provided:

"That in all actions, suits, and proceedings in any court of the United States now pending or hereafter commenced or prosecuted to enforce or declare the forfeiture of any goods, wares, or merchandise, or to recover the value thereof, or any other sum alleged to be forfeited by reason of any violation of the provisions of the customs-revenue laws, or any of such provisions, in which action, suit, or proceeding an issue or issues of fact shall have been joined,

it shall be the duty of the court, on the trial thereof, to submit to the jury, as a distinct and separate proposition, whether the alleged acts were done with an actual intention to defraud the United States, and to require upon such proposition a special finding by such jury; or, if such issues be tried by the court without a jury, it shall be the duty of the court to pass upon and decide such proposition as a distinct and separate finding of fact; and in such cases, unless intent to defraud shall be so found, no fine, penalty, or forfeiture shall be imposed." 18 Stat. 189.

Although section 16, directing the procedure, has been repealed, its provision requiring that the court, or jury, make a special finding as to whether there was actual fraud, the court, being called upon to construe section 15, should still look to section 16 to determine in what sense the word "frauds" is used in section 15. Section 15 contemplates that a violation of the letter of the statute may occur, without any intent to defraud the United States.

Prohibited goods are ipso facto forfeited by the fact of importation. 12 Cyc. 1171; McLane v. U. S., 31 U. S. (6 Pet.) 404, 8 L. Ed. 443; Anonymous, Fed. Cas. No. 470 (the importation in this case being pictures of a nature to corrupt the public morals); U. S. v. Jordan, Fed. Cas. No. 15,498.

It is not necessary to include goods not dutiable in a manifest. The S. Oteri, 67 Fed. 146, 14 C. C. A. 344. This has been expressly recognized by Congress in section 7810, Comp. St., which provides:

"Every yacht, except those of fifteen gross tons or under, visiting a foreign country under the provisions of sections forty-two hundred and fourteen, forty-two hundred and fifteen, and forty-two hundred and seventeen of the Revised Statutes shall, on her return to the United States, make due entry at the custom house of the port at which, on such return, she shall arrive: Provided, that nothing in this act shall be so construed as to exempt the master or person in charge of a yacht or vessel arriving from a foreign port or place with dutiable articles on board from reporting to the customs officer of the United States at the port or place at which said yacht or vessel shall arrive, and deliver in to said officer a manifest of all dutiable articles brought from a foreign country in such yachts or vessels."

Where, in violation of the Nonintercourse Law of the War of 1812, certain merchandise had been brought to the United States from Great Britain, it was said:

"In point of law, no duties, as such, can legally accrue upon the importation of prohibited goods. * * *" McLane v. U. S., 31 U. S. (6 Pet.) 404, at page 427 (8 L. Ed. 443).

In a very recent case in the Northern district of New York, Judge Ray has decided:

"The provision of Act Aug. 10, 1917, § 15 (Comp. St. 1918, § 3115¼*l*), making it a criminal offense to import distilled spirits, punishable by fine or imprisonment or both, is not a customs law, but a prohibition law, enacted under the police power of Congress, and while the seizure and forfeiture as contraband of spirits so imported, though not specifically provided for, is essential to the effective enforcement of the law, the court cannot impose as an additional punishment the forfeiture of the vehicle used, under another statute" (a customs statute). U. S. v. 1 Ford Automobile and 14 Packages of Distilled Spirits (D. C.) 259 Fed. 894.

Attorney General Knox, in an opinion rendered the collector of customs at Port Townsend (29 Op. Attys. Gen. 603), holds that opium

prepared for smoking purposes is a nuisance per se, and quotes Freund on Police Power and Hipolite Egg Co. v. U. S., 220 U. S. 45, at pages 57 and 58, 31 Sup. Ct. 364, 55 L. Ed. 364, to the effect that smoking opium is fitted by nature to harm the community; that it is a menace belonging to the class of things that carry their own identification as contraband of law, which are outlaws of commerce; that, under Act Feb. 9, 1909, c. 100, 35 Stat. 614 (Comp. St. §§ 8800, 8801), opium prepared for smoking purposes is legally no longer classed with commercial imports, but is a prohibited thing, to be summarily condemned and destroyed—in effect, that it is not within the customs laws.

The Attorney General, in his recent opinion, referred to by Judge Ray, approves of and construes the opinion of Attorney General Knox as to the effect "that a violation of the law prohibiting the importation of smoking opium is not a violation of the customs laws." Section 2809, R. S., and section 15 of the act of June 22, 1874, under which the present suit is brought, are customs laws.

Property is a thing which is the subject of ownership. N. W. Mutual Life Ins. Co. v. Lewis County, 28 Mont. 484, 491, 72 Pac. 982, 98 Am. St. Rep. 572. Things capable of no use for lawful purposes are not property. Stanley-Thompson Liquor Co. v. People (Colo.) 168 Pac. 750. There is no right of property in Confederate notes. Murphy v. Denman, 18 La. Ann. 55. Opium prepared for smoking purposes is contraband. It is an outlaw, both under the laws of the United States and British Columbia.

The only reason that there was any question in Northern Commercial Co. v. Brenneman, 259 Fed. 514, —— C. C. A. ——, as to the right of forfeiture, was that interstate commerce was involved, and that there were purposes, other than for a beverage, for which alcoholic liquors could legally be used in Alaska. If such liquor had been contraband, and not legally usable for any purpose, section 23 of the act (Comp. St. 1918, § 3643m) considered by the court in that decision—providing that no property right shall exist in the alcoholic liquor—would be unnecessary. This provision of the law was evidently the result of abundant caution, and is the recognition of an existing rule of law, rather than the promulgation of a new one. Such alcoholic liquor could not be held a nuisance per se, for, under the statute, it could be intended for a lawful purpose. It became a nuisance because it was kept and intended for an unlawful purpose, for beverage purposes. Being of that character, something more was required than a mere inspection of the thing.

It is not so with opium prepared for smoking purposes. It is true that the use of opium prepared for smoking purposes is not prohibited directly, but its use is effectively prohibited by the punishing of one who receives it, and by its possession being made evidence of guilt. Opium prepared for smoking is not a deodand, customarily an innocent thing, that has become the instrument of doing a particular wrong. Such opium is, itself, a wicked thing, dangerous from the beginning and at all times to human welfare.

Property is the right a man has in a thing held, and openly used, or the thing itself, in which a man has, and can have a right the law will

protect—a thing in which it will protect the right of possession, not a forbidden thing he cannot even receive, and the bare possession of which is enough to send him to jail. Such a thing is not property. In a proceeding for forfeiture of opium prepared for smoking purposes, the only issue upon which a claimant would be heard would be whether or not the article was opium prepared for smoking purposes. If it was, it would stand forfeited, and no claim of right in it would avail. Therefore the necessities, if any, for a forfeiture proceeding, do not recognize an article as property.

It is well understood that the tax of $300 per pound on smoking opium of domestic manufacture is one of the means adopted to stamp out traffic in it, and is not intended as a recognition of even the domestic article as property. For smuggling opium there is a penalty provided of a fine not to exceed $5,000, or imprisonment of not to exceed two years. Section 8801, Comp. St. For a violation of the statute regulating domestic manufacture, there is a penalty of not less than $10,000, or imprisonment for not less than five years. Section 6287e, Comp. St.

The purpose to prohibit the domestic manufacture is clearly shown by the enormous tax levied and other burdens placed upon such business. Such a law was probably enacted to prevent the escape of an accused, in whose possession smoking opium was found, for the law against its importation provides two presumptions:

(1) That opium found in the United States is of foreign growth and manufacture.

(2) That the defendant, being shown to be in its possession, may be convicted, unless he satisfactorily explains that possession.

These presumptions are rebuttable. There is left an opportunity for a defendant found in such possession to contend that the smoking opium is of domestic manufacture; but, under the law authorizing its domestic manufacture, the restrictions and punishments being heavier than those for smuggling smoking opium of foreign manufacture, and possession of the domestic article affording a like presumption of guilt sufficient to sustain conviction, this act removes the temptation to attempt to evade punishment for smuggling by setting up the claim that the smoking opium is of domestic manufacture.

"It is well settled that things which are capable of no use for lawful purposes—and it is established that these instruments are of that class—are not the subject of property. They cannot be recovered in replevin, nor will damages be given for their loss or injury. They are, as some courts have said, 'outlaws.'" Stanley-Thompson Liquor Co. v. People (Colo.) 168 Pac. 750.

In Frost v. People, 193 Ill. 635, 61 N. E. 1054, it was held:

"Cr. Code, div. 8, providing that gaming apparatus may be seized and destroyed under the direction of the judge, justice, or court, is not unconstitutional because depriving persons of property without due process of law, such apparatus not being the lawful subject of property which the law protects."

In Mullen v. Mosely, 13 Idaho, 457, 90 Pac. 986, 12 L. R. A. (N. S.) 394 (121 Am. St. Rep. 277, 13 Ann. Cas. 450), the court said:

"A 'slot machine,' incapable of use for any purpose except in violation of the penal provisions of the anti-gambling law, is not property within the meaning and protection of section 13, art. 1, of the state Constitution, which provides that 'no person shall * * * be deprived of life, liberty, or property without due process of law.'"

Miller v. C. & N. W. R. Co., 153 Wis. 431, 141 N. W. 263, 45 L. R. A. (N. S.) 334, Ann. Cas. 1914D, 632, held that, the use of a gambling device being prohibited by statute, there can be no recovery on account of its injury. In Board of Police Commissioners v. Wagner, 93 Md. 182, 48 Atl. 455, 52 L. R. A. 775, 86 Am. St. Rep. 423, it was held that replevin would not lie for the recovery of an outlawed article, a gambling device. State v. Soucie's Hotel, 95 Me. 518, 50 Atl. 709, held that a gambling device is noxious per se, and distinguishable from intoxicating liquors, which will be destroyed only when intended for an unlawful use or purpose. See, also, State v. Four Jugs of Intoxicating Liquor, 58 Vt. 140, 2 Atl. 586, and State v. Robbins, 124 Ind. 308, 24 N. E. 978, 8 L. R. A. 438.

[6] There is another question remaining that, other questions aside, would have to be determined in any event. To justify the imposition of a penalty under section 2809, R. S., the court must be able to measure the penalty in the case by the value of the imported thing. This value must be determined by a statutory rule or a common-law rule.

As smoking opium is a prohibited thing, it is not a thing of value. It is not an asset. It is a liability. Its value is minus. It is worth less than nothing. It can only do harm. In legitimate articles of commerce, the court may inquire at what price they are freely sold in the open market in the ordinary course; but it is inconceivable that the court will be guided by, and seek to ascertain, the ruling quotation for smoking opium as fixed by the furtive exchanges therein effected by criminals in the haunts of vice.

If it were a thing of value, the government would not destroy it. By condemning it to destruction, the government says that there is more harm than good in it; that the harm in it offsets the good, if any, and leaves a residuum of harm. The government does not destroy it as a house in the path of a fire may be destroyed—a good thing made harmful by particular circumstances. It is not destroyed as the skins of fur seals were once destroyed, to protect a monopoly given by the government. Opium prepared for smoking is destroyed because harm is of its essence—because it is malum in se.

Judge Dundy, of Nebraska, in an unreported decision rendered 30 or more years ago, held that, under the statute punishing a post office employé for embezzling a letter containing an article of value (section 5467, R. S. [section 10365, Comp. St.]), a prosecution could not be had for the embezzlement of a letter containing a Louisana lottery ticket, because the ticket was not a thing of value; its carrying being prohibited by the postal laws. This rule is amply supported by the cases collected in 25 Cyc. 1653, V, A, 2.

This being true in the case of a lottery ticket, which, under a prohibition law, one court at least has held not to be malum in se (Com-

monwealth v. Lottery Tickets, 5 Cush. [Mass.] 369), it follows a fortiori that imported opium prepared for smoking purposes, being malum in se, can have no value at common law. Goods, wares, and merchandise are things of value, requiring and justifying expense to bring them to those who need them. Smoking opium is a thing that requires expense to keep it from its victims, and to prevent the innocent being exposed to the dangers that lurk in it.

There is no statute of the United States as to values and the method of determining them that is applicable. The only ones that can bear any analogy to the question are in the customs revenue laws. There have been many of these laws, and many sections are still in effect. They are too numerous to quote. An outline of the growth and trend of these laws is given in 12 Cyc. pp. 1141, 1142, and 1143. Running through all of them, in words or substance, are provisions that value shall be determined as the actual market value, or wholesale price, at the time of exportation to the United States in the principal markets of the country from which exported; that such actual market value is the price at which the merchandise is freely offered for sale to all purchasers in such markets, the price which the manufacturer or owner would have received for such merchandise, sold in the ordinary course of trade in the usual wholesale quantities.

The value in the country from which exported is the one looked to in all of these statutes. Sales of merchandise in British Columbia are the sole standard of value of exports from that country. Hence no consideration can be given to the testimony offered regarding values in China and other foreign countries than British Columbia. The sales shown in the latter country were all illicit sales. There can be no market value of an article which cannot be freely offered for sale; so the statutory rule, provided by the customs revenue laws, does not apply. There was no evidence of the cost of production in British Columbia, or, indeed, any that smoking opium is manufactured therein. It will not be presumed that smoking opium is freely offered for sale in British Columbia, because of the law prohibiting traffic in it. There is neither a legal rule provided by which to determine the value, if any, of such opium, nor any evidence sufficient to find a value for it.

[7-12] There still remains to be considered the effect, if any, of section 8801f upon section 2908, R. S. In section 8801f, in speaking of opium, its preparations and derivatives, did Congress intend to include smoking opium? On account of manifest uncertainties and ambiguities, arising under this statute and section 2809, R. S., which it adopts by reference, construction must be resorted to. Section 2809, R. S., measures the penalty by the value of the merchandise not manifested. This rule is perfectly proper in the case of opium subject to importation; but is it applicable, and did Congress intend it to be applied, in forbidden importations of smoking opium not manifested?

Section 8801f directly provides for a penalty and forfeiture to be imposed against the vessel, and, the present case being one to recover a penalty from the master, under section 2809, R. S., the construction of section 8801f should not be undertaken by the court further than is necessary. This section recites that—

"Such vessel shall be liable for the penalty and forfeiture described in section 2809, R. S. * * *"

The only forfeiture stated in section 2809, R. S., is the forfeiture of the merchandise belonging to the master, mate, officers, or crew of the vessel. Was it intended by the foregoing to forfeit the interest the vessel had on account of freight in the opium omitted from the manifest, or was it intended to subject the vessel to forfeiture, generally, under sections 5792 and 5766, Comp. St.? It could not have been intended that the vessel should be liable for a penalty in addition to its own forfeiture.

Generally, merchandise consigned to others than the master, mate, officers, or crew, and omitted from the manifest, is not subject to forfeiture under section 2809, R. S. This shows that it was intended by section 8801f to effect a forfeiture in the case of opium not applicable to other merchandise. By the former section forfeiture was not provided for general merchandise (the property of those not connected with the ship) for the default of the master in failing to manifest; but by section 8801f, in the matter of opium, such forfeiture was provided.

The penalty and forfeiture pronounced are fixed quantities. Therefore is it likely that Congress would impose the same penalty for the failure to manifest a lawful import as it would a prohibited one, if the manifesting of the latter were contemplated—particularly in view of the severity of the punishment provided for the willful importation of smoking opium by other sections of the law? Does not the requirement that opium be manifested, under a penalty if omitted, imply the law's protection of some one in case of compliance with such requirement? No such protection could be provided in the case of the importation of smoking opium. Therefore it is unreasonable to presume it was intended to be covered by section 8801f.

If no room were left for the operation of the penalty and forfeiture provided for in section 8801f, supra, except in case of the failure to manifest smoking opium, it could be forcibly contended that a penalty equal to the value of such opium accrued against the vessel, and the court would have to treat it as a thing of value, and search for a measure of value. But such is not the case, for, under section 8800, Comp. St., opium and preparations and derivatives thereof, other than smoking opium, or opium prepared for smoking, may be imported for medicinal purposes.

"Preparations and derivatives," these words being associated, take color from one another, and, to one of average understanding, "preparations and derivatives of opium" would not suggest smoking opium. Smoking opium may be prepared from a preparation of opium, or even from the residue of smoking opium, yen shee. Section 6287a, Comp. St. So smoking opium cannot always be accurately described as a preparation of opium, as that expression is ordinarily understood.

Congress, in using the expression "preparations and derivatives" of opium, was using an expression familiar in sections other than those of this act. Section 5291, Schedule A, par. 47, and section 6287g, Comp. St. That section 8801f, in using the words "preparations and

derivatives thereof," contemplates drugs as properly used in medicine, is shown by including cocaine:

"Opium or cocaine or preparations or derivatives thereof."

Cocaine, its preparations and derivatives, are not mentioned in either section 8800 or 8801, or in any of the other sections of the act of January 17, 1914 (38 Stat. 275, c. 9 [Comp. St. §§ 8800–8801f]), relating to imports into the United States. But it is included with opium, its preparations and derivatives, in section 5291, par. 47, and section 6287, subsection (g), supra, both of which latter include, as associated dangers, hedged about with restrictions, opium and cocaine, preparations and derivatives thereof.

All of these sections are limited to those drugs of which opium and cocaine form the base, and to those alone, further showing that section 8801f should be construed for its proper understanding rather with these two sections, than alone with sections 8800 and 8801, neither of which mentions cocaine. Any opium, preparations and derivatives thereof, for medicinal purposes, excepting smoking opium, can be imported under regulations prescribed by the Secretary of the Treasury. Section 8800, Comp. St. Opium, cocaine, salts, preparations and derivatives thereof, except smoking opium, can be exported to countries regulating their entry, under such regulations. Section 8801d, Comp. St.

Having, in the two sections giving the right to import and export opium, its preparations and derivatives (8800 and 8801d), pointed out that the right in neither case extended to smoking opium, may not an intent be shown thereby, in using, in section 8801f, the expression "its preparations and derivatives," not to include smoking opium, providing, as it does, a new penalty for failure to comply with an existing regulation, as to the manner of importing merchandisable opium? In sections 8800 and 8801d, in defining what opium can be imported and exported, exactness was necessary; but section 8801f, regulating the procedure and imposing penalties for an irregularity in bringing within the United States something which a right had been given to import, the same exactness in this particular was not requisite. That which can be lawfully imported had already been definitely stated.

Under the familiar rule that the enactment of a special statute repeals, or takes the subject out of, a general statute, which might otherwise include the particular, the limiting of the penalty and forfeiture to the vessel by this latter section would, in any event, indicate an intention on the part of Congress to leave the smuggler to be punished, alone, by fine, imprisonment, and forfeiture of the opium, as provided in section 8801, and the master not at all, unless criminally liable. The maximum fine, $5,000, to which the willful importer is subject, is sufficient in the vast majority of cases to render superfluous a penalty.

There is nothing in the customs revenue laws to indicate, in requiring the making and delivering to government officers by consignee and ships's officers of manifests, entries, declarations, bills of lading, and invoices of merchandise, any intention or purpose, other than to secure and facilitate the determination of the amounts and payments of

the duties accruing upon imports. The danger arising from the lawful importation of opium, its derivatives and preparations, for medicinal purposes, except smoking opium, was deemed sufficient to warrant the regulation thereof by the Secretary of the Treasury, not applicable to other merchandise. These regulations are authorized by section 8800. It is fair to presume that the same consideration actuated Congress in providing a penalty (section 8801f) in case of failure to properly manifest opium entitled to importation, which is not provided for in case of any other merchandise, except that of the master, mate, officers, or crew of the vessel. The vessel, if a common carrier, is not, in case of other merchandise, liable, unless the owner or master is a consenting party, or privy thereto; the only remedy being an action against the master. 29 Op. Attys. Gen. 364; section 5766, Comp. St.

Interpretations should be, not according to the letter of the statute, but the intent should be gathered from all parts of the law. The letter should not be followed, if a result which is absurd follows, or if a more reasonable meaning presents itself. U. S. v. Hogg, 112 Fed. 909, 50 C. C. A. 608; Interstate Drainage & Investment Co. v. Board of Com'rs, 158 Fed. 270, 85 C. C. A. 532; In re Matthews (D. C.) 109 Fed. 603. It is true that one of the surest means in fixing and determining the scope of a statute is the insertion of an exception or proviso; but, like other canons of construction, its force may be overcome by other evidence of intention. The denial of smoking opium to importation and exportation (sections 8800 and 8801d) is in the nature of an exception. But this rule would be invoked with better grace for the interpretation of those particular sections than of 8801f, a statute concerning other matters, the manifesting of imports for duty purposes. The first of these statutes defines what opium can be and cannot be imported. The latter provides one of the regulations for the importation of that which can be imported. There was, therefore, need for the exception in the former, in order to remove all doubt; not so in the latter.

The rule of interpretation by considering the exception is used to determine those things which do fall within the wider scope of the statute, as indicated by those things which have been excepted from its effect. But this rule cannot be invoked for that purpose here, at least with the same force, because the only thing excepted is smoking opium, and nothing else is claimed to fall within the statute, similar in nature to smoking opium, by reason of the latitude given the statute by such exception.

"The * * * usual office of a proviso is to except something out of a statute which would otherwise be in it." Deitch v. Staub, 115 Fed. 309, at page 310, 53 C. C. A. 137, at page 138.

"Ordinarily, the office of a proviso in a statute is to modify or restrain the enacting clause." U. S. v. Kansas City So. Ry. Co. (D. C.) 189 Fed. 471, at page 472.

"* * * It is no doubt the general rule that a proviso to a particular section does not apply to other sections, and that it is to be construed with reference to the immediately preceding parts of the clause to which it is attached. But such rule is not controlling, especially in such composite structures as tariff and appropriation acts. In U. S. v. Babbit, 1 Black, 55, 17 L. Ed. 94, it was held that the particular proviso then under consideration

was 'not limited in its effect to the section where it is found, but that it was affirmed by Congress as an independent proposition,' applying alike to all officers of 'this class,' including officers not mentioned in the section which contained the proviso. The true rule seems to be that, 'while the position of a proviso in a statute has a great and sometimes a controlling influence upon the extent of its application, yet the inference from its position cannot overrule its plain general intent.' Lewis' Sutherland Statutory Construction (2d Ed.) § 352, and authorities cited." U. S. v. R. F. Downing & Co., 146 Fed. 56, at page 59, 76 C. C. A. 376, at page 379.

Applying the rule announced in this case, the express exception of smoking opium in section 8800 becomes, by implication, a part of section 8801f. Statutes are construed with reference to the common law. In construing statutes in derogation of the common law, there should be no further or greater departure than the statute expressly declares. A statute, the effect of which is to recognize rights of property or value in an outlawed thing, a nuisance per se, a thing malum in se, is certainly in derogation of the common law. Before it can be given such effect, it must clearly so declare. This section 8801f does not do.

If such a radical departure from established principles was contemplated as to undertake to give the qualities of property and value to an outlawed thing, respect for the uniform administration of the law would doubtless have suggested to the enacting Congress that such purpose be clearly and unequivocally expressed. This it has not done; hence I conclude it did not so intend. If such departure was intended, it would not relate back to give to section 2809, R. S., a different effect, in so far as the imposition of the penalty therein provided against the master was concerned, whatever might be its effect regarding the liability of the vessel.

It is not intended by anything said herein to hold that section 8801f does not provide for a forfeiture of a vessel on account of failure to manifest smoking opium, but the provision for a penalty equal to the value must be limited to cases where the subject of importation is merchandisable opium.

Judgment for the defendant.

MEMORANDUM DECISIONS

AMERICAN RY. EXPRESS CO. v. STATE OF MARYLAND, for Use of SMITH et al. (Circuit Court of Appeals, Fourth Circuit. October 7, 1919.) No. 1718. In Error to the District Court of the United States for the District of Maryland at Baltimore. William S. Thomas, of Baltimore, Md., and H. S. Marx, of New York City, for plaintiff in error. Isaac Lobe Straus, of Baltimore, Md., for defendants in error.

PER CURIAM. Cause dismissed on motion of plaintiff in error.

BAKER-WHITELEY COAL CO. v. WILSON. THE BRITANNIA. THE M. MITCHELL DAVIS. THE HELENUS. (Circuit Court of Appeals, Fourth Circuit. May 5, 1919.) No. 1668. Appeal from the District Court of the United States for the District of Maryland, at Baltimore. For opinion below, see 251 Fed. 391. See, also, 262 Fed. 1022, — C. C. A. —. Harry N. Abercrombie, of Baltimore, Md., and Albert T. Gould, of Boston, Mass., for appellants. George Forbes, of Baltimore, Md., for appellee.

PER CURIAM. Cause dismissed under rule 20 (233 Fed. xiii, 146 C. C. A. xiii), in accordance with agreement of counsel.

BARRA v. MILLS, Immigration Inspector. (Circuit Court of Appeals, Eighth Circuit. September 8, 1919.) No. 5486. Appeal from the District Court of the United States for the District of New Mexico. Isaac Barth and T. J. Mabry, both of Albuquerque, N. M., for appellant. S. Burkhart, U. S Atty., of Albuquerque, N. M., and J. O. Seth, Asst. U. S. Atty., of Santa Fé, N. M., for appellee.

PER CURIAM. Cause docketed and appeal dismissed, without costs to either party in this court, on motion of appellee, under rule 16 (188 Fed. xi, 109 C. C. A. xi). Motion of appellant for leave to file and docket record denied.

BLAND v. REEVES. (Circuit Court of Appeals, Eighth Circuit. October 20, 1919.) No. 5375. Appeal from the District Court of the United States, for the Western District of Missouri. James A. Reed and J. G. L. Harvey, both of Kansas City, Mo., and H. M. Harvey, of Columbia, Mo., for appellant. C. C. Madison, of Kansas City, Mo., and W. H. Hallett, of Nevada, Mo., for appellee.

PER CURIAM. Temporary injunction vacated, and cause dismissed by the court, without costs to either party in this court.

BLUMLIEN v. UNITED STATES. (Circuit Court of Appeals, Eighth Circuit. September 2, 1919.) No. 5191. In Error to the District Court of the United States for the District of New Mexico. T. J. Mabry, Isaac Barth, and H. B. Jamison, all of Albuquerque, N. M., for plaintiff in error. S. Burkhart, U. S. Atty., of Albuquerque, N. M.

PER CURIAM. Writ of error dismissed, without costs to either party in this court, on motion of plaintiff in error.

CHICAGO, R. I. & P. RY. CO. v. O'DELL et al. (Circuit Court of Appeals. Eighth Circuit. October 25, 1919.) No. 5419. In Error to the District Court of the United States for the Eastern District of Oklahoma. C. O. Blake, R. J. Roberts, and J. E. Du Mars, all of El Reno, Okl., for plaintiff in error. W.

L. Chapman and Joe M. Adams, both of Shawnee, Okl., for defendants in error.

PER CURIAM. Writ of error dismissed with prejudice, at costs of plaintiff in error, per stipulation of parties.

COSDEN v. BERRINGER. (Circuit Court of Appeals, Eighth Circuit. October 20, 1919.) No. 5482. In Error to the District Court of the United States for the District of Wyoming. Alfred R. Lowey and J. M. Hodgson, both of Casper, Wyo., for plaintiff in error. R. L. Donley, of Cody, Wyo., and William E. Mullen, of Cheyenne, Wyo., for defendant in error.

PER CURIAM. Writ of error dismissed, at costs of plaintiff in error, per stipulation of parties.

CROCKETT v. UNITED STATES. (Circuit Court of Appeals, Sixth Circuit. January 6, 1920.) No. 3377. In Error to the District Court of the United States for the Western District of Tennessee; John E. McCall, Judge. Abe Cohn and Wm. R. Harrison, both of Memphis, Tenn., for plaintiff in error. Wm. D. Kyser, U. S. Atty., of Memphis, Tenn.

PER CURIAM. Order of dismissal entered.

CUDAHY PACKING CO. v. FREY & SON, Inc. (Circuit Court of Appeals, Fourth Circuit. July 16, 1919.) No. 1571. In Error to the District Court of the United States for the District of Maryland at Baltimore. See, also, 261 Fed. 65, — C. C. A. —. Gilbert H. Montague, of New York City (Charles W. Dunn, of New York City, amicus curiæ), for plaintiff in error. Charles Markell and Horace T. Smith, both of Baltimore, Md. (Henry S. Mitchell, of Washington, D. C., amicus curiæ, Department of Justice), for defendant in error.

PER CURIAM. Judgment of District Court reversed. Order allowing writ of error to Supreme Court filed October 13, 1919.

DOWNS et al. v. UNITED STATES. (Circuit Court of Appeals, Fourth Circuit. April 8, 1919.) No. 1693. In Error to the District Court of the United States for the Northern District of West Virginia, at Elkins. Martin Brown, of Moundsville, W. Va., for plaintiffs in error. Harry H. Byrer, Asst. U. S. Atty., and Stuart W. Walker, U. S. Atty., both of Martinsburg, W. Va.

PER CURIAM. Writ of error dismissed on motion of defendant in error.

EAST ST. LOUIS CONNECTING RY. CO. v. ROBERTS. (Circuit Court of Appeals, Eighth Circuit. July 15, 1919.) No. 5292. In Error to the District Court of the United States for the Eastern District of Missouri. W. M. Hezel and J. L. Howell, both of St. Louis, Mo., for plaintiff in error. Sidney Thorne Able and Charles P. Noell, both of St. Louis, Mo., for defendant in error.

PER CURIAM. Writ of error dismissed, at costs of plaintiff in error, per stipulation of parties, etc.

FOSTER v. UNITED STATES. (Circuit Court of Appeals, Fifth Circuit. January 16, 1920.) No. 3380. In Error to the District Court of the United States for the Southern District of Georgia; Beverly D. Evans, Judge. J. H. Foster was convicted of an offense, and he brings error. Affirmed. John R. Cooper, of Macon, Ga., for plaintiff in error. John W. Bennett, U. S. Atty., of Waycross, Ga. Before WALKER, Circuit Judge, and GRUBB and JACK, District Judges.

PER CURIAM. The judgment in the above numbered and entitled cause is affirmed.

GREGORY, Dist. Atty., et al., v. BERNHEIM DISTILLING CO. (Circuit Court of Appeals, Sixth Circuit. March 2, 1920.) No. 3363. Appeal from the District Court of the United States for the Western District of Kentucky; Walter Evans, Judge. W. V. Gregory, U. S. Atty., of Louisville, Ky., for appellants. Selligman & Selligman, of Louisville, Ky., for appellee.

PER CURIAM. Order dismissing appeal entered.

GREGORY, Dist. Atty., et al., v. BROWN-FORMAN CO. (Circuit Court of Appeals, Sixth Circuit. March 2, 1920.) No. 3357. Appeal from the District Court of the United States for the Western District of Kentucky; Walter Evans, Judge. W. V. Gregory, U. S. Atty., of Louisville, Ky., for appellants. Levy Mayer, of Chicago, Ill., and Wm. Marshall Bullitt, of Louisville, Ky., for appellee.

PER CURIAM. Order dismissing appeal entered.

GUENTHER v. DENNIS-SIMMONS LUMBER CO. et al. (Circuit Court of Appeals, Fourth Circuit. October 7, 1919.) No. 1716. Appeal from the District Court of the United States for the Eastern District of North Carolina, at Washington; Henry G. Connor, Judge. Suit in equity by Emil Guenther against Dennis-Simmons Lumber Company and others. Decree for defendants and complainant appeals. Affirmed on opinion of District Court. 246 Fed. 521. A. D. MacLean, of Washington, N. C. (Small, MacLean, Bragaw & Rodman, of Washington, N. C., on the brief), for appellant. H. S. Ward, of Washington, N. C. (Ward & Grimes, of Washington, N. C., and H. W. Stubbs and Wheeler Martin, both of Williamston, N. C., on the brief), for appellees. Before PRITCHARD, KNAPP, and WOODS, Circuit Judges.

PRITCHARD, Circuit Judge. The plaintiff in the court below brings this appeal here from the final decree of the judge of the District Court for the Eastern District of North Carolina, wherein it is decreed that the plaintiff is not the owner of certain lands referred to therein and that the defendant, Dennis-Simmons Lumber Company, is the owner in fee of such lands. The learned judge who tried this suit prepared an exhaustive and comprehensive opinion, in which he entered into an elaborate discussion of the different questions involved, reaching the conclusion that the defendant acquired title to the premises by adverse, open, notorious, and continued possession of the same, and that the plaintiff is also barred by laches. A careful examination of the whole evidence leads us to the conclusion that the decree of the court below is eminently proper. We feel that to write an opinion in this case, in view of our conclusion, would of necessity be more or less repetition of what the lower court has already so well said about the questions involved in this controversy, therefore we content ourselves by adopting the opinion of the court below as reported in Guenther v. Dennis-Simmons Lumber Co. (D. C.) 246 Fed. 521, as the opinion of this court. Affirmed.

HENDRIX v. FORNEY. (Circuit Court of Appeals, Eighth Circuit. September 1, 1919.) No. 5309. In Error to the District Court of the United States for the Eastern District of Arkansas. Morris M. Cohn, Powell Clayton, and Louis M. Cohn, all of Little Rock, Ark., for plaintiff in error. Charles T. Coleman, of Little Rock, Ark., for defendant in error.

PER CURIAM. Writ of error dismissed, with costs, per stipulation of parties.

THE HOWELL. McCOLE v. CHELSEA LIGHTERAGE CO. (Circuit Court of Appeals, Second Circuit. December 31, 1919.) No. 133. Appeal from the District Court of the United States for the Southern District of New York. Suit in admiralty by Michael McCole against the lighter Howell; the Chelsea Lighterage Company, Incorporated, claimant. Decree for respondent, and

libelant appeals. Question certified to Supreme Court. For opinion below, see 257 Fed. 578. Before WARD, ROGERS, and HOUGH, Circuit Judges.

To the Honorable the Justices of the Supreme Court of the United States: The libelant, a longshoreman, while engaged in unloading bags of coffee from the lighter Howell in New York Harbor, was struck on the head by a bolt falling out of a shackle on the end of the boom of the lighter's derrick. He filed this libel in the District Court of the United States for the Southern District of New York to recover damages on the ground that the lighter's equipment or appliances had been negligently allowed to become and to remain in dangerous condition. The owners of the lighter had taken out insurance under the Workmen's Compensation Law (chapter 41, Laws N. Y. 1914, which abolished all other remedies; the libelant being engaged in an employment covered by group 10 of section 2, art. 1, of the act, as amended by chapter 249, Laws 1918. The District Judge dismissed the libel, on the ground that the amendment to sections 24 and 256 of U. S. Judicial Code, reserving "to claimants the rights and remedies under the Workmen's Compensation Law of any state," restricted the libelant to his remedy under the New York Workmen's Compensation Law. An appeal has been duly taken by the libelant from this decree, and this court desires the instructions of the Supreme Court for the proper decision of the following question of law:

Is the remedy provided by the New York Workmen's Compensation Law exclusive, or has the libelant the option either of proceeding under it or of proceeding in admiralty, either against the lighter in rem, or against her owners in personam?

H. G. WARD,
HENRY WADE ROGERS,
CHARLES M. HOUGH.

United States Circuit Court of Appeals for the Second Circuit.

United States of America, Second Judicial Circuit—ss.:

I, William Parkin, clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby certify that the foregoing certificate and statement of facts in the case of Michael McCole v. Lighter Howell, was duly filed and entered of record in my office by order of said court, and, as directed by said court, the said certificate is by me forwarded to the Supreme Court of the United States for its action thereon. In witness whereof, I have hereunto subscribed my name, and affixed the seal of said court, at the city of New York, this 31st day of December, 1919. Wm. Parkin, Clerk of the United States Circuit Court of Appeals for the Second Circuit. [Seal.]

JONG HONG v. UNITED STATES. (Circuit Court of Appeals, Sixth Circuit. October 11, 1919.) No. 3260. Appeal from the District Court of the United States for the Northern District of Ohio; D. C. Westenhaver, Judge. John A. Cline, of Cleveland, Ohio, for appellant. E. S. Wertz, U. S. Atty., of Cleveland, Ohio.

PER CURIAM. Order of dismissal entered.

LANGLEY v. UNITED STATES. (Circuit Court of Appeals, Sixth Circuit. June 30, 1919.) No. 3276. In Error to the District Court of the United States for the Western District of Tennessee; John E. McCall, Judge. Abe Cohn, of Memphis, Tenn., for plaintiff in error. Wm. D. Kyser, U. S. Atty., of Memphis, Tenn.

PER CURIAM. Order of dismissal entered.

LOUISVILLE & JEFFERSONVILLE BRIDGE CO. v. UNITED STATES. (Circuit Court of Appeals, Sixth Circuit. June 30, 1919.) No. 3016. In Error to the District Court of the United States for the Western District of Kentucky; Walter Evans, Judge. For opinion below, see 236 Fed. 1001. Alex P. Humph-

rey and Edw. P. Humphrey, both of Louisville, Ky., for plaintiff in error. Perry B. Miller, U. S. Atty., of Louisville, Ky., and Philip J. Doherty, Sp. Asst. U. S. Atty., of Washington, D. C.

PER CURIAM. Judgment affirmed.

MERLINI v. PARTCH, Immigration Inspector. (Circuit Court of Appeals, Eighth Circuit. September 8, 1919.) No. 5485. Appeal from the District Court of the United States for the District of New Mexico. Isaac Barth and T. J. Mabry, both of Albuquerque, N. M., for appellant. S. Burkhart, U. S. Atty., of Albuquerque, N. M., and J. O. Seth, Asst. U. S. Atty., of Santa Fé, N. M., for appellee.

PER CURIAM. Cause docketed, and appeal dismissed, without costs to either party in this court, on motion of appellee, under rule 16 (188 Fed. xi, 109 C. C. A. xi). Motion of appellant for leave to file and docket record denied.

Petition of NATIONAL DISCOUNT CO. In re HITT LUMBER & BOX CO. (Circuit Court of Appeals, Sixth Circuit. October 11, 1919.) No. 3309. Petition to Revise an Order of the District Court of the United States for the Southern Division of the Eastern District of Tennessee; Edward T. Sanford, Judge. White, Johnson, Cannon & Neff, of Cleveland, Ohio, and Williams & Lancaster, of Chattanooga, Tenn., for petitioner. Frank Spurlock, D. L. Grayson, and J. M. Trimble, all of Chattanooga, Tenn., for trustee. Lusk & Thompson, of Chattanooga, Tenn., for petitioning creditors.

PER CURIAM. Order of dismissal entered.

NEW YORK CENT. R. CO. v. KOVACS. (Circuit Court of Appeals, Sixth Circuit. November 5, 1919.) No. 3314. In Error to the District Court of the United States for the Northern District of Ohio; D. C. Westenhaver, Judge. S. H. West, of Cleveland, Ohio, for plaintiff in error. Anderson & Lamb and J. J. Tetlow, all of Youngstown, Ohio, for defendant in error.

PER CURIAM. Order of dismissal entered.

OMAHA NAT. BANK v. COOTS et al. (Circuit Court of Appeals, Sixth Circuit. December 5, 1919.) No. 3303. In Error to the District Court of the United States for the Eastern District of Michigan; Arthur J. Tuttle, Judge. George E. Brand, of Detroit, Mich., for plaintiff in error. Charles F. Delbridge, of Detroit, Mich., for defendants in error.

PER CURIAM. Order of dismissal entered.

POWERS v. UNITED STATES. (Circuit Court of Appeals, Sixth Circuit. January 6, 1920.) No. 3376. In Error to the District Court of the United States for the Western District of Tennessee; John E. McCall, Judge. Abe Cohn, of Memphis, Tenn., for plaintiff in error. Wm. D. Kyser, U. S. Atty., of Memphis, Tenn.

PER CURIAM. Order of dismissal entered.

PRICE BOOKER MFG. CO. v. HAARMANN PICKLING CO. (Circuit Court of Appeals, Eighth Circuit. September 1, 1919.) No. 5243. In Error to the District Court of the United States for the District of Colorado. Sewall Myer, of Houston, Tex., and G. Dexter Blount, J. Howard Dana, and Harry S. Silverstein, all of Denver, Colo., for plaintiff in error. Carle Whitehead and Albert L. Vogl, both of Denver, Colo., for defendant in error.

PER CURIAM. Writ of error dismissed; with costs, per stipulation of parties.

RATON WATERWORKS CO. v. CITY OF RATON, COLFAX COUNTY, NEW MEXICO. (Circuit Court of Appeals, Eighth Circuit. September 1, 1919.) No. 4941. Appeal from the District Court of the United States for the District of New Mexico. Jesse G. Northcutt, of Denver, Colo., Henry W. Coil, of Riverside, Cal., E. P. Davies, of Santa Fé, N. M., and L. Laflin Kellogg, of New York City, for appellant. James H. Pershing and John H. Fry, both of Denver, Colo., Howard L. Bickley, of Raton, N. M., and A. T. Rogers, Jr., of Las Vegas, N. M., for appellee.

PER CURIAM. Mandate of Supreme Court of the United States (249 U. S. 552, 39 Sup. Ct. 384, 63 L. Ed. 768), ordered filed and recorded, and appeal dismissed with costs, etc.

ST. LOUIS SOUTHWESTERN RY. CO. OF TEXAS v. CONSOLIDATED FUEL CO. (Circuit Court of Appeals, Eighth Circuit. September 1, 1919.) No. 5352. In Error to the District Court of the United States for the Eastern District of Oklahoma. E. B. Perkins, of Dallas, Tex., Clifford L. Jackson, of Muskogee, Okl., and Daniel Upthegrove, of St. Louis, Mo., for plaintiff in error. Edward R. Jones and Ephraim H. Foster, both of Muskogee, Okl., for defendant in error.

PER CURIAM. Writ of error dismissed, with costs, pursuant to opinion in No. 5351, between same parties. 260 Fed. 638, — C. C. A. —.

THE ST. PAUL. Appeal of HUDSON NAV. CO. (Circuit Court of Appeals, Second Circuit. November 12, 1919.) No. 111. Appeal from the District Court of the United States for the Southern District of New York. Libel by J. Aron & Co., Incorporated, against the steamship St. Paul, her engines, etc. From an order refusing confirmation of the marshal's sale, and ordering a resale of the vessel, the Hudson Navigation Company, purchaser, appeals. Appeal dismissed.

Certiorari denied 251 U. S. —, 40 Sup. Ct. 344, 64 L. Ed. —. Barber, Watson & Gibboney, of New York City (S. G. Gibboney, of New York City, of counsel), for appellant. Kirlin, Woolsey & Hickox and George H. Mitchell, all of New York City (C. R. Hickox and G. H. Mitchell, both of New York City, of counsel), for libelant. Before WARD, HOUGH, and MANTON, Circuit Judges.

PER CURIAM. This appeal is dismissed, under Butterfield v. Usher, 91 U. S. 246, 23 L. Ed. 318.

SMITH v. STEPHENS. (Circuit Court of Appeals, Eighth Circuit. May 12, 1919.) No. 5264. Appeal from the District Court of the United States for the Western District of Missouri. Bennett H. Young, for appellant. J. P. McBaine and Boyle G. Clark, both of Columbia, Mo., for appellee.

PER CURIAM. Appeal dismissed, at costs of appellant, per stipulation of parties.

THAYER v. FARMERS' ELEVATOR CO. OF MIRANDA, S. D. (Circuit Court of Appeals, Eighth Circuit. May 6, 1919.) No. 198. Petition to Revise Order of the District Court of the United States for the District of Minnesota. George E. Young, of Minneapolis, Minn., for petitioner. Perry F. Loucks, of Watertown, S. D., and E. P. Allen and Clark R. Fletcher, both of Minneapolis, Minn., for respondent.

PER CURIAM. Petition to revise dismissed by the court for want of prosecution, without costs to either party in this court.

THAYER v. RAMONA FARMERS WAREHOUSE CO. (Circuit Court of Appeals, Eighth Circuit. May 6, 1919.) No. 199. Petition to Revise Order of the District Court of the United States for the District of Minnesota. George E. Young, of Minneapolis, Minn., for petitioner. Perry F. Loucks, of Watertown, S. D., and E. P. Allen and Clark R. Fletcher, both of Minneapolis, Minn., for respondent.

PER CURIAM. Petition to revise dismissed by the court for want of prosecution, without costs to either party in this court.

THOMPSON v. UNITED STATES. (Circuit Court of Appeals, Eighth Circuit. May 12, 1919.) No. 5271. In Error to the District Court of the United States for the Northern District of Iowa. James E. Williams, of Mason City, Iowa, for plaintiff in error. F. A. O'Connor, U. S. Atty., of Dubuque, Iowa.

PER CURIAM. Writ of error dismissed, without costs to either party in this court, on motion of plaintiff in error.

UNITED STATES ex rel. ORMSBY v. PECK, District Judge. (Circuit Court of Appeals, Sixth Circuit. February 13, 1920.) No. 3384. In Error to the District Court of the United States for the Southern District of Ohio. George F. Ormsby, of Cincinnati, Ohio, for petitioner.

PER CURIAM. Order denying petition for writ of mandamus entered.

WARE et al. v. COX. (Circuit Court of Appeals, Eighth Circuit. May 5, 1919.) No. 5413. In Error to the District Court of the United States for the Western District of Arkansas. Robert A. Rowe, of Greenwood, Ark., for plaintiffs in error. Chester Holland, of Greenwood, Ark., for defendant in error.

PER CURIAM. Cause docketed, and writ of error dismissed, at the costs of the plaintiffs in error, on motion of defendant in error.

WEBB et al. v. UNITED STATES. (Circuit Court of Appeals, Fifth Circuit. January 16, 1920.) No. 3394. In Error to the District Court of the United States for the Southern District of Georgia; Wm. Wallace Lambdin, Judge. Criminal prosecution by the United States against Early Webb and others. Judgment of conviction, and defendants bring error. Affirmed. John R. Cooper, of Macon, Ga., for plaintiffs in error. John W. Bennett, U. S. Atty., of Waycross, Ga. Before WALKER, Circuit Judge, and GRUBB and JACK, District Judges.

PER CURIAM. The judgment in the above numbered and entitled cause is affirmed.

WESTERN INDEMNITY CO. v. UNITED STATES. (Circuit Court of Appeals, Eighth Circuit. May 12, 1919.) No. 5256. In Error to the District Court of the United States for the Eastern District of Oklahoma. L. J. Roach, of Muskogee, Okl., for plaintiff in error. W. P. McGinnis, U. S. Atty., of Muskogee, Okl., and J. C. Wilhoit, Sp. Asst. U. S. Atty., of Okemah, Okl.

PER CURIAM. Writ of error dismissed, per stipulation of parties.

WILSON v. BAKER-WHITELEY COAL CO. THE HELENUS. THE BRITANNIA. THE M. MITCHELL DAVIS. (Circuit Court of Appeals, Fourth Circuit. May 5, 1919.) No. 1687. Appeal from the District Court of the United States for the District of Maryland, at Baltimore. For opinion below, see 251 Fed. 391. See, also, 262 Fed. 1016, — C. C. A. —. George

Forbes, of Baltimore, Md., for appellant. Harry N. Abercrombie, of Baltimore, Md., for appellee.

PER CURIAM. Cause dismissed, under rule 20 (233 Fed. xiii, 146 C. C. A. xiii), in accordance with agreement of counsel.

SCANNELL v. BETHKE. (Court of Appeals of District of Columbia. Submitted January 14, 1920. Decided February 2, 1920.) No. 1277. Appeal from Decision of Commissioner of Patents. Interference proceedings in the Patent Office between John P. Scannell and John P. Bethke. From a decision for the first-named party, Bethke appeals. Affirmed. C. E. Riordan and Wm. S. Hodges, both of Washington, D. C., for appellant. A. L. Morsell, of Milwaukee, Wis., and C. D. Davis, of Washington, D. C., for appellee.

PER CURIAM. This is an interference proceeding, which solely turns upon issues of fact. After a careful review of the testimony and the concurring decisions of the tribunals of the Patent Office, we are convinced that no error was committed. The testimony is fully and fairly reviewed in the decision of the Commissioner, and a further review here would serve no good purpose. The decision of the Commissioner of Patents is affirmed, and the clerk is directed to certify these proceedings as required by law.

END OF CASES IN VOL. 262